



# Operational Guidance on **Respecting the Rights of Indigenous Peoples and Local Communities**

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June 2019

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Detail on the scope of company responsibilities to respect IP/LC rights, ways to identify impacts to IP/LC rights, and actions to ensure respect for these rights

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The Accountability Framework was created through a consultative process with a wide range of stakeholders including companies, NGOs, and government, and following applicable good practices for multi-stakeholder initiatives.

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Plus independent experts:  
Gita Syahrani - Indonesia  
Silas Siakor - Liberia

The AFi Backbone Team (secretariat) is co-led by the Rainforest Alliance and the Meridian Institute.



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## Purpose & summary

This document elaborates on the Accountability Framework's **Core Principle 2.1** regarding respect for the rights of indigenous peoples and local communities (IP/LC) in all production and trade activities. It also provides guidance relative to other Core Principles that have implications for these rights, such as **Core Principle 7.1**, addressing land conflict. In particular, this guidance focuses on the various fundamental rights of IP/LC that are often most vulnerable to impacts in agricultural and forestry supply chains, including the rights to property, culture, self-determination, life, and physical integrity, as well as the related rights to self-governance, food security, and livelihoods. The guidance identifies specific measures that companies should take to: i) identify potential and actual adverse impacts to IP/LC rights; ii) avoid undermining states' duties to respect, promote, and protect these rights; and iii) address situations in which the company caused or contributed to adverse impacts on IP/LC rights.

The following topics are included in this document:

- 1) An overview of the rights of IP/LC and their meaning
- 2) Guidance on how to ensure that company activities conform to the expectations outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- 3) The scope of company responsibilities to respect IP/LC property rights (i.e., formal and customary rights to land, territories, and resources)
- 4) The scope of company responsibilities to respect IP/LC rights to livelihoods and food security
- 5) The scope of company responsibilities to respect IP/LC rights to self-determination, self-governance, and culture
- 6) Actions that upstream and downstream companies can implement to respect the rights of IP/LC

Annexes provide additional detail related to these core topics, including guidance on studies and plans that companies should prepare to help ensure respect for IP/LC rights; guidance on protecting environmental and human rights defenders; examples of cultural heritage; and references to other instruments and frameworks addressing IP/LC rights. This Operational Guidance is complemented by several other Accountability Framework elements that also address human rights, including the Operational Guidance documents on **Remediation and Access to Remedy**; **Free, Prior and Informed Consent (FPIC)**; **Relationship between Voluntary Commitments and Applicable Law**; **Supply Chain Management**; and **Monitoring and Verification**.

Several terms used throughout this Operational Guidance have specific defined meanings, including indigenous peoples; local communities; legal personality; customary rights; customary rights to land, resources, and territory; livelihoods; traditional livelihoods; cultural heritage; Free, Prior and Informed Consent (FPIC); stakeholder; and food security. This document should be read with reference to the Accountability Framework **Definitions**, which define these and other key terms.

# 1. Overview

In many contexts, IP/LC have historically been marginalised and discriminated against. Their lack of resources and political power to defend their rights, combined with inadequate articulation and implementation of national laws, policies, and company commitments, have contributed to an increasing number of adverse impacts to these peoples and communities. Many of these impacts are significant in scope and scale, and some are irreparable.

UN Guiding Principles on Business and Human Rights (UNGPs) affirm that companies have the responsibility to respect human rights by: 1) avoid causing or contributing to adverse human rights impacts, 2) addressing such impacts when they arise, and 3) actively seeking to prevent or mitigate such impacts that arise from activities which are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.<sup>1</sup>

In the context of company operations, the importance of respecting human rights arises most importantly from a concern for improving, and doing no harm to, human well-being. Company respect for human rights can also help mitigate risk to companies of reputational damage, delays, increased costs of doing business due to litigation and operational disruptions, needs for remediation, and other costs associated with failure to respect human rights.

## 1.1 The meaning of “rights of indigenous peoples and local communities”

Human rights are universal. Consequently, IP/LC rights are the same as those of other people; however, the law has evolved in terms of how universal human rights are interpreted and applied in the context of IP/LC.

Property is a key fundamental right of IP/LC. The IP/LC right to property includes formal and customary rights to IP/LC lands, resources, and territories, including the rights of ownership, use, possession, control, and administration. Throughout the remainder of this document, references to “property” and to the IP/LC “right to property” are used as shorthand for this more detailed description of the IP/LC right to property.



Experience demonstrates that when the property rights of IP/LC are impacted by agricultural and forestry supply chains, other fundamental rights of IP/LC are likely to be impacted as well. This is because of the special connection that IP/LC have with their property<sup>2</sup> and the extent to which the surrounding legal framework protects those rights and provides forums for their redress when violated. Most commonly, these other rights include the:

- 1) Right to culture
- 2) Right to a healthy environment
- 3) Right to self-determination (including the right to define their own development priorities, maintain their own institutions, and self-governance)
- 4) Right to life and physical integrity
- 5) Right to be free from discrimination
- 6) Right to adequate food
- 7) Right to legal personality
- 8) Right to access to an effective remedy
- 9) Right to equality before the law
- 10) Right to access to justice
- 11) Right to be free from forced eviction (coerced or involuntary displacement)<sup>3</sup>
- 12) Right to participate effectively and meaningfully in the decisions that may affect them, including the right to free, prior and informed consent (FPIC) where applicable

As applied to IP/LC, some of these rights are enjoyed and exercised by the collective (e.g., the right to property, culture, and self-determination), while others more typically apply to individual members of IP/LC (e.g., the right to life). All rights apply equally to all genders.

The above-mentioned rights have been affirmed and recognised by multiple binding international treaties and instruments ratified, acceded to, or otherwise endorsed by the overwhelming majority of the world's nations. In some cases, these international instruments expressly mention "indigenous peoples," such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (International Labour Organization Convention 169) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). In other cases, international conventions are more generally applicable, affirming the human rights of all persons. These conventions have been repeatedly interpreted to include IP/LC rights.<sup>4</sup>

States have a duty to incorporate into their national laws and policies those measures necessary to respect, promote, and protect the rights affirmed in the international instruments to which they are a party. Companies should be familiar with and comply with these national laws. In any case, companies are expected to respect internationally recognised human rights even when national laws fail to guarantee them and even when governments fail to implement and enforce laws intended to protect them.

## 1.2 Conformance to the UN Declaration on the Rights of Indigenous Peoples

**Core Principle 2.2.1** calls for companies to carry out operations consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP is widely considered to be a compilation of the rights of indigenous peoples already affirmed in other binding and ratified treaties. Taking steps to conform company activities to UNDRIP's provisions, and training relevant company personnel on the content of UNDRIP, can help companies fulfil commitments to respect internationally-recognised human rights throughout their operations and supply chains.

## 2. Respect for the IP/LC right to property

**Core Principle 2.2.2** calls on companies to “[i]dentify and respect indigenous peoples’ and local communities’ formal and customary rights to lands, territories, and resources in the context of any company activity. This includes rights to own, occupy, use, and administer these lands, territories, and resources.” This section further explains the nature of these rights and what companies are expected to do to respect them.

### 2.1 Overview of the IP/LC right to property

The right to property is an internationally recognised human right for all persons. As noted in Section 1.1, in the context of IP/LC, the right to property includes both customary and formal rights. This means that IP/LC have the right to the lands, natural resources, and territories that: 1) they have traditionally owned, occupied, or otherwise used; and 2) they have otherwise acquired.<sup>5</sup> These two categories are understood as follows:

- 1) **Property that IP/LC have traditionally owned, occupied, or otherwise used:** This property right is based on peoples’ or communities’ historic and customary use or occupation of their lands, resources, and territories. These “customary rights” arise from the peoples’ or communities’ customary ownership and use in accordance with their own traditions, norms, and values (see [Definitions](#)). Customary rights to ancestral lands include areas from which IP/LC have been involuntarily displaced. These customary rights exist regardless of whether they are “formal rights” that have been formally recognised by the state by means of a title or other similar instrument or registration.
- 2) **Property that IP/LC have acquired:** IP/LC property rights also include lands, resources, and territories secured through purchase, settlement, compensation arrangement, or other means, where such property was not previously part of the customary ownership or use. The origin of these rights means they are likely to be formally recognised within the legal framework of the country and thus considered as “formal rights.”

International law has clarified that states have a duty and obligation to delimit, demarcate, and title lands subject to customary property rights in accordance with the norms, values, and customs of the peoples and communities concerned.<sup>6</sup> Titling is an affirmation of an already existing right, not a grant of a new right. Absent free, prior and informed consent (FPIC), until that titling occurs, states must avoid actions that affect the existence, value, use, or enjoyment of such areas by IP/LC.<sup>7</sup>

International law further specifies that:

- 1) **IP/LC property rights are a bundle of rights:** Similar to property rights for non-indigenous persons, IP/LC rights to property are a ‘bundle’ of rights that includes the right of the IP/LC to own, use, develop, control, and exclude others from their lands, natural resources, and territories. For instance, as property rights holders, the IP/LC decide who may enter and traverse their property, who may lease it, and how the resources therein will be managed.
- 2) **IP/LC customary rights to their lands, resources, and territories are not contingent on state recognition:** The collective human right to property of IP/LC exists and must be respected by companies regardless of whether the state has recognised this right through the issuance of a title or other legal act. Hence, challenges and claims against a company for violating IP/LC property rights can be sustained regardless of whether the IP/LC property right is formally recognised.
- 3) **Companies must not impede states’ ability to protect IP/LC property rights:** Company respect for IP/LC property rights means not undermining the state’s duty and obligation to respect, promote, and protect such rights. Consequently, if there is a risk that a government’s concession of land or resource rights to a company would prejudice an IP/LC’s right to have that same property recognised by the government in their future, or diminish the value of such property without the FPIC of the IP/LC, this too would violate company commitments to respect the rights of IP/LC.
- 4) **IP/LC property rights are not contingent on lands being permanently occupied:** IP/LC rights to property are based on traditional occupation or use. IP/LC frequently hold rights over land that they do not permanently occupy but rather use intermittently for seasonal farming, grazing, hunting, fishing, conducting spiritual practices at a sacred site, gathering plants for medicinal use, or other purposes. Therefore, companies should not construe the lack of permanent settlements as the absence of IP/LC use or rights. Rather, a full investigation of IP/LC use of their land, resources, and territories must be conducted in conjunction with the potentially affected populations to ensure that company actions do not cause adverse impacts to IP/LC human rights.

## 2.2 Company practices to respect the IP/LC right to property

While it is the state's duty to delimit, demarcate, and title IP/LC lands, resources, and territories, a company should not take actions that would prejudice or otherwise hinder IP/LC in securing recognition, promotion, or protection of these rights from the state. Likewise, companies should not otherwise contribute to interference in IP/LC enjoyment of their rights, including any actions that might affect the value of their resources, limit their access to lands, or infringe on the special connection they enjoy with those lands as necessary for their physical and cultural survival.

To achieve the above and avoid adverse impacts to the other fundamental rights that can be connected to IP/LC property rights (as explained further in this guidance), companies should do the following in practice:

- 1) When conducting an applicable law assessment (see [Operational Guidance on Voluntary Commitments and Applicable Law](#)), the company should determine where legal compliance may facilitate respect for IP/LC fundamental rights and where it may risk undermining such rights or lead to adverse impacts.
- 2) Prior to acquiring an interest in land or resources (e.g., new purchases, licences, or concessions, or renewals or modifications of existing interests), the company should conduct:
  - a **social baseline assessment** to gain a full overview of the relevant economic, political, social, and cultural attributes of the area of interest as well as its broader setting that may affect IP/LC rights including property, culture, livelihoods, self-governance, and food security.<sup>8</sup>
  - a **land tenure study** to establish who may have formal or customary property rights in the area in question and how IP/LC own, use, control, and manage their lands, resources, and territories (necessary for understanding the impact of tenure on other fundamental rights). Annex 1 describes the process for conducting the land tenure study.
- 3) Prior to commencing operations—and particularly when developing land use and resource management plans—the company should conduct a **land use study** to understand fully the relationship between the IP/LC and the lands, resources, and territories in question. This study should build upon the information gathered during the land tenure study and seek to clarify the multiple uses of the subject lands, resources, and territories and how they relate to IP/LC development priorities and the enjoyment of other fundamental rights. See Annex 2 for a description of the process for conducting the land use study.

- 4) Prior to any activity that may affect IP/LC rights, land, resources, territories, livelihoods, and food security, **Free, Prior and Informed Consent (FPIC)** must be secured. This should be done in a culturally appropriate manner, in accordance with the traditions, norms, and values of these peoples and communities, and through the representatives and institutions they choose. See the [Operational Guidance on Free, Prior and Informed Consent](#) for information on FPIC and its required process and outcomes.
- 5) Where a company has caused or contributed to the appropriation of or harm to the lands, territories, or resources of IP/LC without an effective FPIC process, **an effective remedy** should be provided, based on an agreement reached through an FPIC process. See the [Operational Guidance on Remediation and Access to Remedy](#).
- 6) If a company determines that IP/LC have property rights to some or all of the lands or resources in which the company wishes to acquire an interest, it should decline to acquire that portion of the interest unless it can secure the interest legally and through a proper FPIC process.
- 7) If, through the FPIC process, consent was not given, and the state still decides to make the interest available to a company through expropriation, the company should decline to accept the interest.
- 8) The company should not acquire interests in land or resources that are subject to ongoing conflicts; see Section 2.3 below.
- 9) As specified in [Core Principle 2](#), companies are expected to protect the security of IP/LC and their members acting as environmental and human rights defenders (EHRD). This includes protecting the rights to life and physical integrity of these peoples, communities, and their members against the occurrence or threat of violence, retaliatory litigation, and other forms of harassment. EHRD include persons and groups acting to defend their rights, which may include opposing activities or plans connected to the operations of the company, its business partners, or the state that facilitates those operations (see Annex 3 for further guidance on the protection of EHRD).
- 10) Where operations already have been established (including land/resource acquisition, site development, or resource extraction) without fulfilling the requirements and processes outlined in this guidance, such requirements and processes should be implemented retroactively. A gap assessment can identify what has already been done, and then supplemental work should be performed in cooperation with the affected populations. Findings and recommendations of this process should be incorporated into management mechanisms and monitoring and verification systems going forward. Where negative impacts to human rights are found, the company is expected to provide for or cooperate in the required remediation efforts.

Many of the actions discussed above (such as conducting social baseline assessments, land tenure and land use studies, and FPIC processes) are typically carried out by producers and primary processors, who tend to engage most directly with IP/LC. However, the responsibility to respect IP/LC rights is shared by actors at all stages of the supply chain. Especially where there are greater risks or known harms to IP/LC property rights, supply chain intermediaries (e.g., traders) and downstream buyers will need to be more proactive to ensure that the practices and processes of upstream suppliers are conducive to ensuring respect for IP/LC rights in the company's supply chain. These companies may need to take actions such as conducting their own analyses of risk or impact to IP/LC rights in their supply chains, participating in multi-stakeholder initiatives to promote IP/LC rights, incorporating provisions into their supplier contracts and supplier engagement plans to help ensure respect for IP/LC rights, auditing suppliers, and providing technical and/or financial resources. See Section 5 for further detail about the roles of different supply chain actors.

## 2.3 Scenarios where there are ongoing conflicts over lands or resources

**Core Principle 7.1** states that “[i]n the case of ongoing land conflicts, companies cease efforts to acquire or gain control of land or resources related to these conflicts until they are addressed through a mutually agreed negotiation process consistent with applicable law.” Companies should consider the following in implementing this commitment:

- 1) Reference to “cease efforts to acquire or gain control of land or resources” should include, for example: declining a grant, sale, or transfer of an interest; withdrawing a permit or concession request; not pursuing renewals and extensions; not subcontracting the interest to another entity; and not taking any other action that could contribute to circumventing the halt on acquiring or gaining control over the lands and resources.<sup>9</sup>
- 2) Reference to a “mutually agreed negotiation process” addresses those situations where ongoing conflicts are identified but are not being addressed by other grievance mechanisms or dispute resolution processes. Where ongoing conflicts are before such formal processes, the company is required to halt efforts to acquire or gain control until a final resolution occurs (e.g., a non-appealable decision of a court, after the right to appeal a decision has not been exercised, or an FPIC agreement is reached where applicable).

- 3) For the resolution to be mutually agreed, the parties must have agreed on the format and process for decision-making or consensus building (e.g., mediation, facilitation, arbitration, or traditional/customary law-based dispute resolution mechanisms) as well as its terms, such as who may present evidence, what kind of evidence may be brought forward, what language(s) will be used, which experts may be involved, and how the process guards against undue coercion and influence by others.
- 4) Where the conflict involves at least one party that is an IP/LC alleging a property interest, its resolution will need to be the outcome of a legitimate FPIC process (see [Operational Guidance on Free, Prior and Informed Consent](#)).
- 5) Where the ongoing conflict is between two indigenous peoples or local communities<sup>10</sup> (e.g., over the extent of a shared border or a use right over a land of concern), the mutually agreed procedure should be the mechanism of their choosing. This is not an FPIC process and the company has no responsibility with respect to this process. However, the company may choose to offer neutral technical or financial support to help facilitate a resolution of the conflict. Once the conflict over property rights is resolved, the company should then follow the usual requirements and practices (such as securing FPIC) outlined in this document and other parts of the Accountability Framework if they wish to pursue activities that could affect these property rights of IP/LC owner(s).

## 2.4 Pre-conditions to legitimate interferences with IP/LC rights

This section elaborates the pre-conditions that must be in place prior to a company taking legitimate action that could limit IP/LC rights. [Core Principle 2.2.4](#) states that “where production or conservation uses impinge on their rights, lands, resources, territories, livelihoods, or food security, indigenous peoples and local communities are compensated or accommodated through appropriate measures reflecting the negotiated outcomes of an FPIC process. These measures may include continued access to these lands, territories, and resources; just and fair compensation; and/or an equitable share in the benefits from such uses.”

To fulfil this principle, companies are expected to engage openly with the affected IP/LC (through the FPIC process) to arrive at mutually accepted agreements about what is equitable, just, and fair in the given context. If consent is granted through the FPIC process, the resulting agreement should specify all arrangements related to continued access of the IP/LC to their lands, resources, and territories; compensation and/or benefit sharing that the IP/LC will receive; and any other appropriate measures upon which the parties agreed. Following is further guidance for specifying each of these elements:



- 1) **Continued access to lands, territories, and resources:** To the greatest extent possible, any restrictions to property rights should avoid negative impacts to IP/LC traditional livelihoods, food security, and cultural identity. Where limitations are necessary and agreed to by the IP/LC through a legitimate FPIC process, they should be narrowly defined as the minimum needed to carry out the company interest with the maximum protection of IP/LC property rights and access. Where restrictions on some access and use continue, to the extent possible, consideration should be given to a right to return as soon as the reason for the restriction ends. The land tenure and land use studies are pivotal tools for reaching a proper arrangement on continued access, as they assess how the affected populations use their lands, resources, and territories and how they depend on these for their physical and cultural survival.

Additionally, any company activity that may affect IP/LC access to lands, territories, and resources should be carried out pursuant to an FPIC agreement that not only documents the agreed access arrangements but also specifies what will occur if either party exceeds its agreed access or denies the other party the agreed-upon access. A single breach or multiple unsubstantial breaches by the IP/LC should not be the reason to deny greater rights or undo the arrangement. To reduce the likelihood of breaches or misunderstanding, the company should consider providing assistance to the affected IP/LC to ensure that the access arrangement is known by all members.

- 2) **Just and fair compensation:** The FPIC agreement should also address the matter of just and fair compensation agreed to with the IP/LC. This should include details about who provides the compensation in exchange for what from the community (e.g., an easement, an agreement not to hunt in a particular area, a temporary lease to ancestral lands, etc.), who receives the compensation, when it is provided and how often and for how long, and the repercussions. The agreement should also include the repercussions if the compensation is not paid as agreed (e.g., time allotted to fix the breach of the agreement, suspension of consent agreement, cancellation of company operations, or specific activity dependent on the infringement).<sup>11</sup>

Compensation can come in many forms, both monetary and non-monetary. As explained further in the [Operational Guidance on Remediation and Access to Remedy](#), when dealing with IP/LC property rights, the default practice of considering the fair market value of the subject lands or resources being taken may not be sufficient, given IP/LC special connections to and dependencies on their property.

- 3) **Benefit sharing:** The FPIC agreement should also detail the fair and equitable benefits that the IP/LC has agreed to receive in exchange for the limitation and infringement on its rights. The agreement should specify what the benefit is

(monetary or non-monetary), from whom it is received, how often and for how long (e.g., monthly, annually, for the lifetime of the company operation, etc.), who receives the benefit on behalf of the community (e.g., a council of elders, a community cooperative, or association of teachers, etc.), and what occurs if the benefit sharing agreement is breached (e.g., if the community does not refrain from using a forest designated for the company, or if the company does not provide the technical assistance it promised).<sup>12</sup> The repercussions of a breach need to be clear and could include, for instance, a cure period to fix the breach, suspension of the agreement, or immediate cancellation of the project.

The nature of the benefits provided should be informed by the IP/LC's overall development priorities and needs, as defined by the IP/LC themselves in accordance with their own norms, values, and customs. Typically, benefits that serve to personally enrich local elites (e.g., community leaders) or vocal or instrumental supporters of the company or its proposals are presumed not to be equitable benefits. On the contrary, benefits of this type could be perceived as a form of coercion or improper inducement for consent, which would render the FPIC process and its outcome improper.<sup>13</sup> Rather, the agreed-upon benefits should reflect the outcomes of a process that takes into account the different uses and values assigned to resources by the different groups within the subject IP/LC, such as women and men, elders and youth, hunters, gatherers, fishers, farmers, and other groups. Benefits can be monetary and/or non-monetary, and the agreed-upon benefits package should reflect the relative worth of each to the IP/LC. For instance, an IP/LC may place less value on a periodic cash payment than on ongoing technical assistance, training, and equipment to help improve farm yields. As a resource, there is a list of possible benefits in the annex to the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization Convention on Biological Diversity*.<sup>14</sup>

What is equitable is determined based on the facts and circumstance of each given case. This means that determination of the benefit should take into account the scale and impact of the infringement on the IP/LC rights (e.g., as informed by a prior environmental and social impact assessment) compared to the benefits that will accrue to the company and to other beneficiaries (e.g., the government, the company's buyers, and other business partners) as a result of the operations enabled by the rights infringement agreed upon by the IP/LC. Consequently, prior full disclosure by the company of the benefits that it expects to receive itself (including information about profit margins) and benefits expected to accrue to other parties is essential to determine what is equitable in any given case and to reach an "informed" agreement on the benefit sharing arrangement.

## BOX 1. Compensation and Benefit Sharing

To ensure that IP/LC receive proper consideration for any limitations on property rights or access to which they may agree, it is important to understand the definitions of—and the relationship between—compensation and benefit sharing. While compensation and benefit sharing may sometimes manifest similarly (e.g., as monetary payments or various types of in-kind remuneration), they are not the same and the provision of one may not be double-counted as fulfilling the other. Compensation is required in exchange for a legal right that is infringed upon, regardless of whether a company or other party ultimately benefits or profits from such infringement. Benefit sharing entails sharing a portion of the benefits derived from the activity by the company or other parties, such as profits, royalties, and jobs.

## 2.5 Scenarios where IP/LC property rights are adversely impacted without consent

This section addresses the scenario where IP/LC lands, resources, and territories are adversely impacted without FPIC from the affected peoples or communities. In such cases, as articulated in [Core Principle 2](#). Implementation of this principle should consider the following guidance:

- 1) This element of the Framework addresses situations where the company and the IP/LC in question choose to work together in good faith to resolve harms.
- 2) “Mutually agreed procedures” may include binding or non-binding facilitation, mediation through a local community dispute resolution mechanism, international arbitration, or other approaches. All options that are agreed to by the parties are acceptable and none will undermine or prejudice either of the parties’ rights to access other state and non-state grievance mechanisms available to them. Given that the procedure is to be agreed upon, the company should refer to the [Operational Guidance on Free, Prior and Informed Consent](#) for guidance on how to engage the IP/LC in question to agree on the procedure to be used.

- 3) The meaning of “cause” or “contributed to” has no international consensus. The [\*Operational Guidance on Remediation and Access to Remedy\*](#) provides guidance on this topic.
- 4) Discussion of remediation should be informed by the [\*Operational Guidance on Remediation and Access to Remedy\*](#), especially for addressing whether compensation is an appropriate remedy in the context of IP/LC. Where restitution of lands, resources, and territories is being contemplated as the remedy, this may involve the company relinquishing part of a concession or lease interest, restoring damaged land and resources, and/or acquiring commensurate lands for the affected populations. As specified in UNDRIP Article 28(2), commensurate typically means equal in “size, quality, and status.” For instance, equal status would typically mean that if the lands previously appropriated or harmed were titled as a protected indigenous reserve, the new lands would need to have the same level of state recognition and protection. Overall, commensurate lands are those where the IP/LC prior uses can be resumed such that the situation of these populations is restored to what it was before the adverse impact.

## 3. Respect for the IP/LC rights to livelihoods and food security

International law recognises that the right to adequate food is fully enjoyed when a person (alone or in community with others) has both economic and physical access to adequate food or the means for obtaining it.<sup>15</sup> This can be achieved through various means, including cultivation, fishing, hunting, and access to affordable purchase, even for those most vulnerable (such as victims of natural disasters) and those living in remote areas (such as IP/LC). Food security is recognised as an essential precondition to the right to adequate food and is therefore often described as a right in and of itself.<sup>16</sup> A person's or group's livelihood encompasses how they make a living and provide for their basic needs, including food.

Livelihoods and food security of IP/LC typically depend heavily on their lands, resources, and territories and on the cultural practices and customary laws related to the use and management of these. For this reason, it is very likely that company operations and supply chains that affect IP/LC property will also affect IP/LC food security and livelihoods.

Consequently, consistent with the approach taken by several other guidelines and frameworks,<sup>17</sup> company approaches to land acquisition, land tenure, site development, and overall land management need to address IP/LC livelihoods and food security issues that may be affected by the company's operations. Potential and actual harms to livelihoods and food security should be identified in consultation with IP/LC,<sup>18</sup> avoided and mitigated, and tracked and monitored.

### 3.1 Identifying and addressing livelihoods and food security issues

When seeking to address risks to IP/LC livelihoods and food security, companies should investigate the questions and issues identified below and use the resulting information to develop plans and implement activities that effectively avoid and mitigate harms to livelihoods and food security and that track and monitor outcome of these activities and the status of IP/LC livelihoods and food security. The studies and assessments described later in this section can be an effective way to investigate this set of questions and issues.

- 1) How do the affected IP/LC and their constituent members say that they earn their respective livelihoods?

- 2) In what way do these livelihoods depend on access to the environment and natural resources, and/or the local economy?
- 3) What subsistence activities are conducted to satisfy basic needs (e.g., gathering food and forest products, fishing, hunting, farming, trapping, animal husbandry, etc.) and who in the community is responsible for these tasks (e.g., elders, youth, women, men, etc.)?
- 4) What activities contribute to the income, subsistence, food, health, and nutritional security of the IP/LC and their members?
- 5) Are there customary laws that already govern these activities and practices? Who adopts and administers these laws within the affected populations?
- 6) Do the affected peoples or communities engage in bartering, trade, or other engagement with other peoples, communities, or formal or informal external markets?
- 7) What are the personal, local, or traditional ecological knowledge, skills, endowments, and practices of the IP/LC that contribute to protecting their livelihoods and ensuring their food security? (Investigation of this question should be done in a manner that protects the confidentiality, privacy, and intellectual property of IP/LC knowledge and cultural heritage.)
- 8) What are the assets that are intrinsic to the peoples' or communities' way of making a living and attending to their basic needs (e.g., farms, fields, pastures, crops, livestock, natural resources, tools, machinery, and intangible cultural properties)?
- 9) What are the peoples' and communities' expectations with respect to their lands and resources for current and future generations, including expectations of the growth of their populations and expanding or decreasing needs?
- 10) What environmental assets need special measures to ensure their protection and continued contributions to livelihoods and food security (including measures related to conservation and access to resources)?
- 11) How have the communities adapted over time to their surroundings to meet basic needs such as food, shelter, and health?
- 12) What role will the communities and peoples play in monitoring and assessing protections for rights to livelihoods and food security?
- 13) What activities of the company may impact livelihoods and food security (e.g., restrictions on access to natural resources or modification of the local economy), and can operations be modified to avoid those impacts?

- 14) Do livelihood and food security impacts arise solely from the company's activities, or is there a cumulative impact due to operations of other companies as well? If the latter, what kind of sector or regional cooperation could help to address these impacts?

Companies can answer these questions and assess risks to IP/LC livelihoods and food security by conducting the following studies and assessments:

- 1) The social baseline assessment, land tenure study, land use study (including participatory mapping), and all ongoing stakeholder engagements (including FPIC processes where required) can each contribute to identifying current and future needs and uses related to IP/LC lands, resources, and territories, including those of the current population as well as future generations based on anticipated population growth. These studies are discussed further in Section 2.2 above and in Annexes 1 and 2.
- 2) Environmental and social impact assessments can help assess risks and potential impacts to IP/LC livelihoods and food security at the time that a company is proposing the acquisition of a new interest in land or resources, or the establishment of new plantings or operations, or the expansion of existing ones.<sup>19</sup>
- 3) Integrated High Conservation Value (HCV) and High Carbon Stock Approach (HCSA) assessments likewise include consideration of the rights and wellbeing of IP/LC, including in relation to livelihoods and food security.<sup>20</sup>

Each of these assessments, studies, and stakeholder engagements should be conducted in a manner that is as inclusive as possible, accounting for where inequities may exist in the participation of vulnerable groups and women, and recognising the value and differentiated contributions of distinct individuals and groups within the larger collective of the IP/LC (e.g., women and men, youth and elders, hunters, fishers, farmers, and others). Additional guidance on expectations related to food security and livelihoods can be found in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>21</sup>

Congruent with the guidance provided in Section 2.2, producers and primary processors will typically need to take the lead in carrying out these studies, assessments, and engagements in close cooperation with potentially affected IP/LC. However, where there are significant risks to livelihoods and food security, or where negative impacts have already manifested due to commodity production, downstream companies will need to take more proactive measures to ensure that the practices and processes of their upstream suppliers are protective of IP/LC livelihoods and food security. See Section 5 for further detail about the roles of different supply chain actors.

Based on the information generated by the above-mentioned studies, companies should define adequate and effective practices, actions, and mitigation measures to respect IP/LC rights to livelihoods and food security. These measures should then be integrated into companies' management plans, fully implemented, monitored and verified to assess outcomes and take corrective actions as needed. Additionally, the company's grievance mechanism should be designed to help bring to light any risks or adverse impacts to IP/LC livelihoods or food security that occur during the course of company operations. For more information on grievance mechanisms, see the [\*\*\*Operational Guideline on Remediation and Access to Remedy\*\*\*](#).



## 4. Respect for the IP/LC rights to self-determination, self-governance, and culture

**Core Principle 2.2** requires companies to “commit to respecting the rights of indigenous peoples and local communities in all production, sourcing and financial investments. This includes, among others, rights to property, culture, self-determination, self-governance, a healthy environment, non-discrimination, and full and effective participation in the decisions that affect them.” This section provides further information on the rights to self-determination, self-governance, and culture, and specifies what companies are expected to do to ensure that these rights are respected.

### 4.1 IP/LC right to self-determination

All persons have the right to self-determination, as affirmed by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the case of IP/LC, this includes the right to “freely determine their political status and freely pursue their economic, social and cultural development” (see UNDRIP, Articles 3 & 4). Because the rights of IP/LC are interdependent, indivisible, and interrelated, for IP/LC to effectively enjoy the right to self-determination, each of the rights listed in **Core Principle 2.2** should also be respected. For instance, IP/LC cannot fully enjoy the right to determine their own economic, social, and cultural development when they do not enjoy the right to culture or have the capacity to maintain and transmit their cultural identity (e.g., practices, beliefs, knowledge) from generation to generation. Similarly, self-determination cannot be exercised where IP/LC do not have full recognition of their right to self-governance, as defined further in Section 4.2 below.

Each of these constituent rights is deeply connected to the special relationship that IP/LC have with their lands, resources, and territories. Consequently, the right to self-determination is also inseparable from IP/LC rights to their lands, resources, and territories. With this interconnectedness in mind, the following sections further elaborate IP/LC rights to self-governance and culture, including how these rights may be impacted by commodity production and trade and what companies can do to help ensure that they are respected in this context.

## 4.2 IP/LC right to self-governance

IP/LC have the right to self-govern their own affairs through their own institutions and customary laws. This includes governance of their people, lands, resources, and territories and decision-making about how their resources will be used to improve livelihoods and sustain their cultural identity as defined by them. The IP/LC right to self-governance is further reflected in and exercised through IP/LC rights to:

- 1) Control their lands, resources, and territories and determine and develop priorities and strategies for their development or use
- 2) “Maintain and strengthen their distinct political, legal, economic, social and cultural institutions”
- 3) “Determine and develop priorities and strategies for exercising their right to development”
- 4) “Administer these development programmes through their own institutions”
- 5) Meaningfully and effectively participate in decisions that may affect them, through “representatives chosen by themselves in accordance with their own procedures”
- 6) “Maintain and develop their own indigenous decision-making institutions”<sup>22</sup>
- 7) Have their legal personality recognised (see [Definitions](#))

As noted in the prior section, the IP/LC right to self-governance is an extension of the IP/LC right to self-determination and is closely related to IP/LC property rights. This right to self-governance is highlighted in the Accountability Framework and discussed in some detail because: i) other frameworks and guidance documents have not comprehensively addressed it, and ii) there is often risk of companies causing or contributing to adverse impacts to this right through their acts or omissions, especially when production or trade activities interfere with IP/LC control and management of their lands, resources, and territories, or when the right to FPIC and right to access to remedy in the event of adverse impacts are not fully respected. Experience has further shown that failure to understand and take steps to respect the IP/LC right to self-governance can present challenges for company activities and impede the fulfilment of their commitments. With these considerations in mind, the following sections provide further guidance on the IP/LC right to self-governance and what companies can do to ensure that it is respected.

## 4.2.1 Potential adverse impacts to the IP/LC right to self-governance

In the context of agricultural and forestry supply chains, the right to self-governance may be impacted in a range of scenarios, such as:

- 1) When a company asserts control over a portion of an ancestral territory and its forest resources, undermining the capacity of IP/LC governments to administer their own resource management plans and development priorities.
- 2) When a company follows a government instruction to seek and secure the consent of a specific indigenous governing authority even though this entity may not be the only governance structure recognised by the affected IP/LC and/or not considered by them to be representative.
- 3) When a company fosters discord or factions within the IP/LC governing structures through selective disbursement of benefits or privileges to certain leaders or representatives who favour company plans or policies (examples include providing jobs, monetary support, or other incentives to specific IP/LC leaders that support the company's activities while disparaging or neglecting to consult with other leaders chosen by the people who have expressed concerns about the company's impacts).
- 4) When a company actively supports and participates in a jurisdictional approach to forest management that prioritises and singles out the signing of resource and labour agreements with IP/LC associations and NGOs that are registered and have their legal personality recognised, while traditional governing structures, without state recognitions, may be marginalised and precluded from securing benefits and asserting the rights of their people in these forums (see Box 2 for further information about assessing risks posed by the absence of legal personality).

## BOX 2. Legal personality of indigenous peoples and local communities

The term *legal personality* refers to whether an individual, group, or entity is recognised under law as capable of having legal rights and duties including the right to sue, be sued, hold property titles and interest, and enter into contracts. Recognition of legal personality is critical to the protection, respect, and fulfilment of human rights of IP/LC. Where legal personality of IP/LC is not fully recognised, companies may need to take additional measures to ensure that IP/LC rights are respected.

When conducting its applicable law assessment, a company should consider the treatment of legal personality of IP/LC under national laws. The review should address questions such as:

- Do the subject IP/LC have recognition of their legal personality in national law? If so, is such recognition consistent with the norms, values, and customary laws of these peoples?
- Have the subject IP/LC applied for legal recognition and does there appear to be an unreasonable delay or undue prejudice in state responses?
- Are the subject IP/LC prevented from securing titles because they lack the recognised legal personality that permits them to hold titles in their name (collectively or individually)?
- Do IP/LC have limited access to domestic remedies and therefore access to justice and equality before the law because of a lack of legal personality (e.g., no standing before judicial bodies)?

Source: UNDP Social and Environmental Standard #6, Indigenous Peoples, Guidance Note.

## 4.2.2 Company challenges to respecting the IP/LC right to self-governance

As noted above, in the context of agricultural and forestry supply chains, the right to self-governance can present challenges to companies that are working to respect internationally recognised human rights. Most frequently, this occurs in the context of FPIC processes and IP/LC stakeholder consultations. This is because these processes often require companies to engage with IP/LC that already have internal conflicts around who governs their lands, resources, and peoples. These conflicts are commonly caused by one or more of the following four circumstances:

- 1) **When the state imposes a form of governance on IP/LC:** In many countries, national law defines and imposes a specific form of governance over indigenous territories that is not only different than their traditional or historic forms of governance, customs, and norms, but also dependent on government resources and more closely aligned with national objectives. This is often done despite objections to these structures by many IP/LC members and the rivalry they often pose to traditional governance structures, such as Councils of Elders, matriarchal political institutions, and others.
- 2) **When a state-imposed governance structure holds the legal personality of IP/LC:** In some cases, state-imposed governance structures are recognised by law as having the legal personality of a given IP/LC. This means that these imposed structures are the only ones that can hold land titles on behalf of the IP/LC, have the capacity to contract or make agreements related to the disposition of their lands and resources, and legally represent their people before the government and courts of law where the collective rights to property are at issue. International law has found that the rights of IP/LC are violated if their legal personality is denied: this denial infringes on IP/LC rights to enjoy their lands, resources, and territory in accordance with their own traditions and to bring grievances to courts for infringements of their collective rights.<sup>23</sup>
- 3) **When IP/LC lack full title to their lands:** In some situations, IP/LC ancestral lands and territories are only partially titled. This often means that national laws recognise IP/LC governance structures as having jurisdiction over only a portion of their lands (those titled), while a governmental body may assert jurisdiction and governing authority over the rest of the claimed ancestral lands and resources. In these cases, IP/LC property rights may remain challenged and vulnerable due to the government's failure fully to recognise such rights, even when international law may recognise the property rights of IP/LC over their full territory (titled or not).

- 4) **When unwelcomed outsiders have moved into indigenous territories:** In many countries, ancestral lands and territories are, by law, exclusively for the possession and use of their rightful IP/LC owners and users. However, over decades non-indigenous settlers and settlements have come into IP/LC territories for a variety of reasons. These non-indigenous residents often demand representation in the indigenous governing structures and/or at least a right to be equally included in the consultation and FPIC process involving companies and the affected peoples and communities.
- 5) **When indigenous self-governance structures, by their express terms or in practice, appear to exclude or marginalise groups:** In some cases, local indigenous governance structures might operate in a way that may make it difficult for companies to assess the will of the larger population and strive for inclusive participation and benefit sharing. For instance, such structures may exclude or limit the voice of certain groups or individuals—such as women or those that have had extended absences from the territory—or certain groups that oppose the governing bodies or leaders or hold different political views.

### 4.2.3 Ways for companies to address these challenges

Irrespective of the complexity of the issues described above, companies need to respect IP/LC right to self-governance. While this Operational Guidance cannot anticipate and prescribe appropriate courses of action for each scenario that a company may encounter when navigating such issues, the following should be considered, together with the [Operational Guidance on Free, Prior and Informed Consent](#), particularly its Annex.

- 1) Companies should refrain from taking sides about who represents the IP/LC and therefore who legitimately governs over the territory.
- 2) Companies should not put themselves in a position of deciding who is and is not indigenous or a member of the local community per their customary laws, norms, and values; nor should they declare or take sides about who can and cannot participate in decision-making. This should be left to the IP/LC in question. Companies could neutrally offer to support internal mechanisms to resolve these questions but should take care in doing so to avoid exerting influence or being perceived as doing so.
- 3) Where operations may impact lands and resources that are not titled to an IP/LC (or perhaps even titled to others), but are claimed by them, companies should include those peoples and communities (and their chosen governance structures) in all due diligence and risk management processes and assessments.

- 4) Where applicable law assessments reveal that the chosen governance structures of IP/LC are denied legal personality, companies should consider measures to mitigate against harms that could arise from the state's omissions in this regard. For instance, leaders from the community's excluded governance structures could be included in consultations or FPIC processes.
- 5) Companies should consider supporting consensus building initiatives, including local community dispute resolution efforts, between and among IP/LC governing entities that assert overlapping rights and/or jurisdictions. This could contribute to achieving broader support for company activities, avoiding future grievances as well as perceived favouritism between stakeholders, and enhancing the enjoyment of human rights that might otherwise be impacted by the company.
- 6) Companies cannot dictate community decision-making mechanisms, but they do have the responsibility to take appropriate measures to ensure that they are not complicit in discriminatory practices. They are likewise responsible for ensuring that all IP/LC members are generally informed about the company's current and proposed production and trade activities and are being represented by those with whom the company is instructed to engage.
- 7) Companies should not jump to conclusions about the adequacies or representativeness of a particular governing institutions. These are sensitive matters. However, it is prudent for companies to invest the time at the beginning of their due diligence process (as part of social baseline assessment and Environmental and Social Impact Assessment (ESIA)) to investigate and understand the relevant laws and socio/political dynamics impacting IP/LC governance. This should include consultation with leaders, community advisors, representatives, a cross section of IP/LC members (considering gender equity and inclusiveness), civil society actors that work with them, and human rights commissions or ombudsmen.

Additional measures specific to companies at different stages of the supply chain are outlined in Section 5.

## 4.3 IP/LC right to culture

As noted above, the IP/LC right to self-determination involves the right for IP/LC to determine their own cultural development. Furthermore, the special connection that IP/LC have with their lands, resources, and territories is one that is inextricably linked with their cultural survival.<sup>24</sup> International law has recognised that the right to culture can be violated where IP/LC rights to property, as well as IP/LC traditional practices (e.g., hunting) and sites of cultural significance, are not protected.<sup>25</sup> As noted above, the IP/LC rights that are the focus of the Accountability Framework are related one to another.

In this context, company production and trade activities may negatively impact IP/LC rights to culture, which include:

- The right to cultural identity
- The right to be free of discrimination when asserting their cultural identity
- The right to maintain, control, develop, and protect their cultural heritage (including traditional knowledge, sacred sites, and cultural practices) (see [Definitions](#))
- The right to practice and revitalise their cultural traditions and customs and participate in the cultural life and cultural values of their peoples and communities
- The right to maintain and transmit their culture to future generations
- The right to be free from the assimilation or destruction of their culture
- The right to sustain their cultural institutions
- The right to the ownership, use, control, and management of their lands, resources, and territories<sup>26</sup>

IP/LC rights to culture are addressed in various international treaties and instruments, in a growing number of social and environmental standards and policies of international financial institutions (including the International Finance Corporation, which involves private sector entities), and in numerous company voluntary commitments. See Annex 4 for a non-exhaustive list of these other instruments. An indicative list of examples of cultural heritage is found in Annex 5.



Collectively, these instruments acknowledge one or all of the following:

- 1) The cultural identity and cultural survival of IP/LC are inextricably linked to their access to and use of the lands, resources, and territories they have traditionally used or occupied.
- 2) Respect for cultural identity also includes respect for the cultural institutions of the peoples and communities in question.
- 3) Where potential adverse impacts on cultural heritage may arise, including through commercial use of IP/LC knowledge, innovations, and practices, FPIC is required. Where use of cultural heritage occurs, compensation may be required, and IP/LC should equitably share in the benefits.
- 4) Special measures must be adopted to avoid and mitigate harms to IP/LC cultural identity and to help secure and protect areas of cultural significance. This includes maintaining the integrity of and access to these areas for the peoples or communities to which they are linked.
- 5) Prior to the commencement of potentially harmful activities, assessments and studies should be conducted (e.g., the social baseline assessment, land tenure study, and land use study, as described in Section 2.2) jointly with the affected IP/LC to ascertain their knowledge about sites, areas, knowledge, and practices of cultural significance that may be affected by proposed activities.
- 6) Where lands and resources are being assigned values (e.g., for a land planning study, national asset inventory, compensation measures, etc.), companies should consider the non-market values attributed to specific lands and resources of IP/LC (such as cultural, religious, and spiritual values). In doing so, it is important to note that IP/LC are not homogenous collectives but have members that value and use their lands and resources differently (e.g., men versus women, youth versus elders, farmers, hunters, etc.).
- 7) Land use planning and monitoring and verification initiatives should involve IP/LC where their right to culture can be at risk of adverse impact.
- 8) “Chance find” procedures are included in company policies, meaning that unanticipated discovery of possible cultural heritage during the course of company operations would not be disturbed until an assessment by a competent specialist and the affected IP/LC is completed and, if needed, mitigation measures are employed.

The above measures and considerations are usually implemented most directly by producers and upstream companies, who engage most directly with IP/LC. However, where IP/LC rights to culture are at greater risk, downstream companies are expected to also take the necessary steps to ensure that these rights are being respected in their supply chains. See Section 5 for further details.

Following is a non-exhaustive list of additional resources available to assist in identifying potential adverse impacts to IP/LC culture. These can help inform the work company compliance teams and their consultants and advisors when conducting studies (e.g., ESAs and land tenure or land use studies) and implementing practices to respect the IP/LC right to culture:

- *Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (UN Convention on Biological Diversity)*, available at <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>
- *Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (UN Convention on Biological Diversity)*, available at <https://www.cbd.int/traditional/code/ethicalconduct-brochure-en.pdf>
- *Technical Guidance for Assessing Physical and Cultural Heritage or any Structure, Site or Thing (Canadian Environmental Assessment Agency)*, available at <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/technical-guidance-assessing-physical-cultural-heritage-or-structure-site-or-thing.html>

## 5. Roles of different supply chain actors in respecting IP/LC rights

Companies at different stages of the supply chain may have different degrees of leverage, ability, access, and direct influence to assess needs and implement measures to respect the rights of IP/LC. This section describes roles and key practices for producers, upstream companies, and downstream companies to work in a synergistic fashion to ensure respect for IP/LC rights. See the [Definitions](#) document for definitions of these different supply chain actors.

### 5.1 Producers and upstream companies

Many of the assessments and actions discussed above (such as the social baseline assessments, land tenure and land use studies, applicable law assessments, and FPIC processes) will be taken more predominantly by producers and upstream companies that engage most directly with IP/LC at the level of specific production and primary processing operations. To help ensure respect for IP/LC rights, these entities are encouraged to take the following steps, in addition to the measures already described elsewhere in this Operational Guidance:

- 1) Ensure that there is a detailed company policy to respect the rights of IP/LC. The policy should be adopted or otherwise acknowledged by corporate governance and be consistent with the Accountability Framework [Core Principles](#), [Definitions](#), and relevant Operational Guidance documents. If the company has suppliers, the policy should be conveyed to these entities, and its objectives and requirements reflected in contracting arrangements.
- 2) Ensure that site managers, procurement and contracting officers, and suppliers are well-versed in the company's commitments and other instruments to protect IP/LC rights, such as applicable law.
- 3) Develop and implement action plans that define the specific, on-the-ground activities that will be implemented to avoid, correct, mitigate, remedy, and otherwise address actual or potential non-compliances related to IP/LC rights. For further information, see the [Operational Guidance on Supply Chain Management](#).

- 4) Develop and implement supplier engagement plans to address suppliers' non-compliance related to IP/LC rights. For further information, see the [Operational Guidance on Supply Chain Management](#).
- 5) Develop and implement an Indigenous Peoples/Local Communities Plan (IP/LC Plan—see Annex 6) when there are IP/LC that may be affected by the activities of the company or its suppliers.
- 6) Establish an effective company grievance mechanism capable of addressing negative impacts to IP/LC rights (see [Operational Guidance on Remediation and Access to Remedy](#)).
- 7) Contribute effectively to consultations and FPIC processes led or overseen by states, consistent with the [Operational Guidance on Free, Prior and Informed Consent](#).
- 8) Establish protocols for sharing information with downstream buyers regarding matters such as risk assessments, mitigation measures, grievances and their resolution, monitoring and verification results, and stakeholder engagements (including FPIC processes). For more information, see the [Operational Guidance on Monitoring and Verification](#) and the [Operational Guidance on Reporting, Disclosure, and Claims](#).

## 5.2 Downstream companies

While producers and upstream companies typically hold the greatest direct responsibility for engaging with IP/LC regarding site-level planning and operations, downstream actors are also responsible for preventing and mitigating impacts to IP/LC rights within their supply chains. This means that downstream companies are expected to understand the conduct and performance of their suppliers with regard to IP/LC rights, and should take measures to help ensure respect for IP/LC rights by these suppliers, especially where the risks to these rights are greater or where harms occur. To help ensure and demonstrate respect for IP/LC rights in their supply chains, downstream companies are encouraged to take the following steps, in addition to the measures already described elsewhere in this Operational Guidance:

- 1) Ensure that there is a detailed company policy to respect the rights of IP/LC. The policy should be adopted or otherwise acknowledged by corporate governance and be consistent with the Accountability Framework [Core Principles](#), [Definitions](#), and relevant Operational Guidance documents.
- 2) The company's policy should be conveyed to its suppliers and its objectives and requirements reflected in contracting arrangements, procurement policies, and supplier engagement plans where applicable. Communication, policies, and

procedures related to suppliers should identify repercussions for non-compliance with the company's human rights commitments as well as support, benefits, or incentives that the buyer can offer to facilitate and reward progress. See the [Operational Guidance on Supply Chain Management](#) for more information.

- 3) Provide language related to the respect for IP/LC rights for use in institutional governance documents (including for subsidiaries) and their trustees or directors.
- 4) Assign executive-level responsibility to ensure that all corporate-level policies and operations are consistent with applicable law (including UNDRIP). Track, measure, incentivise, and communicate internally about delivery of this executive responsibility across the company's supply chain.
- 5) Establish an effective company grievance mechanism capable of addressing negative impacts to IP/LC rights that the company caused or contributed to in its capacity as a buyer. See the [Operational Guidance on Remediation and Access to Remedy](#).
- 6) Establish mechanisms to secure information from upstream suppliers regarding risks, compliance, and performance of these suppliers related to IP/LC rights, and to audit or otherwise verify this information as necessary. See the [Operational Guidance on Monitoring and Verification](#) for more information.
- 7) Provide training to relevant staff (e.g., in the procurement, management, legal, and sustainability teams) regarding the rights of IP/LC and how to respect them, consistent with applicable law and UNDRIP.
- 8) At the corporate level, employ a risk-based approach to identify countries and sub-national jurisdictions where adverse impacts to IP/LC rights are more likely to occur, and prioritise action accordingly to ensure respect for IP/LC rights in these contexts.
- 9) Provide expertise and practical resources for operational level business units (e.g., country or commodity sourcing teams) to help ensure efficient and high-quality assessments, studies, monitoring, reporting, and effective stakeholder engagement of IP/LC related to company operations across the entire company.
- 10) Ensure that the company's suppliers have adequate social baseline and applicable law assessments, land tenure studies, land use studies, FPIC protocols, and IP/LC Plans in place where IP/LC rights may be impacted. Where the risks of impacts are greater, consider whether the downstream company itself should conduct its own studies at a broader level to adequately characterise risk and determine where proactive engagement is needed to ensure respect for IP/LC rights.

## Annex 1: Land tenure study

Prior to acquiring an interest in lands and resources (including new purchases, licences, or concessions, or renewals or modifications of existing interests) a company is expected to conduct a land tenure study. Downstream companies should require their direct or indirect suppliers to fulfil this requirement and should have a policy and mechanism in place to ensure that this requirement is met. The scope of the assessment should be commensurate with the complexity and scale of the circumstances, including the nature of the interest being sought, the extent of the IP/LC lands, resources, and territories in question, the claims of the various stakeholders, and the severity of potential impacts. The integrity of the findings will depend on securing credible and verifiable information from relevant parties.

Steps in conducting a land tenure study include the following:

- 1) Research official records containing relevant maps, land registrations, land surveys, land claims, and administrative or judicial decisions and records.<sup>27</sup>
- 2) Gather and examine maps and lands, resources, and territory studies conducted by affected IP/LC.
- 3) Review other relevant literature and studies (e.g., independent studies of illegal occupation conducted by a local university or civil society organisation).
- 4) Speak with government officials, IP/LC leaders and representatives, civil society organisations, and any other useful information sources, such as members of neighboring communities.

A credible and thorough land tenure study should include, at a minimum:

- 1) Identification of the lands or resources over which IP/LC claim a property right based on traditional occupation and/or use.
- 2) The nature of the populations' traditional uses of the lands, resources, and territories concerned, taking into consideration the distinct values and uses of those resources by different individuals and groups within the population (e.g., women, men, elders, youth, gatherers, fisherman, medicine men, etc.).
- 3) The customary laws of the IP/LC related to land ownership, use, and management.<sup>28</sup>
- 4) Interests in the land or resources that might be claimed by the state or a third party.

- 5) Existence of titles or other formal recognition of the subject lands, resources, and territories including determination of whether the titles or formal recognitions cover the full extent of the lands or resources claimed by the IP/LC.
- 6) The location and nature of any ongoing conflicts related to lands, resources, and territories (this includes situations where there are overlapping claims by alleged rights holders; it does not require violent conflict or the threat of violent conflict).
- 7) What the applicable law provides regarding state duties to delimit, demarcate, and title IP/LC lands, resources, and territories and the state's presumed authority to limit the property rights of IP/LC (per concessions to third parties, establishment of protected forests, etc.).
- 8) The existence of any agreements between IP/LC and other parties related to the lands or resources in question, and, if such agreements exist, whether they were concluded through a legitimate FPIC process.

The results of the study should be documented and shared with the stakeholders consulted to verify the accuracy of the information they contributed. If comments are given, then the study should account for those inputs.

## Annex 2: Land use study

While the land tenure study (Annex 1) will begin to identify risks, companies should supplement the initial findings of the land tenure study (if not already included therein), with more detailed information on land use patterns collected from the affected peoples and communities. This may be done as part of the environmental and social impact assessment or commissioned as a separate study. In either case, the company should conduct a more detailed, inclusive, and participatory analysis of how the IP/LC use their lands, resources, and territories prior to the finalisation of management plans and as part of site development and land use planning. Retroactive conduct of the land use study is discussed in the main text of this Operational Guideline.

Depending on the nature and scale of the company's operations and supply chains, this study may need to go beyond the lands, resources, and territories acquired for company operations and extend to adjacent areas whose populations could be negatively impacted. For instance, if the company operations could potentially contaminate or alter the course of a river that flows into an area otherwise outside of the company's control, but critical to the subsistence fisheries of IP/LC living there, the scope of the land use study should extend to such areas. Similarly, if the company proposes to construct a road that may increase traffic or migrants to previously remote indigenous territories, then the study should consider such potential adverse impacts.

In such a study, the company should, jointly with the potentially affected IP/LC, identify and seek to better understand and document (potentially in a land use map):

- 1) In their words, the relationship that the affected peoples and communities have with the lands, resources, and territories that may be affected, especially as it relates to their physical or cultural survival (e.g., information on hunting and gathering areas, sites used for collecting medicinal plants or food sources, and conducting spiritual activities, etc.).
- 2) All customary use of the land and resources on a permanent, seasonal, or cyclical basis, including for settlements; cultural, ceremonial, or spiritual use (cultural heritage and burial sites); use for cultivations, hunting, fishing, grazing, gathering of food and medicine, or other extraction of forest and woodland products.
- 3) The vision and development plans of the affected peoples or communities for the future use and management of their lands and resources including, for instance, conservation plans, economic plans, and plans for accommodating population growth.



- 4) The applicable customary laws, values, customs, and traditions of the IP/LC related to land, resource, and territorial ownership and use, to the extent that the IP/LC agrees to make such information known (this may include, for instance, rules on when, where and what can be hunted, how lands are divided or shared among families, the role of women in land tenure security, etc.).
- 5) The political and cultural institutions of the IP/LC that govern and administer their resource use, management, and conservation.

This study requires a very inclusive approach involving different population segments of the affected IP/LC (e.g., women and men, youth and elders, etc.). Securing and documenting the information above will require discussions with various sectors and sub-groups of the peoples/communities who possess different knowledge and expertise, and who use the lands and resources differently. Company representatives or those conducting the study should consult with not only the designated leaders, but also hunters, fishers, gatherers, medicine men/women, shamans or other spiritual leaders, forest rangers, and other segments of the community.

Like a good faith consultation, companies should have a “pre-consultation” with the affected peoples (discussed below) to reach mutual understandings as to how to carry out the land use study in a culturally appropriate manner.

It is recommended that the company work with the IP/LC to generate maps that document all of the actual and intended land uses. Terms for use of any existing or new maps should be agreed by the IP/LC to protect the community’s confidentiality, interests, and traditional knowledge. Before finalisation, the results of this analysis should be written up and then shared with the affected communities or peoples in accessible languages and formats so that they can make corrections and validate the results.

In the event that the company ultimately acquires an interest in the lands, resources, and territories that are the subject of the land use study, this study (together with the applicable law assessment, land tenure study, and ESIA) should inform any further planning and development of the area in a way that respects human rights, for instance by:

- Informing the company’s overall risk management plan and land use planning initiatives.
- Clarifying where participatory monitoring is needed (monitoring involving the peoples or communities that may be affected) and/or where community-based monitoring can be useful (see the [Operational Guidance on Monitoring and Verification](#)).
- Identifying where FPIC may be required in the future before realisation of certain activities.
- Recognising where potential interferences with rights to property, livelihoods and food security, and culture are possible.
- Enhancing the content of, and therefore improving, consultations and negotiations with IP/LC during FPIC processes.

## Annex 3: Company responsibility to protect environmental and human rights defenders

**Core Principle 2** provides that companies should take measures to “[p]rotect the security of environmental and human rights defenders, whistle-blowers, complainants, and community spokespersons and protect their confidentiality and (when requested and lawful) their anonymity.” This provision recognises the growing evidence of dangers faced by communities, workers, trade unionists, journalists, lawyers, activists, whistleblowers, and others when defending the environment and human rights. Dangers include stigmatisation, criminalisation, forced disappearance, physical and psychological attacks, and death. EHRDs are also threatened by economic or legal retaliation such as Strategic Lawsuits Against Public Participation (SLAPPs).

Consequently, while respecting the differentiated roles between the state and companies with respect to environmental and human rights defenders (EHRDs), and as appropriate to their position in the supply chain, companies should:

- Provide a safe and enabling environment that respects the rights of EHRDs to continue their efforts free from adverse repercussions from the company’s staff, suppliers, business partners, or other agents.
- Conduct operations consistent with the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, otherwise known as the “Declaration on Human Rights Defenders”.
- Avoid any acts or omissions that would undermine the state’s efforts to protect EHRDs, but rather support and call upon states to implement their duties and obligations.
- Collaborate whenever possible with the state and other stakeholders to promote awareness around protections for EHRDs.

- Ensure that company grievance mechanisms include a whistleblower procedure that:
  - a) is highly visible and understandable;
  - b) permits confidentiality of complainants, whistleblowers, and witnesses;
  - c) provides anonymity where requested by the whistleblower and where consistent with applicable law;
  - d) ensures thorough, timely, and independent investigation of whistleblower reports; and
  - e) has transparent, enforceable, and timely mechanisms for following up on whistleblower retaliation complaints, including a process for disciplining perpetrators of retaliation.<sup>29</sup> The whistleblower procedure should be implemented in a manner that ensures EHRDs are not victimised while seeking legitimate remedies.
- Make clear through written policies and staff trainings what is expected in terms of:
  - + Not interfering in freedom of movement, opinion, speech, or rights of assembly and association—whether through (in-person, written, online, or other channels).
  - + The meaningful and effective participation of citizens in matters of public affairs.
  - + Not retaliating against or otherwise endorsing victimisation, intimidation, or adverse repercussions (including disadvantage or discrimination in the workplace) against those who voice complaints, object to operations, or seek a remedy for potential harms.

Such policies and training should:

- + Be endorsed by senior management.
- + Include a clear definition of environmental and human rights defenders (see [Definitions](#)).
- + Emphasise the importance to the company of the role of EHRDs and the obligation to protect such persons.
- + Make clear that EHRDs must not be subject to acts of defamation, violence, intimidation, threats, reduced pay, less work hours, retaliatory litigation, or other reprisals.
- + Sensitise staff to the particular vulnerabilities of EHRDs that are already marginalised such as females, migrant workers, the disabled, and youth.
- + Include staff or contractors involved in the provision of security.<sup>30</sup>
- + Specify any incentives that are offered to encourage positive actions by staff, suppliers, business partners, and other agents working with the company to respect EHRD rights.

- + Encourage a zero-tolerance policy warranting appropriate sanctions on company staff, suppliers, business partners, and other agents for any violence or threats against EHRDs, or for failures to cooperate with authorities in investigations. Sanctions should be of a nature that deters future actions and avoids an environment of impunity.
- Utilise appropriate forums and mechanisms to speak out on the important role of EHRDs and publicly condemn attacks, threats, and intimidation against them. Statements that discredit, stigmatise, or discriminate against EHRDs should not be made.
- Through company due diligence (for example, through its applicable law assessment), assess whether the legal and political environment within which it conducts operations protects the rights of EHRDs to organise among themselves and with others, speak freely, assemble freely, and have access to an effective grievance mechanism. The company is expected to ensure that its operations and policies do not undermine these protections and, where appropriate, take measures to support and strengthen them.
- Where specific EHRDs may be at risk, cooperate with state authorities seeking to implement measures to protect them. Where possible based on company resources and capacity, companies should seek to support and coordinate assistance to EHRDs by engaging with local civil society monitoring groups and local and regional protection mechanisms for EHRDs.
- Take affirmative steps to provide effective forums and mechanisms to regularly engage local civil society actors and stakeholders so that the voices of EHRDs may be heard and their concerns effectively addressed.

While most of the above measures are implemented by producers and other upstream suppliers, buyers and other downstream companies should also take action to ensure protection of EHRDs in their supply chains. This includes incorporating EHRD issues in due diligence processes to identify where greater risks to EHRDs exist in their supply chains.

This guidance is derived from findings and recommendations of multiple reports, resolutions, and instruments by the United Nations, European Union, Inter-American Commission on Human Rights, international financial institutions, and civil society on EHRDs, as well as the emerging work of other initiatives and frameworks such as the *European Guidelines on Human Rights Defenders*, the *Environmental Defenders Declaration for Southeast Asia*, the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (Escazú Agreement, Art. 19), the Inter-American Commission on Human Rights' recommendations in *Hacia una política integral de protección a personas defensoras de derechos humanos*, and the *RSPO Policy on the Protection of Human*

*Rights Defenders, Whistleblowers, Complainants and Community Spokespersons.* Companies are encouraged to familiarise themselves with such instruments and guidance and seek the assistance of experts as needed.

The Accountability Framework initiative is also tracking the development of additional policies and implementation guides to protect EHRDs, including within the UN Human Rights Council and the UN Working Group on Business and Human Rights. Companies are encouraged to follow these initiatives and, as appropriate, make supporting contributions to strengthen their development, approval, and implementation.

## Annex 4: Other instruments and commitment frameworks addressing IP/LC rights to culture, including traditional knowledge

This Annex provides comparative references to other voluntary commitment frameworks, principles, guidelines, and international treaties and instruments affirming IP/LC rights to culture, including their traditional knowledge. Some are binding on states (affirming internationally recognised rights) and others are voluntary for those companies that ascribe to them.

**TABLE 1.** Instruments addressing IP/LC rights to culture, including traditional knowledge

Instrument	Citation
Forest Stewardship Council (FSC)	FSC-STD-01-005 V.5-2 Principles and Criteria: Criteria 3.4, 3.5, 3.6 and 4.7, and related indicators
Roundtable on Sustainable Palm Oil (RSPO)	RSPO Principles and Criteria (P&C) for the Production of Sustainable Palm Oil (2018): Criteria 4.6 and 4.7 and related indicators and guidance
The High Carbon Stock Approach (HCSA)	HCS Approach: Putting no Deforestation into Practice, Social Requirement (SR) 6, Principles and Requirements
High Conservation Value Approach (HCV)	Requirements to identify and manage categories 4 (ecosystem services), 5 (community needs) and 6 (cultural values)
Sustainable Forest Management (PEFC ST 1003-2018)	Requirements 6.3.2.1 and 6.3.2.2 (requiring company conduct in recognition of the ILO 169 and UNDRIP)
UN Food and Agriculture Organization (FAO)	Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in Context of National Food Security, sections 4.8, 9.1 & 18.2
Equator Principles	See section on “Project Related Loans” and Exhibit II
CFS Principles for Responsible Investment in Agriculture and Food Chains	Principles 5 and 7

Instrument	Citation
IFC	Performance Standard No. 7, Indigenous Peoples; paras. 5, 8, 11, 13, 16-17 (among others) and accompanying guidance notes 2, 10, 11, 27, 38, 42, 43, 45, 51, 53-59 (among others); see also Performance Standard No. 8 on Cultural Heritage
Principles for Responsible Agricultural Investment (PRAI)	Principles 1, 2, 4 and 6
OECD FAO Guidance for Responsible Agricultural Supply Chains	Standard 6: Tenure rights over and access to natural resources (page 28); risks and mitigation strategies (page 61)
UN Development Programme Social and Environmental Standards	Social & Environmental Standard No. 7 (“Indigenous Peoples”), paras. 1, 2, 5 & Objectives, and No. 8 (“Cultural Heritage”) in general & para. 4.
World Bank	Operational Policy 4.10 at paras. 16, 18-20, 22(e); Bank Procedure 4.10:at para. 8(a)
Convention on Biological Diversity	8(j) & 10(c)
International Labour Organization (ILO) Convention 169	Arts. 2(2)(b), 4(1), 5(a), 7(3), 13(1), 23, & 30
International Covenant on Civil and Political Rights	Art. 15
International Covenant Economic, Social and Cultural Rights	Art. 27
International Convention on the Elimination on all Forms of Racial Discrimination	Art. 5 and General Recommendation No. 23, 4(a), 4(c) & 4(e)
American Convention on Human Rights & Protocol	Art. 21; Protocol at Art. 14
African Charter	Art. 21
UN Declaration on the Rights of Indigenous Peoples	Arts. 3, 5, 8, 11, 12, 14, ,15, 31, 32, & 36

## Annex 5: Examples of cultural heritage

Following is an indicative (not exhaustive) list of examples of cultural heritage, which should be respected in accordance with the guidance in Section 4.3.<sup>31</sup>

### **Human-made** cultural heritage

- Religious buildings such as temples, mosques, churches
- Exemplary indigenous or vernacular architecture
- Buildings, or remains of buildings, of architectural or historic interest
- Historic or architecturally important townscapes
- Historic roads, bridges, walls, fortifications, dams, aqueducts and viaducts
- Archeological sites
- Commemorative monuments
- Historic sunken ships

### **Natural** cultural heritage

- Springs and wells
- Sacred waterfalls
- Sacred groves and individual sacred trees
- Historic trees
- Sacred mountains and volcanoes
- Caves currently or previously used for human habitation
- Paleontological sites (i.e., deposits of early human, animal, or fossilised remains)
- Natural landscapes of outstanding aesthetic quality



**Combined human-made and natural** cultural heritage

- Sites used for religious or social functions such as weddings, funerals, or other traditional community activities
- Places of pilgrimage
- Burial grounds
- Family graves in the homestead
- Historic gardens
- Cultural landscapes
- Natural stones bearing historic inscriptions
- Historic battlegrounds
- Combined human and natural landscapes of aesthetic quality
- Cave paintings

**Movable** cultural heritage

- Historic or rare books and manuscripts
- Paintings, drawings, icons, jewelry
- Religious artefacts
- Historic costumes and fabrics
- Memorabilia relating to the lives of prominent individuals or to events such as historic battles
- Statues, statuettes, and carvings
- Pieces broken off monuments or historic buildings
- Unregistered archaeological artefacts
- Antiquities such as coins and seals
- Historic engravings, prints, and lithographs
- Natural history collections such as shells, flora, minerals

**Intangible** cultural heritage

- Oral traditions and expressions
- Performing arts
- Social practices, rituals, and festive events
- Knowledge and practices concerning nature and the universe
- Traditional craftsmanship

## Annex 6: IP/LC plan

To effectively respect the rights of IP/LC, as described in this Operational Guidance, early on in a company's operations, when it is determined that there is a possibility of adverse risks to the human rights of IP/LC, the company should work with the potentially affected peoples and communities to develop an IP/LC plan. This can be a separate stand-alone plan or one incorporated into what is typically referred to as a stakeholder engagement plan ([Core Principle 10.1](#)). The IP/LC plan is a management plan to address potential harms to IP/LC. The process of developing and implementing this plan can be a critical element to the risk management process. It can also identify opportunities where the company can enhance the well-being and advance the human rights of the IP/LC.

Prior to finalising site acquisition, companies should elaborate this plan considering the findings and conclusions of the ESIA and applicable law assessment, and should ensure that it is counted as part of the risk management plans that the companies will use to avoid and mitigate potential harms to IP/LC. This plan should be monitored and verified for compliance. If ongoing operations have never elaborated an IP/LC plan (or similar plan), they should assess the information, measures, and plans they already have in place, build upon those to fill in the gaps, and address the elements and objectives of this plan (as detailed below) going forward.

The complexity of the IP/LC plan should be commensurate with the nature and scale of the project and its potential adverse impacts to IP/LC, based on the findings of the various risks assessments and consultations with potentially affected IP/LC. Companies should consider the IP/LC plan as a place to consolidate all the relevant information, processes, and commitments the company has collected, defined, and made related to the subject IP/LC. To the extent that such information has already been documented in other studies, assessments and processes such as the Social Baseline Assessment, FPIC agreement (FPIC outcome document), or applicable law assessment, the IP/LC plan can incorporate this material by reference. IP/LC plans typically include information such as that listed in Box 3 below.

### BOX 3. Indicative content of an indigenous peoples/local communities plan

- Identification of the peoples/communities that may be affected by the company activities.
- A summary of the findings of the applicable law assessment regarding laws relevant to the rights of these populations in the context of company operations.
- Identification of planned or potential activities of the company that require prior consultation and FPIC.
- A summary of the relevant findings of the ESIA regarding the potential risks and corresponding mitigation measures developed to date with communities and peoples.
- Measures to address gender considerations in all stakeholder engagements, assessments, studies, consultation, and FPIC processes, monitoring, and benefit sharing arrangements.
- Time bound targets relevant to IP/LC.
- Roles and responsibilities of the company and the affected IP/LC in implementing mitigation measures and in designing and carrying out monitoring and verification processes.
- Agreements reached to date with IP/LC and measures to be taken to ensure their implementation.
- An appropriately-costed work plan to undertake the activities discussed in the IP/LC plan.

Several other institutions have also required the development of IP/LC plans (see below). The AFI encourages companies to consider the templates and content suggestions provided for these plans and others, and to responsibly adapt its IP/LC plans to the nature of its operations and its particular context.

- To guide the implementation of its Performance Standard on Indigenous Peoples, the International Financial Corporation directs its private sector clients to create an Indigenous Peoples Plan or a broader community development plan that outlines actions to minimise and/or compensate for adverse impacts in a culturally appropriate manner. Annex A of the Guidance Note for this Performance Standard provides a template for the suggested plan content. See [https://www.ifc.org/wps/wcm/connect/707761004885582bbf24ff6a6515bb18/2007%2BUpdated%2BGuidance%2BNote\\_7.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/707761004885582bbf24ff6a6515bb18/2007%2BUpdated%2BGuidance%2BNote_7.pdf?MOD=AJPERES).
- The UN Development Programme also requires its government partners to draft an indigenous peoples' plan and provides a very detailed indicative outline for such a plan. See Annex I of the UNDP Guidance Note on its Social and Environmental Standard on Indigenous Peoples, available at [https://info.undp.org/sites/bpps/SES\\_Toolkit/SES%20Document%20Library/Uploaded%20October%202016/Final%20UNDP%20SES%20Indigenous%20Peoples%20GN\\_Jan2017.pdf](https://info.undp.org/sites/bpps/SES_Toolkit/SES%20Document%20Library/Uploaded%20October%202016/Final%20UNDP%20SES%20Indigenous%20Peoples%20GN_Jan2017.pdf).
- The World Bank also requires an Indigenous Peoples Plan as part of its *Operational Policy on Indigenous Peoples (OP 410)*; see Annex B of this policy, available at [http://web.worldbank.org/archive/website01541/WEB/0\\_\\_-4663.HTM](http://web.worldbank.org/archive/website01541/WEB/0__-4663.HTM)

# Endnotes

<sup>1</sup> “Activities” refers to both acts and omissions by the company itself, as well as entities with whom they are in business relations throughout their supply chain, including “any other non-State or State entity directly linked to its business operations, products or services.” See *UN Guiding Principles on Business and Human Rights* (2011), para. 13 and Commentary (“UN Guiding Principles”).

<sup>2</sup> It is well established that IP/LC have a special connection to their lands, resources, and territories which are indispensable to their physical and cultural survival. “For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” (See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, parr. 149 (“*Awas Tingni*”); see also Report to the General Assembly, *Conservation and indigenous peoples’ rights*, A/71/150. July 29, 2016 (2016), Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, para. 15 (2016) (“Indigenous peoples retain strong spiritual links with the plants, trees and animals on their lands and protecting their lands is a sacred duty.”)). This connection means that IP/LC rights to their traditional lands are inextricably linked to other fundamental rights, like the right to life and the right to culture affect one right and you affect other rights.

<sup>3</sup> Involuntary displacement arising from company operations can include whole or partial physical displacement as well as economic displacement. Economic displacement may include, for instance, restrictions on access to and use of resources, as well as destruction or degradation of resources (e.g., deforestation), that adversely impacts livelihoods, food security, or income of IP/LC. Of particular concern are displacement scenarios where the physical or cultural survival of the affected IP/LC are jeopardised.

<sup>4</sup> “All persons” has been interpreted and applied to both individual indigenous persons and the collective that is indigenous peoples (or local communities). For example, since their adoptions, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), as well as the conventions (among others) listed in section 3.3.1 of the Framework’s *Operational Guidance on the Relationship between Voluntary Commitments and Applicable Law*, have all been interpreted by their respective committees, commissions, and courts charged with construing their applications, to recognise and require respect, promotion, and protection of the rights of IP/LC. See the following for examples of international instruments being applied to IP/LC, *Indigenous Peoples and United Nations Human Rights Treaty Bodies: A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council* (Volumes I thru VII), available at [https://www.forestpeoples.org/index.php/en/resources?Publications%5B%5D=language%3Aen&search\\_api\\_fulltext=united+nations+compilation+jurisprudence&sort\\_by=search\\_api\\_relevance](https://www.forestpeoples.org/index.php/en/resources?Publications%5B%5D=language%3Aen&search_api_fulltext=united+nations+compilation+jurisprudence&sort_by=search_api_relevance).

<sup>5</sup> UNDRIP, Art. 26.

<sup>6</sup> UNDRIP, Art. 26; See also the following treaties and conventions and their resulting interpretations: ICCPR, Art. 27 (as interpreted by the UN Human Rights Committee), ICESCR, Art. 15 (as interpreted by the Committee on Economic, Social and Cultural Rights), Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination (as interpreted by the Committee on the Elimination of Racial Discrimination); ILO 169 (Arts. 13-19); Art. 21 of the American Convention on Human Rights (as interpreted by the Inter-American Court on Human Rights); Art. 21 of the African Charter on Human and Peoples’ Rights (as interpreted by the African Court on Human and Peoples’ Rights). For a compilation of the jurisprudence related to UN human rights treaties related to indigenous peoples’ and local community rights, see: *Indigenous Peoples and United Nations Human Rights Treaty Bodies – A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council* (Volumes I thru VII), available at: [https://www.forestpeoples.org/index.php/en/resources?Publications%5B%5D=language%3Aen&search\\_api\\_fulltext=united+nations+compilation+jurisprudence&sort\\_by=search\\_api\\_relevance](https://www.forestpeoples.org/index.php/en/resources?Publications%5B%5D=language%3Aen&search_api_fulltext=united+nations+compilation+jurisprudence&sort_by=search_api_relevance).

<sup>7</sup> See “*Awas Tingni*”, para. 158(2) and 164; *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007, Inter-Am. Ct. H.R.(Ser. C) No. 172, para. 194(a) (“*Saramaka*”). See also African Court of Human and Peoples’ Rights the case of the *African Commission on Human and Peoples’ Rights v. Kenya*, Application No. 006/2012, Judgment, para. 43(E)(i)(b) (26 May 2017) IP/LC, (involving the Ogiek peoples of Kenya).

<sup>8</sup> For more information on conducting social baseline assessments, see *HCS Approach Toolkit*, Module 2, version 2.0, *The HCS Approach: Putting no Deforestation into Practice, Social Requirements*, section B (*Working Draft of Social Requirements for Conserving High Carbon Stock Forests in Oil Palm Development*, adopted 22 January 2017), SR 1 (May 2017) (HCS Approach, SR); *Implementation Guide for the Social Requirements of the High Carbon Stock Approach*, Step 1.2 (April 2018).

<sup>9</sup> If a secondary purchaser is seeking to acquire an upstream company that is confronted with an ongoing conflict in an interest it hopes to secure, the secondary purchaser should also refrain from pursuing the sale if its acquisition would be affected by the resolution of the ongoing conflict.

<sup>10</sup> Seeking FPIC is a duty and obligation of the State when the government or a third party is to engage in an activity that may affect the rights and interests of indigenous peoples and local communities. However, where the ongoing dispute is between two indigenous communities for instance, they may use a traditional dispute resolution mechanism and as a non-indigenous party is not present, FPIC is not the main concern, just mutual agreement. This does not preclude FPIC being required once the disposition of the land is settled and the company then seeks the acquisition of an interest from the indigenous peoples or local communities concerned.

<sup>11</sup> Similarly required by the FPIC Guideline for RSPO Members (2015), p. 76 stating that the FPIC agreement should detail “compensation for what (e.g., forests, lands and crops) and to whom (community, family, individuals), compensation mechanism and monitoring, timelines (when and how much), conditions for compensation.”

<sup>12</sup> As the FPIC Guideline for RSPO Members (2015), p. 76 stating that the FPIC agreement specifies “benefit for what, from whom and to whom, timelines, conditions of access to benefits.”

<sup>13</sup> Without prejudice to the peoples'/community's priorities, this interpretation of equitable benefit sharing is consistent with the pledges that governments made in the Tropical Forest Alliance 2020 Marrakesh Declaration for Sustainable Development of the Oil Palm Sector in Africa, where they agree to “bringing jobs to our people; providing fair and equitable labour conditions; working to improve community livelihoods; and contributing to food security and poverty alleviation through equitable benefit sharing.” *Marrakesh Declaration*, p.2, pledge (F).

<sup>14</sup> See <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

<sup>15</sup> For further information, see Office of the High Commissioner for Human Rights, Fact Sheet No. 16 (Rev.1): *The Committee on Economic, Social and Cultural Rights. The Universal Declaration of Human Rights recognises that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food,...”* (art. 25). *The International Covenant on Economic, Social and Cultural Rights also recognises the right to adequate food as an essential element to the right to an adequate standard of living* (art. 11 (1)) and expressly recognises “the fundamental right of everyone to be free from hunger” (art. 11 (2)).

<sup>16</sup> Right to Adequate Food, Fact Sheet #34, p. 4 (OHCHR). See also *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Art. 15(5) (referencing “the right to adequate food, food security and food sovereignty and sustainable and equitable food systems”).

<sup>17</sup> Roundtable on Sustainable Palm Oil (RSPO), *HCS Approach*; and FAO Voluntary Guidelines on the Responsible Governance of Land Tenure (VGGT).

<sup>18</sup> See for example, RSPO Principles & Criteria (P&C) which incorporates the issue of food security into the definition of livelihoods and references High Conservation Value (HCV) 5 “Community needs” as “[s]ites and resources fundamental for satisfying the basic necessities of local communities or indigenous peoples (for livelihoods, health, nutrition, water, etc.)” and per the accompanying note to Principle 7.12.3 “[t]here should be demonstrable benefits to the local community; clear recognition of legal and customary lands based on participatory land use planning; development should be proportional to the needs of the local community; with a balance between conservation and development” (see also related Indicators and Guidance to Principles 3.4 and 7.12); see also *Implementation Guide for the Social Requirements of the High Carbon Stock Approach*, p. 5 (April 2018) calling for the “adoption of measures that ensure respect for their rights and protection of their livelihoods” and advancing HCS Approach, SR5 Providing that “[d]evelopers shall ensure that local livelihoods and food security are not adversely affected by their operations and instead are maintained or strengthened, in line with internationally recognised rights (FAO 2009). Developers shall achieve positive overall impacts on community welfare. The actual impacts of operations shall be assessed in order to verify that these commitments are being met” (with inclusion of issues in community land planning, zoning, consultations, participatory HCV-HCSA assessments, ESAs and all field-based social research (including Social Baseline Assessments, participatory mapping); Food and Agricultural Association (FAO) VGGT, 4.1 (providing that its guidelines include goals of food security, poverty eradication, sustainable livelihoods...”), see also 12.6, 12.7, 15.7, 16.2, 22.1, 22.3, 23.2, 24.4, 24.5, and 25.6.

<sup>19</sup> See 2018 RSPO P&C, 3.4 (requiring “In new plantings or operations including mills, an independent SEIA, undertaken through a participatory methodology involving the affected stakeholders, and including the impacts of any smallholder/outgrower scheme is documented.” and more specifically an “[a]ssessment of potential social impacts on surrounding communities of a plantation, including an analysis of potential effects on livelihoods, and differential effects on women versus men, ethnic communities, and migrant versus long-term residents.”)

<sup>20</sup> See *Implementation Guide for the Social Requirements of the High Carbon Stock Approach*, Step 2.3 (April 2018) and; see also 2018 RSPO P&C 3.4

<sup>21</sup> This declaration addresses a broader set of local and rural people beyond just IP/LC, including smallholders and migrant workers. It reflects a growing contemporary consensus about the need to respect and protect the rights of those living in rural areas and depending on the land, water, and nature (including rights to property, food security, livelihoods, and meaningful and effective participation in decisions that affect them).

<sup>22</sup> Quoted material in bullets arises from UNDRIP, Arts. 5, 18, 20, 23, 26(2), & 32.

<sup>23</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2007. Series C No. 172, paras. 172 and 174.

<sup>24</sup> See section 1.1 and supra note 2.

<sup>25</sup> Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS, paras. 10 and 11 interpreting Article 27 (right to enjoy one’s culture) of the ICCPR (“necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...” and; “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27...”).

<sup>26</sup> For further development of the various manifestations of the rights to culture, see for example, UNDRIP, Arts. 5, 8, 11, 12, 14-16, 25, 31, and 36.

<sup>27</sup> “Claim” includes not only legal petitions before judicial or administrative bodies in accordance with the law, but also requests for land titles and/or denunciations and requests before one or more government bodies (administrative, legislative, or otherwise). The latter is particularly important as sometimes the populations in question lack the capacity or resources to make formal complaints and/or are limited to do so because the law in some way prevents it (i.e. they lack the recognised authority under the law to make a formal complaint, or the law requires actual possession to file a request for title and the community was involuntarily displaced by encroachments years ago).

<sup>28</sup> This may also include how land is transferred, assigned, even inherited, among members (sometimes inequitably between men and women).

<sup>29</sup> Source: RSPO Policy on the Protection of Human Rights Defenders, Whistleblowers, Complainants and Community Spokespersons, Annex 1, sec. 2 (2018). The RSPO policy also provides that complaints of actions against whistleblowers can go to an entity deemed independent of the offending company.

<sup>30</sup> Companies are encouraged to consider application of the Voluntary Principles on Security and Human Rights—an internationally accepted benchmark that guides companies in how they recruit and train their security guards and other related personnel, and how they engage with members of a potentially affected population.

<sup>31</sup> Source: UNDP citing to World Bank, *Physical Cultural Resources Safeguard Policy Guidebook*, and UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

