



COMMENTS ON THE DISCUSSION PAPER FROM ENBRIDGE:  
“INDIGENOUS RIGHTS AND RELATIONSHIPS IN NORTH AMERICAN  
ENERGY INFRASTRUCTURE”<sup>1</sup>

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<sup>1</sup> The [First Peoples Investment Engagement Program](#) (FPIEP) is the successor to First Peoples Worldwide. The FPIEP is based at the University of Colorado and works from a foundation of indigenous values to achieve a sustainable future for all. FPIEP facilitates collaboration between indigenous peoples and investors to address the unique social and environmental impacts of corporate development in indigenous communities, while also preparing students to address the pressing social responsibility challenges facing today’s businesses.

## BACKGROUND

Enbridge, one of North America's largest energy infrastructure companies, recently released a discussion paper on their relationship with indigenous peoples called *Indigenous Rights and Relationships in North American Energy Infrastructure*.

The discussion paper was published in response to a shareholder resolution filed by the Sisters of Charity (Halifax) at Enbridge's May 11, 2017 Annual Gathering Meeting. The resolution, which received support from over 30% of shareholders, called on the company to prepare a report that detailed their due diligence process for identifying and addressing social and environmental risks, including the company's impact on the rights of indigenous peoples. The resolution requested clarity on the following five points:

1. which committees, departments and/or managers are responsible for review, oversight and verification;
2. how indigenous rights and concerns are identified and assessed;
3. how environmental and human rights risks are identified and assessed;
4. which international standards are used to guide the company's human rights and environmental due diligence procedures; and,
5. how this information informs and is weighted in acquisition decisions.

Enbridge's discussion paper and the shareholder resolution stem from the company's involvement with the Dakota Access Pipeline (DAPL). On August 2, 2016, Enbridge acquired a 27.5% ownership interest in DAPL. This was five days after the Standing Rock Sioux Tribe filed a lawsuit to block the project. Enbridge should have been aware of the Tribe's concerns about the environmental, social and cultural impacts of the pipeline due to the lawsuit but prior to that point, the Standing Rock Sioux Tribe had voiced their opposition in various forums. Further, the #NoDAPL movement was growing in strength and was visible on the ground near the pipeline and in the media, indicating the numerous social risks associated with DAPL.

The First Peoples Investment Engagement Program (FPIEP) recently released a case study *Social Cost and Material Loss: The Dakota Access Pipeline* demonstrating that the lack of due diligence and disclosure on the part of investors, companies and financial institutions led to long-term material losses. The case study shows that the failure to properly assess the social risks attendant to DAPL resulted in a failure to respect human and indigenous rights and it undermined financial returns.

Enbridge's discussion paper provides a response to the issues presented during the DAPL controversy. Enbridge is currently requesting feedback on the discussion paper via an online survey. The FPIEP completed the online survey. However, due to the limited nature of the survey, including the narrow scope of the questions and the lack of transparency as to how feedback will be integrated, the FPIEP is posting these additional comments.

The FPIEP is committed to increasing meaningful engagement between indigenous peoples and investors to address the unique social and environmental impacts of development in indigenous communities. The FPIEP sees this as a critical opportunity to provide feedback to Enbridge on how they can properly assess and manage the social risks associated with an investment and how they can align their policies and practices with internationally recognized human and indigenous rights.

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## **ENBRIDGE HAS A STRONG GENERAL COMMITMENT TO INDIGENOUS PEOPLES**

Enbridge's discussion paper demonstrates that they took the shareholder resolution seriously and that they have given thoughtful consideration as to how their operations impact indigenous peoples.

Of note, Enbridge had previously adopted a stand-alone Indigenous Peoples Policy (Policy) in which they acknowledge the importance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). They also point to numerous relevant international standards in the discussion paper including the Voluntary Principles on Security and Human Rights, the United Nations Global Compact and frameworks for sustainable development established by groups such as the International Council on Mining and Metals and the International Finance Corporation. All of these documents set a minimum standard for respecting human rights and indigenous rights.

Enbridge's Policy also commits to consultation with affected indigenous peoples and the discussion paper demonstrates Enbridge's commitment to collaboration. Enbridge gives several examples in Section 8 detailing their engagement with indigenous communities in the areas of cultural knowledge, environmental management, community investment, cultural awareness in the workplace and employment.

The Policy also commits to building capacity for Enbridge's employees on indigenous peoples. In fact, one of the strongest ways that Enbridge has demonstrated their commitment to indigenous peoples is by prioritizing knowledge building on indigenous peoples' issues at the highest levels of the company. For example, the discussion paper comes from the desk of Enbridge's Vice President Responsible for Indigenous Relations, Roxanna Benoit, and there are multiple high-level officers involved in disseminating plans for community engagement. The discussion paper also details the systems approach Enbridge uses to provide training throughout the organization to build capacity around indigenous peoples' issues. Specifically, in Section 5, Enbridge provides a clear and comprehensive overview of implementation of the Policy across the company. Outlining the implementation process in this way demonstrates Enbridge's commitment to operationalizing their Policy as a regular part of their business.

In the opening Letter to Our Readers, Enbridge explicitly acknowledges that indigenous peoples are "transforming the way business is done in North America" and that creating positive, lasting relationships with indigenous peoples is a good business decision:

“While Enbridge believes that building sustainable relationships with Indigenous Nations connects directly to each of our core values—Integrity, Safety and Respect—we also believe that it is integral to our business case.”

The discussion paper clarifies the ways that Enbridge has expanded upon and strengthened their initial commitment to indigenous peoples and describes their general commitment to indigenous peoples in all of their operations. The FPIEP sees a number of opportunities for further improvement that will better align Enbridge’s approach with international best practices.

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## ENBRIDGE’S GENERAL COMMITMENT LACKS NECESSARY SPECIFICITY

Enbridge’s commitment to addressing the concerns of indigenous peoples is too general and the policies in the paper lack the specificity necessary to demonstrate a true acknowledgment of their responsibility to indigenous peoples’ rights throughout the lifecycle of an investment.

The United Nations Guiding Principles on Business and Human Rights (Guiding Principles) state unequivocally that business enterprises have a responsibility to respect human rights. The Guiding Principles provide a framework for creating policies in line with the Global Compact and, as a member of the United Nations Global Compact, Enbridge’s operations should be aligned with the Global Compact’s Principle 1 which states that businesses should support and respect the protection of internationally proclaimed human rights.<sup>2</sup> As such, the FPIEP sets forth the following four nested recommendations to strengthen Enbridge’s commitment to human rights and to indigenous peoples rights in line with the Guiding Principles.

***1) Enbridge must build a stronger commitment to the United Nations Declaration on the Rights of Indigenous Peoples and international norms regarding indigenous people’s rights by creating policies and procedures independent of commitments made by national governments.***

While Enbridge has made a general commitment to the UNDRIP and principles surrounding free, prior and informed consent (FPIC), they qualify the application of those principles in ways that significantly undermine their overall commitment to indigenous peoples. For instance, the Indigenous Peoples Policy states:

“We recognize the importance of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) *within the context of existing Canadian and U.S. law* and the commitments that governments in both countries have made to protecting the rights of Indigenous Peoples” (emphasis added).

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<sup>2</sup> See [the July 2011 Joint Statement](#) by the Global Compact and the Office of the High Commissioner for Human Rights stating that the Guiding Principles provide a framework for members of the United Nations Global Compact to create policies that assist them to meet their responsibility to respect human rights.

And, in Section 3 of the discussion paper, they state that, “Enbridge applies FPIC in a manner that is consistent with how it is being interpreted by the governments of Canada and the U.S.”

Enbridge’s approach to indigenous peoples must be directly aligned with internationally recognized indigenous rights standards to fulfill their responsibility to respect human rights. The laws and policies of both the U.S. and Canada are made in reference to the UNDRIP but each of those government’s policies often fall short of respecting the full breadth of indigenous rights. In their Indigenous Peoples Policy, Enbridge acknowledges, “that the history of Indigenous Peoples in both Canada and the United States has had destructive impacts on the social and economic wellbeing of Indigenous Peoples.” In her September 2017 Country Report on the United States of America, the United Nations Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz noted that the legal, institutional and policy framework developed in the United States is disjointed and “suffers from loopholes, ambiguity, ad hoc implementation on an agency-by-agency basis and a general lack of accountability.” Tauli-Corpuz pointed to the Dakota Access Pipeline as an emblematic case that “highlights the shortcomings in the United States’ policy on consultation.”

The controversy surrounding DAPL clearly demonstrated that following only domestic policies is insufficient to assess social risks. For example, the entities behind the pipeline could have mitigated the social costs associated with the project if they had integrated information given by the Standing Rock Sioux Tribe early in the planning process. When the Tribe informed representatives from Energy Transfer Partners, the parent company behind DAPL, at a September 2014 meeting that the Tribe would not support the pipeline because it crossed their traditional treaty boundaries, the company had an opportunity to change the plans accordingly to respect the Standing Rock Sioux Tribe’s internationally recognized treaty boundaries rather than constrain their assessments to the Tribe’s federally recognized reservation boundaries. See Carl Sack’s #NoDAPL Map, which shows how the DAPL route runs outside reservation boundaries but inside treaty boundaries, and a transcript from a September 2014 meeting where the Standing Rock Sioux Tribal Chairman David Archambault II told representatives from representatives for DAPL that:

“.... we recognize our treaty boundaries, our Fort Laramie Treaty of 1851 and 1868, which encompasses North Dakota, Montana, Wyoming, South Dakota. Because of that we oppose the pipeline. We have a standing resolution that was passed in 2012 that opposes any pipeline within the treaty boundary.”

This was a missed opportunity to properly understand and to manage the social risk attendant to the project; a failure that ultimately cost Energy Transfer Partners and other DAPL associated entities billions in costs due to construction delays and falling share prices.

Given this context, Enbridge should not create policies that merely repeat flawed processes of engagement in national laws. Doing so limits the efficacy of their own policy and undermines the commitments stated therein. Enbridge must set distinct rights-based processes for independent investigation, assessment, and disclosure. Enbridge should design these processes

to be inclusive of the legal and regulatory requirements in place by host countries, but a true responsibility over the lifecycle of a project requires policies independent of federal laws.

Creating a standard independent from government policies will also allow Enbridge to more accurately assess and mitigate the social risks of an investment on or near indigenous lands. Due diligence and disclosure strategies that flow from independent and rights-centered indigenous policies will allow Enbridge and partner investors to accurately understand the total risks associated with the project, whereas leaning on meager national policies may obscure social risks that later manifest into material losses for the company. A further discussion of due diligence and disclosures is presented below in Recommendations 3 and 4.

In short, Enbridge has an opportunity to set an industry-wide standard where the Indigenous Peoples Policy is directly aligned with international standards. This would provide a rights-centric platform from which rights-centric strategies would flow, ensuring that the responsibility to respect human rights is carried through all levels of the organization.

***2) Enbridge must recognize that FPIC is a right and not solely a process. As such, indigenous peoples have the right to withhold consent.***

Enbridge acknowledges the need for engagement and collaboration throughout the paper, and acknowledges that indigenous peoples are more than stakeholders. However, the discussion paper makes clear that their Indigenous Peoples Policy rests on the flawed assumption that dialogue will necessarily generate positive consent. The Policy fails to acknowledge that FPIC is a right and that consent must be sought at various points throughout an iterative engagement process. At each stage, there must be specific mechanisms to identify affected indigenous peoples, to invite them to provide input, and then to meaningfully include their feedback in decision-making. Importantly, the paper does not address how indigenous peoples' concerns will be identified, nor how indigenous peoples' concerns will be considered and weighted.

Once again, Enbridge's view of FPIC is improperly constrained by federal guidelines on implementation. Enbridge states in Section 3 that:

“Although some have interpreted FPIC as a right to “veto” a project, the federal governments of both Canada and the U.S. interpret it as a call for a process of meaningful consultation with Indigenous Peoples with the intent to achieve consent. Enbridge applies FPIC in a manner that is consistent with how it is being interpreted by the governments of Canada and the U.S.”

In a 2013 Report to the Human Rights Council on Extractive Industries and indigenous peoples, the United Nations Special Rapporteur on the Rights of Indigenous Peoples S. James Anaya stated that a rights-based implementation of FPIC requires that entities receive indigenous peoples' free, prior and informed consent before engaging in any manner that impacts tribal

resources.<sup>3</sup> The process of soliciting FPIC is meant to replace the processes that historically excluded indigenous peoples from decisions that impacted their land and their rights.<sup>4</sup> However, the purpose of an iterative engagement process before, during and after an investment is to gather and provide information, and to provide opportunities for indigenous peoples to give or *withhold* consent. Furthermore, “the veto power embedded in FPIC is a critical means to give ‘the correlative power to negotiate on equal terms with the project proponent.’”<sup>5</sup> In short, engagement cannot be viewed as a means to an end or as a checklist; this type of pro forma procedure falls woefully short of respecting the rights contained within the concept of FPIC.

A core right embedded in FPIC is the norm of self-determination. In the 2017 U.S.A. Country Report, Special Rapporteur Victoria Tauli-Corpuz stated that the purpose of FPIC as to energy infrastructure projects is to “ensure that indigenous peoples have decision-making power of the energy development on their lands.” Her predecessor S. James Anaya stated in his 2013 report that, “the character of free, prior and informed consent [is] as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories.” Thus, operationalizing FPIC requires attention to the rights embedded within it, including recognition that indigenous peoples have the right to self-determination, which means the right to withhold consent to investments as to their lands, territories and resources.

Enbridge now has an opportunity to create an independent rights-based policy that recognizes that indigenous peoples have the right to determine and exercise their priorities as to development on and near their lands and as to their resources vis a vis FPIC. This means that indigenous peoples may prioritize economic development, they may allow it via a modified plan, or they may oppose it completely. Enbridge must fully respect indigenous peoples’ right to self-determination by committing to a process of iterative engagement where at every stage, they account for the possibility that indigenous peoples may exercise their right to withhold consent. This includes implementing an operational-level grievance mechanism in accordance with the Guiding Principles that is directly accessible by individuals and communities and aligns with business’ responsibility to remedy impacts of their development projects.

Enbridge’s discussion paper contains many provisions for relationship building, engagement and collaboration. However, there is little specificity as to what next steps would be taken should an indigenous community withhold consent. Further, there is no discussion of what specific steps Enbridge would take if multiple indigenous communities have differing opinions

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<sup>3</sup> See Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples*, U.N. Doc. A/HRC/24/41 (2013), available at <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>.

<sup>4</sup> Carla Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALBANY L. REV. 429, 430 (2017).

<sup>5</sup> *Id.* at 439-40 quoting Robert Goodland, *The Institutionalized Use of Force in Economic Development: With Special Reference to the World Bank*, in SUSTAINING LIFE ON EARTH: ENVIRONMENTAL AND HUMAN HEALTH THROUGH GLOBAL GOVERNANCE 339, 344 (Colin L. Soskolne ed., 2008).

with respect to the same investment. Thus, Enbridge must create specific protocols to address these situations and to realign their investment as necessary.

Creating specific strategies with these possibilities in mind will also allow Enbridge to accurately consider and weigh the social risks of an investment before those risks manifest into social conflict. If the process of FPIC meaningfully considers input at various stages, then the company will have a more accurate source to determine whether and to what degree social conflict may affect their investments and operations.

In sum, the process of engagement must be founded in the norms embedded in FPIC as a right, including specifically acknowledging and preparing for indigenous peoples' right to consent or to refuse consent to an investment. Specifically noting the decision-points where this can occur not only provides valuable information to Enbridge as to social risks, but will evidence a true commitment to valuing indigenous peoples' human rights.

***3) Enbridge's due diligence process must have an explicit commitment to FPIC at every key decision-point.***

Enbridge presents its revised due diligence processes specific to indigenous rights risks in [Section 6](#), where Enbridge recognizes "an assessment of Indigenous rights risks must be conducted as an element in pre-investment due diligence" as part of their regular due diligence process to evaluate environmental, social and governance risks. This section also demonstrates that Enbridge is taking a leadership stance by ensuring that its partners through mergers and acquisitions have similar commitments to respect the rights of indigenous peoples. However, this section, once again, lacks specificity in regards to creating opportunities for meaningful collaboration and consideration of indigenous peoples concerns.

The decision trees in Section 6 do not acknowledge the possibilities that indigenous peoples may not give their consent to all or part of the investment, nor do they specify how Enbridge will assess indigenous peoples concerns and with whom they will work to do so. While Enbridge lays out a path for rerouting the pipeline or deciding not to invest in the project in other sections of the paper, this option is not clear in the flowcharts nor in the sections that define the challenge levels (e.g. Low Challenge, Medium Challenge, Significant Challenge). By not explicitly including this option, it suggests that option will not be contemplated nor considered. While it is important to create opportunities for joint monitoring initiatives, these joint initiatives must be viewed as a small part of soliciting FPIC and not as a means to divert or to quash dissent.

The FPIEP's [FPIC Due Diligence Questionnaire](#) further enumerates the steps necessary to operationalize that commitment. The questionnaire fleshes out the methods by which companies should assess how affected indigenous peoples can be aptly identified and how their rights can be assessed and understood at each stage of investment. This type of rigorous due diligence process begins in the earliest stages of planning and creates opportunities for true consultation by allowing companies to gather accurate information to guide their investment.

It is not enough to simply go through the steps of the due diligence process and identify the level of risk. To properly manage the social risks associated with their operations, Enbridge must contemplate and provide for the possibility that they cannot meaningfully mitigate indigenous concerns and, therefore, should not move forward on an investment.

**4) Enbridge must develop comprehensive disclosure around social risks and create mechanisms for enhanced transparency.**

Enbridge acknowledges in [Section 7](#) that “Indigenous Nations and groups along our rights of way want increased transparency and access to information regarding pipeline maintenance, integrity and operations, and we are responding by providing this information on a more regular basis.” Furthermore, Enbridge states in [Appendix Section A.4](#) that “Enbridge’s goal is to engage in information-sharing throughout the lifecycle of a project” and in [Appendix Section B.8](#) they state that “[w]here a project requires an environmental and social impact assessment, we provide full disclosure of the results of those assessments in the regulatory hearings and in publicly available documentation.” These statements recognize the need for information sharing at critical moments throughout an investment. While transparency itself is not to be considered engagement in its fullest sense, it is an important step to create collaborative dialogue regarding an ongoing investment.

Furthermore, increasing disclosures around social risk allows investors to accurately consider the total risk associated with a development project. These disclosures should be timely and subject to similar accuracy standards as other routine risk disclosures.<sup>6</sup> Accurately assessing and disclosing social risks falls directly within an officer’s fiduciary duties since failing to do so can become negatively affect the financial outcome of the project and, by extension, the company.

To develop metrics for robust social risk and human rights due diligence and disclosure, Enbridge should broaden its view of social, cultural, environmental and economic impacts. Currently, the socio-economic factors discussed in the paper are mostly related to providing jobs and opportunities to indigenous peoples within affected communities. While important, there many more social, economic and cultural impacts that need to be addressed. For example, in many cases, development coincides with an increase in crime and violence. For example, see Carla Fredericks and Kathleen Finn’s paper on [\*Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation\*](#) and Rebecca Adamson’s article [\*Vulnerabilities of Women in Extractive Industries\*](#).

In sum, the [Guiding Principles](#) state that businesses should implement a human rights based due diligence process to identify, prevent, mitigate and account for how their investments and operations impact human rights. To fully actuate their human rights commitments to

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<sup>6</sup> See Social Cost and Material Loss: The Dakota Access Pipeline at 8.

indigenous peoples, to investors, and to the public, Enbridge must commit to full transparency via routine disclosures regarding the human rights impacts attendant to their investments.

## CONCLUSION

Enbridge's discussion paper represents a step forward in addressing the concerns of indigenous peoples as they intersect with Enbridge's investments and operations. However, there are still several critical steps that need to be taken. Neither the discussion paper nor the Indigenous Peoples Policy proactively identifies what actions the company will take should indigenous peoples withhold consent, as is their right under the identified international standards.

In fact, the process for developing the Indigenous Peoples Policy and discussion paper indicates an incomplete understanding of how to properly engage with indigenous peoples. In the Preface, Enbridge acknowledges that they did not directly engage with indigenous nations and groups in the creation of the paper. To address this, they released the discussion paper online with an opportunity for individuals and stakeholders to comment via an online survey. This is not adequate engagement. Enbridge must have a more robust process for meaningful engagement with indigenous leaders, communities, and indigenous-led organizations, particularly when developing infrastructure investments that have identifiable impacts for generations to come.

To this end, Enbridge should continue to develop their policies in line with best practices to create lasting partnerships with indigenous peoples.

**First, Enbridge must create policies and protocols that are directly aligned with internationally recognized indigenous rights standards and are independent from national legal frameworks.** Designing protocols that flow from an independent, rights-based Policy will ensure that indigenous peoples' rights are respected at every stage of investment.

**Second, Enbridge must recognize that FPIC is a right and not solely a process.** Enbridge should continue developing methods for long-term consultation as part of an iterative process and they must also identify mechanisms for soliciting FPIC from affected indigenous peoples at key decision points.

**Third, Enbridge's due diligence processes must have an explicit commitment to FPIC at every key decision-point.** They must also encompass the social, cultural and environmental impacts unique to indigenous communities. Doing so will allow the company to understand the impacts of the investment and to more accurately assess the attendant social risks before they become material loss.

**Fourth, Enbridge must develop comprehensive disclosure processes around social risks and create mechanisms for enhanced transparency.** Doing so alerts investors to the social risks of a

project and allows the company to consider the total risk of a project, an exercise that falls directly within the fiduciary duty of officers to the company.

Enbridge's commitment to recognizing indigenous rights and building relationships with indigenous peoples is being tested now more than ever. Indigenous opposition to Enbridge's Line 3 continues to grow and it is essential that Enbridge properly manages the social risks associated with this project to prevent further material losses and to adequately respect the rights of indigenous peoples.<sup>7</sup>

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<sup>7</sup> The recommendations in this report are not intended to be relied upon as, or to be a substitute for, specific professional advice. The FPIEP shall have no responsibility for loss occasioned to any persons and legal entities acting on or refraining from action as a result of any material in this report. With respect to any and all information contained in this report, the FPIEP makes no representation or warranty of any kind, either express or implied, with respect to such information, or the results to be obtained by the use thereof.