

Indigenous rights, indigenous wrongs: risks for the resource sectors

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1. Overview

The relationship between corporations and indigenous peoples is complex and often difficult. Companies and indigenous peoples look at the same landscape and see different things. A company will see the potential for harnessing resources to provide revenue and profits; indigenous peoples often see the land as integral to who

they are – incorporating their culture, spirituality, history, social organisation, family, food security, economy, and health.

For companies, managing this balance of interests can present a significant challenge. Over recent years oil and gas companies in particular have experienced the enduring damage to reputation that stems from conflict with indigenous peoples.

This briefing seeks to identify the risks and opportunities faced by companies with respect to managing indigenous rights issues and the ways in which these can materialise in the short to medium term for companies involved in resource sectors. The briefing also examines the policies and strategies relating to indigenous peoples adopted by seven companies operating in a range of sectors identified as high risk by EIRIS. Their management response is assessed against EIRIS indicators to determine the extent to which these risks are being mitigated. In relation to these seven companies EIRIS' **key findings** are as follows:

- While there is evidence of some companies addressing indigenous rights issues, none of the companies

researched are achieving a good assessment

- Most companies examined have a basic public commitment to indigenous rights (6 out of 7) and a commitment to meaningful consultation (6 out of 7)
- Of the high risk sectors analysed extractive industries such as oil and gas and mining are most likely to demonstrate a response; sectors such as forestry and agriculture lag behind in their response
- Few companies (3 out of 7) publicly commitment to the principles of free prior informed consent for all projects (as opposed to consultation) or are effectively managing the engagement and consent process
- The quality of reporting is generally poor, with most companies providing a response to any allegations of breaches of indigenous rights but few report voluntarily on areas of non-compliance

Given the level of NGO and media attention to the issue of indigenous peoples' rights and the introduction of laws and regulations in many countries, companies with strong commitments and effective engagement processes will undoubtedly benefit in an environment where access to land and resources is becoming increasingly difficult. Indigenous rights are a human rights issue that companies and their investors should address.

2. Background

2.1. Defining indigenous peoples

There is no universal or unambiguous definition of indigenous peoples.¹ There are a number of different terms used to describe indigenous peoples, including aboriginal, first nation, or land

connected. According to the UN there are 300 to 500 million indigenous peoples in more than 70 countries around the world, comprising over 5,000 languages and cultures.²

Most often cited are the Martínéz Cobo definition in the Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986), and the definition used in this paper, the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries, 1989, No 169 (ILO 169). Article 1 states that the convention applies to:

"(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

'Self identification' i.e. indigenous peoples defining or identifying themselves as indigenous, is a critical concept. Aboriginality refers to being first on the land but the definition need not be constrained by an exclusive reference to peoples of 'ancient times'. This connection to the land is related to cultural distinctiveness.

2.2. Indigenous rights

The concept of participation by local communities, including indigenous groups, in decisions that affect them, is a core tenet of a range of rights, including the right to self determination and the right to development.

The right to self determination does not give indigenous peoples a 'right of veto' over projects, but is really a right that affirms the fundamental importance of the right of self-determination of all peoples, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development.

For indigenous peoples, consent as a right has special importance because of their unique, or culturally distinctive, relationship with their traditional lands and territories. Gaining consent from indigenous peoples for relevant projects at all stages of the project lifecycle can therefore be viewed as an essential aspect of respecting the human rights of indigenous peoples.

There is no single definition of free prior informed consent, however it is understood as consent obtained free of manipulation or coercion. What will constitute 'informed' was further elaborated by UN Commission on Human Rights³. In order to be informed and properly equipped to give consent, affected communities must have access to information in an accessible form on the nature of the project. This includes information on the nature, duration, impact and personnel associated with the project.

Indigenous rights are specified in both ILO 169 and the UN Declaration on Rights of Indigenous Peoples which will be examined below in addition to other initiatives on indigenous rights.

2.3. International initiatives

2.3.1 ILO Convention 169

In 1989, the ILO adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169 (ILO 169). It is ratified by 19 countries (as at October 2007), 13 of which are in South America (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela). The other countries that have ratified the Convention to date are Nepal, Denmark, Fiji, Norway, the Netherlands, and Spain.⁴ These relatively low levels of ratification indicate the difficulties surrounding this issue.

Whilst the private sector does not hold any direct obligations under ILO 169, there are implications that may arise from national legislation implementing ILO 169. Where ILO 169 has been ratified directly into national law, it may be used by the Courts to define responsibilities, which the courts could theoretically decide to apply to non government players, such as corporations. Also there may be implications for companies where a vocal NGO perceives a company to be breaching the ILO 169 in a country which has ratified it.

Specific rights include:

- the right to own and control lands, territories, and resources (ILO 169, Art 13-19)
- the right to self determination (ILO 169, Art 7)
- the right to recognition and protection of social, cultural, religious and spiritual values and practices (ILO 169, Art 5)

2.3.2 UN Declaration on Rights of Indigenous Peoples

The adoption of the Declaration by the UN General Assembly in September 2007 has been the most authoritative indicator to date of the growing consensus on standards required by states as well as non-state actors such as corporations and investors⁵. In total, 143 countries have now adopted the Declaration, as members of the UN General Assembly, demonstrating the growing recognition of the need to establish human rights law on the issue of indigenous peoples' rights.

The Declaration includes the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources (Art 30). There were 11 abstentions and, notably, four countries with large indigenous populations that did not adopt the Declaration: Australia, Canada, New Zealand and the United States, which registered objections concerning the provisions on self-determination, land and resource rights.

2.3.3 Convention on Biological Diversity

The Convention, signed by 150 government leaders in 1992, focuses on the close and traditional dependence of many indigenous and local communities on biological resources. It contains a broad recognition of the contribution that traditional knowledge of indigenous peoples can make to both the conservation and the sustainable use of biological diversity.⁶

2.3.4 Permanent Forum on Indigenous Issues

Following a recommendation by the World Conference on Human Rights, the UN General Assembly proclaimed the International Decade of the World's Indigenous People (1995-2004).⁷

A key outcome of the Decade was the establishment in 2000 of the Permanent Forum on Indigenous Issues (UNPFII) by the UN Economic and Social Council to serve as an advisory body to the Council, advising on indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The aim was to provide a formal setting in which indigenous peoples would be able to participate and communicate their views directly to governments and civil society.

2.3.5 Indigenous Statements

The first indigenous ambassador to make a statement to the international community was Cayuga Chief Deskaheh, as the representative of the Six Nations of the Iroquois, who travelled to Geneva in 1923, to initiate formal talks with League of Nations. In more recent times indigenous peoples have collaborated and made numerous declarations and statements directed at the international community to understand their concerns, including:

- International Cancun Declaration of Indigenous Peoples, 5th WTO Ministerial Conference - Mexico, September 2003⁸
- Motupore Declaration - July 2003⁹
- Charter of the Assembly of First Nations - Canada, April 2003¹⁰
- Indigenous Peoples' Plan of Implementation on Sustainable Development - South Africa, September 2002¹¹

- Declaration of Civil Society and Indigenous Participants of the Regional Workshop of the World Bank's Extractive Industries Review - Brazil, April 2002 ¹²

The central theme of these statements has been to call on governments and corporations to recognise indigenous peoples' rights. In one case the Indigenous Environment Network called for companies to 'ask for freely given, prior-to-project approvals from the state, and informed consent to all forms of mining' and 'pay reparations to affected communities and restitution for past damages'. Such statements have increased the pressure on governments and companies to take action.

2.3.6 World Bank and International Finance Corporation (IFC) Safeguards

In 2005 the World Bank approved a revised guidance document on Indigenous Peoples - Operational Policy/Bank Procedure 4.10 - setting out policies and procedures for corporations and governments. This includes requirements for screening for the presence of indigenous peoples, social assessment, consultation with affected communities, preparation of a plan or framework (Indigenous Peoples Plan or Indigenous Peoples Planning Framework), and disclosure relating to affected indigenous peoples on all Bank financed projects.¹³ Despite criticisms by some indigenous groups relating to the application of requirements for the screening for the presence of indigenous peoples and the Indigenous Peoples Plan, the World Bank policy and procedure, have further raised the profile of indigenous rights issues.¹⁴

IFC applies to all the projects it finances environmental and social standards to minimise their impact on the environment and on affected

communities. The IFC has recently strengthened these safeguard policies and performance standards. The 2006 IFC Performance Standard 7 specifically addresses the issue of indigenous peoples and includes requirements for the avoidance of adverse impacts, information disclosure, consultation and informed participation. Standard 8 also recognises a broader duty to protect and support places of cultural heritage.

2.4 Industry initiatives

There is growing international recognition of the role of companies in relation to human rights issues. This was evidenced by the UN appointment in July 2005, of Professor Ruggie as Special Representative of the UN Secretary-General on Business & Human Rights and the setting up of a Business & Human Rights Resource Centre to facilitate communication and sharing of materials. The Special Representative assists in defining the evolving obligations of companies in relation to human rights including indigenous peoples' rights. In addition, a number of sector initiatives have developed. Four examples are outlined below.

2.4.1 International Council on Mining & Metals

The International Council on Mining and Metals (ICMM) represents leading international mining and metals companies. ICMM members have adopted an operational Framework comprising three elements - a set of 10 Principles, public reporting and independent assurance. The ICMM is committed to the principles of sustainable development and has gone some way towards raising the profile of indigenous rights issues with companies in these sectors.

In March 2006 the ICMM developed a Draft Position Statement on Mining and Indigenous Peoples Issues¹⁵ which commits to meaningful participation and acknowledges that engagement practices "may include seeking consent for activities" and "negotiating agreements, such as for access and benefit sharing, participation, and land use". This policy has also sought to clarify the extent of indigenous peoples 'rights and interests' in relation to land.¹⁶

Underpinning the Framework is a commitment by ICMM members to public report on progress and to share good practice across the industry.

2.4.2 The Equator Principles

The Equator Principles provide a benchmark for the financial industry to manage social and environmental issues when providing project finance. Under the Principles of Social and Environmental Impact Assessment and Consultation and Disclosure the guidance includes consideration of indigenous peoples' rights and is backed up by reference to the IFC Safeguard performance standards.

The Equator Principles call on companies to "respect and preserve the culture, knowledge and practices of indigenous peoples" and also to "ensure the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of indigenous peoples." See 'SEE risk briefing - Project finance: a sustainable future?' (EIRIS, 2006) for further details - click [here](#).

2.4.3 Forest Stewardship Council

FSC is a membership based organisation promoting the responsible stewardship of forests, and provides

certification for forestry companies that adhere to certain standards, policies and procedures. Principle 3 of "Principles and Criteria for Forest Stewardship" includes the recognition of and respect for legal and customary rights of indigenous peoples to own, use and manage their lands and territories, protection of cultural sites and compensation for use of indigenous knowledge.

2.4.4 Roundtable on Sustainable Palm Oil (RSPO)

RSPO includes NGOs, governments, banks, retailers and plantation owners. The Roundtable was initiated by an NGO as a result of concerns regarding the unsustainable production of palm oil and instances of the expansion of palm oil plantations giving rise to social conflicts between the local communities and plantation owners. The rights of indigenous peoples are considered under "Principles and Criteria for Sustainable Palm Oil Production", a guidance document for palm oil companies, but also generally relevant for companies involved in plantations. Principle 6.3 relates to the requirement for a 'documented system' to be in place for compensation for loss of land. Principle 7.5 states that no new plantations are to occur without free prior informed consent, using a 'documented system' that enables companies to take account of indigenous peoples' views. RSPO has a grievance mechanism which acts as a platform for the Roundtable to address complaints against RSPO Members.

2.5 NGO Initiatives

The Oxfam Australia Mining Ombudsman established in 2000 attempts to apply evolving international standards on indigenous rights and techniques of mediation between indigenous communities and companies, to address indigenous

rights abuses by mining companies in Australia. The Mining Ombudsman generally takes up a case at the request of a community organisation and checks all claims through site investigations. Any action taken by the Ombudsman is done in consultation with the community. A formal process is followed which aims to bring together the views of communities, companies and governments to establish a clear picture of the circumstances of and context for each case. The Ombudsman has played a useful a role internationally in bringing large Australian companies to the negotiating table to listen to indigenous concerns. This was used successfully at Tintaya mine, Peru, between BHP Billiton and indigenous communities.

2.6 National laws and regulations

The extent to which the rights of indigenous peoples have been supported by laws and regulations varies greatly between countries as does their implementation. A number of national legislative frameworks are outlined below:

Australia, Northern Territory - legislation in the Northern Territory incorporates a right of veto for Land Councils. In the Aboriginal Land Rights (Northern Territory) Act 1976 consent is obtained through statutory indigenous-controlled Land Councils. A Land Council may not consent to a mining licence unless "they are satisfied that the traditional Aboriginal owners of the land in question understand the nature of the activity and any terms or conditions."¹⁷

Canada - impact and benefit agreements (IBAs) are signed between mining companies and First Nation communities in Canada in order to establish formal relationships between them, to reduce the predicted impact of a mine and secure economic benefit for

affected communities. IBAs are increasingly used by First Nations in Canada to influence decision making about resource exploitation on their lands.

Colombia – the 1991 Political Constitution establishes that: "The State recognises and protects the ethnic and cultural diversity of the Colombian Nation". It also recognises the indigenous territories. Since then, wide-ranging legislation has been promulgated but this has not, however, prevented the continuing loss of - and threats to - indigenous territories.

Papua New Guinea (PNG) - Papua New Guinea's Constitution has enshrined the principles of free prior informed consent by traditional owners. Currently, a number of forestry companies operating in the Western province of PNG accused of failing to adhere to these principles are involved in an ongoing court case regarding the customary rights of the Kiunga Aimabak people.

Philippines - the Indigenous Peoples Rights Act 1997 requires that free prior and informed consent of indigenous peoples is sought and obtained for any commercial activity undertaken on their ancestral lands and territories.¹⁸

3. Scope of EIRIS research

EIRIS' analysis in this report focuses on companies for whom the issue of indigenous rights to land and sea is a potential business risk. These companies are largely in the resource extraction and basic materials sectors; agriculture and farming, forestry, oil and gas production and mining.

The indigenous peoples' rights issues covered in this briefing include prior informed consent to projects, effective

participation in decisions affecting indigenous peoples and protection of indigenous expertise, traditional knowledge and culture.

It is generally recognised that indigenous rights covers a range of interrelated issues including health, representation in the media, access to basic services and equality in the administration of justice. However for the purposes of this briefing EIRIS has focused on companies involved in direct impact activities and excluded companies in other sectors such as Chemicals, Food Producers, Health Care Equipment & Services, Media, Pharmaceuticals & Biotechnology, Real Estate and Tobacco.

This briefing examines the policies and strategies adopted by seven companies operating in a range of countries and business activities to present an overview of the challenges companies face and the management responses they implement to address indigenous land rights issues.

The selected companies are Anglo-Eastern Plantations, Barrick Gold, BHP Billiton, Suncor Energy, Total, Weyerhaeuser, and Woodside Petroleum. All seven companies operate in countries with recognised indigenous peoples and engage in activities that have the potential to infringe on indigenous peoples land and/ or sea rights. These companies have been selected to provide a comparative analysis of management responses from different sectors.

A snapshot of EIRIS findings is presented in section 6.1.

4. Potential social, environmental & other ethical risks & opportunities

This briefing seeks to identify areas of potential risks and opportunities associated with operating in countries with indigenous peoples and engaging in business activities that may infringe indigenous land rights, and ways in which these may materialise in the short to medium term. The key risks identified are reputational risks, access to capital, damage to brand, licence to operate, and operational risks, in particular the threat of litigation and increased regulation. The main opportunities relate to using indigenous knowledge and expertise.

4.1 Reputational risks

4.1.1 NGO campaigns

Partnerships between NGOs and indigenous groups have provided worldwide visibility for indigenous peoples' concerns and have repercussions for companies who ignore the reputational risks that may arise when they come into conflict with indigenous peoples.

The Mining and Minerals Sustainable Development (MMSD) Project, initiated by the World Business Council for Sustainable Development (WBCSD) and supported by the Global Mining Initiative (GMI), recognised that campaigning by environmental and civil society groups has played an important role in catalysing major changes in the standards pursued by the minerals industry in the past, and that these groups would continue to be major drivers of change.¹⁹ Consequently some companies are facing increasing scrutiny by investors and the wider public on these issues.

NGO activities include:

- raising allegations that companies have not conformed with ILO 169²⁰
- engaging with senior management
- direct action such as blockades²¹
- strategic partnerships with private sector aimed at incremental change²²
- pressing for law reform and wider application of existing laws²³
- web and media campaigns²⁴
- lobbying shareholders to support indigenous peoples' rights at company AGMs and shareholder resolutions²⁵
- commissioning high profile reports²⁶

This increase in the sophistication and effectiveness of indigenous actions and the ways NGOs operate has transferred previously local issues covered in the local press to a global audience.

Reputational risk can harm brand value, employee morale, the ability to recruit and in some cases the ability to access markets and resources. In consumer facing companies, such as those in the oil and gas sector, poor performance with regard to indigenous peoples may result in a boycott.

4.2 Access to Capital

4.2.1. Access to investment capital

A company that can demonstrate transparent and responsible business practices may find it easier to secure access to capital from banks and shareholders. NGO campaigns have been influential in highlighting the funding provided by financial institutions for projects that have direct impact on indigenous peoples' land rights. An increased spot-light on project finance and increased awareness through initiatives such as the Equator Principles and the IFC Safeguard policies have resulted in greater scrutiny of financial institutions and subsequently affected resource

companies seeking finance from them. Companies with a poor track record on indigenous rights and other environmental and social areas risk limiting their access to financial backing.

4.3 License to operate

Poor performance on indigenous rights issues can lead to erosion of community and government confidence and consequent opposition to proposed operations. This may have a number of adverse consequences, including increased direct costs to operators through delays and increased operational costs. For example, the Grassy Narrows indigenous logging blockade against Weyerhaeuser is currently in its fifth year, the longest in Canadian history (2002-2007).

Building up expertise in engaging with indigenous peoples and previous good performance managing operational impacts on indigenous peoples can also assist when competing for local or national government licences or permission to access sites or exploit resources. Where there are several companies vying for a licence, governments may take previous track records into account.

The impacts of mismanagement can be considerable. Interruption to operations and attacks on or even kidnapping of employees can result where operations have been established without the consent or participation of local and indigenous communities. There can be additional security costs for companies operating in an environment where conflicts over rights to resources and land ownership are a real risk, for example in the Niger Delta.

4.4 Litigation

Lawsuits generate often adverse publicity impacting on a company's brand image and are a significant expense. They usually take many years to resolve and so continue to impact on brand and absorb large amounts of time and resources defending them in court. Irrespective of outcome, the cost of defending such actions is considerable and may not be fully recoverable even if the case is won. The risk that litigation poses is illustrated by Rio Tinto's resolution initially proposed at the 2006 AGM in Australia compelling class-action lawsuits against the company to be fought only in the state of Victoria. Whilst the company maintained this was a prudent way to protect the company and its investors, institutional shareholders failed to support the resolution, concerned that the motion would reduce accountability. Rio Tinto withdrew the resolution before the AGM.²⁷

Indigenous groups have used domestic and international conventions and laws to bring lawsuits at the national and regional level – for example in the US at the Organization of American States Human Rights Court at a regional level and at the international level, Convention 169 of the International Labour Organization.

Some current examples of litigation include legal action taken by traditional landowners in Australia concerned about the impact which a 5.5 km river diversion proposed by the company Xstrata may have on the environment²⁸ and a class action lawsuit on behalf of 13,000 Ningerum tribes people, to be heard in Papua New Guinea's National Court, alleging that BHP Billiton and other mine owners were "reckless and negligent" in dumping mine waste from

the OK Tedi mine into local river systems.²⁹

4.5 Increased regulation

The consequences of poor environmental management and inadequate consultation with indigenous peoples can lead to governments to impose restrictions or introduce regulation.

The legacy costs of a radioactive spill in 1979 in which 1100 tons of radioactive mill waste and 90 million gallons of contaminated liquid went into the Rio Puerco River prompted Navajo elders in the USA to declare their land would no longer be open for exploration or exploitation of uranium resources. This was passed into law as the Diné Resources Protection Act 2005, which imposes a moratorium on uranium mining for 25 years. More recently, in October 2007, the Wai Wai people, an indigenous group in Guyana, South America backed by government decree and a U.S.-based conservation organisation, banned miners and loggers from its section of the Amazon jungle and pledged to pursue an economic strategy based on ecotourism, research and traditional crafts.³⁰

4.6 Opportunities – indigenous knowledge and expertise

Indigenous peoples' knowledge of biodiversity, sacred sites, seasonal changes and ongoing environmental management can assist with pre-operational preparation, planning, the environmental impact assessment (EIA) process, day to day management of sites and remediation. Early ongoing engagement with indigenous peoples in relation to identifying sacred sites can avert future fines for destruction of these sites or lawsuits. Retaining this expertise through the employment of

indigenous peoples can make good business sense for a company while supporting the local community, building social capital and providing the company staff with a greater understanding of indigenous peoples.

5. Exposure factors

In identifying the companies most exposed to risks related to indigenous rights EIRIS has taken into account a) the nature of their business activities; b) the countries in which they operate; and c) previous allegations of indigenous land rights abuses.

5.1 Business activities

Direct impact activities undertaken by companies in the primary materials and resource extraction sectors represent the greatest risk. The nature of direct impact activities include:

- **Agriculture & farming** - including plantations
- **Forestry** – forestry and paper companies with forestry operations
- **Mining** – all types of mining
- **Oil and gas exploration and production** – on-shore or off-shore but only if associated with on-shore processing operations: for example, companies operating only in the North Sea or Gulf of Mexico are not included

5.2 Countries of concern

Key countries of concern for indigenous rights have been identified using a range of sources including the Indigenous World 2007, a project of the International Work Group for Indigenous Affairs (IWGIA) and a project mapping indigenous territories by the International Forum on Globalisation (IFG) working with partners including Amazon Watch, The European Centre for Ecological and Agricultural Tourism, Greenpeace-US,

Indigenous Environmental Network and Rainforest Action Network.

In most countries not all regions are inhabited by indigenous peoples, however companies are assumed to be exposed to these regions if present in a country unless the company has clearly indicated it is absent from these regions or this is evident from the description of their operations. A number of countries, most notably Japan, are not included in this list, although indigenous peoples live there, as the regions where they are present are unlikely to be in the regions where companies operate.

The countries of concern are:

- **Africa** - Algeria, Angola, Botswana, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of Congo (DRC), Ethiopia, Equatorial Guinea, Gabon, Ghana, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Niger, Nigeria, Republic of Congo (Congo Brazzaville), Rwanda, South Africa, Sudan, Tanzania, Uganda
- **Australia, New Zealand, and the Pacific** – Australia, New Zealand, Papua New Guinea
- **Asia** - Bangladesh, Burma, Cambodia, China (including Tibet), India, Indonesia (including West Papua), Laos, Malaysia, Nepal, Pakistan, Philippines, Thailand
- **Europe** - Denmark (Greenland only), Finland, Norway, Russia, Sweden
- **North America** – Canada, USA
- **Mexico, Central America and the Caribbean** – Belize, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, Trinidad & Tobago, Suriname
- **South America** - Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Venezuela
- **Middle East** – Iraq

5.3 Allegations of indigenous rights abuses

Companies with existing allegations for indigenous rights abuses are more greatly exposed to the risks outlined in section 4. Past allegations of indigenous rights abuses are monitored by EIRIS to identify companies that may previously have mismanaged indigenous rights issues. These companies are often under greater scrutiny from NGOs and the media and are considered to be exposed to a greater risk.

The following sources are used: main international and national press and key NGO websites. These include Business & Human Rights Resource Centre, Amnesty International, Human Rights Watch, Christian Aid and Survival International. Companies subject to an allegation of indigenous rights abuses levelled in one of the above sources within the last three years are classified as high risk exposure.

5.4 Exposure classification

EXPOSURE CATEGORY	CLASSIFICATION
High	Companies engaged in high risk business activities identified in countries of concern AND subject to allegations of indigenous rights abuses within the last three years
Medium	Companies engaged in high risk business activities identified in countries of concern

Companies involved in other business activities will be considered on a case by case basis where allegations of indigenous rights abuses linked to direct impact operations have been raised.

EIRIS has chosen the following selection of companies to analyse in this paper. The selection is a mixture of significant high and medium risk companies from a broad geographical range to offer an overview of approaches and steps taken in relation to indigenous rights. The companies selected all operate in high risk sectors.

Company	Business activity	Countries of concern	Allegations	Exposure
Anglo-Eastern Plantations	Plantations	Yes	No	Medium
Barrick Gold	Mining	Yes	Yes	High
BHP Billiton	Mining, metals & oil exploration	Yes	Yes	High
Suncor Energy	Oil & gas	Yes	No	Medium
Total	Oil & gas	Yes	No	Medium
Weyerhaeuser	Forestry	Yes	Yes	High
Woodside Petroleum	Oil & gas	Yes	Yes	High

All companies in the FTSE All World Developed Index and other companies EIRIS covers have been classified as High, Medium or No risk exposure and their management response will be assessed over the coming year.

6. Managing the risks

While companies are beginning to recognise the importance of human rights and how to manage their impact, respect for indigenous peoples' rights and how to successfully engage with them is less well understood by many companies.

EIRIS has identified 16 key indicators for assessing companies' management response to indigenous rights issues. Detailed definitions of these indicators are provided in Annex 9.1.1. The indicators fall into four categories: strategy & responsibility, engagement

& consent, employment, and reporting & dialogue.

These indicators are described in more detail at paragraph 9.2 below.

Strategy & responsibility

- Policy commitment to indigenous rights
- Commitment to the principles of free prior and informed consent/consultation (FPIC) for proposed projects
- Senior responsibility for indigenous rights issues
- Commitment to employee training on indigenous cultural issues
- Commitment to support indigenous rights laws

Engagement & consent

- Commitment to meaningful participation and early on-going consultation with relevant indigenous communities
- Indigenous Impact Assessment (IIA) involving indigenous communities
- Active participation in resettlement (incl. compensation proposals)
- Use of indigenous knowledge and preservation of culture
- Facilitation of free prior informed consent/consultation
- Dedicated communication channels

Employment

- Skills development and educational support
- Employing indigenous peoples

Reporting & dialogue

- Reporting on engagement activity
- Disclosure of incidents of non-compliance
- Public response to NGO allegations regarding breaches of indigenous rights (where relevant)

6.1 Snapshot of EIRIS findings

Assessed against the indicators described above, three out of seven companies' management response to indigenous rights issues are assessed as Intermediate, three as Limited and one has disclosed No Evidence of addressing the issue. No companies achieved an overall grading of Advanced or Good, although BHP Billiton and Suncor come closest to achieving a Good assessment. Two companies demonstrated a 'best practice' commitment to ILO 169 in their indigenous rights policy. Six of the seven companies have committed to undertake meaningful participation and ongoing consultation. Full results are shown in the table in section 8.

To further understand the business impact of indigenous rights issues on companies the following questions may be used. These questions are intended to assist analysts researching or engaging directly with companies but may be useful to others.

Questions for analysts

How does the company identify which indigenous peoples are affected by operations?

What methods does the company use for communicating with indigenous peoples (given that conventional channels may not necessarily work)?

How is the company evaluating regulatory developments?

How does the company distinguish between free prior informed consent and free prior informed consultation?

Does the company have policy to walk away from a project if consent is not freely given?

7. Good practice examples

While a comprehensive management response to indigenous rights issues may be lacking in most companies, below we explore a few examples of good practice.

BHP Billiton's 'Naonayaotit Traditional Knowledge Project' is a good example of investment in indigenous peoples' culture as well as supporting employment and sustainable development. The Naonayaotit Traditional Knowledge Project (NTKP) in Canada was developed jointly with the Inuit of the Kitikmeot Inuit Association for the purpose of integrating traditional Aboriginal knowledge into environmental management at the mine. Major outcomes of the NTKP to date include: a place names atlas, a series of illustrated reports on topics ranging from heritage and culture to Inuit opinion of exploration, research and development and a geographic information system (GIS) database for use by Inuit land managers.

Recognition of the importance of direct communication and crafting better indigenous communications is demonstrated by Suncor Energy in Canada. Following consultation with aboriginal leaders who stated that they were finding the consultation process on numerous new oil sands projects to be a burden, Suncor is now working with Alberta regulators, and First Nations and Métis representatives in the Wood Buffalo region to find more efficient and effective ways to consult with them.

In some cases companies have demonstrated an understanding of the risks by deferring decisions where adequate consultation and consent have not been achieved. Anglo American's policy on engaging with indigenous peoples includes a

commitment to "work with indigenous people around the world on the basis of consent, recognising their historical disadvantages and specific cultural norms."³¹ In 2002, the AngloAmerican exploration team planned to drill in the vicinity of Suggi Lake in Canada, a significant fish habitat, but has held off from doing so until gaining consent from the local indigenous community.

Rio Tinto also has a policy recognising the principles of free prior informed consent, not only for indigenous communities in the area but for all local people: "In all cases, this involves ongoing consultation with local people, public authorities and others affected. We accept that this may sometimes result in our not exploring land or developing operations, even if legally permitted to do so."³²

Rio Tinto recognised the Mirrar peoples' rights regarding the proposed uranium mine project at Jabiluka in the Northern Territory, Australia, coming to an agreement not to mine until consent is obtained. A traditional owner said: "..This agreement lifts the shadow of Jabiluka off the Mirarr and other Aboriginal peoples in Kakadu. We now have a chance to solve some of the social problems like alcohol, unemployment and health. Jabiluka will never be mined unless the Mirarr give approval - in future the decision is ours alone for the first time."³³

Notes

¹ Howitt, Connell and Hirsch (eds), *Resources, Nations and Indigenous Peoples: Case Studies*, Oxford University Press, p 10

² UN Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices*, <http://www.un.org/esa/socdev/unpfi/documents/unpfi brochure_en07.pdf>

³ UN Economic and Social Council, Commission on Human Rights - Working Group on Indigenous Populations, *Working paper on the principle of free, prior and informed consent*, 8 July 2004, E/CN.4/Sub.2/AC.4/2004/4 <<http://www.ohchr.org/english/issues/indigenous/docs/wqip22/4.pdf>>

⁴ *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, Country list of ratifications <[http://www.ilo.org/ilolex/cgi-lex/ratific.pl?\(C169\)](http://www.ilo.org/ilolex/cgi-lex/ratific.pl?(C169))>

⁵ *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* <<http://www.ilo.org/public/english/indigenous/standard/index.htm>> and, *UN Convention on the Rights of Indigenous Peoples*

<<http://www.un.org/esa/socdev/unpfi/en/declaration.html>>

⁶ *Convention on Biological Diversity* <<http://www.cbd.int/default.shtml#>>

⁷ Office of the High Commissioner for Human Rights, *Fact Sheet No.9 (Rev.1), The Rights of Indigenous Peoples*, 21 December 1995

<<http://www.unhchr.ch/html/menu6/2/fs9.htm>>

⁸ International Forum on Globalization, *The International Cancun Declaration of Indigenous Peoples*, 5th WTO Ministerial Conference, Cancun, Quintana Roo, Mexico, 12 September 2003,

<www.ifg.org/programs/indig/CancunDec.html>

⁹ *Motupore Declaration*, Papua New Guinea, July 2003, <www.minesandcommunities.org/Country/png2.htm>

¹⁰ Assembly of First Nations, *Charter of the Assembly of First Nations*, April 2003 <<http://www.afn.ca/article.asp?id=57>>

¹¹ Dialogue between Nations, *Indigenous Peoples' Plan of Implementation on Sustainable Development*, Johannesburg, South Africa, Presented to the United Nations World Summit on Sustainable Development, 2 September 2002, <<http://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/IndigenousPeoplesPlan.htm>>

¹² Tebtebba, *Declaration of Civil Society and Indigenous Participants of the Regional Workshop of the World Bank's Extractive Industries Review*, Rio de Janeiro, Brazil 16-19 April 2002,

<www.tebtebba.org/tebtebba_files/susdev/mining/eir/riodecl aration.htm>

¹³ World Bank *Revised Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10)* applies to all investment projects for which a Project Concept Review took place on or after July 1, 2005. This replaces the earlier policy (OD 4.20, *Indigenous Peoples*) dated September 1991,

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTS OCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pag ePK:149018~piPK:149093~theSitePK:407802_00.html>

¹⁴ Forest Peoples Programme, *Statement of Indigenous Participants at the Consultation on the World Bank's Draft Policy on Indigenous Peoples (OP/BP 4.10)*, 14 November 2001

<http://www.forestpeoples.org/documents/ifi_igo/wb_4_10_i p_decl_bangladesh_nov01_eng.shtml#_ftn1>

¹⁵ International Council on Mining and Metals website, ICMC Policy Statements, *Draft Position Statement on Mining and Indigenous Peoples Issues*, March 2006. The draft position statement was approved for consultation by ICMC's CEO-led Council in March 2006

<http://www.icmm.com/library_pub_detail.php?rcd=190>

¹⁶ International Council on Mining and Metals website, *Draft Position Statement on Mining and Indigenous Peoples Issues*, March 2006

<http://www.icmm.com/news/1054Drafthighlevelpositionstate ment_FINAL.pdf>

¹⁷ ComLaw website, *Aboriginal Lands Rights (Northern Territory) Act 1976*, section 42(6)(a)

<[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilat ion1.nsf/0/C33803A9831C47C6CA25734C000D90EF/\\$file/Ab l andRightNT76_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilat ion1.nsf/0/C33803A9831C47C6CA25734C000D90EF/$file/Ab l andRightNT76_WD02.pdf)>

¹⁸ UN Department of Economic & Social Affairs, *International Workshop On Methodologies Regarding Free Prior And Informed Consent And Indigenous Peoples*, New York 17-19 January 2005, page 5

<http://www.un.org/esa/socdev/unpfi/documents/FPIC_2005_IFAD.doc>

¹⁹ World Business Council for Sustainable Development, *Breaking New Ground: Report of the Mining, Minerals and Sustainable Development Project*, April 2002, p 69 <<http://www.wbcsd.org/DocRoot/ev8jEJVtIMYd4mJhGGHQ/fin almmmsdreport.pdf>>

²⁰ International Finance Corporation, *ILO Convention 169 and the Private Sector*, March 2007, "The Case of the Marlin Project in Guatemala", page 10

<[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_IL O169/\\$FILE/ILO_169.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_IL O169/$FILE/ILO_169.pdf)>

²¹ For example, Grassy Narrows First Nation website, *Taking A Stand*

<http://freegrassy.org/learn_more/grassy_narrows/taking_a_stand/>

Weyerhaeuser's response to Grassy Narrows First Nation <<http://www.weyerhaeuser.com/environment/currentissues/g rassynarrows.asp>>

²² For example, Round Table on Responsible Palm Oil website, *Background*, <<http://www.rspo.org/background.htm>>

²³ For example, Mineral Policy Institute website, *Fair play in the uranium sector: BHP Billiton called on to relinquish its ability to undercut standards at the Olympic Dam Uranium Mine*, 27 November 2006

<<http://www.mpi.org.au/companies/bhpb/olympicdam/>> The *Roxby Downs (Indenture Ratification) Act 1982* available at <[http://www.legislation.sa.gov.au/LZ/C/A/ROXBY%20DOWNS %20\(INDENTURE%20RATIFICATION\)%20ACT%201982.aspx](http://www.legislation.sa.gov.au/LZ/C/A/ROXBY%20DOWNS %20(INDENTURE%20RATIFICATION)%20ACT%201982.aspx)>

²⁴ A localised campaign turned global: see Stand Up for Burrup website. According to NGOs Woodside Petroleum and the Western Australian Government are planning to turn part of this globally significant site into a natural gas production facility <<http://www.standupfortheburrup.com/>> Woodside's response, Sustainable Development Report 2006, p 36

²⁵ Business and Human Rights Resource Centre website, *Barrick Gold Company profile, Article: Norwegian pension fund reassessing its stake in Barrick Gold*, 23 July 2007

<<http://www.aftenposten.no/english/local/article1900528.ace>

> An example of a resolution proposed at AGM, Diocese of Oxford website, *At what cost do we use petrol?* ECCR (Ecumenical Council for Corporate Responsibility) Oxford and Royal Dutch Shell AGM 2006

<<http://www.oxford.anglican.org/page/2956/>>

²⁶ CorpWatch website, *Barrick's Dirty Secrets*, 1 May 2007

<<http://www.corpwatch.org/article.php?id=14466>> Barrick Gold's response to NGO Report

<<http://barrick.com/Default.aspx?SectionID=34e56f08-f723-4669-b0e1-0d0bffc3c5400&LanguageId=1>>

²⁷ Greenblat, E., "Revolt over Rio's class-action resolution", *Australian Financial Review*, 5 May 2006

²⁸ Ravens, T., "Traditional owners battle to stop Xstrata mine expansion", *The Age*, May 4 2007

<<http://www.theage.com.au/news/business/traditional-owners-battle-to-stop-xstrata-mine-expansion/2007/05/03/1177788311102.html>>

²⁹ Trounson, A., "Ok Tedi keeps haunting BHP", *The Australian Business*, 18 January 2007

<<http://www.theaustralian.news.com.au/story/0,20867,21076116-643,00.html>>

³⁰ "Melia, M., "Amazon Group Bans Logging, Mining", Associated Press, 5 October 2007

<<http://ap.google.com/article/ALeqM5gJqgsuM6JqDFxst94n2-ad0luVzWd8S2VDBOQ>>

³¹ Anglo American, *Report to Society 2006*,

<<http://www.angloamerican.co.uk/static/reports/2007/sc-human-rights.htm>>

³² Rio Tinto website. *The way we work*, September 2005, page 10 (p12 PDF)

<http://www.riotinto.com/documents/ReportsPublications/cor pPub_HumanRights.pdf>

³³ Energy Resources of Australia (ERA) website, Agreement between Mirarr Gundjeihmi Aboriginal people, ERA and the Northern Land Council, 25 February 2005, <http://www.energyres.com.au/our_business/jabiluka>

8. Company assessments

	Anglo Eastern Plantation	Barrick Gold	BHP Billiton	Suncor	Total	Weyerhaeuser	Woodside
Strategy & responsibility							
Commitment to indigenous rights policy		•	• (BP)	•	• (BP)	•	•
Commitment to the principles of free prior & informed consent/consultation			• (BP)	• (BP)	• (BP)		
Senior responsibility			•	•			•
Commitment to employee training			•	•	•	•	•
Commitment to support indigenous rights laws				•			
Engagement & consent							
Commitment to meaningful participation & on-going consultation		•	•	•	•	•	•
Indigenous impact assessment (IIA)		•	•	•	•		•
Active participation in resettlement (incl. compensation proposals)			•				
Use of indigenous knowledge and preservation of culture			• (BP)	•		•	•
Facilitation of prior informed consent/consultation				•			
Dedicated communication channels			•	• (BP)			•
Employment							
Skills development & educational support		•	•	•			•
Employing indigenous peoples			•	•			•
Reporting & dialogue							
Reporting on engagement activity			•	•			
Disclosure of incidents of non-compliance & remedial actions				•			
Public response to NGO allegations		•	•			•	•
Assessment	NE	L	I	I	I	L	L

NE – no evidence; L – limited; I – intermediate; G – good; A – advanced; BP – best practice.

Detailed grading methodology is provided in Annex 9.1 and definitions in Annex 9.1.2. NB Assessments apply to companies and any subsidiaries and associated over 20% owned.

9. Assessment methodology

9.1 Grading methodology

	No evidence	Limited	Intermediate	Good	Advanced
Requirements	No indicators	Any one indicator	All marked indicators & one other	All marked indicators	All marked indicators
Strategy & responsibility					
Commitment to indigenous rights			•	•	• (at BP level)
Commitment to the principles of free prior & informed consent			•	• (at BP level)	• (at BP level)
Senior responsibility				•	•
Commitment to employee training				•	•
Commitment to support indigenous rights laws					•
Engagement & consent					
Commitment to meaningful participation & on-going consultation			•	•	•
Indigenous impact assessment (IIA)				•	•
Active participation in resettlement (incl. compensation proposals)				•	•
Use of indigenous knowledge					• (at BP level)
Facilitation of prior informed consent				•	•
Dedicated communication channels				•	• (at BP level)
Employment					
Skills development & educational support				•	•
Employing indigenous peoples					•
Reporting & dialogue					
Reporting on engagement activity				•	•
Disclosure of incidents of non-compliance & remedial actions					•
Public response to NGO allegations				•	•

9.1.2 Indicator definitions

Company assessments are based on publicly available information and company responses to EIRIS.

Strategy & responsibility

- Commitment to indigenous rights – public commitment to respecting the rights of indigenous peoples. At a best practice level this includes a commitment to the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169), the UN Declaration on the Rights of Indigenous Peoples, the Proposed American Declaration of the rights of indigenous peoples or Participation in UN Permanent Forum on Indigenous Issues (UNPFII)
- Commitment to the principles of free prior and informed consultation/ consent (FPIC) to proposed projects – public commitment to FPIC at each stage of the project. At a best practice level an explicit commitment to free prior and informed consent (rather than consultation) is required
- Senior responsibility for indigenous rights issues – board level (individual or committee) or senior responsibility
- Commitment to employee training on indigenous cultural issues – public commitment or evidence of employee training on indigenous cultural issues
- Commitment to support indigenous rights laws – public commitment not to obstruct the implementation of the recognised rights of indigenous peoples

Engagement & consent

- Commitment to meaningful participation and on-going consultation with relevant indigenous communities – specific public commitment
- Indigenous Impact Assessment (IIA) involving indigenous communities – commitment to undertake IIA or Social Impact Assessments (SIA) including indigenous rights for new projects or significant extensions of existing operations
- Active participation in resettlement (incl. compensation proposals where relevant) – public commitment not to

- engage in forcible removal and commitment to fair compensation
- Use of indigenous knowledge – public commitment to or evidence of incorporating indigenous peoples' knowledge. At a best practice level this includes a public commitment to preserve indigenous peoples' culture
- Facilitation of prior informed consent/consultation – includes requirements to facilitate understanding e.g. through provision of independent translators and clearly identify negative impacts of proposed project e.g. on sacred sites
- Dedicated communication channel – at a best practice level this includes a clear grievance mechanism and evidence this is communicated to indigenous peoples

Employment

- Skills development and educational support provided to local indigenous communities – evidence of skills development in specified skills areas
- Employing indigenous peoples – evidence of targets or monitoring of indigenous workforce composition

Reporting & dialogue

- Reporting on engagement activity – examples of engagement conducted
- Disclosure of incidents of non-compliance and remedial actions – including incidents of violations involving indigenous rights, regulatory breaches etc. Disclosure must be public.
- Public response to allegations regarding breaches of indigenous rights - the company responds to allegations in relation to controversial high-profile incidents (if applicable)

See also section 6 – Managing the risk

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