

**THE DANISH
INSTITUTE FOR
HUMAN RIGHTS**

**RESPECTING THE
RIGHTS OF INDIGENOUS
PEOPLES: A DUE
DILIGENCE CHECKLIST
FOR COMPANIES**

RESPECTING THE RIGHTS OF INDIGENOUS PEOPLES:
A DUE DILIGENCE CHECKLIST FOR COMPANIES

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PART 1

INTRODUCTION

OBJECTIVE

This Checklist seeks to provide companies with operational guidance on how to ensure due diligence when operating in areas where projects may affect indigenous peoples. Based on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169, this Checklist aligns the principles and rights in these two instruments with the human rights due diligence approach set out in the UN Guiding Principles on Business and Human Rights.

INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL LAW

There are over 370 million indigenous people in approximately 90 different countries around the world. While there is no universal definition of **'indigenous peoples'**, ILO Convention No. 169 provides a set of subjective and objective criteria that can be applied to identify indigenous peoples in a given country. Self-identification by indigenous peoples is one of these fundamental criteria. In general, identification in context is considered to be more constructive than attempting to adhere to a rigid definition. Whilst indigenous peoples across the globe are highly diverse, with unique cultures, languages, knowledge systems and livelihood practices, a common thread is a shared history of **marginalisation** and the subsequent undermining of their **right to self-determination**.

"...indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."¹

Indigenous peoples have historically been victims of grave human rights violations by both state and non-state actors. This has had a significant impact on their social, economic and cultural development. While they make up around 5% of the world's population, indigenous peoples also make up approximately 15% of the world's poor. Further, indigenous peoples traditionally have close connections to their **lands and territories**, so any developments undertaken on - or affecting - their lands and territories, can impinge on their rights and significantly affect their material and spiritual wellbeing.

The two main instruments that explicitly define indigenous peoples' rights in international law are the **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** and **ILO Convention No. 169**. Indigenous peoples' rights are also embedded in, and constitute an integral element of, the broader international

human rights regime. These instruments and policies to promote and respect indigenous peoples' rights are intended to address the disadvantaged position of indigenous peoples and to ensure effective equality between indigenous peoples and all other sectors of a given society.

UNDRIP, adopted in 2007, sets out the rights of indigenous peoples and the obligations of states. It articulates existing rights as they apply to indigenous peoples, reflecting existing obligations of States under treaty law. A failure to comply with the provisions of UNDRIP may imply non-compliance with binding human rights instruments which are subject to regular monitoring by international or regional bodies.

ILO Convention No. 169, adopted in 1989, also reflects many elements of universal human rights standards, addressing, inter alia, issues of land and natural resources, health, education, development and cross-border cooperation. The rights to be **consulted** and to **participate** in decision-making are the cornerstones of the Convention and the basis for applying the broader set of rights enshrined within it. Convention No. 169 is an international treaty that becomes legally binding upon States through ratification. To date, it has been ratified by 23 States.

UNDRIP and Convention No. 169 are **mutually compatible and reinforcing**, implying that the domestication and implementation process of the two instruments can be complementary.

Indigenous peoples' rights are not 'special' rights that are exclusive to indigenous peoples. Rather, they are the **articulation of universal human rights as they apply to indigenous peoples**. The requirement in international law for specific consultations with indigenous peoples is a special measure aimed at overcoming discrimination and ensuring equality between indigenous peoples and other sectors of society.

UN core human rights treaty bodies and regional human rights bodies also play an important role in contextualising, legitimising and monitoring these rights.

Moreover, a number of key legally-binding international human rights instruments also contain provisions on the rights of indigenous peoples, or their supervisory bodies have provided specific guidance for states on their implementation with specific regard to indigenous peoples. For example, the Convention on the Rights of the Child contains specific provisions on the rights of indigenous children and its supervisory Committee has produced a specific General Comment on the Convention as it applies to indigenous children.² The Committee on the Elimination of Racial Discrimination has also issued a General Recommendation on the rights of indigenous peoples outlining how the provisions of the Convention on the Elimination of Racial Discrimination applies to them.³

INTERNATIONAL POLICIES AND GUIDANCE ON INDIGENOUS PEOPLES

There is a broad range of international safeguards, policies and guidelines concerning business and the rights of indigenous peoples. These include the **International Finance Corporation's (IFC) Performance Standard No. 7 on Indigenous Peoples**, the World Bank's Environmental and Social Safeguard on "**Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities**", as well as a number of thematic and industry-specific guidelines and policies, including the **Green Climate Fund's Indigenous Peoples Policy**, and the **Indigenous Peoples Position Statement of the International Council on Mining and Metals**, to name but a few. In many cases it is unclear for companies which standards they should refer to when preparing projects and initiatives.

A major challenge with a number of these safeguards and policies is the level of variation in their reflection of international law, and their differing approaches to addressing the rights of indigenous peoples. Some are also ambiguous or unclear about issues around due diligence and impact assessments involving indigenous peoples, leaving them open to misinterpretation. In addition, many fall short of or are not compatible with the standards enshrined in international instruments on the rights of indigenous peoples such as ILO Convention No. 169 and UNDRIP.

Due to these gaps and discrepancies, this Checklist is based on the guidance on indigenous peoples' rights provided by the UNDRIP and ILO Convention No. 169 and follows the key steps of due diligence as outlined in the **UN Guiding Principles on Business and Human Rights (UNGPs)** which enunciate key principles relating to human rights due diligence by business enterprises.

The UNGPs, unanimously adopted in 2011 by the UN Human Rights Council, clearly establish **the corporate responsibility to respect human rights**. They have been widely disseminated, commented on and adopted as an authoritative framework for addressing business and human rights issues across a broad spectrum of actors. Other critical universal frameworks for guiding the conduct of business, including the **OECD Guidelines for Multinational Enterprises** are aligned with the UNGPs.

According to the UNGPs, the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the **International Labour Organization's Declaration on Fundamental Principles and Rights at Work**.⁴ The principles enshrined in the UNGPs can also serve to mitigate confusion surrounding which standards apply in which contexts as they provide that business enterprises should seek ways to **honour the principles of internationally recognized human rights when faced with conflicting requirements**.⁵

Further, the UNGPs make explicit reference to additional standards that may need to be considered when business activity may have an impact on specific population groups including indigenous peoples.

“Depending on circumstances, business enterprises may need to consider additional standards. For instance, 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.”⁶

HUMAN RIGHTS DUE DILIGENCE

Principle 15(b) of the UNGPs states that business enterprises should have appropriate policies and processes in place including “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”.

Such human rights diligence “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”⁷ and “should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”⁸

The UNGPs provide that the due diligence process should include the following steps:

1. **Assessment of human rights impacts (actual and potential);**
2. Integration of findings from impact assessments into relevant internal processes;
3. **Monitoring performance and responses to ensure any impacts are being effectively addressed;** and
4. External reporting and communication on such responses.

This Checklist will focus on the **first** and **third** of these four steps in relation to the rights of indigenous peoples. While the first step often relates to the initial stages of a company’s involvement in a geographical context or a specific project, companies should bear in mind that as highlighted in the UNGPs, due diligence is an **ongoing process**, rather than a single event. Engagement with indigenous peoples does not come to an end if and when consent is given for a particular project activity. Instead, active engagement must continue for the duration of the project.

Similarly, companies should bear in mind that consent, once given, can be retracted at any time. If relations between businesses and indigenous communities become negative, consent may be contested. If comprehensive and participatory due diligence processes have not been observed, companies will have nothing to fall back on. Thus, due diligence processes are crucial in maintaining a **positive relationship** between the company and community.

In addition to ensuring that companies undertake their relevant responsibilities, operating with due diligence in respect of indigenous peoples' rights leads to increased **security of investments, mutually beneficial partnerships, risk minimisation and conflict mitigation or resolution. There is a growing recognition among private sector actors that attaining the highest possible standards in respect of indigenous peoples' rights is simply a matter of sound business principles and good practice.**

PART 2

THE CHECKLIST

The Checklist has been split into four steps:

1. **Screening** – Companies undertake an analysis of the strategic environment in a given country as well as the project-specific context, engaging in initial dialogue with the indigenous peoples potentially affected.
2. **Impact assessment** – Companies assess the actual or potential impacts of a business project or operation on indigenous peoples.
3. **Consultation** – Based on the results of the comprehensive impact assessment, companies consult with indigenous peoples with a view to obtaining agreement or consent.
4. **Implementation and monitoring** – Companies establish permanent and institutionalised mechanisms for continuous dialogue, as well as access to grievance mechanisms to effectively address emerging concerns.

For each step, this Checklist outlines key questions that business should consider in the context of its engagement with indigenous peoples and their communities, as well as the human rights rationale behind these questions. Where there is a risk that the company's actions may compromise specific rights enshrined in UNDRIP and ILO Convention No. 169, these key questions may give rise to a "red flag". Given the complexities of the legal, social and cultural issues relating to indigenous peoples' rights and the diversity between and within indigenous communities, any "red flag" should activate appropriate in-house expertise and procedures on indigenous peoples, and companies should consider the need for supplementary external expert advice including from indigenous experts.

It should be noted that this Checklist is a general guideline only and is not intended to provide a comprehensive or context-specific analysis of relevant obligations and responsibilities. For more in-depth guidance on these and related issues, companies should refer to the additional reading list set out as an Annex to this publication or seek advice from relevant experts in indigenous peoples' rights.

2.1 STEP ONE: SCREENING

RATIONALE

According to both the UNDRIP and ILO Convention No. 169, indigenous peoples have the right to determine their own development. This, in turn, gives rise to interrelated rights to **consultation and participation** with the objective of obtaining **consent** from indigenous peoples to measures proposed by the State.

While States have obligations to respect, protect and fulfil human rights, including rights of indigenous peoples, there are often implementation gaps, even when relevant treaties, such as ILO Convention No. 169 have been ratified. The lack of recognition and/or implementation of rights have in many countries led to high levels of mistrust and conflicts, and means that:

- Policies and projects are often defined by governments, or activities are often defined by business, without the participation of indigenous peoples, so they may therefore be incompatible or conflicting with indigenous peoples' aspirations or real needs in relation to development. In the worst-case scenario, a project may constitute a violation of indigenous peoples' rights from the outset, in relation to, for example, lands or adequate consultation processes.
- The probability of successfully ensuring good faith consultations and meaningful participation of indigenous peoples may depend on factors within the strategic (governance) environment of a given country that are beyond the sphere of influence of the project.

Screening at the initial stage should therefore comprise:

- **Identification of indigenous peoples** that may be affected by the project, based on criteria set out in ILO Convention No. 169, including self-identification as indigenous peoples, regardless of formal recognition by the state as such;
- **Analysis of the strategic environment** in a given country regarding the recognition and respect for indigenous peoples' rights, as well as the particular situation of indigenous peoples in the suggested locality;
- **Analysis of the project-specific context** and locality to ascertain whether the authorities of the concerned country have effectively consulted with potentially affected indigenous peoples, including before issuing licenses or concessions to third parties; and
- **Initial dialogue with the indigenous peoples** potentially affected to assess compatibility between their aspirations for development and the proposed intervention.

This should give the company a sound basis for identifying potential areas of concern and determining the need for in-house and/or external expert advice including from indigenous peoples.

CHECKLIST

Key questions: screening	Red Flag	References/comments
Are there indigenous peoples who may potentially be affected by the project?	Yes = 	In countries where the state does not accept or use the term “indigenous peoples” the assessment should be based on the identification criteria contained in ILO Convention No. 169, including self-identification. ⁹ If specific groups fulfil the relevant criteria then the rights frameworks that apply to indigenous peoples should be applied.
Has the state ratified ILO Convention No. 169 and/or formally recognized indigenous peoples' rights in its legislation?	No = 	The ratification of ILO Convention No. 169 and/or legal recognition of indigenous peoples' rights should provide a framework for legal security and appropriate procedures. However, where there are gaps in implementation of ILO Convention No. 169 or other provisions to protect indigenous peoples' rights, there may be additional risks for private sector actors, so this should be carefully assessed.
Are there institutionalised mechanisms for consultation* with indigenous peoples prior to beginning work on any project that may affect indigenous peoples and/or their lands, territories and resources? *cross-reference with Section 3 of this Checklist on consultation for further guidance.	No = 	Both UNDRIP and ILO Convention No. 169 stipulate that indigenous peoples should be consulted: before consideration of legislative or administrative measures that may affect them; and prior to the exploration and exploitation of resources pertaining to their lands. ¹⁰ Therefore, consultations should begin before the granting of concessions and licenses or other measures likely to have an impact on indigenous peoples.

Key questions: screening	Red Flag	References/comments
<p>If government authorities have already granted third parties the permission to undertake a project that may affect indigenous peoples and/or their lands, territories and resources, have they consulted the potentially affected indigenous peoples beforehand, in accordance with international standards?*</p> <p>*Cross-reference with Section 3 of this Checklist on consultation for further guidance.</p>	<p>No = </p>	<p>If government authorities have already granted permission to third parties to undertake projects that may affect indigenous peoples, it is crucial to verify whether they have already ensured the necessary consultations according to international standards and satisfactorily documented the consent or agreement reached.</p> <p>If permission is granted without consultation, prior to the ratification of ILO Convention No. 169 or the establishment of consultation mechanisms, there is a high risk that it may not be considered legitimate by the indigenous peoples concerned, and may thus lead to conflict or legal, reputational and financial risk.¹¹</p>
<p>If government authorities have granted third parties the permission to undertake a project that may affect indigenous peoples and/or their lands, territories and resources, have they obtained the free, prior and informed consent of the potentially affected indigenous peoples beforehand?</p>	<p>No = </p>	<p>Although the requirement for free, prior and informed consent varies according to the rights affected and the potential impact, a lack of consent will generally indicate high risk of conflict and of adverse impacts on human rights.</p>
<p>Have other companies operating on indigenous lands in the given country or area experienced conflicts?</p>	<p>Yes = </p>	<p>Existing conflicts between companies and indigenous peoples may be an indicator of implementation gaps regarding the recognition of indigenous peoples' rights. Further, it may be more difficult to reach agreement or consent on individual projects when operating in a context with high levels of conflict.</p>

Key questions: screening	Red Flag	References/comments
Do initial consultations indicate potential conflicts between the project and indigenous peoples' aspirations for development?	Yes = 	Initial consultations and dialogue with indigenous peoples' organisations at national, sub-national and local levels can give important indications about the compatibility of development objectives and whether a given project is conflicting, compatible, reinforcing or can at least be reconciled with indigenous peoples' aspirations for development.
Does the analysis of the existing legal and institutional framework reveal any legal gaps , particularly related to land and resource rights and the requirement for consultation and consent?	Yes = 	<p>The analysis should include: frameworks and processes for consultation and participation; recognition of indigenous peoples' own customary and other institutions; state and customary land tenure systems; pending claims to land; and existing land usage. It should identify and include individuals and communities who do not have recognised or recorded legal or customary titles to the land, but who rely on it for their livelihoods (permanent, seasonal, migratory). According to international standards, indigenous peoples' rights to lands are recognised on the basis of customary occupation and use and should be recognised even in the absence of formal land titles.</p> <p>Possible sources of information are comments of the ILO supervisory bodies¹²; reports of the UN Special Rapporteur on the rights of indigenous peoples¹³; international, regional and national human rights bodies; indigenous peoples' organisations and networks; NGOs; and media reports of recent conflicts and protests.</p>

Key questions: screening	Red Flag	References/comments
<p>Does the analysis of the country context indicate implementation gaps, arising from previous or current failure to adequately implement land and resource rights and the requirement for consultation and consent?</p>	<p>Yes = </p>	<p>Possible sources of information are: comments of ILO supervisory bodies; reports of the UN Special Rapporteur on the rights of indigenous peoples; of international, regional and national human rights bodies; of indigenous peoples' organisations and NGOs; and reports of recent conflicts and protests.</p>

2.2 STEP TWO: IMPACT ASSESSMENT

RATIONALE

Following the initial country/regional analysis, the company should undertake an impact assessment, evaluating the potential and actual **social, spiritual, cultural and environmental impact on indigenous peoples**. According to the UNGPs, companies are required to assess their human rights impacts. The UNGPs also place a special emphasis on vulnerable or ‘at-risk’ groups, including indigenous peoples. While different types of impact assessments will be useful in different contexts, the most appropriate tool in this context is a Human Rights Impact Assessment.¹⁴

According to ILO Convention No. 169, the impact assessment should be collaborative, undertaken in **co-operation** with the affected indigenous peoples, and the results should be considered fundamental criteria for the implementation of project activities.

“Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities”.¹⁵

The right of indigenous peoples to participate should also be read in line with their right to consultation, enshrined in Article 6 of the Convention. Taken together, Articles 6, 7.1, 7.3, and 7.4 of ILO Convention No. 169 suggest that indigenous peoples should be consulted as early as possible in any process likely to have an impact on them –including at the stage of environmental and social impact assessment. In addition, it is considered good practice for affected indigenous peoples to be part of the design and implementation of the impact assessment. Collaborative impact assessments offer mutual incentives for stakeholders.¹⁶

For companies, incentives can include:

- Increased **legitimacy** and corresponding levels of trust around the results of the impact assessment. This can reduce the risk of results being contested or considered contentious at a later date.
- Improved **understanding** of the potential impacts on indigenous peoples at a level that may not be possible without their direct involvement in the process.
- Reducing the **risk of social conflicts** arising in relation to the project, and the therefore avoiding the associated costs of such conflicts to the company, both financially and in terms of reputation.
- Improved human rights **capacities**, engagement strategies and decision-making processes of the company.
- Enhanced sharing of information, leading to a more **comprehensive understanding** of potential impacts.
- Facilitation of dialogue between stakeholders to identify **common priorities**.

When carrying out an impact assessment related to indigenous peoples, companies need to ensure they take into account the following key human rights principles:

- **Non-discrimination:** Companies need to recognise that indigenous communities are rarely homogenous. Particularly vulnerable sub-groups may exist within the community. Companies should therefore identify and take steps to address potential discrimination throughout the assessment process including by, for example, identifying potential impacts on specific sectors of indigenous society such as women, youth and persons with disabilities, as well as engaging those specific sectors of society to ensure their views are represented.
- **Participation:** The assessment process should ensure meaningful representation of, and consultation with, all relevant sub-groups of the affected indigenous peoples. This includes obtaining informed consent, modifying timeframes to enable meaningful participation and taking steps to understand and address power relations within the community. Companies should take into account the indigenous community's/communities' own representative institutions and decision-making processes in this regard.
- **Accountability:** Companies should consider and clearly define the relevant rights-holders and duty-bearers, as well as which rights will be affected and how the resulting impacts should be addressed.
- **Transparency:** Relevant information regarding the results of the impact assessment should be made available to the indigenous community in an easily accessible and meaningful way.

Issues and risks that should be considered in an impact assessment include, but are not limited to actual and potential social, spiritual, cultural and environmental impacts. In the context of indigenous peoples, particular attention should be paid to cultural sites (including sacred sites, burial grounds) and intangible cultural heritage (such as spirit forests, places of historical value). These impacts can only be fully assessed on the basis of indigenous peoples' knowledge.

In order for an assessment to adequately evaluate potential impacts on indigenous peoples, it is also important to extend the assessment to the whole **area of project influence or impact**, which may extend well beyond immediate proximity to the proposed project. It could include:

- Lands traditionally owned or under customary, seasonal or cyclical use, for livelihoods or for cultural, ceremonial, and spiritual purposes. According to ILO Convention No. 169, 'lands' **includes the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.**
- Land not exclusively occupied or used by indigenous peoples. According to Convention No. 169, land 'to which they have traditionally had access for their subsistence and traditional activities' is still considered as indigenous land for the purposes of applying their rights, and thus in the case of nomadic communities,

impact may also be on land that they only occupy or use on a seasonal or infrequent basis that is also occupied and used by others through allocation of shared rights.

- Areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks.

CHECKLIST

Key questions: risk assessment	Red Flag	References/comments
Have indigenous peoples been considered in the scoping or Terms of reference for the impact assessment?	No = 	<p>There should be formal processes in place to facilitate collective decision-making among stakeholders, who then participate in the design and conduct of the impact assessment.</p> <p>The participatory impact assessment is the starting point for determining the specific scope of consultations to be undertaken with indigenous peoples.</p>
Does the assessment team include indigenous peoples' experts?	No = 	<p>Specific impacts may require expert indigenous knowledge in order for an adequate assessment to be made.</p>
Has a detailed stakeholder mapping and analysis been undertaken, clearly identifying the different groups of rights-holders and their representative institutions, as well as other stakeholders (including civil society organisations as well as local and customary authorities) in the broad area of project impact?	No = 	<p>The methodology should identify rights-holders and their corresponding rights, and clearly differentiate between rights-holders and other stakeholders within the broad project area.</p> <p>Pay particular attention to rights to lands, territories and natural resources; to identification of all representative institutions, and ensure that both men and women, elders and youth and particularly vulnerable groups have been consulted, e.g., indigenous peoples living in voluntary isolation or experiencing initial contact.</p>

Key questions: risk assessment	Red Flag	References/comments
Has baseline data collected as part of the assessment considered all data relevant to indigenous peoples in the area of project impact?	No = 	Pay particular attention to rights to lands, territories and natural resources, including cultural sites and intangible cultural heritage. These impacts can only be fully assessed on the basis of indigenous peoples' knowledge.
Does the assessment cover different types of impacts on indigenous peoples?	No = 	Assessments should address social, spiritual, cultural and environmental impacts, both actual and potential, that are caused, contributed to by, and/or directly linked to, the Company's operations, products, services and relationships.
Has the participatory assessment been undertaken in cooperation with the relevant indigenous peoples' representative institutions?	No = 	Whenever consideration is being given to measures which may affect indigenous peoples directly, consultations should be undertaken in good faith in accordance with appropriate procedures, in particular, through indigenous peoples' representative institutions. ¹⁷
Are indigenous peoples involved in the design and implementation of the impact assessment and consulted as part of the impact mitigation measures and monitoring?	No = 	Participatory impact assessments require participation at all stages.

Key questions: risk assessment	Red Flag	References/comments
Has the impact assessment process, including methodology and findings, been adequately documented and communicated?	No = 	<p>The impact assessment and consultation process and ensuing decisions and agreements should be properly documented at all phases. The documentation should be made available to the indigenous peoples concerned in an accessible language, format and culturally appropriate manner.</p> <p>Where appropriate, non-confidential information should also be made publicly available.</p>
If the project will be acquired from another [corporate or state] actor, has an appropriate impact assessment and consultation process already taken place, and have the concerned indigenous peoples/communities already given their free, prior and informed consent to the project?	No = 	If the initial stakeholder analysis and mapping reveals that the proposed project will affect indigenous communities or a satisfactory impact assessment and consultation process has not already been undertaken by public authorities, a new impact assessment and consultation process should be designed and conducted.

2.3 STEP THREE: CONSULTATION

RATIONALE

Based on the results of the comprehensive impact assessment, indigenous peoples should be **consulted with a view to obtaining agreement or consent**.¹⁸ **Consultation is a key right of** indigenous peoples, and should be undertaken in accordance with international standards, prior to definite decision-making regarding the project's feasibility. It should be undertaken in good faith and in a form appropriate to the circumstances¹⁹, through appropriate procedures, and with the representative institutions of indigenous peoples.²⁰

Adequate consultation is a **constructive process**, closely tied to the right to participation in decision-making. Conceptualized as a negotiation towards mutually acceptable agreement, adequate consultation allows indigenous peoples to genuinely influence the decision-making process. It should be regarded as a process, involving several stages and steps, rather than a single event.

UN Guiding Principle No. 18 explicitly points out that the process of identifying human rights impacts should involve “meaningful consultation with potentially affected groups and other relevant stakeholders”. In the associated commentary, it is specified that businesses should seek to understand the concerns of potentially affected stakeholders “by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement...”

“The UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has also highlighted the need for companies to conduct meaningful consultation with indigenous peoples. “Companies should respect the rights of local communities and indigenous peoples to be consulted and to give or withhold free, prior and informed consent, in all their operations, and should protect these rights in the conduct of due diligence. This applies irrespective of a national legislative framework.”²¹

Experience suggests that the quality of the consultation process is a key determinant of whether consent will be achieved. For example, simplistic consultations framed as a “yes” or “no” to a pre-defined measure, without reflecting indigenous peoples’ aspirations or rights, may have a detrimental impact on community cohesion. This can, in turn, polarise communities, leading to division and conflict. In contrast, open-ended dialogue or negotiation aimed at exploring options, reconciling positions and accommodating interests, is more likely to result in agreement or consent.

Further, companies cannot assume that indigenous peoples are homogenous and will adopt uniform positions. It is therefore critical that consultation process allows for indigenous peoples’ own decision-making processes to deal with differences of opinion and seek agreement and consent internally. In cases where consent

cannot be reached, or where only one section of the concerned peoples agree, the company should make all possible efforts to ensure the inclusion of the views and positions expressed during consultation in the final decision.

Both ILO Convention No. 169 and UNDRIP stipulate that indigenous peoples shall participate in the benefits of development activities that affect their lands and territories, and receive fair compensation for any damages, which they may sustain as a result of such activities.²² Therefore, consultations should be based on **full disclosure of information** about both potential positive and negative impacts of the project, including possible mitigation measures and potential benefits.

Although Convention No. 169 does not require absolute consent in all circumstances, in general, the requirement for consent is considered proportional to the severity of the potential impact on the concerned indigenous peoples. For example, the former UN Special Rapporteur on the Rights of Indigenous Peoples, underlines that:

“...the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent”.²³

This principle is further reflected in the jurisprudence of the Inter-American Court of Human Rights, which, in a case involving the Saramaka people of Suriname, held that:

“...regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.²⁴

Therefore, if a project leads to displacement, relocation and resettlement of indigenous peoples from their traditional lands and resources, it is of utmost importance that indigenous peoples have given their **free, prior and informed consent**. Proceeding with such a project without the free, prior and informed consent of the concerned peoples may have legal implications under national and/or international law, and will often affect the legitimacy, results and sustainability of the project down the line.

The UN Special Rapporteur on the Rights of Indigenous Peoples has further clarified the role of business, and the State as regards the duty to consult with indigenous peoples. He has clarified that “in order for private companies to

meaningfully comply with relevant human rights norms within their respective spheres of influence, it is necessary for them to identify, fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of their work related to the projects they undertake. In addition, as part of its required due diligence, each private company operating in proximity to indigenous peoples should ensure that, through its behaviour, it does not ratify or contribute to any act or omission on the part of the State that could infringe the human rights of the affected communities, such as a failure on the part of the State to adequately consult with the affected indigenous community before proceeding with a project.”²⁵

“Private companies that operate or seek to operate on or in proximity to indigenous lands should adopt codes of conduct that bind them to respect indigenous peoples’ rights in accordance with relevant international instruments, in particular the United Nations Declaration on the Rights of Indigenous Peoples. States should develop specific mechanisms to closely monitor company behaviour to ensure full respect for indigenous peoples’ rights, and to ensure that required consultations are fully and adequately employed.”²⁶

CHECKLIST

Key questions: consultation	Red Flag	References/comments
<p>Have the parameters and steps of a formal consultation process been agreed on with the representative institutions of the indigenous peoples concerned?</p>	<p>No = </p>	<p>Both UNDRIP and ILO Convention No. 169 require consultation of indigenous peoples through appropriate procedures and in particular through their representative institutions. Agreeing on the parameters and steps for the consultation process is an important element of defining these 'appropriate procedures'.</p> <p>It can be difficult to determine who the representative institutions of indigenous peoples are in a given context. It is advisable to seek advice from experts including indigenous peoples in the process.</p>
<p>Do the indigenous peoples/communities in the broad project area have formally recognized and demarcated land and resource rights in line with ILO Convention No. 169 and UNDRIP?</p>	<p>No = </p>	<p>Both ILO Convention No. 169 and UNDRIP provide for recognition of indigenous peoples' territory, including the total environment of the areas, which they traditionally use and occupy.²⁷ The basis for establishing indigenous peoples' land rights is the traditional occupation and use rather than the eventual official recognition or registration of that ownership.²⁸</p> <p>Evidence of occupation can be obtained from multiple sources in addition to formal land titles, including from indigenous peoples' own participatory maps and their indigenous knowledge. It is advisable to seek indigenous peoples' expert advice in ensuring that all relevant land under ownership (formal or customary) or occupation and use has been identified.</p>

Key questions: consultation	Red Flag	References/comments
Has an appropriate consultation process been undertaken with all indigenous peoples' representative institutions within the broad project area?	No = 	<p>ILO Convention No. 169 and UNDRIP provide the framework to determine whether consultations have been appropriate. Consultations should build on the results of the impact assessment, be undertaken prior to decision-making, through representative institutions, in good faith, in a form appropriate to circumstances and have the objective of achieving agreement or consent to the proposed measures.²⁹</p> <p>Actual confirmation of adequate consultations by representative institutions will be a milestone in the due diligence process.</p> <p>As the interpretation and operationalization of the requirement for consultation is often contentious and strongly debated, it is advisable to seek expert indigenous advice in the process.</p>
Has agreement or consent been reached on the overall project development?	No = 	<p>ILO Convention No. 169 and UNDRIP stipulate that all consultations should be undertaken with the objective of achieving agreement or consent to the proposed measures. Although indigenous peoples do not have a generalised veto right on all decisions affecting them, proceeding with a project without consent may be a violation of national and/or international law, and may imply high reputational risks and/or insecurity of investments for a company.</p>

Key questions: consultation	Red Flag	References/comments
	No = 	<p>Some of the general principles regarding consent include: that it should be free from coercion, take place prior to decision-making, and be informed by full disclosure of information regarding potential positive and negative impacts.</p> <p>As the requirement for consent has been strongly debated and is contentious, it is advisable to seek advice from indigenous experts in the process.</p>
Are there legitimate indigenous representative institutions or sectors of the indigenous population that have not given their agreement or consent to project development?	Yes = 	<p>Indigenous peoples may have various representative institutions and the indigenous population affected by a project may have diverse opinions and views. Opposing views on the agreement or consent reached should be carefully assessed, documented and analysed. Where necessary, further dialogue and consultation should be conducted.</p>
Will the project entail displacement, relocation or resettlement?	Yes = 	<p>ILO Convention No. 169 and UNDRIP include a series of safeguards to prevent the displacement of indigenous peoples.³⁰ The general principle is that indigenous peoples should not be removed from their lands.³¹ When necessary, as an exceptional measure, relocation should take place only with the free and informed consent of the concerned peoples/communities.³² If consent cannot be obtained, relocation must follow appropriate procedures and allow for return.³³</p>

Key questions: consultation	Red Flag	References/comments
	Yes = 	If return is not possible, indigenous peoples must be compensated with land that that is at least equal in quality, size and legal status or of monetary compensation or other appropriate redress. ³⁴ Where the peoples concerned express a preference for compensation in money or in kind, they should be compensated under appropriate guarantees. ³⁵
Have indigenous peoples had access to the legal and technical expertise necessary in order to fully understand the implications and potential impacts of the project and to engage in agreements in a fully informed manner?	No = 	Large-scale long-term projects will often result in a variety of different and cumulative impacts requiring complex assessments of options and difficult decisions. As indigenous peoples are often in a disadvantaged position with regards to access to education, information and financial means, it may be necessary to provide support for their access to independent technical advice.
Has the entire consultation process been adequately documented, and is there formal documentation of the consent or agreement reached with concerned indigenous peoples/ communities?	No = 	The consultation process and ensuing decisions and agreements should be properly documented in all its phases and be made available to the indigenous peoples concerned in an accessible language and culturally appropriate manner.

2.4 STEP FOUR: IMPLEMENTATION AND MONITORING

RATIONALE

Large-scale and complex projects require a **process-oriented approach** to consultation, participation and consent. This includes **monitoring** of results and agreements and, where necessary, adjustment and redress. Operationally, this requires establishing **permanent and institutionalised mechanisms** for continuous dialogue, as well as access to **grievance mechanisms** that can effectively address emerging concerns. Such permanent mechanisms would also help ensure that sub-contractors operate with due diligence in respect of indigenous peoples' rights and that opportunities to optimise benefits, address outstanding social issues and strengthen environmental mitigation and restoration measures will exist throughout the lifetime of the project.

CHECKLIST

Key questions: implementation	Red flag	References/comments
Has a specific plan for engagement with indigenous peoples been developed and agreed with concerned indigenous peoples/ communities?	No = 	<p>Engagement with indigenous community should be ongoing, rather than a “one-off” event. The engagement planning should include a set of actions and measures to promote dialogue and communication that are contained in a time-bound plan. The aim should be to build trust and continuous dialogue among the parties, which will often be initiated as part of the ICP process but should be continued in subsequent phases of project implementation, evaluation and operation.</p> <p>Pay special attention to the inclusion of agreements reached with the concerned indigenous peoples/ communities in the plan. The plan should be subject to consultation and agreement by the concerned indigenous peoples/communities.</p>

Key questions: implementation	Red flag	References/comments
Has a participatory monitoring strategy been put in place to track performance against key risks or potential impacts identified?	No = 	<p>The monitoring strategy should be participatory, involving the concerned indigenous peoples at all stages. Companies should pay particular attention to the inclusion of vulnerable groups within the community.</p> <p>Methods and indicators should be meaningful to the indigenous peoples concerned and underpinned by credible data.</p> <p>The results of monitoring mechanisms should feed into the relevant activities, the company's strategy for communication with the indigenous peoples in question and the relevant, project-level grievance mechanisms.</p>
Has a transparent communication strategy been developed and agreed with concerned indigenous peoples/ communities, including the definition of adequate communication channels?	No = 	<p>The identification of communication channels and the development of a proactive communication strategy helps to ensure that indigenous peoples are continuously and fully informed about the project development and therefore engaged on an ongoing basis.</p> <p>Pay special attention to the documentation of all meetings and agreements. As a minimum, minutes and participant lists should be produced after each meeting, signed by the participants to confirm agreement. The results of impact assessments should also be made available to the concerned indigenous peoples in their native language and in a culturally appropriate manner, ensuring that any technical information is presented in an accessible format.</p>

Key questions: implementation	Red flag	References/comments
<p>Has a project-level grievance mechanism been developed and agreed with concerned indigenous peoples/communities and/or external experts? Has this information been disseminated to the concerned rights-holders?</p>	<p>No = </p>	<p>Design and implement an effective and culturally appropriate project-level grievance mechanism. This should facilitate early indication of, and prompt remediation for, those who believe that they have been harmed by the company's actions.</p> <p>Companies should ensure that the grievance mechanism is in accordance with the eight criteria for effective non-judicial grievance mechanisms, as set out in the UNGPs.³⁶</p> <p>Pay special attention to accessibility of the grievance mechanism for indigenous peoples in terms of procedures, language etc.</p>

ANNEX 1

KEY PROVISIONS OF UNDRIP AND ILO CONVENTION NO. 169

ILO Convention No. 169	UNDRIP	Comment/Guidance
Article 1.2		Self-identification is a fundamental criterion with which to identify indigenous peoples.
Article 6	Articles 19 and 32(2)	Whenever consideration is being given to measures which may affect indigenous peoples directly, consultations should be undertaken in good faith in accordance with appropriate procedures, in particular, through indigenous peoples' representative institutions . Indigenous peoples should be free to participate at all levels of decision making and their free, prior and informed consent should be obtained before adopting any measures which may affect them.
Article 7.3		Studies should assess the potential and actual social, spiritual, cultural and environmental impact of planned development activities on indigenous peoples. The results of such studies should be considered fundamental criteria for the implementation of project activities.

ILO Convention No. 169	UNDRIP	Comment/Guidance
Articles 13 and 14	Article 25 and 26	<p>Indigenous peoples have the right to recognition, protection and adjudication of their inherent rights to lands, territories and natural resources (which covers the total environment of the areas which the peoples concerned occupy or otherwise use).</p> <p>The basis for establishing indigenous peoples' land rights is the traditional use and/or occupation and use rather than the eventual official recognition or registration of that ownership.</p>
Article 15	Articles 10 and 28	<p>Indigenous peoples shall participate in the benefits of development activities that affect their lands and territories, and receive fair compensation for any damages, which they may sustain as a result of such activities.</p>
Article 16	Articles 8(2) and 10	<p>Indigenous peoples should not be removed from their lands. Where relocation is necessary, it should take place only with their free and informed consent and, wherever possible, there should exist the right to return. Indigenous peoples should receive fair compensation for any resulting loss or injury. Such compensation should be in the form of land that that is at least equal in quality, size and legal status or of monetary compensation</p> <p>or other appropriate redress. Where the peoples concerned express a preference for compensation in money or in kind, they should be compensated under appropriate guarantees.</p>

ANNEX 2

FURTHER READING

Handbook for ILO Tripartite Constituents, Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) a practical tool to better understand the relevance, scope and implications of Convention No. 169 and to foster joint efforts for its implementation.

Interpreting the UN Guiding Principles for Indigenous Peoples (IWGIA, 2014) makes recommendations to states, business enterprises, indigenous peoples and other stakeholders for a more effective operationalisation of the Guiding Principles in relation to the human rights of indigenous peoples.

International Finance Corporation (IFC) Performance Standard 7 seeks to ensure that business activities minimize negative impacts, foster respect for human rights, dignity and culture of indigenous populations, and promote development benefits in culturally appropriate ways. IFC's Environmental and Social Performance Standards define IFC clients' responsibilities for managing their environmental and social risks.

Asian Development Bank's indigenous peoples safeguards aim to ensure that the design and implementation of ADB funded projects foster full respect for indigenous peoples' identity, human rights and livelihoods, as defined by indigenous peoples themselves. The Safeguard Policy Statement requires meaningful consultation the implementation of an 'indigenous peoples plan'.

A Collaborative Approach to Human Rights Impact Assessments sets out a robust model for a collaborative approach to HRIAs that involves project-affected people and the company, and potentially other stakeholders such as the host government, in jointly undertaking an HRIA that is considered credible by all sides and can help to address the power imbalances that often exist between companies and communities around private sector projects.

NOTES

- 1 UNDRIP, Preamble.
- 2 General Comment No. 11 (2009) on Indigenous Children and their rights under the Convention.
- 3 General Recommendation No. 23 (1997) on the Rights of Indigenous Peoples.
- 4 UNGPs, Principle 12.
- 5 UNGPs, Principle 23 (b).
- 6 UNGPs, commentary to Principle 12.
- 7 UNGPs, Principle 17 (a).
- 8 UNGPs, Principle 17 (c).
- 9 ILO Convention No. 169, article 1.
- 10 ILO Convention No. 169, articles 6 and 15. For an explanation of the scope of indigenous peoples' land rights, see Handbook for ILO Tripartite Constituents: Understanding Convention No. 169, p. 21.
- 11 Although States do not have an obligation to apply ILO Convention No. 169 retroactively there may be instances where a situation prevails over a period of time. In a case examined by the ILO Committee of Experts, where a concession was signed before the Convention was ratified, the Committee states that "the situation created by that signature still prevails. In addition, the obligation to consult the peoples concerned arise does not only apply to the concluding of agreements but also arises on a general level in connection with the application of the Convention" (GB.282/14/2).
- 12 These can be searched for in NORMLEX, the ILO's international labour standards database.
- 13 These can be found here: <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>
- 14 Types of impact assessments include: Social Impact Assessments, Environmental Impact Assessments, Environmental, Social and Health Impact Assessments and Human Rights Impact Assessments. Consult DIHR's guidance and toolbox on Human Rights Impact Assessments at <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox>.
- 15 ILO Convention No. 169, article 7.3.
- 16 For more on collaborative impact assessments, see [A Collaborative Approach to Human Rights Impact Assessments](#).
- 17 In accordance with ILO Convention No. 169, article 6.1 (a).
- 18 ILO Convention No. 169, article 6.2.
- 19 ILO Convention No. 169, Article 6.2

- 20 ILO Convention No. 169, Article 6.1(a).
- 21 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. No. A/71/291, 4 August 2016, Para. 72
- 22 ILO Convention No. 169, articles 15 and 16 and UNDRIP, article 10.
- 23 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, July 2009, UN Doc. No., A/HRC/12/34, para.47.
- 24 Caso del Pueblo Saramaka Vs. Surinam. Sentencia de 12 de agosto de 2008 Serie C No. 185.
- 25 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, July 2009, UN Doc. No., A/HRC/12/34, para. 57.
- 26 Ibid., para. 73
- 27 ILO Convention No. 169, articles 13 and 14 and UNDRIP, articles 25 and 26.
- 28 See ILO, Handbook for ILO Tripartite Constituents, Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), 2013, p. 21.
- 29 ILO Convention No. 169, article 6 and UNDRIP, articles 19 and 32(2).
- 30 ILO Convention No. 169, article 16 and UNDRIP, articles 8(2) and 10.
- 31 ILO Convention No. 169, Article 16.1.
- 32 ILO Convention No. 169, Article 16.2.
- 33 ILO Convention No. 169, Article 16.3.
- 34 UNDRIP, Article 28(2) and ILO Convention No. 169, Article 16.4.
- 35 ILO Convention No. 169, Article 16.4.
- 36 UN Guiding Principle 31 states that non-judicial grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue.

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