

# The (Un)just Use of Transition Minerals: How Efforts to Achieve a Low-Carbon Economy Continue to Violate Indigenous Rights

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## INTRODUCTION

For the last two decades, policy makers from around the globe have foreseen the need to derive and implement solutions to mitigate the effects of climate change. And the impetus for these solutions is confronting the world in real time. Recently the United Nations Secretary General referred to the Intergovernmental Panel on Climate Change 2022 report as an “atlas of human suffering,” as he pointed to the fact that half of the world’s population in cities is vulnerable to climate change effects, and noted the worsening physical and mental health conditions of those communities facing heat stress, water scarcity, and threats to food security.<sup>1</sup> Global decision makers have rightfully deployed initiatives to address both the imminent impacts on people and planet in recognition of the inextricable links between climate change impacts, environmental health, and human well-being.

One of the core solutions that has gained global traction in the private and public sectors has been action towards reducing greenhouse gas emissions and incentivizing activities that contribute to a future no or low-carbon world. Most of these policies and recommendations are tied to the desire to meet the terms set forth in the Paris Climate Agreement to limit global warming to 1.5 degrees Celsius above pre-industrial levels.<sup>2</sup> These initiatives are instrumental in catalyzing action and innovation to implement a new vision for an energy economy; one that is no longer fossil-fuel reliant, but rather an economy that reduces pollution and climate-harmful gasses. In large part, policy incentives in this theme focus on promoting renewable energy and nuclear technologies. Innovations in vehicle technology have also focused attention on rapid production of electric vehicles on a scale that can be taken up rapidly by mainstream consumers in a relatively short timeframe. While these shifts rightly seek to implement a low-carbon future for all, to date these solutions have been largely divorced from the very real, negative impacts that building these technologies will have on local communities via the increase in mineral mining and extraction necessary for their operation.

The demand for lithium, cobalt, copper, zinc, manganese, and nickel (collectively known as “transition minerals”) has increased exponentially.

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<sup>1</sup> Seth Borenstein, *UN climate report: ‘Atlas of human suffering’ worse, bigger*, AP NEWS (Feb. 28, 2022), <https://apnews.com/article/climate-science-europe-United-Nations-weather-8d5e277660f7125ffdab7a833d9856a3>, (referencing IPCC SIXTH ASSESSMENT REPORT, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY), <https://www.ipcc.ch/report/ar6/wg2/> (2022).

<sup>2</sup> UNITED NATIONS CLIMATE CHANGE, *The Paris Agreement*, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Mar. 7, 2022).

The minerals, once refined, are then used in electric vehicle (“EV”) batteries, battery storage, electric grids, wind turbines and wind farms, solar photovoltaic (“PV”) plants, geothermal projects, hydropower, and nuclear power.<sup>3</sup> While mines for these minerals are already operational around the world, the quantity now required to support the energy transition has quickly outpaced current supply. According to the International Energy Agency, “[a] typical electric car requires six times the mineral inputs of a conventional car and an onshore wind plant requires nine times more mineral resources than a gas-fired one.”<sup>4</sup> For these reasons, battery metals—lithium, cobalt, *and* nickel—are a significant concern, as these are needed for electric vehicle production.<sup>5</sup> Thus, some experts estimate that the production of these minerals could increase by nearly five hundred percent by 2050 to meet the rising demand for clean energy technologies.<sup>6</sup>

Critically, transition minerals are largely sourced via extractive mining practices with a known, and largely negative, environmental and social footprint. Mineral mining generally occurs via underground, open pit, or placer mining, and is an energy- and water-intensive process.<sup>7</sup> Further, it is not just the operation of the mine itself that creates long-term environmental impacts, but the process of early exploration during feasibility and seismic studies that can permanently damage the ecosystem, as well as the subsequent abandonment of these mines. Abandoned mines must be carefully monitored to ensure that there is no leakage of hazardous chemicals into the local or downstream environment.<sup>8</sup>

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<sup>3</sup> See generally Sonal Patel, *Energy Transition Facing Potentially Debilitating Critical Mineral Supply Gap*, POWER (Sept. 1, 2021), <https://www.powermag.com/energy-transition-facing-potentially-debilitating-critical-mineral-supply-gap/>; and Darius Snieckus, *World faces ‘looming mismatch’ between energy transition and critical mineral supply*: IEA, RECHARGE, <https://www.rechargenews.com/energy-transition/world-faces-looming-mismatch-between-energy-transition-and-critical-mineral-supply-iea/2-1-1005607> (last visited May 5, 2021).

<sup>4</sup> *IEA report looks at critical minerals in clean energy transitions*, NUCLEAR ENG’G INT’L (May 6, 2021), <https://www.neimagazine.com/news/newsiea-report-looks-at-critical-minerals-in-clean-energy-transitions-8725909>.

<sup>5</sup> See generally ELSA DOMINISH, SVEN TESKE & NICK FLORIN, RESPONSIBLE MINERALS SOURCING FOR RENEWABLE ENERGY (Inst. for Sustainable Futures 2019).

<sup>6</sup> KIRSTEN HUND ET AL., WORLD BANK GRP., MINERALS FOR CLIMATE ACTION: THE MINERAL INTENSITY OF THE CLEAN ENERGY TRANSITION 71 (2020), <https://pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf>.

<sup>7</sup> *Mining & Renewable energy – a greener way forward*, RENEWABLES NOW (Nov. 24, 2021), <https://renewablesnow.com/news/mining-renewable-energy-a-greener-way-forward-721937/>.

<sup>8</sup> See generally DOMINISH, TESKE & FLORIN, *supra* note 5.

These minerals are central to the energy transition and highly concentrated—with many in Chile, Indonesia, China, and Australia.<sup>9</sup> In the United States specifically, ninety-seven percent of nickel, eighty-nine percent of copper, seventy-nine percent of lithium, and sixty-seven percent of cobalt are found within thirty-five miles of Native American reservations.<sup>10</sup> Thus, the rising demand for transition minerals will uniquely and disproportionately impact Indigenous Peoples unless these patterns are brought to light and intentionally shifted.

There is a well-documented link between these extractive industry operations and human rights violations, in particular with regard to local Indigenous communities. These rights are recognized and protected at the international level via multiple mechanisms but most significantly, the United Nations Declaration on the Rights of Indigenous Peoples.<sup>11</sup> Mining is a threat to a number of the rights articulated therein. In a large majority of cases, Indigenous communities were neither consulted about the project nor able to give their free, prior, and informed consent as to the mining operations that were then being implemented on their lands.<sup>12</sup> Many communities experience increased crime and violence against women during the time that temporary workers are moved in to complete mining operations.<sup>13</sup> What follows is a familiar pattern: the Indigenous communities file legal and political objections to extractive operations; they launch market-based campaigns; they deploy leaders to speak to media and to politicians; but the project continues as permitted by the country. Seeing little recourse, Indigenous Peoples mount social opposition through on-the-ground protests and advocacy. These Indigenous human rights defenders are then criminalized, assaulted, or even killed.<sup>14</sup>

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<sup>9</sup> Dionne Searcey, Michael Forsythe & Eric Lipton, *A Power Struggle Over Cobalt Rattles the Clean Energy Revolution*, N. Y. TIMES (Dec. 7, 2021), <https://www.nytimes.com/2021/11/20/world/china-congo-cobalt.html>.

<sup>10</sup> Samuel Block, *Mining Energy-Transition Metals: National Aims, Local Conflicts*, MSCI (June 3, 2021), <https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947>.

<sup>11</sup> G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 14 (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>12</sup> JOSE AYLWIN & JOHANNES ROHR, INT'L WORK GRP. FOR INDIGENOUS AFF., THE UN GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS: PROGRESS ACHIEVED, THE IMPLEMENTATION GAP AND CHALLENGES FOR THE NEXT DECADE 12 (2021), [https://www.ohchr.org/Documents/Issues/Business/UNGPsbHRnext10/inputs/iwgia\\_final.pdf](https://www.ohchr.org/Documents/Issues/Business/UNGPsbHRnext10/inputs/iwgia_final.pdf).

<sup>13</sup> Laura Notess, *For Indigenous Peoples, Losing Land Can Mean Losing Lives*, WORLD RES. INST. (May 31, 2018), <https://www.wri.org/insights/indigenous-peoples-losing-land-can-mean-losing-lives>.

<sup>14</sup> *Id.*

Further, Indigenous relationships with the land are unique in that they encompass not just an economic relationship but, in many cases, a cultural, spiritual, and ancestral dimension. Where groundwater can be cleaned, and eroded soil restored, there are no ways to repair an interrupted ecosystem, one that has been permanently disturbed. This harm will then disrupt the lives of the people whose culture, religion, and way of life are tied to the plants and animals that thrive on those lands. There is no remediation; no way to fix the impacts to Indigenous Peoples when a way of life that revolves around an animal that has left the region is no longer possible. The aftermath of extraction is catastrophic for Indigenous Peoples, and there is no remedy once completed; thus, the solution must occur *before* the drill hits the soil.

For global leaders to fail to consider these issues, in the face of decades of evidence in the fossil-fuel sector, is to implicitly accept serious human rights violations as a mere consequence of economic transition. When the supply chain becomes more and more attenuated—from mine to battery to car—global decision makers can ignore the connection between increased transition minerals mining and threats to Indigenous rights. In short, this mining perpetuates the same problems that pervade the fossil fuel industry but under a new, cleaner, and greener name.

This Article will analyze the tensions of this path to a low-carbon future and the ways in which the practices of the past may perpetuate an unsustainable treatment of both people and planet if these lessons are not integrated into policy discussions and corporate action around the world. This Article will take a global lens, acknowledging that real change requires shifts in leaders from industries and countries to incorporate standards that point to an international framework to protect Indigenous rights. Each action, no matter how localized, has global reach.

Part I will first provide a summary of the rights violations attendant to mining and the ways in which mining uniquely impacts Indigenous Peoples, forecasting the rights violations that could continue if old practices are not addressed. It will also look to new and developing domestic policies that incentivize the transition to a low-carbon economy, illuminating the ways in which these policies can—and should—consider the full impact on Indigenous Peoples. Part II will set forth a framework of global standards and policies that shape corporate respect for Indigenous and human rights. Part III will provide a case study analysis of the ongoing practices of the mining company, Nornickel, that impact the Indigenous Peoples in Russia. And lastly, Part IV will discuss the ways that national governments, corporate leadership, and other stakeholders must meaningfully incorporate international frameworks for Indigenous Peoples' rights into their laws and policies. This section argues that countries, corporations, and other stakeholders must robustly include and enforce *existing*

*international frameworks*, especially the Declaration on the Rights of Indigenous Peoples, into their policies if real change is to occur.

The transition to green energy is multi-faceted and global. There are significant opportunities at each stage—internationally, domestically, at every level of corporate action, and within the supply chain—to prevent continued and increased Indigenous rights violations and to drive change in the practice of extraction. As the world grapples with how to execute an energy transition, now is the moment to robustly mainstream respect for Indigenous Peoples so that the future holds promise for both people *and* planet.

## I. THE INTERSECTION OF INDIGENOUS RIGHTS AND EXTRACTIVE INDUSTRIES

Historically, extractive industries have been exploitative of Indigenous communities in several ways. At a minimum, extractive industries have depleted resources without providing a fair percentage of the economic gains to the community. At worst, extractive industries have proceeded with development over the explicit objection of the Indigenous Peoples most affected. Thus, the community itself bears the economic, environmental, social, and cultural burdens, while the company and its shareholders reap the economic benefits.

As to transition mineral extraction, there have already been 276 human rights abuse allegations from 2010 to 2020, with the leading allegation being community impact—including health impacts, right to peaceful protest, Indigenous rights, impact to livelihood, and insufficient consultation.<sup>15</sup> Because of the projected increase in demand for lithium, cobalt, copper, zinc, manganese, and nickel, it is critical to examine the impacts of extractive industries on Indigenous rights. Section A will look at this history. Section B will look at new domestic policies in the U.S. that will incentivize continued reliance on extractives, as these policies are not only indicative of the increased interest in these minerals but will also drive the global economy. This exploration ties past practice with current policy, demonstrating the present need to develop better systems that do not perpetuate patterns of disenfranchisement and intergenerational harm to Indigenous Peoples.

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<sup>15</sup> *Transition Minerals Tracker*, BUS. & HUM. RTS. RES. CTR., <https://trackers.business-humanrights.org/transition-minerals/> (last visited Jan. 4, 2022) [hereinafter *Transition Minerals Tracker*].

### A. Past Patterns

Extractive industries quite literally remove minerals from the earth by way of oil and gas extraction, dredging, mining, and other activities with visceral impacts to the land.<sup>16</sup> “Extraction” is a term used in the fossil fuel, mining, biomass production, deforestation, and water sectors.<sup>17</sup> In each extractive sector, there is attendant harm,<sup>18</sup> with negative and long-lasting impacts to the lands and peoples. Although this section focuses on mineral extraction, the identified harms are pervasive in most resource extractive industries. This section explores these patterns of extraction and rights violations to demonstrate that this is an industry norm that will perpetuate without intentional changes.

Mineral extraction is an energy-intensive process that often requires a substantial amount of machinery and electricity for refinement.<sup>19</sup> Extraction degrades environments by destroying habitats, creating toxic waste and carbon emissions, and more.<sup>20</sup> Water-intensive processes<sup>21</sup> deplete and pollute waters, often resulting in other impacts to resources like farmland or to wildlife migration routes and habitats.<sup>22</sup> Extraction can destroy soil and lands and increase noise levels, dust, and emissions.<sup>23</sup> All of these harmful impacts of extractive industry, independently and combined, affect livelihoods, biodiversity, and ecosystems. Corporations exploit untouched environments by building roads, ports, and railways in and out of extraction sites and constructing temporary camps to house laborers.<sup>24</sup>

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<sup>16</sup> See generally DOMINISH, TESKE & FLORIN, *supra* note 5.

<sup>17</sup> “Resource Extraction, UNDERSTANDING GLOBAL CHANGE, <https://ugc.berkeley.edu/background-content/resource-extraction/> (last visited Feb. 15, 2022).

<sup>18</sup> See generally *id.*

<sup>19</sup> *Mining & Renewable energy – a greener way forward*, RENEWABLES NOW (Nov. 24, 2021), <https://renewablesnow.com/news/mining-renewable-energy-a-greener-way-forward-721937/>.

<sup>20</sup> Thomas M. Kostigen, *The might of metals in the clean energy transition*, GREENBIZ (Feb. 10, 2021), <https://www.greenbiz.com/article/might-metals-clean-energy-transition>.

<sup>21</sup> BUS. & HUM. RTS. RES. CTR., TRANSITION MINERALS TRACKER: GLOBAL ANALYSIS OF HUMAN RIGHTS POLICIES & PRACTICES 3 (Feb. 2021), [https://media.business-human-rights.org/media/documents/2021\\_Transition\\_Minerals\\_Tracker\\_Monday\\_w\\_numbers\\_updated.pdf](https://media.business-human-rights.org/media/documents/2021_Transition_Minerals_Tracker_Monday_w_numbers_updated.pdf) [hereinafter TRANSITION MINERALS].

<sup>22</sup> Neal R. Haddaway et al., *Evidence of the impacts of metal mining and the effectiveness of mining mitigation measures on social-ecological systems in Arctic and boreal regions: a systematic map protocol*, 8 ENV'T EVIDENCE 3 (Feb. 21, 2019), <https://environmentalevidencejournal.biomedcentral.com/articles/10.1186/s13750-019-0152-8#citeas>.

<sup>23</sup> Adator Stephanie Worlanyo and Li Jianfeng, *Evaluating the environmental and economic impact of mining for post-mine land restoration and land use*, J. OF ENV'T MGMT. 279 (2021).

<sup>24</sup> See generally DOMINISH, TESKE & FLORIN, *supra* note 5.

This new infrastructure compounds the already significant environmental impacts of the mine.

Environmental threats to land, water, and resources caused by extractive industry impact all local communities near the sites, but Indigenous Peoples are disproportionately impacted.<sup>25</sup> Metals mining also subjects nearby lands to other harms, affecting the waters, plants, animals, and other resources upon which many Indigenous Peoples rely for their culture and, sometimes, subsistence ways of life.<sup>26</sup> In the U.S., metals mining is the number one industrial polluter.<sup>27</sup> This pollution impacts more than just the environment. Since the 1940s, uranium mining has been an economic driver on the Navajo Nation.<sup>28</sup> However, the mines have long since been abandoned and the short-term and long-term health consequences are now known, including sustained negative health impacts to its population.<sup>29</sup> Twenty-six percent of Navajo women have tested positive for uranium in their blood.<sup>30</sup> Other studies show that uranium exposure is linked to chronic illness, kidney disease, and hypertension for all members of the population—elders to children.<sup>31</sup> Thus, extraction not only pollutes the lands, but also the bodies of those near those lands.

The experience of the Navajo Nation is indicative of Indigenous Peoples globally. Former United Nations (“UN”) Special Rapporteur on the rights of indigenous peoples Victoria Tauli Corpuz noted that the extractive sectors caused “serious violations of indigenous peoples’ land, self-

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<sup>25</sup> INT’L LAB. ORG., INDIGENOUS PEOPLES AND CLIMATE CHANGE 1 (2017), [https://www.ilo.org/wcmsp5/groups/public/—dgreports/—gender/documents/publication/wcms\\_551189.pdf](https://www.ilo.org/wcmsp5/groups/public/—dgreports/—gender/documents/publication/wcms_551189.pdf); *see also* THE WORLD BANK, SOCIAL DIMENSIONS OF CLIMATE CHANGE: EQUITY AND VULNERABILITY IN A WARMING WORLD 18 (Robin Mearns & Andrew Norton eds., 2010), <https://openknowledge.worldbank.org/bitstream/handle/10986/2689/520970PUB0EPI11C010disclosed0Dec091.pdf?sequence=1&isAllowed=y>.

<sup>26</sup> *Human rights abuse cannot be the price paid for essential energy transition*, BUS. & HUM. RTS. RES. CTR. (Feb. 2, 2021), <https://www.business-humanrights.org/en/from-us/media-centre/human-rights-abuse-cannot-be-the-price-paid-for-essential-energy-transition/>.

<sup>27</sup> *Making Clean Energy Clean, Just & Equitable*, EARTHWORKS, <https://earthworks.org/campaigns/making-clean-energy-clean/> (last visited Jan. 4, 2022).

<sup>28</sup> EARTHWORKS, JUST MINERALS: SAFEGUARDING PROTECTIONS FOR COMMUNITY RIGHTS, SACRED PLACES, AND PUBLIC LANDS FROM THE UNFOUNDED PUSH FOR MINING EXPANSION 9 (June 2021), <https://earthworks.org/publications/just-minerals/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Johnnye Lewis, Joseph Hoover & Debra MacKenzie, *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENV’T HEALTH REPS. 130, 130 (Apr. 26, 2017), <https://link.springer.com/article/10.1007/s40572-017-0140-5>.

governance and cultural rights.”<sup>32</sup> This bears out in several ways for Indigenous Peoples around the world. For Indigenous Peoples who oppose development, they may be forced to relocate, severing their connection to ancestral lands.<sup>33</sup> For those who stay, some—including children—provide labor to the mining companies absent any regulations to protect their economic and social rights.<sup>34</sup> Reports of exploitative labor practices, dangerous working conditions, and other labor abuses towards Indigenous workers demonstrate the inappropriate working conditions with little oversight.<sup>35</sup> Companies quickly move in short-term workers to meet the demand for labor, who then assault and traffic Indigenous women and girls at increased rates.<sup>36</sup> These workers, who reside in temporary housing and have limited contracts, often face no repercussions for crimes against Indigenous women because there are logistical problems with locating them, or jurisdictional issues with prosecuting them.<sup>37</sup>

In the U.S., for example, after the discovery of oil in the Bakken Formation of North Dakota in 2006, the region experienced an increase in workers to the area and more importantly the creation of man camps, which are temporary camps that house oil and gas workers.<sup>38</sup> As a result, the area experienced an exponential increase in the level of violence against Indigenous women. The Bureau of Justice found that violent crime increased by thirty percent in oil producing counties in the Baaken, and that fifty-three percent of these crimes were committed by strangers to the

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<sup>32</sup> AYLWIN & ROHR, *supra* note 12, at 12.

<sup>33</sup> *Data reveals transition minerals ‘mining abuses’*, RENews.BIZ (Feb. 3, 2021), <https://renews.biz/66196/new-data-reveals-transition-minerals-mining-abuses/>.

<sup>34</sup> *Human rights abuse cannot be the price paid for essential energy transition*, BUS. & HUM. RTS. RES. CTR. (Feb. 2, 2021), <https://www.business-humanrights.org/en/from-us/media-centre/human-rights-abuse-cannot-be-the-price-paid-for-essential-energy-transition/>.

<sup>35</sup> *Id.*; see also *10 Human Rights Priorities for the Sector*, BSR, <https://www.bsr.org/en/our-insights/primers/10-human-rights-priorities-for-the-extractives-sector> (last visited Feb. 15, 2022).

<sup>36</sup> Lori Fox, *‘Man camps’ may be a threat to Yukon Indigenous women and girls, say advocates*, YUKON NEWS (July 4, 2019), <https://www.yukon-news.com/news/man-camps-may-be-a-threat-to-yukon-indigenous-women-and-girls-say-advocates/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Violence from Extractive Industry ‘Man Camps’ Endangers Indigenous Women and Children*, FIRST PEOPLES WORLDWIDE (Jan. 29, 2020), <https://www.colorado.edu/program/fpw/2020/01/29/violence-extractive-industry-man-camps-endangers-indigenous-women-and-children>.

victim.<sup>39</sup> There was no elevated crime in other counties during the same time period.<sup>40</sup>

These types of gross criminal and human rights violations occur on Indigenous lands due to the domestic legal regime specific to the affected Indigenous Peoples, which is often inadequate to fully protect Indigenous rights. Many countries do not provide specific protections for Indigenous Peoples within their countries or do not formally recognize Indigenous means of self-governance.<sup>41</sup> Some countries do not have legal recognition of the existence of Indigenous Peoples in their national legislation or constitutions;<sup>42</sup> this erases any legal status that could be used to protect Indigenous rights. While some countries may recognize Indigenous customary laws, “the interaction between systems frequently remains ad hoc and is strained by discriminatory attitudes.”<sup>43</sup> Other countries may not recognize Indigenous land tenure via legal or customary title to the land.<sup>44</sup> Countries then allocate Indigenous lands for development, often to transnational companies, without the consent of the Indigenous Peoples who have ancestral ties to the region.<sup>45</sup> This effectively means that Indigenous Peoples’ perspectives and priorities are often excluded as part of the formal process of government permitting and planning.

In countries that legally recognize Indigenous Peoples and have formal engagement processes, the standards rarely reach international human rights norms. For example, in the U.S., where the leasing of lands or onset of development could impact a local Indigenous Peoples, the domestic standard is that of consultation,<sup>46</sup> which does not necessitate that agreement be reached between the federal government and the tribal government. Projects may thus be permitted even when tribal leaders have expressed firm opposition. Similarly, U.S. permitting is not required to

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<sup>39</sup> Kate Finn, *Recalibrating Risk Assessment for Indigenous Women*, GREEN MONEY J. (Mar. 15, 2020), <https://greenmoney.com/recalibrating-risk-assessment-for-indigenous-women/>.

<sup>40</sup> KIMBERLY MARTIN ET AL., VIOLENT VICTIMIZATION KNOWN TO LAW ENFORCEMENT IN THE BAKKEN OIL-PRODUCING REGION OF MONTANA AND NORTH DAKOTA, 2006-2012 at 1 (RTI Int'l, Feb. 12, 2019), <https://www.ojp.gov/pdffiles1/bjs/grants/252619.pdf>.

<sup>41</sup> Rights of indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, United Nations G.A. Human Rights Council, A/HRC/42/37 at 10 (Aug. 2, 2019).

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.*

<sup>44</sup> Notess, *supra* note 13.

<sup>45</sup> *Id.*

<sup>46</sup> Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021).

account for impacts that occur beyond modern reservation boundaries, leaving tribes with little recourse when a project could disrupt sacred places and ancestral remains that lie outside their modern territories. The patchwork of Indigenous recognition globally creates disproportionate access to recourse and remedy for human rights violations that occur in the course of development. In short, domestic regimes often fail to account for the perspectives and priorities of Indigenous Peoples and are thus an unreliable source of information regarding assessment and mitigation of human rights impacts.

When corporations do engage Indigenous Peoples in the development process, they may offer incentives such as employment opportunities, compensation for lands, social services, and more.<sup>47</sup> In many cases these incentives are in place only for the lifetime of the project (i.e., jobs in the mine), but in other cases these promises are never delivered. While these actions can be instrumental in building a relationship with the local community, they are no substitute for early consent to the operations given the long-term nature of mining impacts. In egregious cases, corporations may outright bribe countries to roll back environmental regulations.<sup>48</sup> The environmental and financial resources lost to the community, however, can never be replaced, nor can the severed connection to Indigenous Peoples' land, culture, and identity be healed.<sup>49</sup> No matter how these transactions between corporations and countries occur, the result is the same: loss of land to Indigenous People without their free, prior, and informed consent ("FPIC").

As noted earlier, when Indigenous Peoples' priorities, perspectives, and right to FPIC are not recognized, local communities often have little recourse other than to mount opposition that develops into significant social conflict. Government and corporate response to this opposition often includes "criminal prosecution and other acts, including direct attacks, killings, threats, intimidation, harassment and other forms of violence."<sup>50</sup> Since 2015, the United Nations has reported that over 1,300 human rights

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<sup>47</sup> Notess, *supra* note 13; *see also* U.N. Dep't of Econ. and Social Affairs, Indigenous Peoples: Environment, <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html> (last visited Jan. 5, 2022).

<sup>48</sup> Carter Squires, Kelsey Landau & Robin J. Lewis, *Uncommon ground: The impact of natural resource corruption on indigenous peoples*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/08/07/uncommon-ground-the-impact-of-natural-resource-corruption-on-indigenous-peoples/>.

<sup>49</sup> Notess, *supra* note 13.

<sup>50</sup> AYLWIN & ROHR, *supra* note 12, at 39.

defenders have been murdered.<sup>51</sup> Most recently, in 2020, Global Witness reported that 227 land and environmental activists had been murdered worldwide, with rural communities, Indigenous Peoples, and ethnic minorities highly at risk.<sup>52</sup> One third of those murdered were Indigenous.<sup>53</sup>

The ties between this social unrest, protest, and extractive industries are clear. Over one-third of all attacks on human rights defenders are related to extractive industries.<sup>54</sup> Colombia, for example, which accounted for twenty-nine percent of the murders of human rights defenders in 2020, is the fifth-biggest exporter of coal globally and has significant extraction in the palm oil, gas, and oil sectors.<sup>55</sup> Failure to obtain community consent is itself a rights violation and leads to community response by way of protest. This, in turn, leads to more rights violations like violence, harassment and threats, incarceration, and loss of life.

The link between numerous rights violations and the increase in transition minerals mining is being documented in real time.<sup>56</sup> The Business and Human Rights Resources Centre reports that there have been over 300 human rights allegations made against 115 companies involved in transition mineral extraction.<sup>57</sup> Most of these violations have occurred in South America and Africa, but human rights violations occur worldwide.<sup>58</sup> Significantly, forty-nine percent of the companies have a human rights policy and yet fifty-one of the companies researched have allegations of human

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<sup>51</sup> Julia van Leuven, *Killings of human rights defenders 'go largely unnoticed by outside world'*, DW FREEDOM (Mar. 3, 2021), <https://www.dw.com/en/killings-of-human-rights-defenders-go-largely-unnoticed-by-outside-world/a-56757472>.

<sup>52</sup> Steven Grattan, *Environmental defenders killed in record numbers in 2020: Report*, AL JAZEERA (Sept. 13, 2021), <https://www.aljazeera.com/news/2021/9/13/environmental-defenders-killed-in-record-numbers-in-2020-report>; see also Kate Hodal, *At least 331 human rights defenders were murdered in 2020, report finds*, GUARDIAN (Feb. 11, 2021), <https://www.theguardian.com/global-development/2021/feb/11/human-rights-defenders-murder-2020-report> (reporting that up to 331 people were murdered).

<sup>53</sup> Grattan, *supra* note 52.

<sup>54</sup> TRANSITION MINERALS, *supra* note 21, at 3.

<sup>55</sup> Grattan, *supra* note 52.

<sup>56</sup> *Transition Minerals Tracker*, *supra* note 15; see also ABIGAIL ANONGOS ET AL., PITFALLS AND PIPELINES: INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES xiii (Andy Whitmore, IWGIA & Tebtebba Foundation 2012), [https://www.iwgia.org/images/publications/0596\\_Pitfalls\\_and\\_Pipelines\\_-\\_Indigenous\\_Peoples\\_and\\_Extractive\\_Industries.pdf](https://www.iwgia.org/images/publications/0596_Pitfalls_and_Pipelines_-_Indigenous_Peoples_and_Extractive_Industries.pdf).

<sup>57</sup> *Human rights abuse cannot be the price paid for essential energy transition*, BUS. & HUM. RTS. RES. CTR. (Feb. 2, 2021), <https://www.business-humanrights.org/en/from-us/media-centre/human-rights-abuse-cannot-be-the-price-paid-for-essential-energy-transition/>.

<sup>58</sup> *Transition Minerals Tracker*, *supra* note 15.

rights abuse against them.<sup>59</sup> These violations are tied to the impacts previously discussed. They include community impacts (health, right to protest, Indigenous rights, land rights); environmental impacts (water pollution and access, air and soil pollution, insufficient impact assessments); security and conflict zones; the COVID-19 pandemic (public and worker health issues); governance and transparency (corruption, tax avoidance); and impacts on workers (health and safety, death, freedom of association).<sup>60</sup>

The impacts of human rights violations are significant and long-lasting, affecting individuals, communities, and future generations. An Indigenous human rights defender carries with them the trauma of repeated violent arrests and targeted harassment by corporations that are opening their lands to extraction. An Indigenous woman who is trafficked away from her lands and subjected to sexual violence loses her freedom, her ties to her culture, lands, and community. To those Indigenous Peoples who rely on wild rice as a central resource for their community and a critical tenet of their religion, the desiccation of this rice impacts more than their subsistence, but their access to culture. For Indigenous Peoples, these lands, waters, and resources are more than a commodity—they are central to their identity, culture, religion, and way of life. And once these harms to the lands occur, once Indigenous human rights are violated, the impacts cannot be undone.

### *B. Present Economic Drivers*

Countries around the world are now increasing the demand for transition mineral extraction as they pass low-carbon and net zero policies to address the threat of climate change. This section examines some of the United States' new green policies driving the shift to green energy, as the United States' approach is indicative of other countries' efforts to quickly integrate green energy. Each policy at a domestic level will, in turn, drive the global economy.

The Biden administration has undertaken several efforts to respond to the climate crisis, including rejoining the Paris Climate Agreement and setting forth an ambitious green energy policy platform. This approach—at the global, federal, and state level—aims to reduce the United States'

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<sup>59</sup> TRANSITION MINERALS, *supra* note 21, at 1 (this summary report only represents research for 103 companies and 276 allegations.).

<sup>60</sup> *Id.* at 2.

“planet-warming pollution 50 percent from 2005 levels by 2030.”<sup>61</sup> The administration has stated its goal of advancing a “just transition,”<sup>62</sup> referring to an ethical and sustainable shift from a fossil-fuel economy. This can mean, for instance, creating job security for workers in the fossil-fuel industry, which President Biden began to address with his Executive Order on Tackling the Climate Crisis at Home and Abroad.<sup>63</sup> However, as will be discussed further in Section IV, there is far more nuance to understanding how a “just transition” impacts Indigenous Peoples beyond job creation and the closure of fossil fuel operations on or near tribal lands.

In Congress, there are parallel efforts to enact federal legislation that supports President Biden’s climate agenda. Two specific bills, the Build Back Better Act and the Infrastructure Bill, allocate over \$500 billion to climate change efforts by way of clean energy tax cuts to incentivize a transition away from fossil fuels.<sup>64</sup> In November 2021, President Biden signed the \$1 trillion Infrastructure Bill, but, as of publishing, the Build Back Better Bill has since been stalled in the Senate.<sup>65</sup> Although both bills encompass far more than green energy, they could be key drivers of a national shift in this administration’s efforts to incentivize low-carbon energy alternatives.

President Biden has also introduced other initiatives via Executive Orders, such as his plan to make the federal government carbon neutral by increasing electric vehicle (“EV”) use and powering federal facilities with

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<sup>61</sup> Coral Davenport, *Ahead of a U.N. climate summit, Democrats push to secure policies Biden can promote*, N. Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/us/politics/biden-un-climate-summit-democrats.html>.

<sup>62</sup> Press Release, White House Briefing Room, FACT SHEET: President Biden’s Leaders Summit on Climate (Apr. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/>.

<sup>63</sup> Memorandum, White House, Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

<sup>64</sup> Christina Wilkie, *House passes \$1.75 trillion Biden plan that funds universal pre-K, Medicare expansion and renewable energy credits*, CNBC (Nov. 19, 2021, 9:46 AM), <https://www.cnbc.com/2021/11/19/biden-build-back-better-bill-house-passes-social-safety-net-and-climate-plan.html>; see also Denise Chow & Evan Bush, *Billions and trillions: Climate efforts set for big boost if Build Back Better Bill passes*, NBC NEWS (Nov. 28, 2021, 5:33 AM), <https://www.nbcnews.com/science/environment/climate-change-efforts-set-big-boost-build-back-better-bill-passes-rcna6471>.

<sup>65</sup> Press Release, President Joseph R. Biden Jr., Statement from President Biden on the Build Back Better Act (Dec. 16, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/16/statement-from-the-president-on-the-build-back-better-act/>.

clean energy.<sup>66</sup> At present, only forty percent of federal energy comes from renewables, but President Biden wants to commit to fully renewable energy sources by 2035.<sup>67</sup> Even more significant is the fact that EVs currently make up only 1.5% of government vehicles, but President Biden's goal is 100% EV use.<sup>68</sup>

The Biden administration has formally recognized the significant mineral sourcing necessary to meet its goals.<sup>69</sup> An early Executive Order prioritized domestic mines to shore up U.S. supply chains and support American workers.<sup>70</sup> The Executive Order also states that as a second step the United States will look to ally countries—Canada, Australia, and Brazil—or sourcing, with plans to process these minerals domestically.<sup>71</sup> A federal review of the U.S. supply chain called for an interagency analysis of gaps in statutes and regulations that need to be addressed to uphold sustainability standards; it also requested that agencies identify opportunities to reduce time, cost, and risk without compromising on environmental and consultation benchmarks.<sup>72</sup> This first supply chain review does not acknowledge how mineral production uniquely impacts local communities and Indigenous Peoples.<sup>73</sup>

The strategies to shift to green energy set forth by the United States are driving demand for transition minerals globally and are indicative of a shift in global consciousness to incentivize the production of green energy

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<sup>66</sup> Lisa Friedman, *Biden Orders Federal Vehicles and Buildings to Use Renewable Energy by 2050*, N. Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/08/climate/biden-government-carbon-neutral.html>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> EARTHWORKS, *supra* note 28, at 5 (2021).

<sup>70</sup> *Id.* at 14; *see also* Blaine Miller-McFeeley, *To Create a Clean Energy Future, Mining Reform Must be Front and Center*, EARTHJUSTICE (June 28, 2021), <https://earthjustice.org/from-the-experts/2021-june/to-create-a-clean-energy-future-mining-reform-must-be-front-and-center>.

<sup>71</sup> Ernest Scheyder & Trevor Hunnicutt, *EXCLUSIVE – Biden looks abroad for electric vehicle metals, in blow to U.S. miners*, NASDAQ (May 25, 2021), <https://www.nasdaq.com/articles/exclusive-biden-looks-abroad-for-electric-vehicle-metals-in-blow-to-u.s.-miners-2021-05-25>; *see also* Press Release, The White House, FACT SHEET: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities (June 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/>.

<sup>72</sup> *See* THE WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH (June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

<sup>73</sup> *See generally id.*

in response to climate change. Countries that put out seventy-three percent of emissions have committed to net zero emissions by 2050.<sup>74</sup> Countries around the world, including the United States, are rapidly implementing domestic laws and policies that reduce emissions and incentivize green energy sources.

However, the long-term impacts of the new domestic policies will extend long past the political incentives for renewable energy. A holistic view of how a just transition impacts Indigenous Peoples is necessary. For example, the United States' current policies incorporate Indigenous issues by way of creating jobs,<sup>75</sup> but do not reflect a critical understanding of how Indigenous peoples are impacted by the global transition to sustainable energy. It is crucial to consider how fossil fuel reliance will impact the Native economies built on that reliance, but it is also important to understand that transition minerals will be extracted from Indigenous lands and threaten Indigenous rights in the same ways that mining always has. Opportunities for economic development are important, but the past reliance on a fossil fuel economy has shown that commitment to FPIC is necessary; long-term impacts cannot be forgotten in favor of short-term benefits. Without a hard look at how to remedy and prevent further rights violations against Indigenous Peoples, this continued behavior is guaranteed.

## II. GLOBAL STANDARDS TO SHAPE THE SUPPLY CHAIN

A complete shift in how transition minerals are mined requires a global look at the extractive industry, as each domestic endeavor to source transition minerals converges with the actions of the corporations mining and refining these minerals. This section will look at how the international framework that has developed over the past decades impacts countries and corporations.

The United Nations (“UN”) has developed many instruments that, when understood together, comprise the global framework on business and

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<sup>74</sup> United Nations Secretary General, *Secretary-General's remarks at 2021 Petersberg Climate Dialogue* (May 6, 2021), <https://www.un.org/sg/en/content/sg/statement/2021-05-06/secretary-generals-remarks-2021-petersberg-climate-dialogue-delivered>.

<sup>75</sup> See e.g., Press Release, The White House, FACT SHEET: Biden Administration Outlines Key Resources to Invest in Coal and Power Plant Community Economic Revitalization (Apr. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-biden-administration-outlines-key-resources-to-invest-in-coal-and-power-plant-community-economic-revitalization/>.

human rights. The significance of these standards varies and depends on whether they are binding upon those who have signed, endorsed, or adopted them. Because of uneven domestic commitments to human rights, these international norms comprise an important rights-based framework that sets forth clear standards by which countries and corporations should measure their own commitments. Human rights treaty bodies, like the Committee on the Elimination of Racial Discrimination (“CERD”),<sup>76</sup> have articulated the connection between human rights, country obligation, and corporate behavior. In 2011, CERD articulated that the United States and Canada had an affirmative duty to prevent global human rights abuses by corporations licensed in their countries.<sup>77</sup>

A leading benchmark for both companies and corporations is the United Nations Guiding Principles on Business and Human Rights (“UNGPs”), which sets forth thirty-one principles or business standards to “protect, respect, and remedy” human rights abuses committed in business operations.<sup>78</sup> Prior to the implementation of the UNGPs, international law did not have any common standard regarding the relationship between business and human rights. Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs articulate an agreed-upon standard and have introduced a level of accountability to protect the rights of affected stakeholders, such as local communities, vulnerable workers, and consumers.<sup>79</sup>

The UNGPs do not impose new obligations on countries but do clarify that countries have a *duty* to protect against human rights abuses by corporations.<sup>80</sup> Countries should “[e]nforce laws that are aimed at, or have

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<sup>76</sup> U.N. Human Rights Office of the High Comm’r, *The Core International Human Rights Instruments and their monitoring bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Jan. 5, 2022).

<sup>77</sup> Andrea Carmen, *Corporations and the Rights of Indigenous Peoples: Advancing the Struggle for Protection, Recognition, and Redress at the Third UN Forum on Business and Human Rights*, CULTURAL SURVIVAL (Mar. 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/corporations-and-rights-indigenous-peoples-advancing>.

<sup>78</sup> *See generally* GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>79</sup> *See generally id.*; *see also* DEBEVOISE & PLIMPTON, UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AT 10: THE IMPACT OF THE UNGPs ON COURTS AND JUDICIAL MECHANISMS 17 (2021), <https://www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/debevoise.pdf>.

<sup>80</sup> U.N. Human Rights Office of the High Comm’r, *Mandatory human rights due diligence* (mHRDD),

the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps . . . .”<sup>81</sup> Countries must ensure the availability of effective remedies. The UNGPs also establish the corporate *responsibility* to protect human rights, with guidelines for continuous human rights due diligence.<sup>82</sup> A corporation’s human rights due diligence must include identifying and assessing actual and potential human rights impacts of the corporation; taking appropriate action following these impact assessments to integrate this knowledge into corporate practice; tracking the effectiveness of their actions to ensure these impacts are properly addressed; and communicating and external reporting with affected stakeholders.<sup>83</sup>

The UNGPs require corporations to enforce international instruments such as the Organization for Economic Co-operation and Development Guidelines and numerous human rights treaties like the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the UN Declaration on Human Rights, and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.<sup>84</sup> These human rights instruments comprise the international human rights framework that articulates the civil, political, economic, social, and cultural rights that countries are required to uphold through domestic laws and regulation of private industry.

The standard by which Indigenous rights should be upheld is measured by adherence to the UN Declaration on the Rights of Indigenous Peoples (“the Declaration”), which sets forth the “minimum standards for the survival, dignity, and well-being” of Indigenous peoples.<sup>85</sup> The Declaration articulates Indigenous Peoples’ inherent individual and collective rights to land, resources, culture, and self-determination.<sup>86</sup> It was adopted

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<https://www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx> (last visited Jan. 5, 2022).

<sup>81</sup> DEBEVOISE & PLIMPTON, *supra* note 79, at 6 (citing to the UNGPs commentary to principle 3).

<sup>82</sup> Olivier De Schutter, *Towards a social economy: The next generation of the Guiding Principles on Business and Human Rights*, BUS. & HUM. RIGHTS RES. CTR. (June 14, 2021), <https://www.business-humanrights.org/en/blog/towards-a-social-economy-the-next-generation-of-the-guiding-principles-on-business-and-human-rights/>.

<sup>83</sup> *Human Rights Due Diligence & Impact Assessment*, BUS. & HUM. RIGHTS RES. CTR., <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/human-rights-due-diligence-impact-assessment/> (last visited Jan. 5, 2022).

<sup>84</sup> DEBEVOISE & PLIMPTON, *supra* note 79, at 6.

<sup>85</sup> UNDRIP, *supra* note 11.

<sup>86</sup> *Id.*

by the UN General Assembly in 2007, and, although it is non-binding,<sup>87</sup> the Declaration's articulation of these rights has provided a proactive framework to further Indigenous rights. Many of the rights enumerated in the Declaration flow from the right to self-determination. This refers to the right of Indigenous Peoples to determine their own political status and freely pursue their economic, social, and cultural development.<sup>88</sup> Indigenous Peoples' self-determined control and use of their lands is thus protected by the Declaration, which states that they "have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" as well as to "own, use, develop and control" these lands and resources.<sup>89</sup>

Another critical right that is articulated in Article 32 of the Declaration is that of FPIC.<sup>90</sup> FPIC requires that countries "consult and cooperate in good faith" with Indigenous Peoples and their self-identified representatives to seek FPIC "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."<sup>91</sup> Indigenous Peoples as a collective have a right to give or withhold their consent voluntarily and without coercion when they are affected by a project or activity.<sup>92</sup> They must be provided with the information needed to make this decision well in advance of the activity occurring. This right allows for a robust exercise of the collective right to self-determination, as it enshrines Indigenous communities' ability to determine priorities for their peoples, lands, and resources.

The Declaration may be given binding force within domestic laws, and there are varying degrees to which countries have integrated the Declaration. Bolivia, for example, has codified parts of the Declaration in domestic law *and* in its Constitution.<sup>93</sup> Despite this, the Bolivian Constitution does not establish a right to FPIC, but rather relies on the concept of prior consultation.<sup>94</sup> This approach is similar to the one taken by the United States, which has made no such efforts to codify or integrate the Declaration in part or in whole and remains committed to consultation-level

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at art. 26.

<sup>90</sup> *Id.* at art. 32.

<sup>91</sup> *Id.* at art. 19.

<sup>92</sup> *Id.*

<sup>93</sup> Corinne Tansowny, *An UNDRIP in the Bucket? The Potential Impact of BC's Adoption of the United Nations Declaration on the Rights of Indigenous Peoples*, MCGILL J. SUSTAINABLE DEV. L. (Feb. 7, 2020), <https://www.mcgill.ca/mjsdl/article/undrip-bucket-potential-impact-bcs-adoption-united-nations-declaration-rights-indigenous-people>.

<sup>94</sup> *Id.*

engagement with Indigenous Peoples.<sup>95</sup> The United States has diluted FPIC to consultation, which is now essentially a box-checking procedure instead of a right that must be upheld and assessed iteratively. Thus, Indigenous Peoples in countries like the United States or Bolivia that do not adopt the right of FPIC as set forth by the Declaration do not have the ability to give or withhold consent for projects that affect them. This lack of power has consistently led to significant rights violations.

Corporations must also uphold the Declaration's rights. While the UNGPs do not explicitly reference the Declaration, they do provide for the application of other human rights standards: "enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them."<sup>96</sup> As with the United States' inadequate integration of the Declaration, many corporations do not robustly integrate the Declaration, or integrate diluted versions, such as consultation instead of FPIC.

The global framework articulates a uniform standard under which countries and corporations must seek to uphold human rights, and under which their past practices and current policies can be evaluated. In contrast, even when domestic laws recognize human rights or Indigenous rights, domestic enforcement may not be evenly applied. Thus, the international human rights framework is the most protective of Indigenous rights and is the standard to be applied across the value chain.

### III. RUSSIAN INDIGENOUS PEOPLES AND NORNICHEL – A DEVELOPING CASE STUDY

A case study of the Indigenous Peoples in Russia depicts a developing issue that encapsulates the tension between extractive industry, domestic law and policy, and human rights. At present, Indigenous Peoples in the North, Siberia, and Far East of the Russian Federation are engaged in dialogue with Norlisk Nickel ("Nornickel"), a Russian state-owned corporation with a significant transnational market. Nornickel is the world's largest producer of palladium and nickel and owner of some of the largest

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<sup>95</sup> Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021).

<sup>96</sup> DEBEVOISE & PLIMPTON, *supra* note 79, at 7 (citing to UNGPs commentary to principle 12).

factories for copper and cobalt.<sup>97</sup> It is positioned to be a critical supplier of the minerals most necessary for the clean energy transition. This section summarizes the impact of Nornickel's operations along the international supply chain and the Indigenous engagement that has followed.

Nornickel has a significant presence in the Taimyr peninsula region of Russia, home to members of the Nenets, Nganasans, Dolgans, and Enets communities. These communities have stated that the company's extractive operations violate numerous human rights, including their rights to a clean environment, to resources like hunting and fishing, to culture, and to their traditional way of life.<sup>98</sup> In May 2021, Nornickel's power plant collapsed and caused a spill of over 21,000 tons of diesel fuel into Lake Payasina with an estimated \$1.4 billion of environmental damage—the second largest spill in the Arctic region.<sup>99</sup> This spill poisoned the waters and the fish on which the local communities and Indigenous Peoples rely.<sup>100</sup> Additionally, Nornickel's production sites around the city of Norilsk have discharged contaminated wastewater, causing heavy metal pollution in waters and soils. The plants have also caused regional air pollution at levels that are double the annual sulfur dioxide emissions of the United States.<sup>101</sup>

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<sup>97</sup> *Indigenous Peoples of Russia's Far North March Against Nornickel*, RADIO FREE EUROPE (Aug. 12, 2020, 3:13 PM), <https://www.rferl.org/a/indigenous-peoples-of-russia-s-far-north-march-against-nornickel/30780197.html>; see also Eric Belfi, *Indigenous Activists Demand Tesla Stop Buying Nickel from Nornickel in Russia*, CULTURAL SURVIVAL (Aug. 11, 2020), <https://www.culturalsurvival.org/news/indigenous-activists-demand-tesla-stop-buying-nickel-nornickel-russia>; Thomas Nilsen, *Indigenous peoples call on Nornickel's global partners to demand environmental action*, BARENTS OBSERVER (Mar. 11, 2021), <https://thebarentsobserver.com/en/indigenous-peoples/2021/03/russian-indigenous-people-lose-out-electromobility-industry-hunts-metals>.

<sup>98</sup> See *First Letter to BASF on Nornickel*, iRUSSIA (Nov. 11, 2020), <https://indigenous-russia.com/archives/16076> [hereinafter *First Letter*]; *Second Letter to BASF on Nornickel. "BASF must take action to address NorNickel's violations,"* iRUSSIA (Mar. 2, 2021) [hereinafter *Second Letter*], <https://indigenous-russia.com/archives/16070>; Nilsen, *supra* note 97; *Tesla urged to respect indigenous rights in supply chain by not sourcing from Norilsk Nickel*, BUS. AND HUM. RTS. RES. CTR. (Sept. 22, 2020), <https://www.business-humanrights.org/en/latest-news/tesla-and-norilsk-nickel-urged-to-respect-indigenous-rights-by-ngos/>.

<sup>99</sup> *Nornickel Draws Up Permafrost Monitoring Plan After Russian Arctic Fuel Spill*, RADIO FREE EUROPE (July 2, 2020), <https://www.rferl.org/a/nornickel-draws-up-permafrost-monitoring-plan-after-russian-arctic-fuel-spill/30702583.html>.

<sup>100</sup> Maddie Stone, *Russian Indigenous communities are begging Tesla not to get its nickel from this major polluter*, GRIST (Sept. 21, 2020), <https://grist.org/justice/russian-indigenous-communities-are-begging-tesla-not-to-get-its-nickel-from-this-major-polluter/>.

<sup>101</sup> *Id.*

In response to the spill, Nornickel launched an “ethnological expert review” and created a department for Indigenous engagement.<sup>102</sup> In September 2021, Nornickel produced a support package for some of the affected Indigenous Peoples in Russia totaling \$25.42 million over five years, including initiatives to support programs like housing, health, tourism, and education.<sup>103</sup> Pavel Sulyandziga, President of Batani Foundation, has stated that Nornickel only engages with those who depict a “beautiful picture” of Nornickel’s actions, and that “[t]hose who ask inconvenient questions, about various violations and problems are simply excluded.”<sup>104</sup> Thus, Nornickel’s engagement with select Indigenous communities with conflicting views about how to engage with the corporation has left others excluded from the dialogue completely. This engagement is an incomplete picture of Indigenous perspectives in the region.

In Russia, Indigenous participation within the country is incredibly weak and their rights are “mostly theoretical.”<sup>105</sup> Indigenous Peoples must be on the national register for their rights to hunting and fishing to be recognized.<sup>106</sup> Many Indigenous Peoples in Russia are not legally recognized as such by the country, which means there is little opportunity for legal protection of their rights or access to remedy when those rights are violated.<sup>107</sup> Therefore, these communities do not have access to a domestic legal framework that protects their collective rights that stem from the relationship with their traditional lands, waters, and resources.

Because of this limited domestic recourse, the impacted communities have turned to engagement with Nornickel and others. Indigenous-led organizations have executed a strategy of corporate engagement by way of letter writing and public appeals in order to shift corporate behavior.<sup>108</sup> These targeted efforts ask corporations to uphold international human

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<sup>102</sup> *Id.*

<sup>103</sup> Matthew Hall, *Nornickel signs support package with indigenous peoples*, MINING TECH. (Sept. 28, 2020), <https://www.mining-technology.com/features/nornickel-indigenous-support/>.

<sup>104</sup> Nilsen, *supra* note 97.

<sup>105</sup> AYLWIN & ROHR, *supra* note 12, at 11.

<sup>106</sup> *Id.*

<sup>107</sup> See Tatiana Britskaya, *They are no longer counted as indigenous peoples*, BARENTS OBSERVER (Oct. 7, 2020), <https://thebarentsobserver.com/en/indigenous-peoples/2020/10/they-are-no-longer-counted-indigenous-people> (stating the restrictions of the new law that exclude a number of Indigenous Peoples who do not meet the legal criteria for registration).

<sup>108</sup> See generally *First Letter*, *supra* note 98; and *Second Letter*, *supra* note 98; and Nilsen, *supra* note 97; and *Indigenous peoples call on Nornickel’s global partners to demand environmental action*, BUS. AND HUM. RTS. RES. CTR., *supra* note 98.

rights frameworks.<sup>109</sup> In articulating the experience of Indigenous Peoples where Nornickel operates, there is a clear link to Nornickel's operation and the continued risks under the environmental, social, and governance metrics.

In a letter to Nornickel, Indigenous-led organizations requested that Nornickel's policies be informed by the Declaration on the Rights of Indigenous Peoples and that Nornickel obtain FPIC before undertaking a project that affects Indigenous lands or resources.<sup>110</sup> Tesla Motors, a company likely to source nickel from Nornickel given the increased level of current demand on suppliers already at market, was also identified as a relevant actor. At present, Tesla's Company Code of Conduct states that its suppliers minimize their negative impacts on the environment to achieve long-term sustainability.<sup>111</sup> Indigenous-led organizations then asked Tesla to not source from Nornickel until the company implements their requests.<sup>112</sup> They requested that Tesla consider the Indigenous Peoples along its supply chain.<sup>113</sup>

Also along the supply chain is the Germany-based company Badische Anilin und Soda Fabrik ("BASF"), which has signed an agreement with Nornickel to supply nickel for a battery materials plan that will produce tremendous EV output in the European market.<sup>114</sup> BASF is the world's largest chemical company and a leading producer of materials for EV batteries.<sup>115</sup> The Indigenous-led organizations called on the company to adhere to its own Group Position and Supplier Code of Conduct ("Code").<sup>116</sup> This Code states that BASF expects its "suppliers to fully comply with applicable laws and to adhere to internationally recognized environmental, social and corporate governance standards."<sup>117</sup> The letter cites Nornickel's

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<sup>109</sup> In the engagement with BASF, the signatory organizations and Indigenous Peoples cite to Article 28 of the Declaration. *First Letter*, *supra* note 98. They also state: "Moving forward, a true commitment to Free, Prior, and Informed Consent — as required by the United Nations Declaration on the Rights of Indigenous Peoples by the Initiative for Responsible Mining Assurance (IRMA) Standard for Responsible Mining, and the International Council of Metals and Mining — requires good-faith engagement and consultation with Indigenous Peoples, including all Indigenous communities and groups on lands affected by Nornickel, not just with a single, government-controlled Russian Indigenous organization." *Second letter*, *supra* note 98.

<sup>110</sup> *First Letter*, *supra* note 98.

<sup>111</sup> Belfi, *supra* note 97.

<sup>112</sup> RADIO FREE EUROPE, *supra* note 97.

<sup>113</sup> *Id.*

<sup>114</sup> Stone, *supra* note 100.

<sup>115</sup> Nilsen, *supra* note 97.

<sup>116</sup> *Id.*; see also *First Letter*, *supra* note 98.

<sup>117</sup> *First Letter*, *supra* note 98.

violation of Article 28 of the Declaration, the right to traditional way of life.<sup>118</sup>

Lastly, the organizations have directly engaged international credit and banking institutions that finance Nornickel, like the Union Bank of Switzerland and Credit Suisse. They have asked that the international financial institutions (“IFIs”) prohibit sourcing from Nornickel due to these known rights violations.<sup>119</sup>

These Indigenous communities in Russia have led this engagement with transnational corporations and IFIs to demand change at various points along the supply chain. For a company like Nornickel, which is a leading transition mineral producer, a shift in practice and policy would have tangible and beneficial effects globally. Were each corporation along the supply chain to require that all others they do business with also adhere to these standards, then there would be no choice but for corporations like Nornickel to operate in compliance with more stringent policies. This direct engagement incorporates these companies’ own policies and commitments as well at the international business and human rights framework to which they are bound. This case study demonstrates not only an Indigenous-led targeted approach to affect corporate change in real time, but also the ways in which strategies to target human rights violations must be global in nature.

#### IV. NEXT STEPS TO A GREEN FUTURE

Mining in the name of producing new technology presents the same problems from the extractive industry in a new form. Because of these recognizable problems, there are known solutions that can be implemented at every level of the supply chain. An examination of each of these inflection points can allow for new solution sets that drive true economic and social sustainability. This Section presents rights-based recommendations for decision makers and stakeholders that will proactively center Indigenous Peoples at all levels of the new energy economy.

##### *A. Strengthening Domestic Policies and Adherence to the Declaration*

The domestic push for clean energy has now created an urgent need for individual countries to understand, prevent, and remedy impacts to Indigenous Peoples who are affected in the mineral supply chain. This

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<sup>118</sup> *Id.*

<sup>119</sup> Nilsen, *supra* note 97.

Section details shifts that these countries can take in parallel to their climate commitments to actualize respect for Indigenous Peoples.

First, at the highest level, countries must not only introduce domestic law and policy that codifies international human rights norms like the Declaration, but they must also introduce environmental policies that reflect a deeper understanding of the spectrum of impacts inherent in the energy transition. A change to domestic frameworks at large would be more effective than piecemeal changes within individual regulations or agencies and would promote Indigenous rights at every level.

For example, in Canada, the passage of Bill C-15, or the UNDRIP Act, codifies the principles of the Declaration, including FPIC.<sup>120</sup> The Bill specifically states that Indigenous Peoples have the right to “determine and develop priorities and strategies for the development or use of their lands or territories and other resources” and for their FPIC to be obtained in resource development.<sup>121</sup> This is unique in that Indigenous Peoples are given the opportunity to refuse consent for a project impacting them. Canada’s Truth and Reconciliation Commission has also called on corporations to adopt the Declaration,<sup>122</sup> reflecting the nationwide efforts to integrate these rights in all aspects of development. This can, in turn, create a domestic regulatory framework that upholds Indigenous rights.

Second, domestic policies should prioritize—and require—that corporations affirmatively integrate the following standards into their internal policies to be eligible for government contracts or green energy incentives. This could include voluntarily adopting a responsible sourcing policy as one step to identify, assess, and mitigate human rights violations along the supply chain. To best actuate their responsibility to respect human rights, these policies should explicitly reference the Declaration and the UNGPs. For instance, the United States or other countries increasing their purchase of transition minerals could institute domestic regulations that require that corporations have responsible sourcing policies. For critical players in the battery supply chain, like U.S. companies Ford, Dow Chemical, Dupont, and Lithium Nevada, responsible sourcing policies could prevent acquiring minerals from regions like the Taymyr Peninsula where Nor Nickel operates.

Globally, there are efforts to integrate regulations to drive better corporate behavior. For example, the European Union Parliament’s draft

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<sup>120</sup> Sara King-Abadi, *UNDRIP legislation could spell more certainty for resource development*, CIM MAGAZINE (Feb. 25, 2021), <https://magazine.cim.org/en/news/2021/undrip-legislation-could-spell-more-certainty-for-resource-development-en>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Directive on Corporate Due Diligence and Corporate Accountability seeks to impose a mandatory obligation on corporations along the value chain.<sup>123</sup> There is also a proposed battery regulation that aims to promote sustainability and proposes due diligence along the battery supply chain, from production and sale, to use, collection, and recycling.<sup>124</sup> Regulations such as this should clearly require that due diligence be performed for both direct and indirect suppliers. This analysis should not be retroactive, conducted only when there is knowledge of potential abuses, but rather should be an ongoing process to identify issues preemptively. Risk assessment tools like this can align regulations with international human rights norms to protect impacted communities, including Indigenous Peoples, at all stages of the supply chain.

Third, economic agreements like treaties or contracts present opportunities for countries to require compliance with the Declaration and the UNGPs. For example, the United States is pushing to increase EV use, which is driving up demand for auto companies. Eleven auto companies have already signed onto the Biden administration's EV goals.<sup>125</sup> Many of these auto companies already have policies that commit to upholding the UNGPs, but none have fully integrated the rights of Indigenous Peoples.<sup>126</sup> Countries like the United States should not award government contracts to auto companies that do not have an explicit commitment to the Declaration and the UNGPs in their internal policies. Countries can also set similar standards for imported minerals and negotiate those standards in trade agreements.

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<sup>123</sup> Ionel Zamfir, *Corporate Due Diligence and Corporate Accountability*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence> (last visited Jan. 6, 2022).

<sup>124</sup> *The EU Battery Regulation Due Diligence Rules: Ensuring That Human Rights and the Environment Are Not Casualties of the Energy Transition*, AMNESTY INTERNATIONAL AND TRANSPORT & ENVIRONMENT (2021), [https://www.transportenvironment.org/wp-content/uploads/2021/10/2021\\_10\\_Report\\_EU-Battery-Regulation-Due-Diligence.pdf](https://www.transportenvironment.org/wp-content/uploads/2021/10/2021_10_Report_EU-Battery-Regulation-Due-Diligence.pdf).

<sup>125</sup> FACT SHEET: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks," THE WHITE HOUSE (Aug. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/05/fact-sheet-president-biden-announces-steps-to-drive-american-leadership-forward-on-clean-cars-and-trucks/>; see also *Automakers Have No Unique Policy to Consider Indigenous Peoples' Rights Despite U.S. Push to Accelerate Electric Vehicle Problem*, FIRST PEOPLES WORLDWIDE (Dec. 22, 2021), <https://www.colorado.edu/program/fpw/2021/12/22/automakers-have-no-unique-policy-consider-indigenous-peoples-rights-despite-us-push>.

<sup>126</sup> *Automakers Have No Unique Policy to Consider Indigenous Peoples' Rights Despite U.S. Push to Accelerate Electric Vehicle Problem*, FIRST PEOPLES WORLDWIDE (DEC. 22, 2021), <https://www.colorado.edu/program/fpw/2021/12/22/automakers-have-no-unique-policy-consider-indigenous-peoples-rights-despite-us-push>.

There is a global impact with each domestic law and policy. Each of these domestically oriented approaches can serve to impact Indigenous Peoples in the country and can also influence corporations who operate or are domiciled in its borders.

*B. Pushing for Robust Adherence to the Declaration in International Norms*

International business and human rights norms must robustly integrate *all* human rights frameworks and must explicitly include the rights enumerated in the Declaration. This would create a global framework that sets forth a uniform standard for rights-based engagement with Indigenous Peoples.

First, business frameworks that require international human rights be integrated, such as the UNGPs, should cite to the Declaration in its entirety. Indigenous Peoples should not be relegated to an insufficient reference to “other human rights,” but rather should be explicitly referenced. These international frameworks will then provide clarity to transnational corporations that should robustly integrate Indigenous Peoples’ rights in all levels of operations.

Instead of applying parts of the Declaration piecemeal, transnational corporations should fully integrate the rights as they are articulated therein. Until recently, corporations have interpreted that the UNGPs require for them to obtain FPIC when Indigenous Peoples are adversely impacted. This is not the true spirit of the Declaration. The Declaration requires that Indigenous Peoples be integrated with *any* impact—not specifically adverse impacts. This small change creates a gap whereby corporations can internally assess what an adverse impact is and, from there, decide whether the Indigenous Peoples ought to be involved in their due diligence process. The definition of “impact” is best assessed by those most acutely affected and the corporation should instead set forth a process that involves meaningful consultation with Indigenous Peoples in all stages of development. This process, which must include FPIC, should appropriately acknowledge Indigenous Peoples as rights holders instead of merely stakeholders.

Second, the UN has undertaken a new “open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” to elaborate “an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises which would impose legal obligations on non-state actors which will be legally

binding on signatories but lack enforcement.”<sup>127</sup> An instrument such as this would create a binding way to regulate corporations at a global level. It could require strict adherence to the international human rights treaties and the Declaration. Likely, this would still be limited to corporations that subject themselves to the jurisdiction of the treaty, but ratifying this treaty would be an important step to attempt to fill the gap between the human rights framework and corporate behavior regarding complex transnational markets. Each piece of international law and guidance that comprises business and human rights norms should independently uphold the Declaration and explicitly require that corporations and countries uphold Indigenous rights.

### *C. Corporate Compliance with International Frameworks*

Corporate compliance with the pillars of the UNGPs, as well as with international human rights law, can be encouraged through internal policies that uphold these frameworks as well. It is clear that corporations are considering their role on the path to net zero;<sup>128</sup> this path must not ignore the energy transition’s negative impacts on Indigenous Peoples.

First, corporations should explicitly incorporate the Declaration and the UNGPs in a way that applies throughout their entire operations and along their value chain. An explicit reference to the Declaration and its articles, such as the right to FPIC, creates a stronger commitment from the corporation. Indigenous rights should not be siloed in a sustainability or human rights policy, but rather integrated operationally at all levels of practice. A human rights or Indigenous Peoples policy that applies to all operations and includes the necessary specificity as to procedure must be followed by the corporation, as well as a supplier or subcontractor. The corporation can evaluate suppliers through rigorous human rights due diligence and maintain continual monitoring processes throughout a project’s lifecycle. As the supply chain becomes more attenuated, corporations lose sight of the origin of these minerals and have a limited purview of how their work intersects with Indigenous Peoples. And when this occurs,

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<sup>127</sup> See OEIGWG Chairman’s Third Revised Draft: Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>; see also *Binding Treaty*, BUS. AND HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/big-issues/binding-treaty/> (last visited Jan. 5, 2022).

<sup>128</sup> *Larry Fink’s 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last visited Mar. 8, 2022).

Indigenous Peoples and their rights become invisible. Supply chain attenuation is no excuse to neglect human rights issues.<sup>129</sup>

Second, corporate policies must strive to engage with Indigenous Peoples at the earliest stage to create a foundation of cooperation and mutual understanding. Corporations should integrate rights-based processes in order to avoid the material risks caused by violating human rights. Corporate failure to respect human rights opens a business to numerous kinds of risk, creates liability for violating these rights domestically, and increases the threat of social risk caused by community disagreement. This will undoubtedly translate to lower risk because there are more chances to converse and reach an agreement.

An integrated approach to dialogue with Indigenous Peoples not only adheres to international law but also supports the corporation's bottom line. The social license to operate reflects the importance of the relationship between corporations and communities; social risk is risk to the business that is associated with impacts to local communities, which is often heightened without meaningful engagement with Indigenous Peoples.<sup>130</sup> Without achieving social license to operate, a project can face lengthy and expensive delays and uncertain outcomes.<sup>131</sup> Further, continuing with a project without social license can lead to operational, compliance, legal, financial, and reputational risks.<sup>132</sup> Social impact assessments and human rights due diligence are ways for a corporation or company to identify and evaluate social impacts, and therefore social risks, to the project.<sup>133</sup> Full-scope due diligence not only identifies the risks to a project and its potential success, but it also highlights the potential harms to Indigenous Peoples, lands, and resources. Properly implemented, due diligence should also consider whether FPIC has been obtained in conformity with the Declaration.

FPIC is not a process to greenlight a project, but rather a right that must be upheld in business practice. Failure to obtain FPIC creates

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<sup>129</sup> Juliane Kippenberg, *Corporate Human Rights Responsibility – Why a strong Supply Chain Act is Important*, HUM. RTS. WATCH (Apr. 22, 2021), <https://www.hrw.org/news/2021/04/22/corporate-human-rights-responsibility-why-strong-supply-chain-act-important-0>.

<sup>130</sup> Rae Lindsay & Anna Kirkpatrick, *Human Rights and International Mining Disputes*, GLOB. ARB. REV. (June 18, 2019), <https://globalarbitrationreview.com/guide/the-guide-mining-arbitrations/1st-edition/article/human-rights-and-international-mining-disputes>.

<sup>131</sup> REBECCA ADAMSON & NICK PELOSI, FIRST PEOPLES WORLDWIDE, INDIGENOUS RIGHTS RISK REPORT 8 (2014), [https://www.colorado.edu/program/fpw/sites/default/files/attached-files/indigenous\\_rights\\_risk\\_report.pdf](https://www.colorado.edu/program/fpw/sites/default/files/attached-files/indigenous_rights_risk_report.pdf).

<sup>132</sup> Lindsay & Kirkpatrick, *supra* note 130.

<sup>133</sup> *Id.*

material risk for corporations. In 2016, Energy Transfer Partners (“ETP”) built the Dakota Access Pipeline (“DAPL”), which ran through many ancestral Indigenous lands in the United States.<sup>134</sup> The company faced significant social risks because it had not obtained the FPIC of the affected tribe.<sup>135</sup> These risks cost ETP over \$7.5 million according to a study conducted by First Peoples Worldwide.<sup>136</sup> On the ground, these social risks took the form of the continued and sustained protests by tribes—like the Standing Rock Sioux—impacted by the pipeline, and who did not consent to its placement crossing sacred sites, burial grounds, and critical water sources.<sup>137</sup> State and private law enforcement reacted to these protests with arrests, violence, rubber bullets, unleashed dogs, pepper spray, and sound cannons.<sup>138</sup> #NODAPL became a global movement of Indigenous resistance to pipelines, and the social risk attendant to it translated to reputational and financial risk to ETP.<sup>139</sup> DAPL demonstrates that failure to obtain FPIC carries not only financial losses, but also significant harm to Indigenous Peoples. One study reported that temporary shutdown of operations, which can occur with community discord, can cost the company \$20 million a week.<sup>140</sup> The sustained protest and objection by the Standing Rock Sioux Tribe demonstrated the material costs of social risk. Early dialogue with Indigenous Peoples and a rights-based engagement can prevent the discord and risk attendant to developments that do not adhere to these practices.

Fourth, corporations must immediately assess their internal policies and address the gaps between policy and practice. This process can include explicit adoption of Indigenous Peoples policies instead of reliance on broad human rights language that does not specifically address the unique impacts to Indigenous Peoples. Industry leader Rio Tinto’s internal policies, which referred to FPIC, were inadequate in practice and demonstrated the catastrophic consequences of this gap. In 2020, Rio Tinto blasted a cultural heritage site at Jukkan Gorge in Australia on the land of the Puutu Kuntj Kurrama and Pinikura peoples.<sup>141</sup> Rio Tinto had made commitments to working with local communities and upholding the

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<sup>134</sup> See generally CARLA F. FREDERICKS ET AL., FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE (2018), [https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social\\_cost\\_and\\_material\\_loss\\_0.pdf](https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf).

<sup>135</sup> See generally *id.*

<sup>136</sup> *Id.* at 4.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> Lindsay & Kirkpatrick, *supra* note 130.

<sup>141</sup> AYLWIN & ROHR, *supra* note 12, at 18.

UNGPs as well as their own Communities and Social Performance Standard.<sup>142</sup> The company also had a heritage management plan in place.<sup>143</sup> Despite Rio Tinto's claims that it completed FPIC, the company only presented the local community with four options of development.<sup>144</sup> Rio Tinto failed to follow its own policies and the commitments it made, permanently harming a sacred and culturally significant site. This gap between policy and practice requires significant internal monitoring and reflection to make sure that the text of policies results in real action.

And finally, industry-specific organizations can develop standards that impact corporate action and drive a more fulsome uptake of the Declaration within corporate policy. Member-based organizations can require adoption of certain standards. While not a substitute for domestic and international law, such industry standards can influence corporate behavior and can be used to incentivize corporations to uphold human rights. The Initiative for Responsible Mining Assurance ("IRMA"), for example, sets forth an advanced standard<sup>145</sup> that incorporates labor, environmental and human rights, Indigenous rights, and land reclamation after mining is complete.<sup>146</sup> The IRMA states that FPIC can only occur if the Indigenous Peoples agree to enter into the FPIC process, which is a welcome departure from mere consultation and more aligned with the spirit of the Declaration.<sup>147</sup> The IRMA offers certification for corporations that adhere to these standards and encourages transparency so that all levels of performance are evaluated, rather than a pass-fail assessment.<sup>148</sup> This third-party audit and evaluation process holds promise, as it does not rely on industries to self-monitor and report but rather provides a mechanism of increased accountability. Industry standards such as these are forward-looking models of corporate behavior with regards to human rights. Internal and external accountability to uphold the international business and human rights framework can support corporations as they align their policies and practices to better integrate Indigenous rights at all levels of their operation.

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<sup>142</sup> Anirudha Nagar, *The Juukan Gorge Incident: Key Lessons on Free, Prior and Informed Consent*, 6 BUS. & HUM. RTS. J. 377, 377 (2021).

<sup>143</sup> *Juukan Gorge*, RIO TINTO, <https://www.riotinto.com/en/news/inquiry-into-juukan-gorge> (last visited Jan. 5, 2022).

<sup>144</sup> Glynn Cochrane, *Rio Tinto's Juukan shame exposes ESG box-ticking*, FIN. REV. (Dec. 13, 2020), <https://www.afr.com/policy/economy/rio-tinto-s-juukan-shame-exposes-esg-box-ticking-20201210-p56mfo>.

<sup>145</sup> AYLWIN & ROHR, *supra* note 12, at 22.

<sup>146</sup> Paul Moore, *IRMA releases Standard for Responsible Mining global certification program*, INT'L MINING (June 28, 2018), <https://im-mining.com/2018/06/28/irma-releases-standard-responsible-mining-global-certification-program/>.

<sup>147</sup> AYLWIN & ROHR, *supra* note 12, at 22.

<sup>148</sup> Moore, *supra* note 146.

#### *D. Activating Accountability to Rights-Based Standards*

Finally, stakeholders—such as financiers and investors that have an interest in a corporation and its operations—have increasing opportunity and power to hold corporations accountable to these standards. Indigenous Peoples, too, have an interest in these actions but from the unique position of rights bearers. As rights bearers, Indigenous Peoples possess rights, such as those enumerated in the Declaration, that are directly impacted by corporate actions. However, it should not be the responsibility of an affected community, such as Indigenous Peoples, to urge better corporate behavior. Market pressure to adopt human rights policies and adhere to them is growing, and stakeholders can harness this moment to seek accountability on a global stage.

One type of stakeholder, corporate shareholders, can create pressure for corporations to uphold human rights and business frameworks. Shareholders own shares in companies and thus have vested interest in corporate action because they hold a stake in ownership. Shareholder action can drive corporate responses to insufficient processes, such as an inadequate approach to FPIC. As owners of companies, investors have the opportunity—and the obligation—to act when corporations are not following their own policies or commitments. This might look like incorporating Indigenous rights into proxy voting strategies,<sup>149</sup> advocating for improved disclosures on human rights issues, and mandating due diligence that includes meaningful consultation and FPIC. Shareholder pressure may also serve as a catalyst for action in certain circumstances. When Rio Tinto decimated Juukan Gorge, investors acted quickly to create a remedy by pressuring the CEO and two executives to step down and stripping them of bonuses.<sup>150</sup> The blast in Australia was a stark example that internal policies were not being followed and that there were problems with governance. Investors acted swiftly and held leadership accountable.

Second, IFIs, insurers, and other financiers that have stakeholder interest in corporate behavior must also adopt human rights due diligence that requires adherence to human rights standards at all stages of a deal and along a supply chain. Financiers could require explicit integration of their own relevant policies—such as Environmental, Social, and

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<sup>149</sup> Diane-Laure Arjalies & Matthew Lynch, *Indigenous Peoples & Responsible Investing: Q&A with Mark Sevestre and Katherine Wheatley*, IVEY (Nov. 1, 2021), <https://www.ivey.uwo.ca/sustainability/news/2021/10/indigenous-peoples-responsible-investing-qa-with-mark-sevestre-and-katherine-wheatley/>.

<sup>150</sup> Ben Butler & Calla Wahlquist, *Rio Tinto investors welcome chair's decision to step down after Juukan Gorge scandal*, GUARDIAN (Mar. 2, 2021), <https://www.theguardian.com/business/2021/mar/03/rio-tinto-investors-welcome-chairs-decision-to-step-down-after-juukan-gorge-scandal>.

Governance policies and human rights policies or FPIC policies—into client contracts. Refusing financing unless certain standards, such as the UNGPs, are met is a practical tool. Combined with other advocacy strategies, engaging IFIs and insurers can shift corporate development priorities.

For example, in 2017, a rider to the U.S. Tax Act removed permanent protections for the Coastal Plain of the Arctic National Wildlife Refuge, opening it up to potential oil and gas development.<sup>151</sup> This land, the *Izhik Gwats'an Gwandaii Goodlit*, or the Sacred Place Where Life Begins, is sacred to the Gwich'in and critical to their identity, culture, and subsistence livelihood.<sup>152</sup> The Gwich'in are opposed to this rider, and potential seismic testing and oil and gas development constitute a major threat to their rights and violate their self-determination.<sup>153</sup> A coalition of environmental groups and Indigenous Peoples executed a multi-prong strategy that targeted international forums and treaty bodies like the CERD, filed domestic litigation, and engaged in corporate advocacy.<sup>154</sup> One by one, banks refused to fund development in these sacred lands. Twenty-nine major financial institutions, including all major U.S. banks, have made this commitment, thus signaling their refusal to be associated with this sort of project.<sup>155</sup> Now, a growing list of international insurers have made the same commitment.<sup>156</sup> Elevating the potential human rights violations and business risk made this proposed development unfavorable for banks and insurers even though the United States had opened the lands up for leasing. Financial institutions' due diligence on what their funds are supporting can powerfully shift what projects are able to proceed, and thus their engagement in these rights-centered dialogues and rights-based mechanisms is critical.

Finally, Indigenous Peoples are central to shifting the negative practices of extractive industry, and stakeholders must seek their engagement

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<sup>151</sup> *Indigenous-led Corporate Advocacy and How Financial Institutions Can Avoid "Another Standing Rock"*, FIRST PEOPLES WORLDWIDE (Apr. 22, 2020), <https://www.colorado.edu/program/fpw/2020/04/22/indigenous-led-corporate-advocacy-and-how-financial-institutions-can-avoid-another>.

<sup>152</sup> *Id.*

<sup>153</sup> Jess Cherofsky, *The Privatization of Arctic National Wildlife Refuge is a Violation of Gwich'in Rights to Free, Prior and Informed Consent*, CULTURAL SURVIVAL (Jan. 21, 2021), <https://www.culturalsurvival.org/news/privatization-arctic-national-wildlife-refuge-violation-gwichin-rights-free-prior-and-informed>.

<sup>154</sup> FIRST PEOPLES WORLDWIDE, *supra* note 151.

<sup>155</sup> *Corporate Commitment to Protect the Arctic Refuge*, GWICH'IN STEERING COMM. (Feb. 7, 2021), <https://ourarcticrefuge.org/corporate-commitment-to-protect-the-arctic-refuge/>.

<sup>156</sup> *GSC Scorecard Rates Insurance Companies on Arctic Refuge Policies*, GWICH'IN STEERING COMM. (Aug. 10, 2021), <https://ourarcticrefuge.org/gsc-scorecard-rates-insurance-companies-on-arctic-refuge-policies/>.

not only to prevent human rights violations but also to drive positive and mutually beneficial energy development. Indigenous Peoples have the right to decide what occurs on their lands and what impacts their people. Upholding this foundational right should be at the heart of this work. Until recently, companies wishing to engage with Indigenous communities did so by creating or applying their own engagement policies to such communities. This approach is to be understood as a gap-filling measure meant to drive some level of engagement. Recently there has been a resurgence of Indigenous forms of governance and leadership on the world stage. For decades, Indigenous communities and allied organizations have sought to build Indigenous capacity around education, language, human rights, and governance. These efforts are gaining visible traction, as evidenced by the 2021 holding of the Supreme Court of Belize, which upheld the Maya community of Jalacete's right to FPIC.<sup>157</sup>

Similarly, many Indigenous communities worldwide are putting forward autonomous FPIC protocols to drive outside engagement with their communities, ensuring that all of their rights are accounted for as part of a robust FPIC process. Thus, the next step for companies to take is not only to implement an Indigenous Peoples policy that applies throughout operations and supply chain but also to ensure that the first measure of due diligence is to ask and honor any community's protocols as to FPIC. The rights of Indigenous Peoples to determine their political, social, economic, and cultural priorities are best safeguarded when FPIC is properly operationalized as both a process and a right. Taking this step would truly ensure that people and planet can walk together, equitably, into the next energy economy.

The Tribal Implementation Toolkit<sup>158</sup> offers real examples of tribally determined initiatives to integrate the Declaration into Indigenous jurisprudence. In the United States, the Muscogee (Creek) Nation has translated the Declaration into Mvskoke language and integrated its own culture by way of expanding on the language in the Declaration and developing Mvskoke-centered meanings.<sup>159</sup> It has also adopted the Muscogee Declaration as tribal law.<sup>160</sup> Other U.S.-based tribal nations, such as

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<sup>157</sup> *Maya Peoples Win Lawsuit against Belize Government for Violating Land Rights*, CULTURAL SURVIVAL (June 23, 2021), <https://www.culturalsurvival.org/news/maya-peoples-win-lawsuit-against-belize-government-violating-land-rights>.

<sup>158</sup> *See The Implementation Project – Realizing the United Declaration on the Rights of Indigenous Peoples*, NATIVE AM. RTS. FUND & UNIV. OF COLO. SCHOOL OF LAW, <https://un-declaration.narf.org/> (last visited Jan. 5, 2022).

<sup>159</sup> KRISTEN CARPENTER ET AL., TRIBAL IMPLEMENTATION TOOLKIT, <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>.

<sup>160</sup> *Id.*

the Seminole Nation of Oklahoma, have passed resolutions that endorse the Declaration.<sup>161</sup>

On the opportunity side, Indigenous Peoples' expression of self-determination has led to beneficial partnerships and sustainable development and portrays a powerful representation of economic, Indigenous, and energy sovereignty. The former UN Special Rapporteur on Indigenous Issues, James Anaya, has reported that there are increasing examples of Indigenous Peoples who initiate and control resource extraction—such as by operating their own oil and gas companies or managing electric power assets.<sup>162</sup> There are numerous examples of this Indigenous-forward partnership in the United States. In New Mexico, Picuris Pueblo partnered with an electric company to develop solar power that would not only drive revenue for the tribe but also provide complete daytime energy and reduce other energy bills.<sup>163</sup> Benefiting both the tribe and Kit Carson Electric Cooperative, this partnership met its goals and is now expanding to other initiatives.<sup>164</sup> In California, the Blue Lake Rancheria's solar energy grid was so successful that it is able to serve as an "island," operating apart from the energy grid.<sup>165</sup> When California faced blackouts in 2020 and 2021, Blue Lake Rancheria was able to continue providing energy to its residents.<sup>166</sup> Genuine partnership, a seat at any table, and a sharing of benefits for Indigenous Peoples represents dealmaking that is truly respectful of Indigenous self-determination.

## CONCLUSION

As the world shifts to respond to the changing landscape and commits to a low-carbon future that relies on renewable energy and other green resources, a true just transition that integrates Indigenous Peoples rights must be threaded throughout. A low-carbon future is simply not possible

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<sup>161</sup> *Id.*

<sup>162</sup> James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, UNITED NATIONS GENERAL ASSEMBLY HUMAN RIGHTS COUNCIL at 5 (July 1, 2013), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\\_en.pdf](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf).

<sup>163</sup> Natalie Peart, *How Indigenous communities build energy sovereignty*, GREEN BIZ (Sept. 6, 2021), <https://www.greenbiz.com/article/how-indigenous-communities-build-energy-sovereignty>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

without transition minerals.<sup>167</sup> But there *must* be a focus on the people located where these transition minerals are mined, instead of simply prioritizing output.

To implement the type of rapid uptake of policies that ensures a just transition alongside the push for a green economy, the norms of the Declaration must be integrated at all levels of the supply chain, from sourcing to due diligence, to contracting, to disclosures, permitting, and more. The focus for all stakeholders must be on implementing the norms of the Declaration, including FPIC. This includes countries, corporations, financial institutions, suppliers, and subcontractors. Relying on one stakeholder or one actor in the supply chain is a flawed approach and creates gaps in policy and implementation. Rio Tinto was known for having a strong Indigenous Peoples policy, and yet still failed to protect Indigenous Peoples' rights when Rio Tinto blasted Jukkan Gorge and decimated the sacred site. The International Finance Corporation's own performance standard on Indigenous Peoples has failed to identify dozens, possibly hundreds, of investments that did not properly implement Indigenous rights.<sup>168</sup> There is no singular actor that can unilaterally align true respect for Indigenous rights with business practices. Better standards—and accountability—are needed throughout the supply chain.

While Indigenous Peoples and their allies have been trying to influence these actors for years, the global community now must come alongside Indigenous advocacy and hold corporations accountable. With the surge in transition mineral extraction, there is no better time for countries, corporations, and stakeholders to implement rights-based tools and policies that better respect Indigenous Peoples in the current global effort to bring about a just transition.

The urgency created by the global response to climate change provides an opportunity to integrate the Declaration into legal, policy, and corporate frameworks in real time. The UN Global Consultation on the Right to Development accurately and presciently stated: “the most destructive and prevalent abuses of Indigenous rights are the direct consequences of development strategies that fail to respect [Indigenous

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<sup>167</sup> KIRSTEN HUND ET AL., WORLD BANK GRP., MINERALS FOR CLIMATE ACTION: THE MINERAL INTENSITY OF THE CLEAN ENERGY TRANSITION 7 (2020), <https://pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf>.

<sup>168</sup> KENYL SALCITO, “MISSING PEOPLES” AT IFC (NoMoGaia 2021), <http://nomogaia.org/report-missing-peoples-ifc-projects-that-did-not-apply-ps7/>.

Peoples'] fundamental right of self-determination.”<sup>169</sup> As climate change has revealed and perpetuated existing inequity in global communities, the steps to address climate change should not further entrench these disparities and further erode Indigenous sovereignty. Although the future of the planet is unknown, it is certain that Indigenous futures will continue to be harmed without a hard look at the past.

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<sup>169</sup> Andrea Carmen, *Corporations and the Rights of Indigenous Peoples: Advancing the Struggle for Protection, Recognition, and Redress at the Third UN Forum on Business and Human Rights*, CULTURAL SURVIVAL (Mar. 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/corporations-and-rights-indigenous-peoples-advancing>.