

## FPIC and due diligence by business

How can the rights of indigenous peoples and the principle of FPIC be integrated into human rights due diligence by businesses in line with the UN Guiding Principles?

It is in principle fairly easy, at the same time as it seems difficult, to implement IP rights to FPIC into HR due diligence by businesses.

Every business should ask themselves these questions when entering or operating in an IP geographical or cultural domain:

- Have we identified the IP rights holders, and their representatives?
- Do we truly recognize them as rights holders?
- Are we sure the IP-party has been able to understand the consequences of our activity?
- Have we asked if our activity is OK of them?
- Are we prepared to pull out if NO?
- Did we ask early enough to adjust the project pulling out?
- Are we ready to share some of the benefits?
- Is it possible to make it positive for both parties, and reach an agreement on that?
- Do we have such agreements related to our activities in IP areas?

Businesses are used to relate to rights holders and work daily to respect the rights of others. What might be unfamiliar is to accept that indigenous peoples truly are rights holders you need to relate to.

An FPIC process can be difficult and requires true commitment and mutual understanding from both sides. The standing of the different parties is usually totally different.

The Indigenous peoples concerned might know zero to nothing about the proposed activity of the business side. Neither did they, in most cases, ask for the activity to come to their area. Their point of departure is to defend their rights and resources. The business on the other hand wants access to the resources on an IP domain.

All in all, the businesses should fairly easy be able to document their standing regarding FPIC and IPs in their portfolio for anyone to scrutinize. Do we have agreements that cover our activities with the indigenous peoples concerned, or not? If not, we fail to meet the UN Guiding Principles.

What are some good practices for human rights due diligence by businesses regarding the FPIC of indigenous peoples, such as in environmental/social impact assessments?

In the Sámi area we have two concrete examples that are possible to look at. One constructive positive and another that is in the other end of the scale.

Disney-agreement

Where the Sámi Parliaments and the Sámi Council agreed with Walt Disney Animation Studios on the use of cultural elements in Frozen II.

Link: The Sámi Walt Disney Animation Studios agreement: <https://bit.ly/SapmiWDAS>

The Fosen-case

Where wind mills were built against the sami reindeer herders consent.

The windmills were deemed illegal by the supreme court.

Link (English): <https://www.domstol.no/en/enkelt-domstol/supremecourt/rulings/2021/supreme-court---civil-cases/hr-2021-1975-s/>

What should be the role of States in ensuring that the FPIC of indigenous peoples is respected by businesses, including in their due diligence processes?

The first step should be to fundamentally accept, and legislate, IP position as rights holders.

Step two is to encourage the parties to enter into FPIC processes that ultimately may lead to agreements and maybe even partnerships.

The challenge is often the power imbalance between the parties, and how to remedy and assist in truly upholding the steps needed for a fruitful FPIC process.

What have been the achievements and gaps in efforts by some States for mandatory due diligence laws to respect the rights of indigenous peoples?

My take on this is that most states work hard to avoid a true consent approach. There is a constant discussion on how to not accept IP rights to a veto. That takes the focus away from a good dialogue between the parties.

How effective has indigenous peoples' development of their FPIC protocols and other standards influenced businesses' human rights due diligence?

I think when the real gain occurs when FPIC is regarded as a true partnership approach to benefit all.