

This comment’s purpose is to provide the Board with feedback related to its various disclosure topics and metrics pertaining to the rights of indigenous peoples (“IPs”).

Since the Board assesses materiality at the level of disclosure topics and not metrics, there is no discussion of materiality. Rather, evaluation of existing or proposed metrics is taken by reference to the accounting metric criteria detailed on page 19 of the Conceptual Framework.

Global comment: The industries that presently have specific IP disclosure topics are: Oil and Gas – Exploration and Production; Coal Operations; Metals and Mining; and Forestry Management. As a starting point, we highlight the lack of uniformity in existing IP/CR disclosure topics and metrics among these industries. What we mean:

Coal:

TOPIC	ACCOUNTING METRIC	CATEGORY	UNIT OF MEASURE	CODE
Community Relations & Rights of Indigenous Peoples	Discussion of process to manage risks and opportunities associated with community rights and interests	Discussion and Analysis	n/a	NR0201 <u>EM0201-09</u>
	Number and duration of non-technical delays	Quantitative	Number, Days	NR0201 <u>EM0201-10</u>
	(1) Proven and (2) probable reserves in or near indigenous land	Quantitative	Million metric tons (t)	NR0201 <u>EM0201-11</u>

Oil and Gas – E&P:

TOPIC	ACCOUNTING METRIC	CATEGORY	UNIT OF MEASURE	CODE
Security, Human Rights, and the Rights of Indigenous Peoples	(1) Proved and (2) probable reserves in or near areas of conflict	Quantitative	Million barrels (MMbbls), Million standard cubic feet (MMscf)	NR0101 <u>EM0101-12</u>
	(1) Proved and (2) probable reserves in or near indigenous land	Quantitative	Million barrels (MMbbls), Million standard cubic feet (MMscf)	NR0101-13 <u>TA04-04-01</u>
	Discussion of engagement processes and due diligence practices with respect to human rights, indigenous rights, and operation in areas of conflict	Discussion and Analysis	n/a	NR0101 <u>EM0101-14</u>
Community Relations	Discussion of process to manage risks and opportunities associated with community rights and interests	Discussion and Analysis	n/a	NR0101 <u>EM0101-15</u>
	Number and duration of non-technical delays	Quantitative	Number, Days	NR0101+EM0101-16

Specifically, notice how the Coal standard includes Community Relations and Indigenous Peoples in the same disclosure topic, while the Oil and Gas E&P and Mining and Metals standards have each of those as separate disclosure topics. Coal is the only standard that conflates the Community Relations and Indigenous Peoples in a single disclosure topic. Why this matters: the accounting metrics associated with the Community Relations topic are different, and

in some cases more robust, than the metrics of the standalone IP disclosure topics. It should be clear that the “Community Relations” standard applies to companies’ interactions with both indigenous and non-indigenous populations. One would hope that would be self-evident, but as the non-Coal IP standards are currently configured, they are open to the interpretation that when interacting with IPs, the IP disclosure topic and accounting metrics apply instead of, rather than in addition to, the Community Relations topic and metric.

Thus, **our recommendation is that the Community Relations and Indigenous Peoples accounting metrics be applied uniformly** across the Oil and Gas E&P, Coal, Metals and Mining, and Forestry sectors. This resolves inconsistencies between sectors that each have substantive social impacts, and makes for a simplified reporting process for all stakeholders, especially companies that may have assets in more than one of these sectors

Additionally, even if it is totally clear that the Community Relations standard applies to interaction with IPs, we believe that metric itself should be tweaked and tailored and applied specifically within the IP disclosure topics. Thus **we also recommend that the Community Relations accounting metrics be 1) incorporated within existing IP disclosure topics, and 2) refined and tailored specifically to interactions with indigenous populations.** For our comments on tailoring that metric, the standard itself is attached with redline additions.

Specific comments on existing IP metrics

This section provides comments on the following two IP accounting metrics:

1. Proved and probable reserves in or near indigenous land
2. Discussion of engagement processes and due diligence practices with respect to human rights, indigenous rights, and operation in areas of conflict

Metric: “Proven and probable reserves on or near indigenous land”

- Applies to:
- Oil and Gas E&P (TA04-04-01)
- Coal Operations (EM0201-11)
- Metals and Mining (TA04-30-01)
- Forestry Management (“Area of forestland in indigenous land”; RR0201-05)

Comment:

Our comment here regards precisely what constitutes “indigenous land.” The Board should be aware that in many contexts, and not only in developing countries, the land rights of indigenous people are in active dispute.¹ In Canada for instance, the government recognizes indigenous land rights but many indigenous tribes are still negotiating land claims through the state’s official reconciliation mechanism.² In other countries indigenous populations might not have access to

¹ Foley Hoag, LLP, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, p. 25, July 2010.

² An archived page detailing the official land claim program is available at <http://www.aadnc-aandc.gc.ca/eng/1100100014174/1100100014179#iss>. For recent coverage see <https://www.nytimes.com/2017/11/12/world/canada/canada-first-nations-algonquin-land-claims.html>.

official channels to codify their land rights, or might operate in a legal context that simply does not recognize communal land rights or land rights based on traditional usage practices. **For this reason, we recommend rewording this metric to “proven and probable reserves on or near land subject to legal or traditional ownership claims by Indigenous Peoples.”** Regardless of whether the company itself is aware that its operations stand to affect indigenous communities, failure to meaningfully engage can be fundamentally destabilizing and trigger serious conflict. Thus, it’s important to alert companies that their disclosure obligations might extend to due diligence efforts taken to determine whether and to what extent their resource reserves are on or near indigenous land in the first place.

Metric: “Discussion of engagement processes and due diligence practices with respect to human rights, indigenous rights, and operation in areas of conflict”

- Applies to:
- Oil and Gas E&P (EM0101-14)
- Metals and Mining (EM0302-17)
- Forestry Management contains a similar metric but is different enough that it merits separate discussion.

Comment:

At the outset, we note briefly that this metric is not included Coal Operations IP/Community Relations topic. That standard does not contain any reference to due diligence procedures with respect to free, prior and informed consent (“FPIC”), which it should.

Inclusion of ILO C-169 and FPIC is definitely a critical, and a number of companies have formally adopted FPIC principles as a matter of practice. However, a word about what FPIC is precisely, and about its challenges and opportunities. The genesis of FPIC’s present “prominence” was its inclusion in several articles of the U.N. Declaration of the Rights of Indigenous Peoples (“UNDRIP”), which was ratified in 2007. So, while its relevance is age-old, FPIC’s significance as a term of art emerged only recently. Additionally, UNDRIP alone does not legally bind signatory states to FPIC or anything else, so the instrument enshrines aspirations, not obligations. That said, it is gaining traction. It is legally mandated by a small but increasing number of states; required by a range of standards-setting organizations such as the International Finance Corporation through its Environmental and Social Performance Standard 7 on Indigenous Peoples; and being voluntarily endorsed by industry as a matter of CSR policy.

In 2015, Oxfam surveyed the publicly available policies regarding community rights and community engagement of 38 oil, gas, and mining companies.³ The organization found that 14 of those 38 had adopted corporate commitments to FPIC, but that no FPIC policy reviewed provided significant detail regarding implementation. Additionally, the study’s 14 companies that had formally adopted FPIC principles were all mining companies—no surveyed oil had gas company policies mentioned FPIC at the time of the study. As of 2016, Shell is the only major

³ Oxfam, *COMMUNITY CONSENT INDEX 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent*, July 2015.

oil company to have publicly endorsed FPIC, and stated only that they believe their “approach is consistent with the principle.”

These trends are in response to mounting evidence that the absence of the social license to operate can have material long-term impacts to the corporate bottom line. John Ruggie, who led the development of the UN Guiding Principles on Business and Human Rights, told *Business Ethics* that “for a world-class mining operation...there’s a cost somewhere between \$20 million to \$30 million a week for operational disruptions by communities” and that the time it takes to bring oil and gas projects online has “doubled over the course of the previous decade, creating substantial cost inflation.”⁴ Additionally, “analysis by Environmental Resources Management of delays associated with a sample of 190 of the world’s largest oil and gas projects (as ranked by Goldman Sachs) found that 73% of project delays were due to “above-ground” or non-technical risk, including stakeholder resistance.”⁵ In 2016, Ernst and Young elevated the “social license to operate” to the third place on its list of the greatest business risks to the mining industry.⁶

This is all to say that while extractive companies are increasingly seeing the relevance of FPIC to their operations, the concept’s utility as an operational principle is still a way off. For that reason, while we believe it is nonetheless vital for the Board to include FPIC in its IP metrics, there is a two-fold problem with relying too heavily on that concept as a disclosure metric. The first aspect is simply an implementation problem: given how few companies have made formal commitments to FPIC, it seems like mainstream disclosure pertaining specifically to that topic might be fairly difficult to elicit. However, the crux of the problem is that even if companies were to commonly report on the Board’s IP disclosure topics, the existing metrics don’t communicate to investors the types of things they should be looking for in the first place to evaluate the quality of the company’s disclosed practices. To illustrate: say a company details in their MD&A a truly exemplary FPIC consultation process. The investor considers the disclosure, concludes correctly that the official process is great, and thinks “ok, I can trust this company to not to get itself into operational trouble.” So, the company’s official *protocol* is excellent, but what mechanisms exist to ensure it is actually followed? For example, does the company have any internal audit or board-level oversight of community relations performance? If a community conflict emerges, does the company have a clear reporting structure and chain of command for decision-making? These examples serve to illustrate an entire category of material information that the existing IP metrics do not capture: a firm’s internal governance mechanisms tied to its community relations performance. What follows are three suggested metrics to be added to the IP disclosure topic, and a brief explanation of why. These are offered in addition to the redline comments in the attachment, with some overlap.

Suggested Metric: Governance of social performance

The registrant shall disclose its internal accountability and oversight mechanisms for implementing its processes for managing community risks and interests. This may

⁴ <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>

⁵ http://www.bsr.org/reports/BSR_LocalContent_March2011.pdf

⁶ <http://www.ey.com/GL/en/Industries/Mining---Metals/Business-risks-in-mining-and-metals>

include discussion of board or executive level expertise in social performance; the reporting chain and highest levels of management tasked with oversight of social performance; the presence of any active and independent external bodies to advise and evaluate its social performance; and the presence of rewards and incentives for staff and managers to pursue successful community relations.

Suggested Metric: Number of community agreements

The registrant shall disclose the number of agreements entered with Indigenous Peoples and other local communities impacted by their operations. These may take the form of consent agreements, benefits sharing agreements, or simply relationship agreements that define the protocol for communications between parties. Although the agreements themselves are not often public due to their proprietary nature, the presence of agreements is a critical indicator of how effectively the company is managing community risks and interests.

Suggested Metric: Number of projects with project level grievance mechanisms

The registrant shall disclose the number of projects at which grievance mechanisms have been implemented. In addition to being a best practice, grievance mechanisms mitigate risk by providing a space in which community stakeholders can resolve concerns without going to court, going to the press, or pursuing other avenues that generate risk to the company.

Community Relations & Rights of Indigenous Peoples

Accounting Metrics

NR0201EM0201-09. Discussion of process to manage risks and opportunities associated with community rights and interests

.50 The registrant shall describe its processes, procedures, and practices to manage risks and opportunities associated with the rights and interests of indigenous and non-indigenous communities in areas where it conducts business, where community rights and interests include:

- Economic rights and interests, including the right to employment, fair wages, payment transparency, and respect of infrastructure and agricultural land.
- Environmental rights and interests, including the right to clean local air and water, as well as safe discharge and disposal of waste.
- Social rights and interests, including the rights to adequate health care, education, and housing.
- Cultural rights and interests, including the right to protection of places of cultural significance (e.g., sacred sites or burial sites).
- Indigenous Peoples' right to traditional claims to land even where title is not formally recognized by the national government
- Indigenous Peoples' right to not be resettled without free, prior and informed consent
- Indigenous Peoples' right to not forgo the use of land traditionally dedicated to fishing, hunting and trapping without free, prior and informed consent

.51 The registrant shall disclose the following, as relevant:

- Lifecycle stages to which its practices apply, such as: pre-bid (when the registrant is considering acquisition of a site), exploration and appraisal, site development, coal production, and during closure, decommissioning, and restoration.
- The community rights and interests (enumerated above) specifically addressed by the practices.
- The underlying references for its procedures, including whether they are codes, guidelines, standards, or regulations and whether they were developed by the registrant, an industry organization, a third- party organization (e.g., a non-governmental organization), a governmental agency, or some combination of these groups.

.52 Risks and opportunities include, but are not limited to: non-technical delays, availability and development of local content, availability and access to adequate infrastructure, community actions related to resource nationalism, and challenges associated with resettlement and access to land.

.53 The registrant shall disclose the degree to which its policies and practices are aligned with the International Finance Corporation's (IFC) [Performance Standards on Environmental and Social Sustainability](#), January 1, 2012, including specifically:

- Performance Standard 4 – Community Health, Safety, and Security
- Performance Standard 5 – Land Acquisition and Involuntary Resettlement
- Performance Standard 7 – Indigenous Peoples
- Performance Standard 8 – Cultural Heritage

.54 The discussion shall include how practices apply to business partners such as contractors, sub-contractors, suppliers, and joint venture partners.

.55 The registrant should describe its efforts to eliminate or mitigate community risks and/or address community concerns, including, but not limited to:

- The use of social impact assessment (SIA) that evaluates, manages, and mitigates risks.
- Efforts to engage with stakeholders, build consensus, and collaborate with communities.
- “Shared” or “blended” value projects that provide quantifiable benefits to the community and the registrant.

.56 The registrant may choose to quantify its community risks by calculating the aggregate estimated value at risk (in U.S. dollars) to its capital expenditure projects as the difference in value (in U.S. dollars) between a project free from country, regional, and/or community risks (hereafter, country risk) and the value of a project adjusted for these risks.

- This calculation should be conducted using an appropriate valuation model; variations of the Capital Asset Pricing Model (CAPM) are commonly used to assess country risk.

Value at risk can be calculated by applying an additional discount rate premium when calculating the net present value of a project using discounted cash flow (DCF) analysis.

☞ Value at risk can be expressed as a reduction in the expected cash flows of a project due to

country risk when calculating the net present value of a project using discounted cash flow (DCF) analysis.

☞ If a project is insured for country risks, the value at risk can be expressed as a reduction in the cash

flows of a project due to the cost of insurance when calculating the net present value of a project using discounted cash flow (DCF) analysis.

- Country, regional, and/or community risks include, but are not limited to: corruption, business legal structure, political stability, regulation, resource nationalism, ethnic conflict, stability of the local market, labor force (skills) availability, resettlement and access to land, quality of access to infrastructure (e.g., ports, roads, shipping channels), and/or general license to operate.

☞ These risks are likely to manifest differently at the country (national), regional (state), community (local)

levels, and project levels.

☞ This risk differs from sovereign risk, which is defined as the potential for a central bank or government- backed entity to willingly or unwillingly default on debt obligations, or significantly alter key economic variables such as foreign exchange rates, import ratios, and money supply.

- The registrant should identify and describe country risks specific to its projects and unique operating context.

☞ This may include the identification of country, regional, and community risks and/or the discussion of specific projects.

☞ This may include discussion of how the registrant has mitigated these risks through community engagement partnerships, blended value projects, etc.; the registrant shall quantify this reduction in risk according to the methods described above.

☞ Discussion should be in addition to broad country risk classification (e.g., OECD Prevaling Country Risk classification, Standard & Poor's Country Risk ratings, World Economic Forum Global Competitiveness Index, etc.).

- With specific respect to operations that affect indigenous peoples, country risk also refers to:

- The extent to which the government officially recognizes the existence of indigenous peoples within its borders.

- The extent to which indigenous land rights are officially recognized.
 - The extent to which the country has a legal framework for consultation with indigenous peoples and communities.
 - The extent to which indigenous peoples enjoy the exercise of civil liberties within the country.
- With specific respect to operations that affect indigenous peoples, **community risk** also refers to:
 - The extent to which affected indigenous communities are clearly identified and mapped by the company
 - The extent to which communities in or near the project area have secured title to their land
 - The extent of community capacity for self-governance with respect to internal decision-making and external negotiation with companies
 - The extent to which there is evidence of internally-controlled economic development, education, healthcare and social development
 - The extent to which NGOs and other external influences (NGOs) present in the community support or oppose a project
 - The extent of community support or opposition to a project
- The registrant should describe the model or approach used to value capital expenditure projects such as adjusted discount rate, expected cash flow, or other methods.

~~R0201~~EM0201-10. . Number and duration of non-technical delays

.57 The registrant shall disclose the total number and aggregate length (in days) of site shutdowns or project delays due to non-technical factors.

.58 The scope includes shutdowns and project delays including, but not limited to, those resulting from pending regulatory permits or other political delays, community or stakeholder resistance or protest, and armed conflict.
