

Indigenous rights: risks and opportunities for investors

Introduction

According to the United Nations there are 370 million indigenous people in the world and 5,000 distinct indigenous cultural identities in more than 70 countries. Although indigenous people only account for 5% of the world's population, they account for over 15% of the world's poor. Following the paper *Indigenous rights, indigenous wrongs: risks for the resource sectors* released in 2007, EIRIS and CAER have analysed the response of companies in the FTSE All World Developed Index to indigenous rights. This latest research highlights the challenges facing companies and examines the implications for investors. This paper covers companies operating in sectors (mining, oil & gas, agricultural producers and forestry & paper) and countries considered high risk for indigenous rights.

Key findings

Many companies at risk

250 companies have been identified as having an exposure to indigenous rights. 17% of these companies have a high risk exposure to indigenous rights issues.

Few companies report on indigenous rights issues:

The quality of reporting is generally poor: whilst most companies provide a response to allegations of breaches of indigenous rights few report voluntarily on areas of non-compliance.

Fewer than 20% of companies have adopted a policy supporting free prior informed consultation for indigenous peoples

19% of companies have a corporate-wide indigenous rights policy. Only 15% of companies have a corporate-wide policy supporting free prior informed consultation.

Only a fifth of companies disclose employment data on indigenous peoples

19% of companies disclose employment data on indigenous peoples.

Fewer than 10% of companies have a policy for involuntary resettlement

Just over 6% of companies have a policy covering involuntary resettlement.

Indigenous peoples – background

Indigenous peoples' identity is bound up with the concept of ancestral lands. The relationship between indigenous peoples and their land is reflected in their culture, spirituality, history, social organisation, food security, economy and health. In the last two decades, the United Nations has been paying increasing attention to the social responsibility of the private sector. The Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples has also tackled the impact of large scale development projects on indigenous peoples.

Indigenous rights – international law

International law has given increased recognition to indigenous peoples as meriting a special regime based on historical pre-existence and special attachment to ancestral lands.

There are two specific international indigenous rights instruments.

The ILO Indigenous and Tribal Peoples Convention 169 (1989) was the first binding international convention to address the specific rights of indigenous peoples and to outline the legal responsibilities of governments to promote and protect their human rights. It has been ratified by 20 countries (as at June 2009), 14 of which are in South America (Argentina, Bolivia, Brazil, Chile, 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. This relatively

low level of ratification indicates the difficulties surrounding this issue.

The United Nations Declaration on the Rights of Indigenous Peoples was approved in September 2007 with 143 Member States voting in favour; 11 abstained and four voted against – Australia, New Zealand, Canada and the United States. However, Australia changed its position in April 2009 and now supports the Declaration. According to EIRIS research these four states are actually the home countries of companies that score highest for their response to indigenous rights issues.

Although it is a non-binding text, the Declaration's adoption by the UN General Assembly is considered to give it great moral force.

It is the most comprehensive statement of the rights of indigenous peoples to date, establishing collective rights to a greater extent than any other document in international human rights law. It establishes the rights of indigenous peoples to protect their cultural property and identity as well as the right to education, employment, health, religion, language and culture. It also protects the right to own land collectively.

In addition to these two specific indigenous rights instruments, UN bodies, indigenous peoples and NGOs use general human rights instruments to protect indigenous rights. For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which deals with right to culture has been used to contest failure to consult and to assert indigenous peoples' land rights. Over 140 states are parties to the ICCPR which gives it a wide reach.

Key issues for indigenous peoples

Free prior informed consultation/consent
Free prior informed consultation/consent establishes the framework and context for all consultations with indigenous peoples which ranges from guidance for project

acceptance to mitigation measures. Free prior informed consultation is necessary for projects which will heavily disrupt natural landscapes, such as oil production development, new mine sites and planned plantations. It is also necessary throughout the operating life of such projects. Affected communities must have access to information on the nature of the project in an accessible form. This includes information on the nature, duration, impact and personnel associated with the project. Setting such a framework is of paramount importance as indigenous peoples rarely have the ability in practice to veto development projects that affect them.

An important distinction exists between *consultation* and *consent*. Only free prior informed consent (FPIC) guarantees the right of indigenous peoples to potentially veto companies' projects. FPIC is seen by the Declaration as an essential step forward for guaranteeing indigenous peoples' well-being. Hence under the EIRIS methodology companies cannot achieve a good or advanced management response grade without adopting a policy commitment to FPIC.

Employment

Unemployment among indigenous peoples is higher than in the rest of society. Indigenous peoples often face discrimination within the education system which directly affects their opportunities within the job market. Indigenous peoples living in isolated areas, in particular, are less likely to find new employment if dispossessed of their lands. For instance, according to the New Zealand Labour Ministry in March 2009, the Maori unemployment rate was 9.2% which is nearly double the rate for European descendents (4.5%).

Involuntary resettlement

Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationship to their land, international law treats relocation as a

serious human rights concern. Strict standards of scrutiny are required and indigenous peoples' free prior and informed consent must be obtained. Additionally, relocation may only be considered as an exceptional measure in extreme and extraordinary cases. For indigenous peoples, forcible relocation can be disastrous, summarily severing their various relationships with the ancestral lands.

A key investment issue?

Indigenous rights are a human rights issue that companies and their investors should take into account.

Given the level of NGO and media attention to the issue of indigenous peoples' rights and the introduction of laws and regulation 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 restricted.

Access to investment capital

As resource companies often rely on financial institutions for financing their projects, they also need to demonstrate transparent and responsible business practices. In the last few years the banking sector has become more exposed to negative publicity for financing environmentally and socially damaging projects. NGO campaigns have been influential in highlighting the funding provided by financial institutions for projects that have direct impacts on indigenous peoples' land rights. The Equator Principles and the International Finance Corporation's (IFC) policies have resulted in higher scrutiny of both the lenders and the companies seeking project finance from them.

Increased regulation

The consequences of poor environmental management and inadequate consultation with indigenous peoples can lead 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 in Navajo territory. 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.

Litigation

Lawsuits can generate adverse publicity impacting on a company's brand image and are a significant expense. They can take many years to resolve and so continue to impact on brand and absorb large amounts of time and resources. An example of recent litigation includes the legal action taken by traditional landowners in Australia concerned about the impact which a 5.5 km river diversion proposed by the mining company Xstrata might have on their environment.

Reputational risk

Partnerships between NGOs and indigenous groups have provided worldwide visibility for indigenous peoples' concerns. This can have repercussions for companies which 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. Consequently some companies are facing increasing scrutiny by investors and the wider public on these issues. NGO activities include:

- alleging that companies are breaching ILO Convention 169
- engaging with senior management
- direct action such as blockades
- strategic partnerships with the private sector aimed at incremental change
- pressing for law reform and wider application of existing laws
- web and media campaigns
- lobbying shareholders to support indigenous peoples' rights at annual general meetings and proposing shareholder resolutions
- commissioning high profile reports

This increase in the sophistication and effectiveness of indigenous peoples' actions and NGO operations means that previously local issues covered in the local press now reach 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 poor performance with regard to indigenous peoples may result in a boycott. An example was the Survival International 2008 campaign against De Beers' diamonds regarding allegations of exploration in the Central Kalahari Game Reserve, home to the indigenous San, also known as Bushmen, in Botswana.

In February 2009, the UK's Co-operative Bank announced it would fund a legal challenge by the Beaver Lake Cree Nation against oil and gas companies on the basis that tar sands extraction in Canada is destroying indigenous peoples' hunting and fishing lands and resources.

Analysis of the FTSE All World Developed Index

EIRIS has analysed the impact and the response of 250 companies considered to have a high risk or a medium risk exposure to indigenous rights. The analysis has been carried out on the basis of 16 indigenous rights indicators covering strategy, engagement and consent, employment and performance elements.

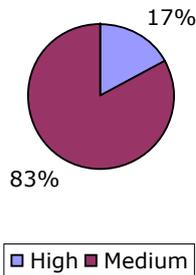
1) Many companies at risk

Companies are classified as having a high or medium risk for indigenous rights on the basis of sectors, country of operation, and NGO allegations levelled against the company.

EIRIS identifies companies operating in extractive sectors (oil & gas, mining, forestry & paper and agricultural producers) and operating in one or more high indigenous rights risk countries (such as Australia, Canada, United States, New Zealand, South Africa, Sweden, Finland, Argentina, Mexico, Thailand, Zimbabwe) as a medium risk for indigenous rights exposure.

Companies which are also subject to an allegation of indigenous rights abuse within the last three years are classified as high risk exposure. Allegations against companies include failure to inform or consult, negative impacts on traditional ways of life, destruction of sacred sites or impacts on health through pollution.

Fig.1 Companies' exposure to indigenous rights risks (% by number of companies)



(Data from June 2009)

Figure 1 illustrates that 17% of companies assessed have a high exposure to indigenous rights risk. The remainder (83%) are considered to be medium exposure for indigenous rights risks.

Regarding industry activity, most of the companies are involved in oil and gas or mining. Nearly 47% of the companies exposed to indigenous rights are oil and gas companies, 36% are involved in mining, 7% are agricultural producers and just over 10% are involved in forestry.

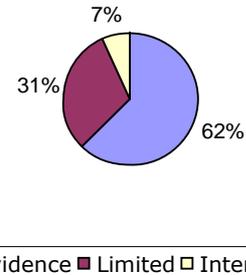
EIRIS has identified 16 indicators for assessing corporate responses to indigenous rights. These indicators fall into four sections: strategy & responsibility, engagement & consent, employment and reporting.

EIRIS has developed a five-point grading system for evaluating management response: no evidence, limited, intermediate, good and advanced. No companies currently reach a good grade, although a few are close. In order to meet the intermediate grade, companies need an indigenous rights policy, a commitment to adopt free prior informed consultation in their operations and a commitment to meaningful participation and ongoing consultation.

2) High risk companies not adequately responding to risks & opportunities

The highest risk companies for indigenous rights are not adequately responding to risks and opportunities.

Fig.2 Company response to indigenous rights issues (% by number of companies)



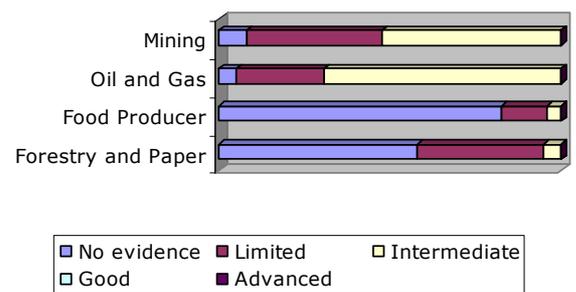
(Data from June 2009)

Figure 2 illustrates that approximately 7% of companies exposed to high risks associated with indigenous rights have an intermediate corporate response, with another 31% reaching a limited grade. However, 62% of companies identified score 'no evidence' of a corporate response to indigenous rights.

Analysis on results variance across sectors

An analysis covering all the EIRIS indigenous rights indicators shows that the mining sector is the best performing sector, and agricultural producers are the worst performing companies.

Fig.3 Overall sectoral performance (% by number of companies)



(Data from June 2009)

Analysis shows 6% of mining companies reaching an intermediate grade assessment, 28% limited, and 66% no evidence. Whilst no company in any sector meets a good or advanced grade according to the EIRIS research, mining companies meet the highest number of indicators overall. For instance, Rio Tinto meets 13 indicators out of the 16. The company does not achieve a good grade, because it does not report on two of its indigenous peoples' engagement programmes.

The rationale behind the mining sector's performance can be attributed to the stance taken by the International Council of Metals and Mining (ICMM) which in 2006 issued a Draft Position Statement on Mining and Indigenous Peoples Issues. The final Position Statement was approved in June 2008. The document advocates for a commitment 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'. Underpinning the framework is a commitment by ICMM members to publicly report on progress and to share good practice across the industry.

Despite the fact that the single largest sector exposed to indigenous rights risks is the oil and gas sector, EIRIS identifies only seven companies that reach an intermediate grade, while 89 companies show no evidence of adopting a corporate response to address indigenous rights risks. BP and TransCanada are among the best performing companies. Oil and gas companies often need to draw on large investment resources, therefore the need to comply with the requirements of the International Finance Corporation (IFC) has been a driver for companies to improve their policies and practices. In order to be eligible for IFC funding, companies have to demonstrate that social and environmental assessments

are carried out in order to avoid adverse impacts whenever feasible. In addition the IFC advocates that companies should provide an action plan to communities affected by their operations. Indigenous communities should be offered free, prior and informed consultation regarding the potential impact and opportunities created by the projects seeking funding.

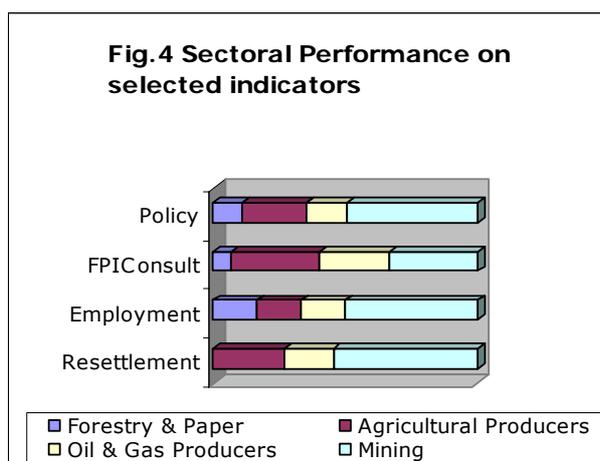
Within the forestry and paper sector, only one company meets an intermediate grade, although 37% of companies meet a limited grade. 58% show no evidence of addressing indigenous rights risks. EIRIS research shows Mondi to be the best performing company in the forestry and paper sector. Through its certification to the Forest Stewardship Council (FSC) standard, the company meets the free prior informed consultation indicator. Principle 3 of the FSC standard, advocates that companies should recognise and respect the legal and customary rights of indigenous peoples to own, use and manage their lands and territories. It also requires protection of cultural sites and compensation for use of indigenous knowledge.

EIRIS identifies agricultural producers as the worst performing sector in addressing indigenous rights risks. Only one company meets an intermediate grade and 84% of agricultural producing companies show no evidence of adopting a corporate response to address indigenous rights risks. The Roundtable Sustainable Palm Oil (RSPO) industry initiative addresses the unsustainable production of palm oil, highlighting instances of expansion of 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 be established without free prior informed consent, using a 'documented system' that enables companies to take account of indigenous peoples' views. The RSPO has a grievance mechanism which acts as a platform for the Roundtable to address complaints against RSPO Members.

Performance according to selected indicators

In this section, EIRIS highlights sectoral performance against four selected indicators: corporate policy on commitment to respect indigenous rights, policy commitment to adopt free prior informed consultation/consent, provision of employment opportunities to indigenous peoples and adoption of a corporate policy which covers resettlement. As described above under 'Key issues for indigenous peoples', these areas of concern are crucial in any dialogue between indigenous peoples and companies.



(Data from June 2009)

Policy – This indicator takes into consideration whether companies have adopted a public commitment to respect indigenous rights throughout their global operations. The indicator would be met at a

higher grade through public commitment to the ILO Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) or the UN Declaration on the Rights of Indigenous Peoples. 49 out of 250 companies covered by EIRIS research have a corporate policy respecting indigenous rights. The largest single sector meeting this indicator is mining with 43% of companies. Nearly 39% of companies meeting this policy indicator belong to the oil and gas sector, with 12% in forestry and 6% in the agricultural producers sector.

Free prior informed consultation/consent

– This refers to the informative and consultative process which companies should undertake before commencing operations which are likely to disrupt indigenous communities. The indicator covers consultation throughout the life-cycle of companies' operations. 37 companies out of 250 meet this indicator. 45.5% of companies meeting this indicator belong to the mining sector, 45.5% to the oil and gas sector, 6% to forestry and 3% are agricultural producers. To meet this indicator at the higher level (necessary for good and advanced grades) it is necessary to have a policy statement in support of consent. Four companies meet this indicator at the higher level.

Employment – This indicator covers whether the company has disclosed targets for employing indigenous people, monitors increases over time or publishes figures giving the proportion of indigenous employees. Only 47 companies out of 250 have disclosed such information about employing indigenous people. Nearly 51% of them are mining companies, 41 % are oil and gas companies, 6% are forestry and 2% are agricultural producers.

Resettlement – This indicator covers whether companies have a policy commitment to avoid involuntary resettlement and a policy on free prior informed consultation. As a proxy a

commitment to support the World Bank Operational Directive on Involuntary Resettlement counts for this indicator. In addition, the company must specify that compensation is offered when forcible resettlement occurs or provide an example of when compensation was provided.

To reach a higher grade (good or advanced) the Company needs to have a policy on free prior informed *consent*. This is in line with Article 10 of the UN Declaration on the Rights of Indigenous Peoples, which states that '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.'

Only 16 companies out of 250 meet this indicator. 69% of companies meeting this indicator belong to the mining sector. 25% are oil and gas companies and 6% are agricultural producers. No forestry companies meet this indicator.

Recommendations for investors

Only 17 companies have reached an intermediate grade for their response to indigenous rights. Investors may wish to engage with companies and play a key role in encouraging further uptake of best practice policies and systems, including:

- implementing an indigenous rights policy across all operations which respects rights drawn from ILO Convention 169 or the UN Declaration on the Rights of Indigenous Peoples
- following a free prior informed consultation or preferably consent process throughout their operations
- provide employment and education opportunities for indigenous populations affected by their operations
- proactively respond to NGO allegations and build grievance mechanisms to address indigenous rights concerns

- respond to EIRIS Convention Watch reports on forced resettlement

EIRIS PRI toolkit offers practical solutions for investors looking to implement the UN PRI, and in particular Principles 1, 2 and 3. The EIRisk tool assigns companies an ESG risk management grade that can be integrated into investment analysis and decision making processes. It helps investors meet their commitments under Principle 1 of the PRI. The Global Compact Engager assists investors who have adopted an engagement strategy, and meet their commitments under Principle 2 of the PRI. The Report Monitor focuses exclusively on companies' reporting practices to assist signatories to identify leaders and laggards on ESG disclosure, and meet their commitments under Principle 3 of the PRI. Further information on the toolkit is available [here](http://www.eiris.org/UNPRI/eirisunpritookit.html) (<http://www.eiris.org/UNPRI/eirisunpritookit.html>).

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About EIRIS

EIRIS is a leading global provider of independent research into the environmental, social, governance (ESG) and ethical performance of companies. With over 25 years' experience of conducting research and promoting responsible investment strategies, EIRIS now provides services to more than 100 asset owners and asset managers globally.

In the last ten years new EIRIS research has focused on the risks and exposure of companies in key ESG areas, and how companies are responding. EIRIS works with clients to create their own ESG ratings and rankings, to engage with companies and to create specific funds for their clients. EIRIS has a multinational team of over 50 staff in London, together with offices in Boston and Paris. The

EIRIS network includes research organisations in Australia, France, Israel, Germany, Spain & South Korea, and now covers over 2,800 companies globally.

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