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Evaluating international ethical standards and instruments: policy summary

HIGHLIGHTS

- Under international law, states are responsible for ensuring that indigenous rights are protected. This includes incorporating international standards into national legal and regulatory regimes, as well as early consultation with indigenous peoples, for instance prior to allocating exploration licences.
- For companies, respecting internationally recognised indigenous rights frequently necessitates going over and above the requirements of national law.
- Companies are often assessed on their policies rather than their practices. Having a policy in place is an important first step and too few companies currently have indigenous peoples' policies. However, it is also important to assess practice on the ground.
- International standards for consultation and participation have evolved over recent years, while increasing numbers of instruments have a requirement to obtain the free, prior and informed consent (FPIC) of affected indigenous communities if their natural and cultural resources are under threat.
- Despite advances in consultation, participation and consent, the question of indigenous control over the processes of decision-making relating to extractive industry development is still under debate.

International standards and instruments have evolved since the 1960s to protect the rights of indigenous peoples in the context of major development interventions taking place on their lands. Given the great number of different standards and instruments, there is a need to build understanding of how to interpret them and how they are implemented in practice, particularly in the face of increasing pressures on indigenous peoples' lands and resources in the present day. Risks and impacts are accumulating from multiple sources. This briefing focuses on the extractive industries, but communities may also face proposals for wind farms, roads and electric power lines (often simultaneously).

While extractive industry companies have made improvements in their environmental performance since the 1990s, they continue to perform less well on social issues. Often this is due to a lack of adequate understanding of social issues and a lack of involvement of affected communities in impact assessments and decision-making. These gaps are particularly evident in relation to indigenous peoples.

At the same time, indigenous peoples are building awareness about their rights and are mobilising and gaining influence, especially through the use of social media and increasing engagement in political forums, and as a result of international support for high profile protests such as the Dakota Access Pipeline in the United States. In general, governments, businesses, and investors are increasingly concerned about the cost of conflicts and the practical and reputational risks of failing to respect indigenous rights. Greater understanding of international instruments, including their specific content and how the instruments are applied, can help to promote mutual understanding and constructive engagement.

This briefing focuses on international hard and soft law and industry standards and guidelines. It compares their content in relation to five key themes: due diligence; consultation; free, prior and informed consent (FPIC); benefit sharing; and access to remedy. Annex 1 gives a comparison of key requirements of seven selected international instruments in terms of these five themes. The recommendations offer ways to build greater understanding and ensure more effective implementation of international standards and instruments. This is the summary briefing of a longer analytical paper, which is available on request (Wilson, 2017a).

Key themes

Frequently there is a lack of agreement on how international standards and instruments are interpreted. Accepted understandings are often developed in particular contexts through the analysis of legal case history (e.g. Heinämäki, 2015; Åhrén, 2016), or the function of ombudsmen and complaints mechanisms (see Section 4 below). Official commentaries and guidance documents play an important role in the interpretation of international instruments (see Box1). Of particular relevance here are the commentaries of the former UN Special Rapporteur on the rights of Indigenous Peoples, James Anaya, relating to the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), given that indigenous peoples' rights are barely mentioned in this important human rights instrument (e.g. Anaya, 2013). This and other commentaries and guidance documents are explored in more depth in the longer paper (Wilson, 2017a). The analysis highlighted five interrelated themes, organised around the procedural aspects of international standards: due diligence; consultation; free, prior and informed consent (FPIC); benefit sharing; and access to remedy. Annex 1 presents selected provisions of seven key international instruments, which sit at the core of this analysis:

- International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples (ILO 169) (1989)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)
- UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011)
- International Finance Corporation (IFC) Environmental and Social Performance Standards (2012), especially Performance Standard (PS) 7 on Indigenous Peoples
- Towards Sustainable Mining (TSM) initiative (Mining Association of Canada) (2004)
- Equitable Origin EO100™ Standard for Responsible Energy Development (2012)
- International Council on Mining and Metals (ICMM) Position Statement on Indigenous Peoples and Mining (2013)

This section summarises the key requirements of the international standards, instruments and guidance documents analysed for this project.

Due diligence

Due diligence is an ongoing set of assessment and monitoring activities carried out in consultation, or preferably in collaboration, with the community. It features strongly in the UN Guiding Principles and the performance standards of international

financial institutions such as the International Finance Corporation (IFC), as well as other instruments (see Annex 1). Due diligence should be carried out from the earliest stages of project planning and implementation, repeated when necessary, and should take cumulative impacts into account. In some cases meeting international standards will require going over and beyond the requirements of national law. Due diligence should identify affected communities and their rights, vulnerabilities and needs, including the specific cultural and livelihoods concerns of indigenous peoples, which may be different from non-indigenous populations. The findings need to feed into the system employed for managing environmental and social risks throughout the life of the project. Governments and state-owned companies have due diligence responsibilities as much as private companies. A project-related due diligence process needs to cover direct business relationships (including contractors), over which the operating company is deemed to have control, as well as the risks posed by their indirect business relationships, which need to be identified and managed, where possible, through collaboration with relevant third parties.

Consultation and engagement

The terms 'consultation' and 'engagement' have evolved greatly over recent years within international standards, while increasing volumes of guidance have been prepared on how to engage 'meaningfully' with indigenous and local communities (e.g. OECD, 2016). Good practice includes consultation or engagement that is: early, timely, ongoing, inclusive, in good faith, fair, representative, non-discriminatory and culturally appropriate. Engagement with indigenous peoples is likely to require special considerations, such as their governance institutions, relations to the land and historical discrimination – considerations which may not be necessary for non-indigenous peoples. Engagement processes should be consistent with indigenous peoples' own consultation and decision-making processes. Support may be required for capacity building. Engagement might involve participation of the community in resource- use assessments, monitoring and planning. It often requires advance planning and mutual agreement on the rules of the engagement. Community protocols are increasingly used by communities to build consensus in advance of external negotiations, to establish expectations, priorities and favoured engagement procedures (Gibson Macdonald and Zezulka, 2015).

Free, prior and informed consent

The principle of FPIC is enshrined in ILO 169, UNDRIP and other international human rights treaties. It may or may not be a requirement of national law. However, international standards of good practice

indicate that companies should have an FPIC policy in place if they are working in regions inhabited by indigenous peoples (UN Global Compact, 2013). They should be prepared to meet the expectations of local indigenous peoples to respect their internationally-recognised rights. A process of FPIC needs to be agreed in advance with the community, possibly through a formal, legal agreement. The FPIC process needs to be conducted in good faith, free from coercion, intimidation or manipulation. It needs to take place in advance of relevant decisions being made, and as early as possible in the project planning process. It requires the sharing of adequate and timely information in accessible formats and appropriate languages. Aspects of the dialogue or negotiation need to be agreed in advance, including what constitutes consent and who is responsible for giving or withholding that consent. The process should be conducted in a way that is consistent with indigenous peoples' own institutions and customs. FPIC is an ongoing, iterative process, not a one-off event – continuous dialogue is required to build trust. All commitments need to be documented and mutually agreed, including procedures to follow if agreement is not reached, or if commitments are subsequently not met.

Access to remedy

According to the UN Guiding Principles, governments are required to ensure judicial and non-judicial access to remedy, while companies are required to establish their own grievance mechanisms. Many instruments also have their own mechanisms (such as an ombudsman, in the case of IFC, or in the case of the OECD Guidelines, a network of National Contact Points) by which the public and local communities can raise concerns if an industrial activity is in breach of the standard itself. The work of ombudsmen often revolves around mediation and facilitating dialogue between the parties to a conflict. Sometimes (but not always) it is sufficient for them to encourage the parties to meet and talk through their differences. Issues raised by indigenous peoples often relate to the failure of governments or companies to consult adequately with them on development activities that affect their lands. In addressing complaints, several international instruments emphasise the need to give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned, as well as the international human rights norms. With all grievance resolution, the mechanism should be culturally appropriate, readily accessible, free for affected people to use, and should not hamper access to alternative judicial or administrative mechanisms. Local and indigenous communities should have full information about the availability and operation of all forms of access to remedy related to a particular development.

BOX 1. Key guidance documents

- Report on extractive industries and indigenous peoples by James Anaya, then-UN Special Rapporteur on the rights of indigenous peoples (Anaya, 2013)
- UN Global Compact business reference guide to UNDRIP (UN Global Compact, 2013)
- ICMM Good practice guide on indigenous peoples and mining (ICMM, 2015)
- Akwé: kon: Voluntary guidelines on cultural, environmental and social impact assessment produced by the Secretariat of the Convention on Biological Diversity (CBD, 2004)
- Handbook for ILO constituents on understanding ILO 169 (ILO, 2013)
- UNDRIP manual for National Human Rights Institutions (APF and OHCHR, 2013)
- IPIECA (the global oil and gas industry association for environmental and social issues) guidance on indigenous peoples (IPIECA, 2012)
- Organization for Economic Co-operation and Development due diligence guidance for meaningful stakeholder consultation in the extractive sector (with annex on indigenous peoples) (OECD, 2016)

Benefit sharing

International instruments refer to indigenous peoples' right to benefit from natural resource development, at least on an equal footing with other parts of the population, while governments are expected to prioritise their wellbeing in economic development planning. James Anaya (2013) has recognised inequities inherent in the 'prevailing model' of resource development, whereby external companies lead resource development projects, supported by the state and then 'share the benefits' with local communities. His 'preferred model' of development, if resource extraction is to go ahead, is for indigenous peoples to have greater control over the actual developments and how the benefits are subsequently shared. This reflects the spirit of UNDRIP which refers to indigenous peoples' right to 'determine priorities and strategies for the development or use of their lands and territories' (which indicates more than 'participation'). Within the 'prevailing model', there are still opportunities for innovation in benefit sharing, including greater transparency of revenue flows; royalty- and profit-sharing and equity stakes; independent funds; local development initiatives; community benefit agreements; preferential employment and livelihoods development. While these may not be made plain in many of the standards and instruments, they have been explored and assessed in a wide range of guidance documents produced by standard-setters and industry associations (e.g. IPIECA, 2012; World Bank, 2012; Lohde *et al*, 2015; ICMM, 2015).

Recommendations

The main aim of this briefing, and the longer paper that it summarises, is to assist with increasing understanding of international standards and instruments, by highlighting key themes and issues and pointing towards important analysis and guidance to be found in existing published sources. The findings are meant to provide a foundation and stimulus for further debate, research and analysis. Some of the key gaps in understanding and/or practice are highlighted below.

Government vs industry responsibilities

- Under international law, states are ultimately responsible for ensuring compliance with human rights norms within their jurisdictions, including the rights of indigenous peoples and communities. This requires governments to take responsibility for early engagement with indigenous peoples, for instance prior to mineral exploration.
- Governments need to co-ordinate effectively between international instruments and national legal and regulatory regimes in order to ensure adequate implementation of international standards at the national and local level.
- Companies need to be prepared to go beyond legal compliance in order to respect internationally recognised indigenous rights, and to engage meaningfully with local indigenous communities.

Policies vs practice

- Companies should be assessed not only on the basis of their policies and self-reporting, but on field visits and third party audit or assurance processes, to ensure that they are indeed implementing the commitments that they have officially made.
- At the same time, companies should be encouraged to put policies in place as a first step for society in being able to hold them to account. Company rankings, such as the one developed by this project (Øverland, 2016) are one way to provide this encouragement.

Community control

- Indigenous people's interests are frequently not recognised in decision-making processes, and increasingly people are seeking greater involvement in decision-making, in order to determine outcomes, not simply to be consulted on them.
- Most standards, especially those aimed at industry, remain focused on good practice within the 'prevailing model' of resource development, led by an external company, with support from the state (Anaya, 2013). More effort should be made to implement Anaya's 'preferred model' of resource development, with greater indigenous control.

Transparency and lesson sharing

- Overall, greater transparency is needed in regard to the implementation of international standards and the negotiation of agreements.
- There is a need for greater sharing of lessons learned and case study experience. This needs to be in appropriate formats, from community radio programmes, to public meetings, to academic research papers, to policy briefings, in order to reach relevant audiences.

In the spirit of greater transparency and lesson sharing, we welcome any comments on this briefing and the longer analytical paper. We hope that they contribute to a much-needed dialogue on the topic of international instruments for indigenous rights protection and their application in the context of extractive industry development.

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Annex 1. Comparison of key requirements of selected international instruments

Instrument	1. Due diligence	2. Consultation/participation
<p>ILO Convention 169 on Indigenous and Tribal Peoples (1989)</p> <p>Legally binding on the 22 countries which have ratified it.</p> <p>http://www.ilo.org/dynnormlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314</p>	<p>Article 7(3): ‘Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.’</p> <p>Article 7(4): ‘Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.’</p>	<p>Article 6(1): ‘[G]overnments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;</p> <p>(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;</p> <p>(c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.’</p> <p>Article 7(1): ‘The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.’</p> <p>Article 15(2): ‘Where the state retains ownership of the resources, [G]overnments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands...’</p>
<p>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)</p> <p>Not legally binding but universally recognised by all UN member states.</p> <p>http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf</p>	<p>Article 8(2): ‘States shall provide effective mechanisms for prevention of, and redress for: ... (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.’</p> <p>Article 32(3): ‘States shall provide effective mechanisms for just and fair redress for [any project affecting their lands or territories and other resources] and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact’.</p>	<p>Article 18: ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.’</p> <p>Article 26(2): ‘Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.’</p> <p>Article 27: ‘States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.’</p> <p>Article 32(1): ‘Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.’</p>

3. FPIC	4. Access to remedy	5. Benefit sharing
<p>Article 6(2): 'The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.'</p> <p>Article 16(1-2): '1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.'</p>	<p>Article 15(2): In regard to natural resource developments, indigenous peoples '[s]hall receive fair compensation for any damages which they may sustain as a result of such activities'.</p> <p>Article 16(3-5): '3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. 4. [When this is not possible], these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.'</p>	<p>Article 2(2a): [G]overnments shall implement measures for: '... ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.'</p> <p>Article 7(2): 'The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.'</p> <p>Article 15(2): In regard to natural resource developments, indigenous peoples '[s]hall wherever possible participate in the benefits of such activities'.</p>
<p>Article 10: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.'</p> <p>Article 19: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'</p> <p>Article 29: 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.'</p> <p>Article 32(2): 'States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.'</p>	<p>Article 11(2): 'States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their FPIC or in violation of their laws, traditions and customs.'</p> <p>Article 28(1): 'Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their FPIC. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.'</p> <p>Article 32(3): 'States shall provide effective mechanisms for just and fair redress for [any project affecting indigenous peoples' lands or territories/ other resources]'</p> <p>Article 40: 'Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. ...'</p> <p>Article 42: 'The United Nations [and its bodies] and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.'</p>	<p>Article 26(2): 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'</p> <p>Article 32(1): 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.'</p>

Instrument	1. Due diligence	2. Consultation/participation
<p>UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011)</p> <p>Non-binding but widely accepted by UN member states.</p> <p>http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf</p>	<p>Principle 4: States should protect against human rights abuses by state-owned or supported business enterprises ... 'including, where appropriate, by requiring human rights due diligence.'</p> <p>Principle 15: 'In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: ... (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights...' [See Principle 17 for more detail on the process of due diligence]</p> <p>Principle 19: 'In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action...'</p> <p>[see the rest of Principle 19 for detail on how to integrate findings and take appropriate action]</p>	<p>Principle 18: '[B]usiness enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: ...</p> <p>(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.'</p>
<p>International Finance Corporation (IFC) Environmental and Social Performance Standards (2012), Performance Standard (PS) 7 (Indigenous Peoples)</p> <p>Obligatory for companies ('clients') using finance from the IFC.</p> <p>http://www.ifc.org/performancestandards</p> <p>Note: This matrix only includes the content of PS7 on Indigenous Peoples. Relevant clauses are also contained in other performance standards, including relating to impact assessment and stakeholder engagement (PS1), land acquisition and resettlement (PS5). PS8 (cultural heritage), however, does not apply to indigenous peoples' cultural heritage, which is covered by PS7.</p>	<p>PS7(8): 'The client will identify, through an environmental and social risks impact assessment process, all communities of Indigenous Peoples within the project area of influence who may be affected by the project, as well as the nature and degree of the expected direct and indirect, economic, social, cultural (including cultural heritage), and environmental impacts on them.'</p> <p>PS 7(14): 'If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected, the client will take the following steps:</p> <ul style="list-style-type: none"> - Document efforts to avoid and otherwise minimize the area of land proposed for the project; - Document efforts to avoid and otherwise minimize impacts on natural resources and natural areas of importance to Indigenous People; - Identify and review all property interests and traditional resource uses prior to purchasing or leasing land; - Assess and document the Affected Communities of Indigenous Peoples' resource use without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources. - Ensure that Affected Communities of Indigenous Peoples are informed of their land rights under national law, including any national law recognizing customary use rights.' <p>(see also 5. Benefit sharing)</p>	<p>PS7(10): 'The client will undertake an engagement process with the Affected Communities of Indigenous Peoples as required in PS1. This engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition this process will:</p> <p>(a) Involve Indigenous Peoples' representative bodies and organizations (e.g., councils of elders or village councils), as well as members of the Affected Communities of Indigenous Peoples; and</p> <p>(b) Provide sufficient time for Indigenous Peoples' decision-making processes.'</p>

3. FPIC	4. Access to remedy	5. Benefit sharing
<p>Principle 12: ‘The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.’</p> <p>Commentary to Principle 12: ‘Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. ...’</p>	<p>Principle 15: ‘[Business enterprises should have in place] (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.’</p> <p>Principles 25-28: States should ensure ‘access to effective remedy’ if human rights abuses occur within their territory/jurisdiction, including appropriate judicial and non-judicial, as well as non-State grievance mechanisms.</p> <p>Principle 29: ‘[B]usiness enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.’</p> <p>Principle 30: ‘Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.’</p> <p>Principle 31 provides effectiveness criteria for non-judicial grievance mechanisms.</p>	<p>There is no explicit reference to benefit sharing.</p>
<p>PS 7(11): ‘[T]he client will obtain the FPIC of the Affected Communities of Indigenous Peoples in the circumstances described in paragraphs 13-17.’ ‘FPIC applies to project design, implementation, and expected outcomes related to impacts.’</p> <p>PS7(12): ‘FPIC builds on and expands the process of ICP [informed consultation and participation] described in PS1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and the Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community disagree.’</p> <p>PS7(14): A process of due diligence will be followed (see 1. Due diligence).</p> <p>PS7(15): The client will consider feasible alternatives to relocation. ‘[I]f such relocation is unavoidable, the client will not proceed with the project unless FPIC has been obtained as described above. Any relocation of Indigenous Peoples will be consistent with the requirements of PS 5 [Land Acquisition and Resettlement]. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the cause of their relocation cease to exist.’</p> <p>PS7(16): ‘Where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples’ lives, priority will be given to avoidance of such impacts. Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples.’</p>	<p>PS1(35) requires clients to establish an effective grievance mechanism for (all) affected communities.</p> <p>PS7(9): Where adverse impacts on Indigenous Peoples are unavoidable, ‘[t]he client will minimize, restore, and/or compensate for these impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of Affected Communities of Indigenous Peoples. The client’s proposed actions will be developed with the ICP [informed consultation and participation] of the Affected Communities of Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Plan, or a broader community development plan with separate components for indigenous peoples.’</p> <p>PS 7(14) Where adverse impacts on lands traditional used by Indigenous Peoples are unavoidable, the client will: ‘[O]ffer Affected Communities of Indigenous Peoples compensation and due process, including:</p> <ul style="list-style-type: none"> - Providing land-based compensation or compensation in-kind in lieu of cash compensation where feasible. - Ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods if project development results in the loss of access to and the loss of natural resources independent of project land acquisition. - Providing Affected Communities of Indigenous Peoples with access, usage, and transit on land it is developing subject to overriding health, safety, and security considerations.’ 	<p>PS 7(14): Where adverse impacts on lands traditionally used by Indigenous Peoples are unavoidable, the client will offer ‘culturally appropriate sustainable development opportunities’, including:</p> <ul style="list-style-type: none"> - ‘Ensuring fair and equitable sharing of benefits associated with project usage of the resources where the client intends to utilize natural resources that are central to the identity and livelihood of Affected Communities of Indigenous Peoples and their usage thereof exacerbates livelihood risk.’ <p>PS 7(20): ‘[I]dentified [benefit sharing] opportunities should aim to address the goals and preferences of the Indigenous Peoples including improving their standard of living and livelihoods in a culturally appropriate manner, and to foster the long-term sustainability of the natural resources on which they depend.’</p>

Instrument	1. Due diligence	2. Consultation/participation	
<p>Towards Sustainable Mining (TSM) (2004)</p> <p>Adoption of the TSM guiding principles and other commitments is mandatory for all members of the Mining Association of Canada (MAC).</p> <p>http://mining.ca/towards-sustainable-mining/tsm-guiding-principles</p> <p>Aboriginal and Community Outreach Framework http://mining.ca/towards-sustainable-mining/protocols-frameworks/aboriginal-and-community-outreach</p> <p>and Protocol: http://mining.ca/sites/default/files/documents/TSM-Aboriginal-and-Community-Outreach-Protocol-2015.pdf</p>	<p>According to the Aboriginal and Community Outreach Framework, MAC members have agreed to several commitments, including:</p> <ul style="list-style-type: none"> - Undertaking early, timely and culturally appropriate engagement with Aboriginal Peoples, including within the environmental assessment process, to ensure their interests in a project and its potential impacts are understood. - Consideration of traditional knowledge to minimise or mitigate potential adverse environmental and social impacts, and enhance positive benefits of mining and related activities. 	<p>MAC members commit to:</p> <ul style="list-style-type: none"> - 'Building cross-cultural understanding so that company personnel understand Aboriginal Peoples' culture, values and aspirations, and Aboriginal Peoples understand the company's principles, objectives, operations and practices. - Undertaking early, timely and culturally appropriate engagement... (see 1. Due diligence) - Developing agreements for participation, where appropriate, either directly with local Aboriginal communities or in conjunction with governments. - Supporting and encouraging aboriginal involvement in environmental monitoring, closure planning and reclamation and other environmental activities that may be of interest to them.' 	
<p>Equitable Origin EO100™ Standard (2012) for Responsible Energy Development</p> <p>Binding on energy companies which voluntarily sign up to become certified to the EO100 Standard through an independent assurance process.</p> <p>https://d2oc0ihd6a5bt.cloudfront.net/wp-content/uploads/sites/1738/2016/05/EO100_Standard_for_Responsible_Energy.pdf</p>	<p>Provision 2.1: 'Operator shall commit to respect the human rights set out in the United Nations Universal Declaration of Human Rights within its sphere of influence and implement the Guiding Principles on Business and Human Rights.'</p> <p>Provision 6.5: 'Operator shall commission independent Economic, Environmental and Social Impact Assessments for each phase of the project using a recognized international standard to identify impacts and appropriate mitigation measures at each stage of the project life cycle, from exploration through closure.'</p> <p>Provision 4.5, Performance Target 1: 'Operator's development plans, as well as the environmental and social impact assessments, consider the participatory identification and assessment of traditional natural resource use by Indigenous Peoples (land, water, landscape, flora and fauna) during all project phases.'</p>	<p>Provision 2.4: 'Operator shall have a policy, strategy and management system that direct its approach to managing stakeholder engagement activities.'</p> <p>Provision 2.5: 'Operator shall undertake a process of fair, representative and non-discriminatory consultation with stakeholders who are subject to identified risks and adverse impacts from the project.'</p> <p>Provision 2.8: 'Operator shall ensure that engagement activities involve bodies and organizations (e.g., councils of elders or village councils) and will not exclude participation based on gender, social status, religious affiliation or spiritual practice, language, literacy, formal education, age or other considerations.'</p> <p>Provision 4.2: 'Operator shall undertake a process of fair, representative and non-discriminatory engagement and consultation with potentially affected communities of Indigenous Peoples.'</p>	

3. FPIC	4. Access to remedy	5. Benefit sharing
<p>FPIC is not referred to in the Framework or the Protocol</p>	<p>One of four key elements of the Aboriginal and Community Outreach Protocol (for implementing the Framework) is the Community of Interest (COI) Response Mechanism.</p> <p>Companies are rated C (lowest) to AAA (highest).</p> <p>An A rating (mid-range) will be awarded if:</p> <ul style="list-style-type: none"> - The facility has a good understanding of COI concerns and consultation requirements and documents them. - A complaint and response mechanism is in place with processes for follow up and tracking. - COI input is considered in decision-making. 	<p>MAC members commit to:</p> <ul style="list-style-type: none"> - Working with governments and communities to support and encourage community development programs, which may include education, training, health, culture, employment and business development or other community needs and priorities, such as capacity building.

<p>Provision 4.1: ‘Operator shall obtain the FPIC of the affected communities of Indigenous Peoples when the proposed project is on or may affect lands traditionally owned by or under the customary use of Indigenous Peoples.’</p> <p>Provision 4.1, Performance Target 1: ‘Operator has developed a policy specifically for engaging with Indigenous Peoples which includes procedures to implement the principle of FPIC both before and during activities that are conducted on or affect land, territory, or resources to which Indigenous Peoples are entitled through traditional ownership or any other traditional use or occupation, as well as those that have been acquired by other means, such as migration, displacement or relocation. The policy and procedure are consistent with Indigenous Peoples’ internal organizational structures. This policy is available to all interested stakeholders.’</p>	<p>Provision 2.6: ‘Operator shall manage and/or minimize, restore, and/or compensate for adverse impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of affected communities.’</p> <p>Provision 2.11: ‘Operator shall develop, implement and maintain a grievance mechanism to accommodate, understand, document, and address complaints, comments, and expectations of stakeholders.’</p> <p>Provision 4.5 ‘Operator shall protect the traditional natural resource use by Indigenous Peoples (land, water, landscape, flora and fauna) during all project phases.’</p>	<p>Provision 2.13: ‘Sustainable Community Investment: Operator shall identify and pursue opportunities to support long-term and/or sustainable improvements to affected communities and residents’ quality of life.’</p> <p>Provision 2.14: ‘Economic and Social Opportunities: Operator shall identify and provide appropriate opportunities for employment, training and other services to communities within or adjacent to the project area.’</p> <p>Provision 2.15: ‘Community Development Agreements (CDAs): Operator shall determine opportunities for community development agreements and shall collaborate with community stakeholders to establish such agreements. Operator shall carry out terms of this Agreement in a timely, equitable and culturally appropriate manner as agreed to with affected communities.’</p>
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Instrument	1. Due diligence	2. Consultation/participation
<p>International Council on Mining and Metals (ICMM) Position Statement on Indigenous Peoples and Mining (2013)</p> <p>Mandatory for ICMM's 23 member companies.</p> <p>https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement</p> <p>Note: ICMM has a set of 10 Principles and a number of other Position Statements that together make up its Sustainable Development Framework. Many of these other elements are also relevant to indigenous peoples' issues, but are not included in this matrix.</p>	<p>Commitment 1 of the Position Statement on Indigenous Peoples and Mining: ICMM members commit to: 'Engage with potentially impacted Indigenous Peoples with the objectives of ... (ii) designing projects to avoid adverse impacts and minimising, managing or compensating for unavoidable residual impacts.'</p> <p>Commitment 2: ICMM members commit to 'Understand and respect the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts. Social and environmental impact assessments or other social baseline analyses will be undertaken to identify those who may be impacted by a project as well as the nature and extent of potential impacts on Indigenous Peoples and any other potentially impacted communities. The conduct of such studies should be participatory and inclusive to help build broad cross-cultural understanding between companies and communities and in support of the objectives described in Commitment 1 above.'</p>	<p>Commitment 1: ICMM members commit to 'Engage with potentially impacted Indigenous Peoples with the objectives of (i) ensuring that the development of mining and metals projects fosters respect for the rights, interests, aspirations, culture and natural resource-based livelihoods of Indigenous Peoples; (ii) designing projects to avoid adverse impacts and minimising, managing or compensating for unavoidable residual impacts; and (iii) ensuring sustainable benefits and opportunities for Indigenous Peoples through the development of mining and metals projects.'</p> <p>Commitment 3: ICMM members commit to 'Agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making. Where required, support should be provided to build community capacity for good faith negotiation on an equitable basis. These processes should strive to be consistent with Indigenous Peoples' decision-making processes and reflect internationally accepted human rights, and be commensurate with the scale of the potential impacts and vulnerability of impacted communities. The processes should embody the attributes of good faith negotiation and be documented in a plan that identifies representatives of potentially impacted indigenous communities and government, agreed consultation processes and protocols, reciprocal responsibilities of parties to the engagement process and agreed avenues of recourse in the event of disagreements or impasses occurring. The plan should also define what would constitute consent from indigenous communities that may be significantly impacted. Agreed engagement and consultation processes should be applied in collaboration with potentially impacted indigenous communities, in a manner that ensures their meaningful participation in decision making.'</p>

3. FPIC	4. Access to remedy	5. Benefit sharing
<p>Commitment 3: ICMM members commit to drawing up an engagement and consultation plan with potentially affected Indigenous Peoples, which should '[d]efine what would constitute consent from indigenous communities that may be significantly impacted'.</p> <p>Commitment 4: ICMM members commit to: 'Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage are likely to occur. Consent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.'</p> <p>Commitment 6: 'Where commitment 4 applies and consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, ICMM members will determine whether they ought to remain involved with a project.'</p>	<p>Commitment 1: ICMM members commit to community engagement with the objective of (ii) ... minimising, managing or compensating for unavoidable residual impacts ...'</p> <p>Commitment 3: Engagement and consultation processes will include 'agreed avenues of recourse in the event of disagreements or impasses occurring'...</p> <p>Commitment 6: 'Companies and potentially impacted indigenous communities should agree on reasonable tests or avenues of recourse at the outset, to be applied where differences of opinion arise. This might include seeking mediation or advice from mutually acceptable parties.'</p>	<p>Commitment 1: ICMM members commit to: 'Engage with potentially impacted Indigenous Peoples with the objectives of ... (iii) ensuring sustainable benefits and opportunities for Indigenous Peoples through the development of mining and metals projects.'</p>

Acronyms and abbreviations

APF	Asia Pacific Forum of National Human Rights Institutions
CBD	Convention on Biological Diversity
FPIC	free, prior and informed consent
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organization
ILO 169	ILO Convention 169 on Indigenous and Tribal Peoples
IPIECA	The global oil and gas industry association for environmental and social issues
OECD	Organization for Economic Cooperation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OHCHR	Office of the United Nations High Commissioner for Human Rights
SIA	social impact assessment
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UN Guiding Principles	UN Guiding Principles on Business and Human Rights

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