

The Honorable Gary Gensler
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

June 14, 2021

Re: Response to Call for Public Input on Climate Change Disclosures from Commissioner Allison Herren Lee

Dear Chair Gensler,

We write to you from twenty-two climate, environment, public interest, racial justice, and Indigenous rights organizations (see full list below).

We appreciate the opportunity to comment on the above referenced Request for Input by the Securities and Exchange Commission (the “SEC” or the “Commission”) which rightly identified the urgent need for mandatory climate and environmental, social, and governance (ESG) disclosures. The Commission should move quickly to propose, adopt, implement, and enforce detailed disclosure requirements for all issuers.

We write to you about a specific set of disclosures we believe are crucial to addressing climate risk – as well as broader ESG risks and political, reputational, operational, and legal risks – but that we fear may be overlooked in your assessment of possible climate change disclosures. That issue is the involvement of listed companies in the abuse of the land rights and other rights of Indigenous and tribal peoples. As we detail in this letter, companies directly implicated in land rights abuses rarely disclose the myriad legal, political, reputational, and operational risks to investors inherent in such abuses, all of which can significantly impact the finances of issuers.

Disregard for the land rights and human rights of Indigenous and tribal peoples regularly leads to project delays and even cancelation, as this letter details below. This disregard also helps accelerate environmental degradation, climate change, and social conflict and violence.

Indigenous and tribal peoples are critical to forest conservation and climate stability: studies show that ancestral lands and land under title by Indigenous peoples are the most biodiverse and best conserved on the planet.¹ And a 2019 report on climate change and land use from the Intergovernmental Panel on Climate Change found that agricultural practices which incorporate Indigenous and local knowledge are more effective in adjusting to deforestation, biodiversity loss, and other challenges.² To provide an example from one ecosystem critical to climate stability: Indigenous lands make up nearly half of the Amazon rainforest, according to a March

¹ *Frontiers in Ecology and the Environment*, “Importance of Indigenous Peoples’ Lands For the Conservation of Intact Forest Landscapes,” January 6, 2020, <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.2148>.

² Intergovernmental Panel on Climate Change, “Special Report on Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems,” 2019, <https://www.ipcc.ch/srccl/>.

2021 United Nations report.³ In Brazil, the lands classified by the government as Indigenous territories or protected areas comprise up to 1.3 million square kilometers (500,000 square miles)⁴ and store 56 percent of the total carbon stock in the Brazilian Amazon.⁵ That makes preserving these areas crucial for achieving the Paris Climate Agreement goal of limiting global warming to 1.5 degrees Celsius above pre-industrial levels.

Yet when Indigenous and tribal peoples attempt to defend their land rights they are often threatened, attacked, and even killed. According to data collected by Global Witness between 2002 and 2019, over 2,000 environmental defenders have been murdered defending their rights to their land and the environment.⁶ The Front Line Defenders Global Analysis 2020 Report identified that a further 220 land, environmental or Indigenous and tribal peoples' rights defenders were killed in 2020, and 26% of those killed were defenders of Indigenous and tribal peoples' rights. Front Line Defenders has recorded the killing of 327 Indigenous and tribal peoples' rights defenders since 2017. Many more have faced threats, physical attacks, smear campaigns, and judicial harassment. Impunity for these attacks is the norm.⁷

Increasingly, however, banks, asset managers and other financial firms are publicly recognizing the crucial role of respect for Indigenous and tribal rights. For example, in March 2021 BlackRock clearly stated its expectation that companies “obtain (and maintain) the free, prior, and informed consent of indigenous peoples for business decisions that affect their rights.”⁸ (Free, prior, and informed consent (FPIC) is discussed below.) The World Bank has had a strict FPIC policy in place since 2015.⁹

Foreign securities regulators are also recognizing the importance of disclosures of this nature. For example, the European Commission's Non-Financial Reporting Directive recommends disclosures on human rights due diligence and efforts to prevent human rights abuses, including

³ Food and Agriculture Organization of the United Nations, “Forest Governance by Indigenous and Tribal Peoples,” March 2021, <http://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-Indigenous/en/>.

⁴ The Association of Brazil's Indigenous Peoples, “Brazilian Indigenous Leaders Issue Call for BlackRock to Adopt a Forests and Indigenous Rights Policy,” January 11, 2021, <https://apiboficial.org/2021/01/11/brazilian-Indigenous-leaders-issue-call-for-blackrock-to-adopt-a-forests-and-Indigenous-rights-policy/?lang=en>.

⁵ Walker et. al., “The role of forest conversion, degradation, and disturbance in the carbon dynamics of Amazon Indigenous territories and protected areas,” *Proceedings of the National Academy of Sciences* Feb 2020, 117 (6) 3015-3025; DOI: 10.1073/pnas.1913321117.

⁶ Global Witness, *Defending Tomorrow: The climate crisis and threats against land and environmental defenders*, 29 July 2020, <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>.

⁷ Front Line Defenders, *Global Analysis 2020*, 2021, https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf.

⁸ BlackRock, “Our approach to engagement with companies on their human rights impacts,” March 2021, <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf>.

⁹ The World Bank, “World Bank Board Committee Authorizes Release of Revised Draft Environmental and Social Framework,” 4 August 2015, <https://www.worldbank.org/en/news/press-release/2015/08/04/world-bank-board-committee-authorizes-release-of-revised-draft-environmental-and-social-framework>.

the rights of Indigenous peoples.¹⁰ The Directive is currently under review and these types of standards are expected to become binding.

As this letter demonstrates, the abuse of Indigenous and tribal peoples' rights leads to legal, reputational, operational, and political risks for companies. Not only that, but the respect for these rights is central to climate risk mitigation, an issue the SEC has acknowledged is an important part of its mission.¹¹ And finally, the issue of Indigenous and tribal peoples' land rights and its centrality to environmental and climate protection, overlaps with all three pieces of the ESG landscape, a landscape on which investors themselves are increasingly affirming that they base investment decisions.¹²

Therefore, the SEC should require disclosures about the risks related to existing and prospective abuses of Indigenous and tribal people's land rights and other rights caused both by the issuers' business models and specific projects. To do so would squarely support the SEC's mission to 1) protect investors; 2) ensure fair, orderly, and efficient markets; and 3) facilitate capital formation.

Indigenous & Tribal Peoples and the Environment

As explained by the UN Permanent Forum on Indigenous Issues, “[w]hile Indigenous peoples in all regions of the world live on lands and territories that contain a great wealth of natural resources, they remain some of the most vulnerable people on earth due to centuries of marginalization and discrimination... Indigenous peoples' special relationship with their lands – a fundamental element of their spiritual, religious, cultural and physical survival – is often at odds with these interests.”¹³

For many Indigenous and tribal peoples, land is not merely a possession and a means of production.¹⁴ Their history and identity are tied to their territory through memories, stories and sacred and cultural sites. Environmental and climate impacts not only affect people's means of sustenance; they also affect people's relationship with their territory and their ability to continue to live as Indigenous people and maintain their own identity and customs. Many Indigenous and

¹⁰ European Commission, *Guidelines on non-financial reporting (methodology for reporting non-financial information)*, C/2017/4234, 2017, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705\(01\)#ntr25-C_2017215EN.01000101-E0025](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01)#ntr25-C_2017215EN.01000101-E0025).

¹¹ SEC Acting Chair Allison Lee, “A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC,” 15 March 2021, <https://www.sec.gov/news/speech/lee-climate-change>.

¹² Business Wire, “ESG Investing Reaches Critical Mass; Ongoing Momentum Depends on What's Driving the Demand, Finds Natixis Investment Managers Survey,” 22 April 2021, <https://www.businesswire.com/news/home/20210422005347/en/ESG-Investing-Reaches-Critical-Mass-Ongoing-Momentum-Depends-on-What's-Driving-the-Demand-Finds-Natixis-Investment-Managers-Survey>.

¹³ United Nations Permanent Forum on Indigenous Issues, “Indigenous Peoples And Industrial Corporations,” https://www.un.org/esa/socdev/unpfii/documents/PFII8_FS3.pdf.

¹⁴ J. R. Martínez Cobo, *Study of the problem of discrimination against Indigenous populations*. Volume V. Conclusions, proposals and recommendations. United Nations, 1987.

tribal territories are collectively owned and managed, with complex networks of relationships, usage rights and diverse decision-making structures.

Indigenous peoples vary enormously from one to another. Many Indigenous and tribal peoples, especially forest peoples, do not live as settled agriculturalists on a small plot of land. For some, their farming systems are based on rotational agriculture that is spread across extensive areas. Hunter-gatherer peoples spend much of their time in the forest, at camps and farms, sometimes several days' travel from their communities, where they hunt, fish and gather medicinal plants, building materials, clay for pottery, and countless other resources essential for their way of life. In particularly remote regions, like in the Amazon rainforest and in West Papua and the Andaman Islands, some Indigenous peoples continue to live in voluntary isolation.¹⁵ Any attempt to contact them or operate in their territory, or in areas that would cause impact to their territory, would be a violation of their right to self-determination, could force their displacement, and poses a serious health risk: COVID-19, influenza, other diseases, or even a simple cold could wipe out an entire people.¹⁶

As such, oil drilling, mining, agribusiness, or other types of activities or projects, even in an apparently vacant area far from a community, can hinder survival. Per the UN Permanent Forum on Indigenous Issues, “[t]he impact of such projects includes environmental damage to traditional lands in addition to loss of culture, traditional knowledge and livelihoods.”¹⁷

Indigenous and tribal peoples enjoy a deeply intimate relationship with their environments, have unique ways of relating with both the land and people from other cultures, and live and subsist in ways that are often not understood, appreciated or respected by outside entities. These differences are significant because they have given rise to a body of international legal standards.

International legal standards on Indigenous rights

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations on September 13, 2007, enshrines the rights that “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”¹⁸ At the time of the UN General Assembly adoption of UNDRIP in 2007, 144 member states voted in

¹⁵ Dinah Shelton et.al, *Indigenous Peoples in Voluntary Isolation and Initial Contact*, International Work Group for Indigenous Affairs, 2013, <https://www.iwgia.org/en/resources/publications/305-books/3107-indigenous-peoples-in-voluntary-isolation-and-initial-contact.html>.

¹⁶ For example, over half the Nahua population was wiped out by disease in the months following contact in 1984. See G.H. Sheppard, *Pharmacognosy and the Senses in Two Amazonian Societies*. PhD. Thesis, Medical Anthropology Program, University of California, Berkeley, 1999.

¹⁷ United Nations Permanent Forum on Indigenous Issues, *Op Cit*.

¹⁸ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf, Article 43.

favor; only 4 states—the U.S., Canada, Australia and New Zealand—voted against it, and since then all four have reversed course and now support UNDRIP.¹⁹

While making clear that Indigenous peoples and individuals enjoy the same human rights that others enjoy, like those stated in the UN Charter and the Universal Declaration of Human Rights, the UNDRIP elaborates additional rights necessary for the survival, dignity and well-being of Indigenous peoples. One of the first such rights outlined in the Declaration, in Article 3, is Indigenous peoples' right to self-determination.

This right should be particularly noteworthy for the purposes of corporate activity impacting Indigenous peoples and their rights. The UNDRIP further states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,”²⁰ and have the right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”

In addition to the near-universal adoption of the UNDRIP, the member states of the Organization of American States (every country in the Americas except Cuba) have adopted the American Declaration on the Rights of Indigenous Peoples, which also affirms the right of Indigenous peoples to self-determination.²¹ Of particular relevance to the subject of this letter, the American Declaration recognizes Indigenous peoples as enjoying collective rights to “their lands, territories and resources,”²² the “right to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way,”²³ and “the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”²⁴ The American Declaration also includes specific provisions related to the rights of Indigenous peoples living in voluntary isolation.²⁵

While, like the UNDRIP, the American Declaration is a nonbinding declaration, 25 of the 35 OAS member states have ratified or adhered to the American Convention on Human Rights, which entered into force in 1978. In order to enforce the rights set forth in the Convention, the Convention created the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.²⁶ Though the Convention does not outline specific rights for Indigenous and tribal peoples, it does uphold fundamental rights like the right to property²⁷ and to judicial

¹⁹ United Nations, United Nations Declaration on the Rights of Indigenous Peoples, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

²⁰ UNDRIP, Article 26. Emphasis added.

²¹ Organization of American States, American Declaration on the Rights of Indigenous Peoples, <https://www.oas.org/en/sare/documents/DecAmIND.pdf>. Article III.

²² American Declaration, Article VI.

²³ *Ibid*, Article XIX.

²⁴ *Ibid*, Article XXV. Emphasis added.

²⁵ *Ibid*, Article XXVI.

²⁶ Inter-American Court of Human Rights, “History,” <https://www.corteidh.or.cr/historia.cfm?lang=en>.

²⁷ American Declaration, Article 21.

protection²⁸ which the Court has relied upon in judgements in favor of Indigenous and tribal peoples, as described below.

And finally, while less widely adopted, 23 countries have ratified International Labor Organization Indigenous and Tribal Peoples Convention (No. 169) and have thus taken on binding treaty obligations. ILO Convention No. 169 spells out specific rights for Indigenous and tribal peoples. Among other rights outlined in the Convention, Article 7 states that Indigenous and Tribal peoples have “the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use.”²⁹

In summary, nearly every country in the world has affirmed, some in multiple instances, that Indigenous peoples have certain inalienable rights, including the right to self-determination and to manage, distribute, and effectively control their territory, in accordance with their customary laws and traditional collective land tenure system.

Free, Prior, and Informed Consent

The UNDRIP, the American Declaration, ILO 169, and jurisprudence of bodies like the Inter-American Court of Human Rights have established that if activities related to a project would violate or infringe upon the rights of an Indigenous people, then the project may not go forward without the genuine consent of the Indigenous people concerned, and where inalienable rights would be violated, it may not go forward at all.³⁰

From this has emerged the concept of free, prior and informed consent (FPIC), meaning consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.

Free means that Indigenous people are free from coercion or manipulation to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws.

Prior means that Indigenous people understand and are involved in a decision-making process and have the opportunity to give or withhold their consent during the early planning stages (for example, before auctioning exploration concessions) before a project becomes an economic or political inevitability, and this participation and consent process continues through the design and implementation phases of the project. Informed means that Indigenous people have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and their future, and that allows them

²⁸ *Ibid*, Article 25.

²⁹ International Labor Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

³⁰ Marcus Colchester, *Free, Prior and Informed Consent: Making FPIC work for forests and peoples*, The Forests Dialogue at the School of Forestry and Environmental Studies and Yale University, No. 11, July 2010. See also UNDRIP Article 23. *Note: Most human rights, such as those in the Universal Declaration of Human Rights, are inalienable and thus cannot be given up or diminished by consent.*

to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so.

Informed means that Indigenous people have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and their future, and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so.

If affected peoples choose to withhold their consent or to not enter into negotiations with a company or government, then with very few exceptions, an activity or project cannot proceed without violating their rights to self-determination and to control what happens on their land.

Indigenous Rights and Investor Risk

Because of the intimate relationship so many Indigenous and tribal peoples have with their territories, and the near-universal agreement that such peoples enjoy rights to self-determination and control over their lands, corporate disregard for these rights will inevitably generate conflict with impacted Indigenous and tribal peoples. That conflict will also inevitably generate legal, political, reputational, and operational risks for companies and their investors, and, as we describe below, this corporate lack of respect for Indigenous rights has resulted in financial losses for the companies involved.

Notwithstanding the material financial risks to companies from their violations of the rights of Indigenous peoples, a review of company 10-K and 6K filings demonstrates that companies are not disclosing the risks deriving from their potential, or active, disrespect for Indigenous and tribal rights. The following are some examples of relevant, but nonetheless undisclosed, risks of this nature facing a variety of extractive industry companies around the world. In many of these cases, the companies were eventually forced to report—sometimes to the SEC, sometimes to the media—significant financial losses resulting from their lack of attention to Indigenous and tribal peoples' land rights.

Legal Risks

Legal risks include the possibility of local courts overturning concessions on the basis of land rights violations, lawsuits resulting from human rights abuses committed in connection with projects and activities, and legal cases before international legal institutions like the Inter-American Court of Human Rights. As the examples below demonstrate, the continuation of activities or projects without FPIC can result in major delays due to domestic or international court decisions requiring a corporation to regress to an earlier stage in the development of the project and properly consult the communities affected.

Los Angeles-based oil company Occidental Petroleum (OXY) spent eight years fighting a lawsuit in U.S. courts filed by Achuar communities in Peru for the contamination and health impacts caused by Occidental's operations in Northern Peru, in an oil block known previously as 1-AB, more recently as Block 192 (more on this case below). The case was eventually settled in 2015, with an agreement by Occidental to spend an undisclosed amount on development

programs in Achuar communities.³¹ A review of Occidental's 10-K filings from 2007, when the suit was filed, through its settlement in 2015 shows no mention of the suit nor any mention of Indigenous land rights nor community opposition as a risk factor.³²

Companies can also be indirectly affected by decisions in international courts against governments. In Suriname, for example, the Inter-American Court of Human Rights ordered a set of changes to law and practice in Suriname in response to a petition filed by the Saramaka people in the face of logging and mining concessions granted by the State in their ancestral territory without their consent.³³ In its ruling, the Court affirmed Indigenous peoples' communal property rights, rights which require special measures to guarantee physical and cultural survival under international human rights law,³⁴ and asserted that State action and domestic legislation was "not sufficient to guarantee the Saramaka people the right to effectively control their territory without outside interference."³⁵ The Court ordered Suriname to review and consider modification of existing mining and logging concessions in light of the judgement,³⁶ and update legal provisions to ensure full management and control of the lands and natural resources in the Saramaka's collective territory.³⁷ While the Suriname government has been reluctant to implement the court's ruling, the Saramaka people have pledged to continue their efforts to defend their customary lands.³⁸

Political Risks

Political risks may include referendums that outlaw extraction, such as the binding referendum in Cajamarca, Colombia in 2017 that rejected plans for a \$35 billion AngloGold Ashanti gold mine;³⁹ a local government canceling the contract for an oil block concession after massive local protests; passage of legislation that reforms national laws in regards to customary land tenure rights such as Liberia's recent Land Rights Act;⁴⁰ or change in government leading to increased regulatory and enforcement action to protect land rights.

³¹ *Reuters*, "Peru indigenous groups settle U.S. court claims with Occidental," 5 March 2015, <https://www.reuters.com/article/us-peru-occidental/peru-indigenous-groups-settle-u-s-court-claims-with-occidental-idUSKBN0M12BN20150305>.

³² 10-K review by Amazon Watch on May 28, 2021.

³³ *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment of 28 November 2007.

³⁴ *Ibid.* para 85

³⁵ *Ibid.* para 115.

³⁶ *Ibid.* para 194.

³⁷ *Ibid.* para 194.

³⁸ Richard Price, "'Development' versus human rights: the Saramaka Maroons' fight for the rainforests of Suriname," London School of Economics Latin America and Caribbean Centre, 31 May 2018, <https://blogs.lse.ac.uk/latamcaribbean/2018/05/31/development-versus-human-rights-the-saamaka-maroons-fight-for-the-rainforests-of-suriname/>.

³⁹ Kejal Vajas, "Colombian Town Chooses Farming Life Over a \$35 Billion Gold Mine," *Reuters*, <https://www.reuters.com/article/us-liberia-landrights-lawmaking/liberia-passes-landmark-law-to-secure-ancestral-land-rights-idUSKCN1M02FG>. NOTE: AngloGold Ashanti did make mention of community opposition in its 2017 annual filings to the SEC.

⁴⁰ FAO, FAO Database, Liberia Land Rights Act, <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC182407/#:~:text=Land%20Rights%20Act,used%2C%20transferred%20and%20otherwise%20managed>.

Social unrest and conflict caused by disagreement or disaffection with a project can also produce significant delays to operations in addition to reputational risk. In many cases, governments fail to consult adequately with affected Indigenous peoples prior to leasing a concession or approving a project application. Even if affected peoples are initially in agreement with a project, negative impacts and a failure to involve affected peoples in decision-making and the participation in benefits throughout operations leads to disaffection that can manifest in protests or actions to block or shut down the company's operations at significant cost to the company.

The case of Sime Darby clearly illustrates the political risk of ignoring the land rights of Indigenous and tribal peoples, and the interplay of the political risk with operational and legal risks. (Please note: Sime Darby is not publicly traded in the U.S. but is illustrative of the risks and of companies that may attempt to register in the U.S., or in which U.S. investors may be investing.)

In 2009 Sime Darby, a Malaysian palm oil conglomerate, signed a 63-year concession contract for 220,000 hectares of land in northwestern Liberia, making up fully one-fifth of the company's land bank. The government agreed to allocate land 'free of encumbrances' to Sime Darby, and the company agreed to pay US\$5 per hectare per year for land and to provide employment for more than 30,000 Liberians.⁴¹ The project was initially expected to involve capital expenditures of \$3.1 billion over 15 years.⁴²

However, Sime Darby never sought or secured free, prior, and informed consent from local rights holders. In November 2012, more than 150 representatives of communities affected by Sime Darby's palm oil plantations issued a declaration stating that no consultation had taken place before their land was taken over by Sime Darby and that affected communities did not give their consent to giving away the land to Sime Darby.

At the same time, legislative developments in Liberia strengthened community rights. In the years following Sime Darby's initial investment Liberia passed several laws that heightened its legal risk, including:

- Free, Prior and Informed Consent formalized in the Community Rights Law (2009)
- Land Commission established (2009)
- Customary land recognized as a land category in the Land Rights Policy (2013)
- Land Authority Act established the Land Authority (2016)
- Land Rights Act provides automatic protection of customary land rights (2016)

With new laws in place and continuous unrest among affected communities, Sime Darby was forced to reckon with the fact that full concession development would require engaging in FPIC negotiations with 55 distinct villages. The company's experience indicated that a single process

⁴¹ Friends of the Earth Europe, Fact sheet: Sime Darby and land grabs in Liberia, https://www.foeeurope.org/sites/default/files/news/foee_simedarby_factsheet_010213.pdf/

⁴² Chain Reaction Research, "Sime Darby: Liberian Crossroads," 1 November 2016, <https://chainreactionresearch.com/report/sime-darby-liberian-crossroads/>.

could take up to two years and that some communities may not want to give up their land or may negotiate on the exact amount of land for plantation development.⁴³

Sime Darby ultimately spent more than \$200 million on its Liberian operations and filed a \$26.81 million impairment for the financial year that ended in June 2018.⁴⁴ In 2019, Sime Darby sold its plantation assets for \$1 plus an earn-out payment.⁴⁵ During the three months during which the sale took place the company reported a net loss of \$10.6 million USD, and an overall drop in revenue of 3.5%.⁴⁶

Reputational Risks

Reputational risks may arise from the local, national and/or international negative publicity caused by the exposure of human rights abuse, deforestation, and pollution. Society has the basic expectation that companies should do no harm,⁴⁷ and in a globalized world a toxic dump or an oil spill in a remote corner of the Amazon or the Congo Basin no longer goes unnoticed. Images of environmental destruction can cause lasting damage to a company's image and reputation. Indigenous peoples are organizing, travelling to shareholder meetings, speaking to the press, and filing lawsuits. A company's actions in a remote area of rainforest on the other side of the world can directly affect their reputation and ultimately their relationships with customers, shareholders and financial institutions.

The case of the Standing Rock Sioux Tribe's fight against the siting of the Dakota Access Pipeline (DAPL) on their treaty territory is illustrative of reputational risk and its intersections with political, legal, and operational risks. As early as 2014, the Tribe had expressed its desire for the proposed pipeline to be rerouted away from their treaty territory and in 2016 filed a legal case to that effect, while simultaneously launching media and social media campaigns about how the pipeline violated their most fundamental rights. Despite this, DAPL's parent company, Energy Transfer Partners, continued construction, in the process decimating objects with cultural and spiritual value not just to the Standing Rock Sioux but also to tribes across the Great Plains. In opposition to this disrespect for the Standing Rock Sioux and other tribes, Indigenous peoples and allies from around the world gathered in Standing Rock to physically protest continued pipeline construction. At the protest's biggest moment, 15,000 people were present at Standing Rock as part of the the #NoDAPL movement, with millions more following closely on social

⁴³ *Ibid.*

⁴⁴ *Reuters*, "Sime Darby to sell Liberia plantation to local manufacturer," 5 December 2019, <https://www.reuters.com/article/us-sime-darby-liberia/sime-darby-to-sell-liberia-plantation-to-local-manufacturer-idUSKBN1YA0OP>.

⁴⁵ Fara Aisyah, "Sime Darby Plantation sells Liberia unit for US\$1 plus an earn-out payment," *The Malaysian Reserve*, 17 February 2020, <https://themalaysianreserve.com/2020/01/17/sime-darby-plantation-sells-liberia-unit-for-us1-plus-an-earn-out-payment/>.

⁴⁶ *Reuters*, "Malaysia's Sime Darby Q4 flips to loss on Liberia operations, lower FFB production," 27 February 2020, <https://www.reuters.com/article/sime-darby-plant-results/malaysias-sime-darby-q4-flips-to-loss-on-liberia-operations-lower-ffb-production-idUSL3N2AR22Z>.

⁴⁷ John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (A/HRC/8/5), United Nations Human Rights Council, 2008, para. 9;24.

media and in the press. The company and local security forces' response to the protests led to arrests and further human rights violations.⁴⁸

Not only did the Standing Rock Sioux Tribe's opposition generate reputational, operational, and legal risks to Energy Transfer partners and the DAPL project, but the Tribe successfully activated a shareholder advocacy campaign targeting the financial institutions providing funding for the pipeline's construction. After the Tribe organized socially responsible investors and met with various financial institutions, several European banks pulled their financing commitments from the pipeline. A 2018 analysis by First Peoples Worldwide found that, though initially estimated to cost \$3.8 billion, the pipeline cost more than \$12 billion by the time it was operational in June 2017, losses accumulated from the long delays in construction due to social unrest and legal filings. Furthermore, Energy Transfer Partners' stock price significantly underperformed relative to market expectations during the event study period, and it experienced a long-term decline in value that persisted after the project was completed. In fact, from August 2016 to September 2018—while the S&P 500 increased by nearly 35 percent—ETP's stock declined by almost 20 percent.⁴⁹

In a different case involving reputational and other risks that is still unfolding, a Canadian oil company, ReconAfrica, is currently facing growing scrutiny for its exploratory drilling for oil and gas in the sensitive wilderness in Namibia and Botswana, home to the watershed of the UNESCO World Heritage site, the Okavango Delta, and six community-run wildlife reserves.

Local community members have voiced concerns that ReconAfrica's initial exploration activities have already violated Indigenous rights and human rights. Namibian law requires companies to ensure not just that Indigenous and tribal peoples are consulted, but also that members of the general public are aware of the proposed project, fully understand it, and have a chance to raise concerns. Any such concerns must be addressed in the assessment's final report in order to get government approval. ReconAfrica released the thousand-plus-page draft of the assessment on March 26, 2021, yet numerous people and advocacy organizations who participated, or sought to participate, in the consultation process, said the consultation was extremely limited, with translation unavailable, limits on attendance, ignored questions, and cancelled sessions.⁵⁰ Legal action has also been threatened against journalists covering the project,⁵¹ and the head of a tribal-

⁴⁸ Carla F. Fredericks & Kate R. Finn, "Indigenous Peoples' Human Rights as a Minimum Standard for Corporate Practice," Stanford Social Innovation Review, 18 February 2021, https://ssir.org/articles/entry/indigenous_peoples_human_rights_as_a_minimum_standard_for_corporate_practice.

⁴⁹ First Peoples Worldwide, "Social Cost and Material Loss: The Dakota Access Pipeline," University of Colorado, 2018, <https://www.colorado.edu/program/fpw/DAPL-case-study>.

⁵⁰ See, e.g.: *National Geographic*: "[Oil company exploring in sensitive elephant habitat accused of ignoring community concerns](#)"; *Al Jazeera*: "[Namibia: Indigenous leaders want big oil out of Kavango Basin](#)"; *Oxpeckers*: "[Mission to the Kawe](#)"; *The Namibian*: "[ReconAfrica adviser calls oil-drilling concerns 'stupidity'](#)."

⁵¹ Tuyakula Mushoko and Shinovene Immanuel, *The Namibian*, "Canadian oil driller threatens to sue The Namibian," 16, February 2021, <https://www.namibian.com.na/208788/archive-read/Canadian-oil-driller-threatens-to-sue-The-Namibian>.

run conservation area says he fears for his life for speaking out.⁵² A local farmer has filed a lawsuit against ReconAfrica for failing to consult with local peoples.⁵³

In the wake of this negative publicity storm, on May 5, 2021, an anonymous whistleblower filed a complaint with the SEC, alleging that ReconAfrica misled investors about its plans to explore for oil and gas deposits in the region by promoting revenue projections to investors based on activities for which it has not secured permission or permits. The whistleblower also alleges that the company “fail[ed] to disclose the compensation paid to the publications of third-party materials or their financial interests in the company’s stock.”⁵⁴ *National Geographic* reports that the day following the magazine’s request for comment to ReconAfrica, the company filed new disclosures and amended reports with Canadian regulators.⁵⁵

Operational Risks

Operational risks can stem from community protests and blockades, which may delay or even permanently obstruct a project, or necessary inputs may not be accessible. As research conducted by the Corporate Social Responsibility Initiative at Harvard Kennedy School and the Centre for Social Responsibility in Mining at the University of Queensland demonstrated, “most extractive companies do not currently identify, understand and aggregate the full range of costs of conflict with local communities.”⁵⁶

In the most extreme cases, investors can lose their entire stake when the project is forced to cancel, as in the case of a series of companies—including Occidental Petroleum, Talisman (now Repsol), and GeoPark—that have attempted to explore and drill for oil in Block 64 in Peru.

The oil field known as Block 64 is located in the Peruvian Amazon province of Loreto, in the heart of a region where Achuar, Wampis, and Kichwa indigenous peoples have historically resisted the oil industry. When the government originally created the concession in 1995, local Achuar communities immediately and continuously denounced it, noting “the grave contamination to the environment, water, and resources on which indigenous communities

⁵² Laurel Neme and Jeffrey Barbee, “Oil company exploring in sensitive elephant habitat accused of ignoring community concerns,” 11 May 2021, <https://www.nationalgeographic.com/animals/article/oil-company-reconafrika-accused-of-ignoring-communities-concerns>.

⁵³ Laurel Neme and Jeffrey Barbee, “A whistleblower complaint to the U.S. Securities and Exchange Commission cites ‘egregious’ violations by ReconAfrica and executives,” *National Geographic*, 12 May 2021, <https://www.nationalgeographic.com/animals/article/oil-exploration-company-in-okavango-wilderness-misled-investors-sec-complaint-says>.

⁵⁴ Geoffrey York and Emma Graney, “As Calgary’s ReconAfrica drills for Namibian oil, a global outcry over endangered elephants grows,” *The Globe and Mail*, 30 May 2021, <https://www.theglobeandmail.com/business/article-as-calgarys-reconafrika-drills-for-namibian-oil-a-global-outcry-over/>.

⁵⁵ Neme, Laurel and Jeffrey Barbee, “A whistleblower complaint to the U.S. Securities and Exchange Commission cites “egregious” violations by ReconAfrica and executives,” *Op. Cit.*

⁵⁶ Davis, Rachel and Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector,” CSR initiative at the Harvard Kennedy School, 2014, http://www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf.

depend” in adjacent Blocks 1AB and 8.⁵⁷ After years of Achuar protest, the original concession-holder, ARCO, transferred Block 64 to Occidental Petroleum and two other companies, with Oxy acting as lead operator.⁵⁸ In fact, since Block 64’s creation in 1995, at least nine oil companies have purchased leases, and all have subsequently withdrawn after fierce opposition from local community members.⁵⁹ An Amazon Watch review of SEC company filings during the periods they held Block 64 leases shows limited to no mention of Achuar or Wampis opposition to Block 64 oil development. The closest any company got to describing the opposition of local Indigenous community was Talisman’s March 5, 2012, 6-K filings, which described how a “local federation” (Indigenous community groups in Peru often use the term “federation” in their name, as is the case of the Federation of the Achuar People of Peru-FENAP) had blockaded a river and impeded the transport of Talisman contractors.

The most recent oil company to leave Block 64 after local Indigenous opposition was GeoPark, which announced its departure in July 2020. FENAP (see above) had publicly communicated its opposition to oil drilling in Block 64 and its intention to force GeoPark out ever since GeoPark’s October 2014 announcement of its intention to initiate oil extraction within Block 64.⁶⁰ The Wampis Nation later voiced their opposition, denouncing GeoPark beginning in August of 2018.⁶¹ Indigenous opposition led GeoPark to withdraw its Environmental Impact Study in June 2019, and that same year communities filed a lawsuit to annul Block 64 entirely for lack of consultation. In 2020, the Wampis Nation filed a criminal complaint against GeoPark, given the danger the continued presence of company workers during the COVID-19 pandemic posed to the Wampis peoples.⁶²

GeoPark’s 2020 SEC filings discuss the company’s decision to withdraw from the Block 64 contract, though make no mention of community opposition to the project. The filings do,

⁵⁷ Press conference, Peruvian Congress, Lima, Peru, 16 February 2004. “Ayuda memoria de la situación petrolera en el Lote Petrolero 64 a cargo de la empresa Oxy en tierras de las comunidades Achuar de la Cuenca de Pastaza.” AIDSEP press release, February 12, 2004, Lima, Peru. As recorded in EarthRights International et. al., “*A Legacy of Harm: Occidental Petroleum in Indigenous Territory in the Peruvian Amazon*,” 2007, <https://earthrights.org/wp-content/uploads/publications/A-Legacy-of-Harm.pdf>.

⁵⁸ EarthRights International, *Op. Cit.*

⁵⁹ Mongabay News, “Perú: Denuncian que pasivos ambientales no son remediados en lote petrolero de Loreto”, October 12 (2016), <https://es.mongabay.com/2016/10/contaminacion-petroleo-pueblosindigenas/>; Amazon Watch, “Indigenous Resistance Expels Oil Company GeoPark from Peruvian Amazon,” 17 July 2020, <https://amazonwatch.org/news/2020/0717-indigenous-resistance-expels-oil-company-geopark-from-peruvian-amazon>.

⁶⁰ Amazon Watch, “Peruvian Indigenous Federation Tells Oil Company: Stay Out of Our Territory,” 20 December 2016, <https://amazonwatch.org/news/2016/1220-peruvian-indigenous-federation-tells-oil-company-stay-out-of-our-territory>.

⁶¹ Wampis Nation, “Pueblos Wampís y Achuar exigen anulación del Lote Petrolero 64 a ser operado por GEOPARK,” 15 August 2018, <https://nacionwampis.com/pueblos-wampis-y-achuar-exigen-anulacion-del-lote-petrolero-64-a-ser-operado-por-geopark/>.

⁶² María Cervantes, “Indigenous groups in Peru are suing government over oil, mining plans - and winning,” *Reuters*, 27 June 2019, <https://www.reuters.com/article/us-peru-indigenous/indigenous-groups-in-peru-are-suing-government-over-oil-mining-plans-and-winning-idUSKCN1TS240>.

however, note an impairment loss of \$34 million; 2017 and 2018 filings note construction costs in the block of at least \$36.8 million.⁶³

Conclusion

Companies often cannot rely on the government in the countries where they operate to protect Indigenous rights – even in the U.S. (see case studies, below). As the examples in this letter and others clearly demonstrate, **there are significant legal, operational, reputational and political risks associated with the possible or actual abuse of Indigenous and tribal peoples’ rights, which in turn can impact issuers’ finances. In order for investors to have full knowledge of these risks, the SEC should require all issuers to document, for their direct operations as well as direct and indirect suppliers, the following information:**

- a) how their business model implicates issues of Indigenous and/or tribal peoples’ rights, including through their supply chains, contractors and subcontractors, etc.
- b) the names of any and all Indigenous and/or tribal peoples whose territories (both legally recognized as well as any territories currently under request of legal recognition) in any way overlap with operations or would be directly impacted by them, for example by downstream pollution from oil drilling waste products;
- c) any and all land rights grievances or complaints filed by local communities in the company’s areas of operations (for a comparable example, see Land Conflict Watch⁶⁴ in India or Environmental Justice Atlas⁶⁵), the company’s response, and statements from complainants on how they assess the response;
- d) description of any open processes in which the issuer is seeking to consult with or obtain the consent of Indigenous or tribal peoples that would be impacted by a planned or in-process activity by the issuer, subsidiary, or supplier;
- e) list of any and all consultation processes carried out in the past reporting year, including information on what entity carried out the consultation, and if consent was obtained, how the impacted Indigenous peoples expressed that consent;
- f) list of any and all legal processes in U.S. and/or foreign jurisdictions related to land rights disputes, consultation or consent processes, or other Indigenous rights matters; and
- g) a list of any and all projects undertaken by the issuer or subsidiaries that require the relocation of Indigenous and/or tribal communities, including any and all compensation, monetary or otherwise, provided in exchange for relocation.

These disclosure requirements should apply to any issuer whose operations, or the operations of subsidiaries or suppliers, require the use of land, including the subsoil. Key sectors include agriculture, mining, oil and gas, energy infrastructure, logging, and biofuels, though these are not the only sectors that implicate such issues. For example, a wind farm project in Oaxaca, Mexico was successfully challenged in 2016 by impacted Indigenous communities for failing to include

⁶³ Amazon Watch review of GeoPark’s 6-K and 20-F filings from 2017-2020.

⁶⁴ <https://www.landconflictwatch.org/>.

⁶⁵ <https://ejatlas.org/>.

the community in project design.⁶⁶ As such, these disclosures should apply to any sector whose operations, or those of subsidiaries and suppliers, involve any kind of land use.

Respectfully submitted,

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Action Center on Race and the Economy

Amazon Watch

Businesses for a Livable Climate

CA Businesses for a Livable Climate

Call to Action Colorado

Catholic Network US

CO Businesses for a Livable Climate

Colorado Small Business Coalition

First Peoples Worldwide

Friends of the Earth US

North Range Concerned Citizens

Oil Change International

Public Citizen

Rainforest Action Network

Rapid Shift Network

Revolving Door Project

Spirit of the Sun

Texas Campaign for the Environment

Unite North Metro Denver

Wall of Women

Women's Earth and Climate Action Network (WECAN)

⁶⁶ Leonardo Crippa, "Inter-American Development Bank Confirms Mexico Wind Farm Project Violated Indigenous Peoples Policies," Indian Law Resource Center, September 23, 2016, <https://indianlaw.org/mdb/inter-american-development-bank-confirms-mexico-wind-farm-project-violated-indigenous-peoples>.