

The background is a vibrant, abstract illustration. It features several hands of different colors (green, brown, orange, teal) reaching towards the center, symbolizing unity and community. There are also stylized icons of a wind turbine, a solar panel, and a tree. The background is composed of various geometric shapes and patterns in shades of red, teal, and brown.

# RESPECTING THE HUMAN RIGHTS OF COMMUNITIES

**A LEGAL RISK PRIMER FOR COMMERCIAL WIND AND SOLAR PROJECT DEPLOYMENT**

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# 1. WHAT LEGAL RISKS?

Wind and solar energy are essential for the world to reach net zero global emissions in accordance with *Intergovernmental Panel on Climate Change* targets. The potential for wind and solar energy to advance the Sustainable Development Goals (SDGs) around the world is also without question. Rights-respecting wind and solar projects can also contribute to equitable rural development and bolster community livelihoods. The global installed capacity of renewable energy has more than doubled in the last ten years,<sup>1</sup> with wind and solar energy leading this growth.<sup>2</sup> Yet amidst this rapid expansion, the Business and Human Rights Resource Center recorded over 200 allegations of adverse human rights impacts in the renewable energy industry between 2010 and 2020, 44% of which were linked to the wind and

solar sectors.<sup>3</sup> Many of these affect Indigenous Peoples and local communities and concern land rights, Free, Prior and Informed Consent (FPIC), and attacks against human rights defenders, among other impacts. Beyond the associated financial, operational, and reputational risks, a complex landscape of legal risks brings these human rights concerns within the purview of corporate legal teams.

This legal risk primer serves as a companion to CCSI's Business Guide: *Respecting the human rights of communities: A business guide for commercial wind and solar project deployment* (CCSI, 2022). It provides the general counsels and corporate legal teams of commercial wind and solar companies with an overview of the key legal risks that may arise from the above community-related human rights impacts (see Box 1.)

These legal risks derive from the following sources:

1. Host government regulators
2. Home government regulators
3. Community litigators
4. Financiers
5. Power purchase agreements

Like the *Business Guide*, this primer's scope is limited to community-related human rights impacts during project *deployment*, and does not encompass risks arising in other phases of the wind and solar value chains (see Box 2).

### BOX 1: TYPES OF COMMUNITY HUMAN RIGHTS IMPACTS

Common adverse human rights impacts on communities during the deployment phase of a wind or solar project include:

- **Land acquisition without FPIC** (as a right for Indigenous communities and best practice and/or domestic legal requirement for other local communities) and meaningful consultation with Indigenous Peoples and other local communities;
- **Physical and/or economic displacement** of Indigenous Peoples and other local communities without fair and adequate compensation, affecting their human rights to property, housing, food, water,<sup>4</sup> health, development, and a clean, healthy, and sustainable environment,<sup>5</sup> among many others, as well as specific rights of Indigenous Peoples including the right to self-determination, and collective rights to land, territories, and resources;
- **Loss of culture and traditions as well as impacts to community cohesion and identity** of Indigenous or minority communities via the interference with or destruction of sacred sites, burial grounds, and areas of cultural significance;
- **Threats, intimidation, and violence against human rights defenders** via security personnel, Strategic Lawsuits Against Public Participation (SLAPPs),<sup>6</sup> and other tactics;<sup>7</sup>
- **Threats to community health and safety** during project construction including physical threats from security personnel and temporary workers, the spread of communicable diseases via imported laborers, and environmental threats from poor waste management practices; and
- **Labor rights impacts** where community members are recruited locally to form part of the project's workforce.

This primer also includes factors that can contribute to human rights impacts, including:

- **Bribery and corruption** during project deployment that can undermine respect for community rights as well as the ability of communities to seek redress via legitimate processes; and
- **Local tax avoidance**, which can adversely impact human rights and sustainable development outcomes for local communities.<sup>8</sup>

### BOX 2: THE DEPLOYMENT PHASE OF THE WIND AND SOLAR VALUE CHAINS





This primer's focus is legal risk, but there is a strong nexus between *business* and *legal* considerations. General counsels and corporate legal teams often serve as not just technical experts, but also *strategic advisors* on corporate governance, non-judicial complaints, and emerging trends and risks beyond the realm of strict legal compliance.<sup>9</sup> Strategic advice regarding implementation of the *UN Guiding Principles on Business and Human Rights* (UNGPs)<sup>10</sup> is one such area, particularly given the

increasing awareness of, and reference to, the UNGPs among policy-makers, legislators, judicial and quasi-judicial bodies, and advocates.<sup>11</sup> As a result, this primer should be read together with the *Business Guide*, which contains information and practical recommendations on how wind and solar companies can implement the UNGPs to improve community-related human rights performance, thus helping to mitigate legal risk.

## KEY TERMS

**Wind and solar companies:** Developers; Engineering, Procurement, and Construction companies (EPCs); Asset Owners; Operation and Maintenance Service Providers; and vertically integrated companies involved in commercial wind and solar energy projects.

**Project deployment phase:** Development (feasibility, scoping), construction, and ongoing operation of wind or solar energy projects (see Box 2).

**Project-affected communities:** All Indigenous communities as well as other local communities, especially vulnerable or marginalized communities, whose internationally recognized human rights are, or risk being, affected by a project.

**Human rights defenders:** People who, individually or with others, act to promote or protect human rights in a peaceful manner.<sup>12</sup> This may include human rights activists, lawyers, journalists, whistleblowers, and community leaders and members.

**Adverse human rights impact:** When an action removes or reduces the ability of an individual or community to enjoy their human rights.<sup>13</sup>

**Free, Prior and Informed Consent (FPIC):** FPIC concerns the right of Indigenous and tribal peoples to collectively and independently decide on matters that stand to affect their lands, territories, resources, and cultural integrity. FPIC entails a requirement to enable participation in decisions by project-affected Indigenous Peoples, beyond consultation, and to respect their right to give or withhold consent—without coercion or misinformation—to any project that may affect them or their lands or resources. FPIC derives from Indigenous and tribal peoples' collective rights under international law, including the right to self-determination.<sup>14</sup> In addition, companies and governments are increasingly being required to obtain FPIC from all communities whose human rights may be put at risk. Some domestic laws, such as Liberia's *Land Rights Act* (2018), contain FPIC requirements for *all* communities. Similarly, various industry and multi-stakeholder initiative standards, including the *EO100 Standard for Responsible Energy*, promote FPIC as a good practice for all affected communities.<sup>15</sup> All communities also have human rights to information and public participation that must be respected.

## 2. HOST GOVERNMENT REGULATORS



### 2.1 GOVERNMENT APPROVALS

Host governments play a number of roles in relation to wind and solar projects, including granting approvals essential for companies to establish, expand, and carry out projects. Common examples include the award of permits and licenses for project commencement, zoning, land use, land clearing, grid connection, and power generation. For wind and solar companies, adverse human rights impacts may give rise to several legal risks in this regard, including the delay, denial, suspension, or revocation of permits for failure to meet social risk criteria. Depending on the size of the project, a common pre-requisite to obtaining many permits is conducting an *Environmental and Social Impact Assessment* (ESIA) and obtaining associated approval by relevant government agencies (see Box 3). Larger-scale wind and solar projects will usually also be required to engage with affected communities.

Examples include the following:

- **Kenya:** Project approval requires an ESIA as well as consultation with affected parties and communities via multiple communication channels, including at least three public meetings.<sup>17</sup>
- **Mexico:** All energy projects of a certain generating capacity require a stand-alone *Social Impact Assessment* (SIA), which includes a consultation process to obtain FPIC from affected communities.<sup>18</sup> *SIA Guidelines* issued

by the Ministry of Energy note that an SIA must ensure human rights are protected, adopt a participatory approach, incorporate gender perspectives, and use current and verifiable information.<sup>19</sup>

Companies risk delays or denial of permits when they fail to conduct an adequate (or any) ESIA when required, fail to adjust a project's design to mitigate and avoid negative social impacts, or when there is significant community opposition. Further, suspension or revocation of an *existing* permit may occur where a company is found to be causing or contributing to adverse human rights impacts subsequent to its issue. For example, Mexico's Supreme Court revoked the license of BHCE Yucatan's solar and wind project on the basis that the company had not obtained the FPIC of the Indigenous Ejido de Sinanché community.<sup>20</sup> Similarly, Norway's Supreme Court revoked the operating permits of two Fosen Vind wind farms (owned by Statkraft, BKW, and others) because they interfered with Indigenous Sami reindeer herders' traditional grazing rights.<sup>21</sup> Statkraft and BKW were also pursued for interference with Indigenous Sami reindeer herders' rights via the *OECD Guidelines for Multinational Enterprises* complaint mechanism.<sup>22</sup> Companies should note that the *quality* of an ESIA or SIA, and ensuring a *balanced focus* between environmental and social impacts within it, can be determinants of whether or not legal risks linked to unforeseen adverse human rights impacts arise later during project deployment.<sup>23</sup>

#### BOX 3: ENVIRONMENTAL & SOCIAL IMPACT ASSESSMENTS (ESIA)

An ESIA requires a detailed assessment of not just the environmental, but also the likely social consequences, both positive and negative, of the activity for which a permit is sought.<sup>16</sup> This includes human rights-related impacts to Indigenous and other local communities outlined in Box 1. In addition, both approval and ESIA processes often include legal requirements for meaningful engagement with project-affected communities.



## 2.2 LAND TENURE LAWS

Given the land-intensive nature of commercial wind and solar projects, companies are particularly vulnerable to legal risks linked to land tenure which, if they eventuate, could prevent project deployment and result in the loss of all prior investment (see Box 4). Wind and solar companies must comply with a range of host country domestic legal requirements concerning land tenure and non-compliance may result in administrative fines, criminal penalties, or project suspension and termination. Several laws relate specifically to the acquisition of *community* lands and thus represent a heightened source of legal risk for wind and solar companies. These include:

- **Requirements to recognize Indigenous and other customary land rights** – For example, the *Land Transfer Regulation* in the state of Andhra Pradesh, India, prohibits the transfer of certain land to anyone but a person from a recognized Indigenous tribe or a registered Indigenous Cooperative society. The law also requires that land found in possession of a non-Indigenous owner should be returned to its Indigenous owner.<sup>28</sup> Penalties include fines and/or imprisonment.<sup>29</sup>
- **Requirements for community compensation and benefit sharing** – For example, Kenya’s *Community Land Act* (2016) requires that any agreement pertaining to investment in community land contains provisions for the payment of compensation and royalties, the capacity building of the community, and other matters indicating how the community will benefit from investments in their land.<sup>30</sup>
- **Requirements for community consultation, participation, and FPIC** – For example, Liberia’s *Land Rights Act* (2018) recognizes customary land rights and requires that a community’s FPIC is obtained prior to any “interferences” with customary land.<sup>31</sup> Similarly, Kenya’s *Community Land Act* requires a free and open consultative process prior to investment in community land and makes it an offense to occupy or use such land in contravention of the Act’s provisions, the penalty for which includes fines and/or imprisonment.<sup>32</sup>

- **Constitutional requirements for the protection of, and consultation with, Indigenous Peoples** – For example, the *Constitution of the United Mexican States* includes protections for Indigenous Peoples, including a requirement for consultation with Indigenous communities in national, state, and local development planning.<sup>33</sup> The *Constitution of the Free and Sovereign State of Oaxaca*, Mexico, also includes protections for Indigenous Peoples and requires consultation with, and the FPIC of, Indigenous communities where legislative or other measures could affect them.<sup>34</sup>

An increasing number of wind and solar projects are facing suspension or termination as a result of domestic law violations. For example, Jinkosolar Investment’s solar project, also located in Yucatán, Mexico, was suspended because of its failure to obtain the FPIC of local communities.<sup>35</sup> Similarly, the High Court in Meru, Kenya, nullified the land title deeds for the Lake Turkana Wind Power project on the grounds the land was acquired without proper consultation with, or compensation of, Indigenous community members, in violation of domestic law.<sup>36</sup>



Norway’s Supreme Court has ruled that two wind farms in the country’s west have violated the rights of Sámi reindeer herders.

## BOX 4: LAND TENURE RISK

**Tenure rights** refer to the relationship among individuals or groups, whether formal or customary, with respect to land.<sup>24</sup> This encompasses different types of rights including the right to *access* (e.g. to get to local water sources), *use* (e.g. for grazing or growing crops), *control* (e.g. decide how it is used or derive income from its use), or *transfer* (e.g. sell or lease) a parcel of land. Tenure rights that lack formal documentation may still be *legitimate* and should therefore be respected.<sup>25</sup>

**Land tenure risk** is the risk that land offered for project development is subject to these pre-existing individual, collective, communal, or overlapping claims.<sup>26</sup> Such risks are common in countries where land governance is weak, land rights are undocumented or otherwise insecure, ownership of land by women is not recognized, and customary uses (e.g. pastoral grazing, harvesting of forest products) are not well understood or protected.<sup>27</sup> Examples include the Indigenous Sami reindeer herders' case in Norway (see Section 2.1) and the Lake Turkana Wind Power case in Kenya (see Section 2.2). Land tenure risk can also result in significant financial and/or operational issues for companies because of local opposition (see Box 8).



Kalpitiya, Sri Lanka.



Oaxaca, Mexico.



## 3.1 HUMAN RIGHTS DUE DILIGENCE LAWS

An emerging regulatory landscape of mandatory corporate human rights due diligence (HRDD) laws strengthens existing due diligence requirements in line with expectations set out in the *UNGPs* and *OECD Guidelines*. These laws differ in scope (and some also encompass environmental due diligence, which is beyond the scope of this primer) but typically require companies that meet certain employee, revenue, or other thresholds and criteria to conduct ongoing HRDD throughout their operations and in some cases, their full value chains (see Box 5). The consequences of non-compliance include administrative supervision (e.g. fines, orders, and exclusion from government procurement contracts) and civil liability.<sup>38</sup> Existing and proposed examples of these laws include:

Examples include the following:

- **France:** The *Corporate Duty of Vigilance Law* (2017)<sup>39</sup>
- **Netherlands:** The *Child Labour Due Diligence Act* (2019)<sup>40</sup>
- **Germany:** The *Corporate Due Diligence in Supply Chains Act* (2021)<sup>41</sup>
- **Norway:** The *Transparency Act* (2021)<sup>42</sup>
- **Switzerland:** The *Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict-Affected Areas and Child Labour* (2021)<sup>43</sup>
- **European Union:** The European Commission has adopted a proposal for a *Directive on Corporate Sustainability Due Diligence* (2022).<sup>44</sup>

Further examples are currently under consideration in several other jurisdictions.<sup>45</sup> Although these laws are jurisdiction-specific, their effect can be extraterritorial and apply to:

- Foreign companies merely operating and not necessarily headquartered in that country; and
- Human rights impacts occurring abroad, including the deployment-related impacts detailed in Box 1.

For example, a lawsuit was filed against France's largest utility, Électricité de France (EDF), under France's *Corporate Duty of Vigilance Law* for a failure to conduct adequate HRDD in relation to its wind farm development in Mexico resulting in a violation of the Indigenous Zapotec community of Unión Hidalgo's right to FPIC in the use of their land.<sup>46</sup> Other companies have received enforcement notices, penalties, and been taken to court for simply failing to develop adequate vigilance plans required by the French law, irrespective of whether harm giving rise to potential civil liability has occurred.<sup>47</sup> Companies have also been pursued via non-judicial mechanisms. For instance, EDF faced a parallel action under the *OECD Guidelines* complaint mechanism for its wind farm mentioned above.<sup>48</sup> An example from another renewables sector is also illustrative: NorConsult was the subject of an OECD complaint for failing to conduct appropriate HRDD in relation to its hydropower projects in Malaysia, which resulted in adverse human rights impacts on Indigenous communities.<sup>49</sup> Companies should also note that conducting HRDD either to comply with HRDD laws or simply as a good practice measure, may reduce legal risks associated with secondary criminal liability or 'complicity' (see Box 6), and possibly civil liability if HRDD evolves as a legal standard of care (absent specific HRDD legislation).<sup>51</sup>

### BOX 5: WHAT DOES COMPLIANCE WITH HRDD LAWS TYPICALLY REQUIRE?

HRDD laws differ, but typically require companies to:<sup>37</sup>

1. Identify actual or potential adverse human rights impacts arising from business operations;
2. Create and implement an action plan to address these risks;
3. Continuously monitor the implementation of the action plan; and
4. Report on the HRDD processes employed, actions taken, and their outcomes.

HRDD should not be confused with merely undertaking social auditing. Further, HRDD differs from due diligence in the finance context which typically only involves an *initial* appraisal of human rights issues and is concerned with risks to *business*; HRDD, on the other hand, is concerned with risks to *people* and requires *ongoing* vigilance.

### BOX 6: HRDD AS A TOOL TO AVOID COMPLICITY

Most national jurisdictions prohibit complicity in the commission of a crime, and several extend this liability to companies. In these fora, corporate liability for complicity may arise where a company contributes to an adverse human rights impact caused by another party that is criminally prosecutable. Tests for complicity vary by jurisdiction but typically assess liability in terms of both the degree of culpability (intentional, knowing, reckless, or negligent) and the degree of assistance provided (material, substantial). This legal risk is heightened in conflict-affected areas. Conducting HRDD can help a company to avoid exposure to complicity in the first place, as well as serve to potentially reduce the risk of legal liability by showing that it has taken proactive measures and all reasonable steps to avoid being complicit in adverse human rights impacts.<sup>50</sup>





## 3.2 HUMAN RIGHTS DISCLOSURE LAWS

Wind and solar companies may also be required to report on the actual or potential adverse human rights impacts of their operations under mandatory disclosure and transparency laws. Penalties for non-compliance with such laws range from fines for administrative offences to personal liability (fines and/or imprisonment) for company directors for reporting false or misleading information. These requirements arise in a range of different regulatory fora, including:

- Environmental, Social & Governance (ESG) Reporting Requirements:** Several disclosure laws deal exclusively with company reporting on ESG impacts, including the community-related human rights impacts in this primer. For example, the European Union’s (EU) *Non-Financial Reporting Directive*<sup>52</sup> adopts a “comply or explain” system, requiring certain entities to report annually on their respect for human rights and anti-corruption matters (among other ESG areas).<sup>53</sup> Further, the EU’s proposed *Corporate Sustainability Reporting Directive* extends the NFRD scope to all large companies, requires more detailed reporting in accordance with mandatory EU sustainability reporting standards, and mandates assurance and digital tagging for reported information.<sup>54</sup>
- Corporations Laws:** Disclosure of material human rights risks is required as part of annual financial reporting in some jurisdictions. For example, the United Kingdom’s (UK) *Companies Act* requires that certain companies produce an annual strategic report that includes a review of social, community, and human rights risks (among other ESG areas).<sup>55</sup>
- Stock Exchange Regulation:** A growing number of stock exchanges require disclosure of material ESG risks as a condition of listing,<sup>56</sup> including the exchanges in Malaysia, Indonesia, Singapore, Thailand, and Johannesburg.<sup>57</sup> Some adopt a ‘comply and explain’ approach while others require mandatory reporting with enforcement via public sanctions.<sup>58</sup>
- Modern Slavery Disclosure Regulation:** Several national and state jurisdictions require companies to report annually on their measures to address human trafficking and modern slavery in their operations and supply chains. Examples include the UK *Modern Slavery Act*, Australia’s *Modern Slavery Act*, the New South Wales *Modern Slavery Act*, and California’s *Transparency in Supply Chains Act*.<sup>59</sup>



### 3.3 LABOR RIGHTS PROTECTIONS

Community-related labor rights impacts, including forced labor, may also give rise to legal risks during project deployment. In addition to the legal risks of non-compliance with *host* state labor laws, several *home* state labor laws also present legal risks, particularly in the area of human trafficking and modern slavery. Although modern slavery risks are typically seen as *supply chain* issues (see Box 7), such risks could also arise during project *deployment* where community members are contracted directly as part of a project's local workforce, indirectly via third party agencies, or as part of a state-directed scheme.<sup>65</sup> For example, in the US, the *Trafficking Victims Protection Reauthorization Act* creates extraterritorial civil and criminal liability for knowingly benefiting from human trafficking and forced labor.<sup>66</sup> Various forms of corporate liability for forced labor and human trafficking (often extraterritorial in reach) also exist in jurisdictions such as South Africa, Brazil, Qatar, Japan, UAE, and the EU.<sup>67</sup>



Tamil Nadu, India.

#### BOX 7: SUPPLY CHAIN FORCED LABOR

Although legal risks regarding *supply chain* forced labor fall beyond the scope of this primer, one particular risk is important to mention here given its salience. Allegations concerning the use of state-directed forced labor in Xinjiang, China for the manufacture of polysilicon used in solar panels have attracted global attention,<sup>60</sup> led to import bans on Xinjiang-produced polysilicon and goods that contain it,<sup>61</sup> and caused some audit firms to cease labor audits in the region amidst concerns of restricted access.<sup>62</sup> The US introduced the *Uyghur Forced Labor Prevention Act* to prevent goods made with forced labor in Xinjiang from entering US markets.<sup>63</sup> Crucially, 95% of solar modules require solar-grade polysilicon and 45% of that polysilicon is produced in Xinjiang, thereby pervading the supply chains of solar companies globally.<sup>64</sup>



### 3.4 EXTRATERRITORIAL ANTI-CORRUPTION LAWS

Wind and solar companies may face heightened exposure to corruption – particularly bribery, collusion, and bid-rigging – as a result of several factors, including the use of third-party agents to navigate local contexts, and deploying projects in locations with weak rule of law. Corruption can cause or exacerbate adverse human rights impacts and has been found to be a common determinant of renewable energy project failure.<sup>68</sup> Corruption may also give rise to legal risks for wind and solar companies under not only *host* state laws, but also *home* state extraterritorial anti-corruption laws, with various criminal and civil penalties. Key examples include the following:

- The UK Bribery Act:** This law makes it an offense for companies and other commercial organizations that carry on a business, or part of a business, in the UK (whether or not incorporated there) to bribe another person, be bribed, bribe a foreign public official, or fail to prevent bribery (including by an employee, agent or subsidiary).<sup>69</sup>
- The US Foreign Corrupt Practices Act:** This law prohibits US companies, companies with their principal place of business in the US, and companies listed on a US stock exchange (including subsidiaries, officers, directors, employees, and agents) from making a corrupt payment (directly or via intermediaries) to a foreign government official (including government-owned or controlled entities) in the US or abroad.<sup>70</sup> Liability also extends to *any* foreign company that commits an act in furtherance of such bribery within the US through interstate commerce.<sup>71</sup>

Given the pervasive scope and extraterritorial reach of such laws, private and public lenders typically require vigorous anti-corruption and bribery representations and covenants in wind and solar project finance agreements, as well as robust anti-corruption policies and training programs. Thus, bribery and corruption may also give rise to legal risks in the provision of project finance (see Section 5).





A key legal risk stemming from community-related adverse human rights impacts by wind and solar projects is exposure to community litigation brought in both *host* and *home* state fora by community members and their representatives. These community claims can arise from one or more of the impacts outlined in Box 1. Beyond the *financial*, *operational*, and *reputational* impacts of community litigation for companies (see Box 8), the *legal* outcomes can include project delays, alterations, suspension, and termination, as well as orders to pay fines and damages. Three common types of community-initiated action against companies – host state litigation, transnational tort litigation, and non-judicial complaints – are discussed below.

## 4.1 HOST STATE LITIGATION

Companies may face litigation brought by communities and their representatives in host state courts for breaches of host state laws concerning land, community consultation, FPIC, labor rights, bribery, and other issues (see Sections 2.1, 2.2, 3.3 and 3.4). Examples include the cases from Kenya, Mexico, and Norway mentioned above (see Section 2).

### BOX 8: THE COST OF COMMUNITY CONFLICT

The financial, operational, and reputational risks of adverse human rights impacts for wind and solar companies include:

- **Operational delays and lost productivity** due to community conflict, protests, roadblocks, injunctions, and other legal proceedings in response to adverse impacts and a lack of community consultation;
- **Revocation of, or an inability to secure, project finance** due to a failure to meet lender social impact criteria;
- **Project write-offs** including abandoned assets and projects due to a lack of due diligence surrounding land rights and tenure risk;
- **Reputational damage** from adverse media coverage and civil society campaigns;
- **Financial costs** and subsequent impacts on project or business viability; and
- **Diminished return on investment**, investor pressure, and decreased investor appetite.

A study of company-community conflict in the extractives sector by the *Harvard Corporate Social Responsibility Initiative* found that the company cost of preventable conflicts could amount to \$379 million in asset write-offs and \$1.33 billion in projected reserves for a single project.<sup>72</sup> In Oaxaca, Mexico, communities affected by the 132-turbine Mareña Renovables wind project challenged the project for a failure to obtain FPIC, a lack of fair compensation for their land, interference with traditional fishing practices and cultural rituals, and corruption in the issue of project permits.<sup>73</sup> A combined approach of community roadblocks, non-judicial complaints, and litigation impeded construction and forced Mareña to abandon and relocate the \$1.2 billion project.





## 4.2 TRANSNATIONAL TORT LITIGATION

An evolving landscape of transnational tort claims brought in home state courts by community litigators could lead to increased legal risk for wind and solar companies that adversely impact the rights of communities, either directly or via their subsidiaries. Examples of both established and emerging precedent for such claims – and the receptiveness of *home* state courts to hear them – are evident in several jurisdictions, including the following:

- Canada:** The Supreme Court of Canada in *Nevsun Resources Ltd. v. Araya* found that Canadian courts could enact civil remedies for corporate violations of customary international law and allowed the case to proceed.<sup>74</sup> Nevsun was accused of complicity in the enslavement of mine workers in **Eritrea** who were indefinitely conscripted via military service into a forced labor regime and made to work at a mine for Nevsun’s contractors. The case subsequently settled out of court.<sup>75</sup> Canada has also heard community litigation regarding attacks against human rights defenders: the Ontario Superior Court of Justice in *Choc et al. v. Hudbay Minerals* allowed three related actions concerning, among other allegations, the murder of an Indigenous community leader and human rights defender by security personnel during a protest against a Hudbay subsidiary’s Guatemalan mine, to proceed to trial.<sup>76</sup> The case is ongoing.
  - UK:** The UK Supreme Court in *Vedanta Resources Plc v. Lungowe & Others* held that a duty of care can exist between a parent company and those affected by the operations of its subsidiaries abroad (depending on the relationship between the entities and in particular the role the parent company had in the relevant activities or operations which caused the plaintiffs harm).<sup>77</sup> The case, brought by 1,826 Zambian farmers and community members against UK company Vedanta for pollution of community water sources in **Zambia** by its subsidiary, Konkola Copper Mines Plc, was allowed to proceed but subsequently settled out of court.<sup>78</sup>
- This precedent was subsequently applied in *Okpabi v Royal Dutch Shell*, with the UK Supreme Court unanimously allowing Nigerian community members to bring a lawsuit against Royal Dutch Shell for environmental and human rights abuses by its Nigerian subsidiary.<sup>79</sup>
- The Netherlands:** The Dutch Court of Appeal in *Four Nigerian Farmers v Royal Dutch Shell* found a limited duty of care in relation to a parent company’s response to an oil spill that occurred through its subsidiary’s operations in **Nigeria**.<sup>80</sup> The plaintiffs, whose lands, fishponds, and livelihoods were affected by the spill, were also successful on the merits at trial.
  - Thailand:** The Bangkok South Civil Court in *Hoy Mai & Others vs. Mitr Phol Co. Ltd* held that the plaintiffs, around 700 Cambodian families, could bring a class action lawsuit against Thai company Mitr Phol for human rights abuses committed in **Cambodia**.<sup>81</sup> The plaintiffs accused the company of complicity in their forcible displacement and the dispossession of their land without resettlement or compensation. The actions were carried out by Mitr Phol’s wholly owned subsidiary, Angkor Sugar, in order to clear way for an industrial sugar plantation.
  - USA:** Many foreign claimants, including communities, have invoked the *Alien Tort Statute* (ATS) to seek redress against parent and subsidiary corporations for human rights abuses occurring abroad that violate customary international law or a treaty of the US, with mixed results.<sup>82</sup> While the nature and extent of future applications of the ATS against corporations remains uncertain, for now this remains a legal risk for wind and solar companies to consider.<sup>83</sup>



## 4.3 NON-JUDICIAL COMPLAINTS

Companies may also be subject to community complaints (and associated dispute resolution and/or compliance review processes) via *non-judicial grievance mechanisms* such as those established pursuant to the *OECD Guidelines* and by various development finance institutions, certification schemes, and other multi-stakeholder or sustainability-focused initiatives. Such community action can similarly lead to project delays, alterations, suspension, and compensation payments.

For example, after Indigenous communities in Oaxaca, Mexico, filed a complaint to the Overseas Private Investment Corporation's Office of Accountability in relation to various human rights impacts by the Cerro de Oro hydropower project financed by the institution, the project was suspended.<sup>84</sup> Other examples include the complaints brought by Indigenous communities via the European Investment Bank's (EIB) complaint office against Akiira (see Section 5), and under the *OECD Guidelines* against EDF, NorConsult, Statkraft, and BKW (see Sections 2.1 and 3.1).

Lake Turkana wind power installations, Kenya.





## 5. FINANCIERS

Adverse human rights impacts by wind and solar companies may give rise to legal risks linked to the provision of finance by public or private financial institutions. There is mounting pressure on investors (and, subsequently, borrowers) to comply with an increasing array of ESG performance standards<sup>85</sup> such as the *Equator Principles*,<sup>86</sup> *Principles for Responsible Investment*,<sup>87</sup> and development finance institution standards such as the International Finance Corporation's *Environmental and Social Performance Standards*.<sup>88</sup> Further, regulatory frameworks such as the *EU Sustainable Finance Disclosure Regulation* impose both substantive and disclosure requirements on investors in relation to the ESG risks and adverse impacts of their investments.<sup>89</sup> These developments have led to corresponding investor-driven pressure on companies to proactively implement measures to mitigate ESG impacts, including those that infringe the human rights of communities. Project finance transactions, in particular, enable lenders to exert significant pressure over companies that perform poorly in this regard.

Amidst this landscape, finance-related legal risks for wind and solar companies are becoming more widespread. Loan agreements and common terms agreements, particularly with development finance institutions, increasingly incorporate terms and conditions that require companies to mitigate adverse human rights impacts, adhere to ESG performance standards, furnish evidence of ESIA's and FPIC, and provide representations and warranties as to ongoing regulatory compliance on environmental and social matters, among other requirements<sup>90</sup> (see Box 9). A company's failure to comply with these terms may trigger a number of events depending on whether the breach is characterized under the contract as a material breach or event of default, a

misrepresentation, a failure to uphold a warranty or covenant, a failure to fulfill a condition precedent, or otherwise. Such events include the following:<sup>92</sup>

- **A refusal to disburse funds** to the borrower;
- **Termination** of the contract and cancellation of finance by the lender;
- **Takeover** of project operations by the lender;
- **A requirement for early repayment** of the loan via *cash sweeps* (applying all net cash flow to repayments) or *acceleration* (immediate repayment of the loan);<sup>93</sup> and
- **Enforcement of loan security interests** in the borrower's project assets and contracts by the lender.

Examples from other renewables sectors are illustrative. For instance, the EIB withdrew its USD\$190 million loan to Akiira's geothermal project in Kenya following community grievances over the loss of their land and livelihood as well as impacts to their pastoralist lifestyle.<sup>94</sup> The project was also subject to non-judicial complaints via the EIB's complaint office.<sup>95</sup> Similarly, FMO and Finnfund terminated their investment contract for Desarrollos Energéticos S.A.'s Agua Zarca hydropower project in Honduras following concerns over impacts to the land and cultural rights of the Indigenous Lenca community and the murder of human rights defender and Indigenous activist, Berta Cáceres.<sup>96</sup>



## BOX 9: EXAMPLE OF HUMAN RIGHTS TERMS AND CONDITIONS IN A PROJECT FINANCE AGREEMENT

The following clause from a loan agreement between the Asia Development Bank and the Rajasthan Renewable Energy Project provides an illustrative example of the incorporation of terms and conditions concerning the rights of Indigenous communities:<sup>91</sup>

*The Borrower shall ensure or cause the EA\* to ensure that the preparation, design, construction, implementation and operation of the Project, each Subproject and all Project facilities comply with:*

*(a) all applicable laws and regulations of the Borrower and the State relating to indigenous peoples;*

*(b) the Indigenous Peoples Safeguards;*

*(c) the Indigenous Peoples Planning Framework; and*

*(d) all measures and requirements set forth in the respective Indigenous Peoples Plan, and any corrective or preventative actions set forth in a Safeguards Monitoring Report.*

\*\*EA' or the "Project Executing Agency" for the purposes of and within the meaning of the Loan Regulations means the State and Rajasthan Rajya Vidyut Prasaran Nigam Limited or any successors thereto acceptable to ADB, that are jointly responsible for carrying out the Project.



Atacama Desert, Chile.



## 6. POWER PURCHASE AGREEMENTS



Legal risks from adverse human rights impacts may also arise under power purchase agreements (PPAs) between **generators** (wind and solar companies producing and selling electricity) and one or more **offtakers** (electricity purchasers, often government utilities). PPAs are central to a project's ability to secure finance, generate cash flow, recover costs, meet lender repayments, and turn a profit. A company's performance of its obligations under a PPA is therefore vital to ensure overall project success.<sup>97</sup> PPAs vary by project, company and region but typically require that:<sup>98</sup>

- Project construction begins by a certain date;
- Project construction is not abandoned without the express consent of the offtaker;
- The project is operational by an agreed Commercial Operation Date (COD); and
- The company complies with domestic laws, including those concerning environmental and social impacts.

If a company causes, contributes to, or is directly linked to adverse human rights impacts through its business relationships during project *development*, *construction*, or *operation*, one or more of the following events may occur:<sup>99</sup>

- **Community disputes** over land tenure rights associated with the project site (see Section 2.2);
- **Physical disruption** to the project from community protests and roadblocks (see Box 8);
- **Litigation** by communities (see Section 4);
- **Host state prosecution** of project companies for corruption (see Section 3.4)
- **Delay, denial, or revocation of permits** (see Section 2.1); and
- **Suspension or termination** of the project (see Sections 2-5).

These events could, in turn, affect a project's construction start date, COD, compliance with domestic laws, or result in a project being abandoned altogether, all of which may result in a company breaching its obligations under the PPA. The legal consequences of a given breach depend on how it is characterized under the PPA, its seriousness, and whether there are other contributing factors (such as fault by the offtaker or *force majeure*), but typically include:<sup>100</sup>

- **Liquidated damages:** If the company fails to meet the COD, the PPA may require that the company pay a fixed sum for each week delayed or reimburse the offtaker for interim electricity purchases from an alternative provider.<sup>101</sup>
- **Termination of the PPA:** If delays to construction commencement or the COD exceed a certain threshold, the project is abandoned, or the company violates domestic law, the PPA may enable the offtaker to terminate the agreement for material breach and invoke other penalties, with flow-on consequences for project finance.<sup>102</sup>

For example, land rights issues and a subsequent need for site relocation caused a 210-day delay to the COD of ReNew Power's solar project under a PPA with Madhya Pradesh Power Management Company Limited (MPPMCL).<sup>103</sup> The Supreme Court of India ordered that ReNew Power pay a penalty of approximately USD \$1.8 million to MPPMCL as a result of the delay.<sup>104</sup> General counsels and corporate legal teams can help companies avoid breaching PPAs by proactively identifying actual and potential human rights impacts, determining ways to prevent, mitigate, and account for them through the life of the contract, and enabling remedy for affected communities.<sup>105</sup>

## 7. HOW TO MANAGE LEGAL RISKS?



This primer outlines a wide range of different legal risks for wind and solar companies associated with community-related adverse human rights impacts. Building a comprehensive human rights program that is aligned with the UNGPs and integrated throughout business operations can help companies involved in wind and solar projects to get ahead of these risks. General counsels and corporate legal teams can and should play a key role in the program's design and implementation.

For more information and practical recommendations on the core elements of such a program and how wind and solar companies can improve community-related human rights performance to help mitigate the above legal risks, please see the Business Guide companion to this legal primer: *Respecting the human rights of communities: A business guide for commercial wind and solar project deployment* (CCSI, 2022).





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Wind farm under construction in Dak Lak, Vietnam.





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