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# Sustainable Development Finance, ESG and Land Rights

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## EXECUTIVE SUMMARY

Local communities and indigenous peoples (LCIPs) are central to sustainable land governance for global sustainable development and climate change mitigation and adaptation. Despite established practice and evidence that their inclusion in land projects are key to delivering sustainable outcomes, LCIPs continue to have their land rights violated.

This policy brief outlines how financial and legal architecture, contractual terms and operational practices for sustainable development and green growth frequently sideline human rights-based considerations, fail to apply or implement appropriate environmental, social and governance (ESG) standards and rarely obtain meaningful free, prior and informed consent (FPIC) from LCIPs. It recommends adapting ESG risk frameworks and impact assessments to deliver more ethical, inclusive and rights-compliant outcomes.

## Sustainable development finance and ESG

Corporations and financiers (public and commercial) have developed a variety of tools and standards aimed at identifying, measuring and mitigating the risks of investing in sustainable development projects that have the potential to harm local communities and indigenous peoples.

This ESG toolbox includes lender performance standards, social and human rights impact assessments and action plans, risk frameworks, and at times benefit-sharing agreements and mediation processes. These are important instruments in ensuring adherence to ESG standards and achieving sustainability outcomes. Established initially by international financial institutions (IFIs), these legal and non-legal normative tools have become commonplace in the financial system.

However, despite their widespread use, over 20 years of experience demonstrates that while these instruments are good at identifying and mitigating risk to corporations, investors and financiers, they are not adequate for producing human rights or environmentally compliant outcomes for communities. Evidence from complaints lodged by communities and non-governmental organisations (NGOs) to the IFI ombudsman mechanisms indicate that current ESG risk frameworks neither implement meaningful human rights-based outcomes for LCIPs nor achieve international sustainable development and climate objectives. This is due to shortcomings in their content, timing, authenticity and a lack of understanding of the private financial architecture in which they are embedded.



Figure 1. Current tools for regulating land rights

### The problem with the toolbox

Corporate and financier land rights tools have the potential for empowering and including LCIPs in development projects but current market standard legal terms and ESG frameworks are focused on shifting ESG risk away or relegating risks from the responsibility of financiers and companies.

By placing greater emphasis on the ESG process over their content, the current approach to ESG and land rights will continue to have adverse impacts on LCIPs.

#### 1. These tools do not work in isolation.

They are embedded within the private financial legal architecture of a given project and its surrounding terms, practices and culture all of which have the capacity to sideline LCIP considerations at key moments in the project life cycle.

#### Examples of Land Rights Violations

- Forcible removal without consent or adequate compensation
- No free, prior and informed consent (FPIC)
- Failure to consider economic, social and cultural development
- No accountability for violations

#### 2. Reliance on action plans and generic lender performance standards implemented through standardised international loan agreements produces a tick-box, arm's length mentality.

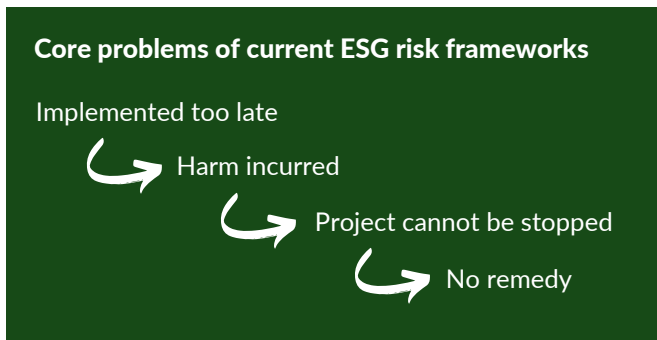
This approach gets the deal done but comes at the long-term cost of distancing companies and financiers from local community capacity building, creating LCIP-led collective legal empowerment opportunities and building trust.

**3. Market practices around the design and implementation of action plans, performance standards and loan agreements mean that the legal content fails to capture the full constitutional, national, regulatory and ombudsman legal ecosystem which applies to a project.**

Market-standard terms in loan agreements permit financiers to waive ESG-related requirements without consideration of their materiality for LCIPs and the long-term sustainability of the project. Often these overlooked legacy issues form the basis of future legal disputes.

**4. Action plans and lender performance standards enter the project ecosystem too late to make any meaningful impact.**

The timeframe does not allow for developing pre-emptive and practical FPIC policies and protocols, land and benefit sharing agreements or for inserting a culture of 'do no harm'.



**5. Considerations over time and money, lack of education about land rights issues among decision makers and overall haste routinely displace ethical considerations.**

These challenges, coupled with a lack of training and capacity building, often result in failed implementation of land rights tools and loss of trust among LCIPs. Corporates and financiers should devote more time to understanding these barriers and adapting current tools and standards to fix these problems.

**Fixing the toolbox**

The key to preventing land rights violations and implementing a meaningful ESG framework revolves around a commitment to early planning, budgeting and trust-based engagement.

Figure 2 represents an alternative ESG framework for land rights that is grounded in norms of equity, rights compliance and accountability. The principle of early design intervention is essential for overall success.

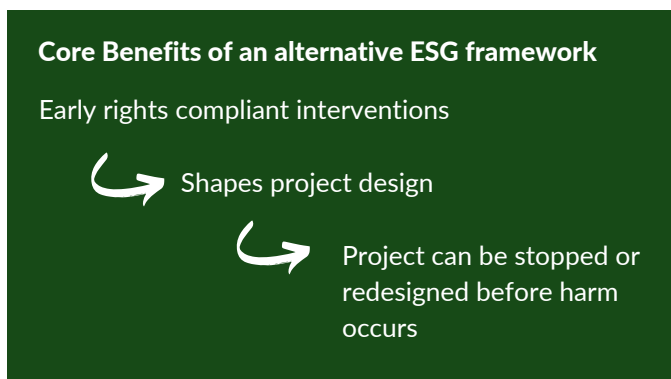


Figure 2. Towards a rights-compliant framework for land rights

# Policy recommendations

- 1** All actors involved in the financing of sustainable development projects and programmes must prioritise LCIP land rights issues in early project planning.
- 2** ESG assessment and actions tools should be underpinned by respect for LCIP land rights and other human rights standards (see Figure 2).
- 3** Early design capacity building interventions for developing indigenous-led FPIC protocols, benefit sharing, mediation and grievance processes should be instituted and funded, for instance through a private sector fund.
- 4** There should be a wholesale review of standard financing terms for their compatibility with LCIP land rights and human rights, including the principle of FPIC.
- 5** The international community should promote and create enabling environments for implementing these recommendations and including LCIPs in the development of new standards, norms and frameworks

## About the author



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Dr Bhatt is founder of Surya Advisory, an independent legal advisory providing ethical and just transition focused legal advice for business, government, international organisations and civil society. She is a practising solicitor, widely published and a panel expert on land rights and indigenous rights with the Independent Redress Mechanism of the Green Climate Fund.

## More on this research



Bhatt K (2020) *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects*. Cambridge: Cambridge University Press



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