



Understanding Free, Prior and Informed Consent:

International instruments and other mechanisms

CONTENTS

INTRODUCTION	3
<i>Table: Summary of instruments/guidance reviewed</i>	<i>3</i>
INTERNATIONAL INSTRUMENTS AND GUIDELINES	7
ILO 169: Convention on Indigenous and Tribal Peoples in Independent Countries (1989).....	7
World Bank Operational Directives (OP) 4.10 on Indigenous Peoples (2005).....	9
Inter-American Development Bank Operational Policy on Indigenous Peoples (2006)	10
United Nations Declaration on the Rights of Indigenous Peoples (2007)	11
European Bank for Reconstruction and Development - Performance Requirement 7 (2008)	13
Asian Development Bank (ADB) Safeguard Policy Statement (2009)	14
Guidelines on Indigenous Peoples' Issues - United Nations Development Group (2009)	16
United Nations Guiding Principles on Business and Human Rights (2011)	17
IFC Performance Standard 7 (2012)	18
Equator Principles III (2013)	19
United Nations Global Compact- A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples (2013)	20
'Guidelines on Free, Prior and Informed Consent' - UN-REDD (2013)	22
RELEVANT GUIDELINES, MEETINGS AND REPORTS	24
Vienna Declaration and Programme of Action (1993)	24
Report of the workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights - UN Commission on human rights (2002)	24
'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights' - United Nations (2003)	25
Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - Extractive industries operating within or near indigenous territories (2011)	26
'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - Extractive industries operating within or near indigenous territories' (2012)	27
RELATED REPORTS, TEXTS, AND CONVENTIONS	30
'Convention for the Safeguarding of Intangible Cultural Heritage' - UNESCO (2003)	30
Indigenous Peoples and Mining Position Statement - International Council on Mining & Metals (2013)	31
RESOURCES ON FPIC	33

INTRODUCTION

The concept of Free, Prior and Informed Consent (FPIC) is rooted in international instruments such as the International Labour Organization's Convention (ILO) on Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples. However, there is lack of clarity of FPIC concepts and debates over its definition and its implementation. The following document provides an overview of the key international instruments, mechanisms, and relevant statements and reports to help IPIECA members gain an understanding of FPIC.

Table: Summary of instruments/guidance reviewed

Instrument, Guideline, Report, Meeting, Convention	Summary
<u>ILO 169: Convention on Indigenous and Tribal peoples in Independent Countries (1989)</u>	ILO 169- The Convention on Indigenous and Tribal Peoples in Independent Countries states that governments will consult Indigenous Peoples whenever considerations are being given to measures that may impact them. It grants Indigenous Peoples with the right to decide and exercise control of their economic, social and cultural developments. If and when relocation is considered necessary, ILO 169 requires the free and informed consent of Indigenous Peoples. If consent cannot be obtained, relocation must comply with national laws and regulations.
<u>World Bank Operational Directives (OP) 4.10 on Indigenous Peoples (2005)</u>	In order to secure funding, the World Bank requires borrowers to engage in a culturally appropriate process of free, prior and informed consultation when their proposed projects affect Indigenous Peoples—all of which must be documented. All bank supported projects have measures that avoid potential adverse effects on Indigenous Peoples.
<u>Inter-American Development Bank Operational Policy on Indigenous Peoples (2006)</u>	In projects of resource extraction and protected areas management, the Inter-American Development Bank has safeguards to protect Indigenous Peoples consistent with the applicable legal frameworks and norms. The safeguards include: (i) prior consultation mechanisms to preserve the physical, cultural and economic integrity of the affected peoples and the sustainability of the protected areas and natural resources; (ii) mechanisms for the participation of Indigenous Peoples in the utilization, administration and conservation of these resources; (iii) fair compensation for any damage these peoples might suffer as a result of the project; and (iv) whenever possible, participation in project benefits.
<u>United Nations Declaration on the Rights of Indigenous Peoples (2007)</u>	The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that relocation of Indigenous People shall not take place without FPIC, and fair compensation. It protects Indigenous Peoples' right to their lands and the resources on their lands, and grants them the freedom to use the land and its resources in any way they deem appropriate. It outlines the responsibility of States to protect these rights. It also requires States to consult and cooperate

	with Indigenous Peoples through their own respective institutions when obtaining FPIC, which must occur before authorizing measures that affect Indigenous Peoples.
<u>European Bank for Reconstruction and Development- Performance Requirement 7 (2008)</u>	The European Bank for Reconstruction and Development requires clients to establish an on-going relationship with Indigenous Peoples if and when their proposed project impacts them. Additional special requirements for clients include: entering a good faith negotiation with Indigenous Peoples; ensuring their informed participation; and obtaining FPIC from them before starting any activity. This process needs to comply with customary law and cultural differences.
<u>Asian Development Bank Safeguard Policy Statement (2009)</u>	In its Safeguard Policy Statement, the Asian Development Bank (ADB) states that consent of affected Indigenous Peoples, through meaningful consultation, will be obtained for commercial activities proposed to be on traditional land and when physical relocation of Indigenous Peoples is required. Consent refers to a collective expression by the Indigenous Peoples through recognized representatives. The ADB will not finance the project if broad community support does not exist.
<u>Guidelines on Indigenous Peoples' Issues- United Nations Development Group (2009)</u>	The United Nations Development Group recognizes the complicated relationship of land and resource rights on native lands; however, it acknowledges both Indigenous Peoples' land rights and their rights to the natural resources of that land. In some situations, legal agreements further outline the land deeds between Indigenous Peoples and states. The Guidelines assert that FPIC must be obtained for exploration and development on Indigenous Peoples' lands even if the state owns sub-surface resources. Thereafter, Indigenous Peoples have a right of benefit sharing arrangements. The Guidelines also assert that extraction should not occur on indigenous lands if the operation hinders Indigenous Peoples' continual use of the land.
<u>United Nations Guiding Principles on Business and Human Rights (2011)</u>	States must protect against human rights abuse within their territory, including business enterprises through prevention, investigation, punishment, and retribution. In addition, business enterprises should identify and assess any actual or potential human rights impacts resulting from their own activities and business relationships. This involves meaningful consultations with potentially affected groups.
<u>IFC Performance Standard 7 (2012)</u>	The International Finance Corporation requires clients to obtain FPIC of affected communities and/or Indigenous Peoples in order to be eligible for funding in specific situations. These situations include: when proposed projects impact lands or natural resources of Indigenous Peoples; if relocation of Indigenous People is necessary in order to continue with the project; or if the proposed project is to be on land that is critical to a groups' cultural heritage.
<u>Equator Principles III (2013)</u>	The Equator Principles require clients to demonstrate effective and on-going stakeholder engagement that is culturally appropriate in affected communities. Clients' will be responsible for conducting informed consultation and participation processes if their proposed projects have adverse effects on communities or involve Indigenous

	Peoples. With that being said, if their projects have adverse impacts on Indigenous Peoples, clients are required to secure FPIC.
<u>United Nations Global Compact- A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples (2013)</u>	The Business Reference Guide produced by the United Nations Global Compact affords states with the responsibility to carry out the FPIC process; however, it recognizes that governments respect for FPIC compliance varies widely. The Guide also acknowledges many independent initiatives like funding schemes that expect businesses to secure FPIC. In addition to outlining the roles of both states and businesses, the guide identifies situations where FPIC is required based on international norms like the UN Declaration on the Rights of Indigenous Peoples. These situations include: when relocation of Indigenous Peoples is necessary; cultural, intellectual, religious or spiritual property and/or land is seized; hazardous material is disposed of on indigenous lands; or a project is proposed to be on Indigenous Peoples' lands.
<u>'Guidelines on Free, Prior and Informed Consent'- UN-REDD (2013)</u>	UN-REDD established guidelines for community engagement and consultation. It assert that FPIC is required if there are potential changes in resource use that could impact Indigenous Peoples and other forest-dependent communities. In addition, the guidelines follow the United Nations Declaration of the Rights of Indigenous Peoples and requires consent if: relocation of Indigenous People is required; there is a seizure of cultural, intellectual, religious, and spiritual property; and there is potential impact or damage to Indigenous Peoples' land.
<u>Vienna Declaration and Programme of Action (1993)</u>	The Vienna Declaration and Programme of Action recognizes the importance of Indigenous Peoples' free participation in matters that affect them and asks states to protect this right.
<u>Report of the workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights- Commission on human rights (2002)</u>	The Working Group on Indigenous Populations from the Sub-Commission on the Promotion and Protection of Human Rights issued a report that recommended companies' consultations with indigenous peoples be in line with FPIC. It also recommended that development projects be mutually beneficial for companies and Indigenous Peoples.
<u>'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights'- United Nations (2003)</u>	The Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights' indicates that states have the responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized by both international and national laws. Likewise, transnational corporations have to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international and national laws. In both situations, these rights include the rights of Indigenous Peoples and vulnerable groups. The Norms further outline

	rights, which include economic, social and cultural rights, and the rights to development.
<u>Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya- Extractive industries operating within or near indigenous territories (2011)</u>	The Special Rapporteur provides an overview of the activities carried out during his third year and offers an analysis on the impact of extractive industries operating within or near indigenous territories. In his report, he acknowledges that natural resource extraction is one of the most significant violations of Indigenous Peoples' rights. He goes on to recommend the development of specific guidelines aimed at helping governments and companies when interacting with Indigenous Peoples.
<u>'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya- Extractive industries operating within or near indigenous territories' (2012)</u>	In his 2012 report, the Special Rapporteur summarizes his activities and acknowledges the accomplishments and challenges throughout the year. In the 'Extractive Industries' section, the Special Rapporteur concludes that focusing on consultation and FPIC are blurring understanding of human rights of indigenous peoples—rights that include property, culture, religion, health, and physical well-being. Rather the consultation and FPIC processes should be seen as safeguards for potentially affected Indigenous Peoples. The report goes on to assert that states must protect the rights of Indigenous Peoples, including rights over their land and development. It also asserts that businesses have to respect the rights of Indigenous Peoples, which include securing consent—not just consultation—if operations have significant impacts on Indigenous Peoples.
<u>'Convention for the Safeguarding of Intangible Cultural Heritage'- UNESCO (2003)</u>	Intangible cultural heritage includes the cultural spaces of communities, groups, and in some cases, individuals that are vital to identity and its continuity. If spaces are recognized as being intangible cultural heritage, then it must be safeguarded—meaning preserved, protected, and promoted—by states.
<u>Indigenous Peoples and Mining Position Statement- ICMM (2013)</u>	The International Council on Mining and Metals made six commitments related to indigenous peoples. The commitments reflect the industries respect for human rights and indigenous rights. It states that it will strive for consent from indigenous peoples on all new and existing projects that take place on traditional lands; however, consent does not confer veto rights to individuals or subgroups, or require unanimity.

ILO 169: Convention on Indigenous and Tribal Peoples in Independent Countries (1989)

Relevant section

Article 6

1. In applying the provisions of this Convention, governments shall:
 - a. Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - b. Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - c. Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 16

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.

Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

Summary

Convention No.169 is a legally binding international instrument which is directed at governments and deals specifically with the rights of indigenous and tribal peoples. Today, the Convention has been ratified by 20 countries. Once it ratifies the Convention, a country has one year to align legislation, policies and programmes to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision with regards to its implementation.

The Convention states that governments will consult Indigenous Peoples whenever considerations are being given to measures that may impact them. It grants Indigenous Peoples with the right to decide and exercise control of their economic, social and cultural developments. If and when relocation is considered necessary, ILO 169 requires the free and informed consent of Indigenous Peoples. If consent cannot be obtained, relocation must comply with national laws and regulations.

Government's role

ILO 169 outlines the rights and responsibilities of governments in relation to Indigenous Peoples and their land. This includes developing a decision-making process that is inclusive of Indigenous Peoples, and establishing agencies and other appropriate mechanisms that have the capacity to fulfil the functions assigned to them (Article 33).

Expectations from business

According to the IFC, while private companies do not have any direct obligations under the Convention, it has clear implications for their activities and operations. There may be legal obligations arising from national legislation implementing the Convention. For instance, in some countries, ratified Conventions are incorporated directly into national law and may be used by courts to determine responsibilities, which they could theoretically decide to apply to actors other than governments.

Convention 169 and private sector obligations and impacts:

The failure for a government to fulfil its obligation to implement the Convention or to comply with its responsibilities under national legislation, can have consequences for a private sector project. For instance, if a State fails to comply with obligations on prior consultation on a project, a private company may find that the licenses that have been granted are subject to legal challenge. There may also be circumstances where private sector companies' actions could influence or compromise the State's implementation of its obligations under international agreements. For example, a private sector extractive project can potentially generate very large revenues, some of which will be paid over to the State in the form of concession, license or royalty fees, and taxes. A state regulatory agency, in anticipation of such revenue, may expedite the project approval process by not following its own consultation requirements under Convention 169. In summary, consensus is emerging that private sector companies should not act in a manner that would interfere with the State's discharge of its obligations under its international agreements. (ILO, Convention 169 and the Private Sector, [Questions and Answers for IFC Clients](#), 2007).

World Bank Operational Directives (OP) 4.10 on Indigenous Peoples (2005)

Please note a new version of this document is scheduled for publication in 2015/2016.

Relevant section

Article 1

... For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples. Such Bank-financed projects include measures to (a) avoid potentially adverse effects on the Indigenous Peoples' communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects. Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive.

Article 4

For purposes of this policy, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social and cultural group⁶ possessing the following characteristics in varying degrees:

- a) Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- b) Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories
- c) Customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- d) An indigenous language, often different from the official language of the country or region.
- e) A group that has lost "collective attachment to geographically distinct habitats or ancestral territories in the project area"; because of forced severance remains eligible for coverage under this policy. Ascertaining whether a particular group is considered as "Indigenous Peoples" for the purpose of this policy may require a technical judgment.

Article 10

Consultation and Participation. Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:

- a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;
- b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and

- c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.

Article 11

In deciding whether to proceed with the project, the borrower ascertains, on the basis of the social assessment and the free, prior, and informed consultation, whether the affected Indigenous Peoples' communities provide their broad support to the project. Where there is such support, the borrower prepares a detailed report...

Summary

In order to secure funding, the World Bank requires borrowers to engage in a culturally appropriate process of free, prior and informed consultation when their proposed projects affect Indigenous Peoples—all of which must be documented. All bank supported projects have measures that avoid potential adverse effects on Indigenous Peoples.

Impact on government and business

The Bank requires all borrowers/clients to meet these guidelines.

Note: The World Bank is currently preparing a new Environmental and Social Framework. The proposed Environmental and Social Framework builds on previous safeguard policies and aims to consolidate them into a unified framework that is more effective to apply and implement. The proposal aims to maintain and build on existing protections, including the enhanced protection of disadvantaged and vulnerable people, Indigenous Peoples, communities and the environment, including provisions for pest management, dam and road safety, natural habitats, and cultural heritage. Specifically, Standard 7 focuses on Indigenous Peoples and includes a detailed outline of the circumstances requiring FPIC. The proposal document is currently undergoing public consultation, the deadline for feedback is early 2015.

Inter-American Development Bank Operational Policy on Indigenous Peoples (2006)

Relevant section

Policy Directives- Promoting Development with Identity

In its efforts to facilitate dialogue and support the mainstreaming of indigenous issues, the Bank will seek to address the various facets of development with identity, as far as is feasible and appropriate. In natural resource management and extraction and protected area management projects, the promotion of mechanisms for appropriate consultation, participation in natural resources management, and benefit sharing by the indigenous peoples on whose lands and territories the projects are conducted.

Policy Directives- Safeguards In Bank Operations

Operations that directly or indirectly affect the legal status, possession, or management of territories, lands, or natural resources traditionally occupied or used by indigenous peoples will include specific safeguards, consistent with the applicable legal framework regarding ecosystem and land protection. One of those safeguards is respect for the rights recognized in accordance with the applicable legal norms. In projects for natural resource extraction and management and protected areas management, safeguards include: (i) prior consultation mechanisms to preserve the physical, cultural, and economic integrity of the affected peoples and the sustainability of the protected areas and natural resources; (ii) mechanisms for the participation of Indigenous Peoples in the utilization, administration and conservation of these resources; (iii) fair compensation for any damage these peoples might suffer as a result of the project; and (iv) whenever possible, participation in project benefits. Where legal or administrative protection is insufficient to ensure that the project will not directly or indirectly cause the deterioration of the physical integrity or legal status of the affected lands, territories or resources, the project will include the pertinent restrictions or corrective or compensatory measures.

Summary

In projects of resource extraction and protected areas management, the Inter-American Development Bank has safeguards to protect Indigenous Peoples consistent with the applicable legal frameworks and norms. The safeguards include: (i) prior consultation mechanisms to preserve the physical, cultural and economic integrity of the affected peoples and the sustainability of the protected areas and natural resources; (ii) mechanisms for the participation of Indigenous Peoples in the utilization, administration and conservation of these resources; (iii) fair compensation for any damage these peoples might suffer as a result of the project; and (iv) whenever possible, participation in project benefits.

Impact on government and business

This policy affects all of the banks clients, including central governments, provinces, municipalities, private firms and NGOs.

United Nations Declaration on the Rights of Indigenous Peoples (2007)

Relevant section

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and

spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain free, prior, informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact.

Summary

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) consists of 46 articles which describe the specific rights and actions that governments must take to protect the rights of Indigenous Peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It declares discrimination against Indigenous Peoples as unlawful and promotes their full and effective participation in all matters that concern them. It also affirms their right to remain distinct and to pursue their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples.

Indigenous P

Government's role

The UNDRIP allocates responsibility to governments to protect the rights of Indigenous Peoples.

Expectations from business

The UNDRIP does not explicitly mention business anywhere in its text; however, it grants Indigenous Peoples with autonomy over their lands and the decisions that affect their lands. Naturally, this affects business operations or proposed business operations on their lands. More broadly, as an international human rights instrument, businesses do have a responsibility to respect the rights articulated, regardless of whether or not States fulfil their responsibilities. Notably, the UN Global Compact launched its [Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples](#) in late 2013 (see page X).

European Bank for Reconstruction and Development - Performance Requirement 7 (2008)

Relevant section

Article 22

The client will establish an ongoing relationship with the affected communities of Indigenous Peoples from as early as possible in the project planning process and throughout the life of the project. The engagement process will ensure their meaningful consultation in order to facilitate their informed participation on matters that affect them directly, proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.

Article 23

The client shall ensure that the project-affected Indigenous Peoples are adequately informed in a culturally appropriate manner about EBRD PRs and about project plans affecting them

Article 25

In particular, the engagement process will include the following:

- Involvement of Indigenous Peoples' representative bodies (for example, councils of elders or village councils, among others), Indigenous Peoples' organisations as well as individually affected indigenous persons
- Understanding and respect for any relevant customary laws
- Provision of sufficient time for Indigenous Peoples' collective decision-making process
- Facilitation of the Indigenous Peoples' expression of their views, concerns, and proposals in the language of their choice, and without external manipulation, interference, or intimidation and in a culturally appropriate manner
- Disclosure to Indigenous Peoples of all relevant plans and information on potential social and ecological impacts affecting indigenous communities in a culturally appropriate manner and language, and without jargon
- Recognition of community heterogeneity, taking into account the following: Indigenous Peoples live in mixed communities with non-Indigenous Peoples; Indigenous communities are multi-vocal; consultations and participation must be inclusive of gender, generational,

and excluded groups; Dissemination of appropriate information to the EBRD, and involvement of the Bank in the consultation process, where practicable

- full documentation of the consultation process

Article 31

As Indigenous Peoples may be particularly vulnerable in the project circumstances described below, the following special requirements will also apply, in addition to the General Requirements above. Common to these requirements is the need for the client to:

- enter into good faith negotiation with Indigenous Peoples
- ensure the Indigenous Peoples' informed participation
- obtain the free, prior and informed consent of Indigenous Peoples before starting with an activity described in paragraphs 32–37.

Summary

The European Bank for Reconstruction and Development requires clients to establish an on-going relationship with Indigenous Peoples if and when their proposed project impacts them. Additional special requirements for clients include: entering a good faith negotiation with Indigenous Peoples; ensuring their informed participation; and obtaining free, prior and informed consent from them before starting any activity.

Government's role

The European Bank for Reconstruction and Development does not explicitly allocate governments with any responsibilities in relation to Indigenous Peoples.

Expectations from business

The Performance Requirement recognises and approaches Indigenous Peoples as partners, respecting them as people whose values can contribute greatly to not only their own, but also to national socio-economic development. Performance Requirement 7, outlines the expectations and requirements for clients/loan recipients working on projects that impacts indigenous communities. Requirements include conducting impact assessments, establishing a grievance mechanism and preparing an Indigenous Peoples Development Plan (IPDP).

Asian Development Bank (ADB) Safeguard Policy Statement (2009)

Relevant section

Article 55

ADB recognizes that Indigenous Peoples may be particularly vulnerable in certain project circumstances. Therefore, consent of affected Indigenous Peoples communities, through meaningful consultation, will be ascertained for the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical relocation from traditional or customary lands; and (iii) commercial development of natural resources within customary lands

under use that would impact the livelihoods or cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples. For the purposes of policy application, consent of affected Indigenous Peoples communities refers to a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for such project activities. Broad community support may exist even if some individuals or groups object to the project activities. The borrower/client will ascertain whether the affected Indigenous Peoples communities provide their broad support to the project activities, and where such broad community support exists, the IPP will clearly document the consultation process. ADB will review the borrower's/client's documentation of the engagement process, and in addition, through its own investigation, will assure itself that broad community support for the project activities has been demonstrated by the affected Indigenous Peoples communities. ADB will not finance the project if such broad community support does not exist.

On Consultation and Participation

The borrower/client will undertake meaningful consultation with affected Indigenous Peoples to ensure their informed participation in (i) designing, implementing, and monitoring measures to avoid adverse impacts on them or, when avoidance is not possible, to minimize, mitigate, and compensate for such effects; and (ii) tailoring project benefits that accrue to them in a culturally appropriate manner. Meaningful consultation is a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues. Consultation will be carried out in a manner commensurate with the impacts on affected communities. The consultation process and its results will be documented and reflected in the Indigenous Peoples plan (IPP).

Summary

In its Safeguard Policy Statement, the Asian Development Bank (ADB) states that consent of affected Indigenous Peoples, through meaningful consultation, will be obtained for commercial activities proposed to be on traditional land and when physical relocation of Indigenous Peoples is required. Consent refers to a collective expression by Indigenous Peoples through recognized representatives. The ADB will not finance the project if broad community support does not exist.

Impact on government and business

The Safeguard Policy Statement is applicable to all borrowers and of the Asian Development Bank regardless of whether it's a government or business.

Guidelines on Indigenous Peoples' Issues - United Nations Development Group (2009)

Relevant section

Natural Resources

- Indigenous peoples have rights to the natural resources on their lands although in some countries sub-surface and natural resource rights legally belong to the State. However, these rights are often expressed through legal agreements that define how resources will be used, ensuring protection of indigenous heritage, benefit-sharing and compensation.
- Indigenous peoples' rights to resources that are necessary for their subsistence and development should be respected.
- In the case of State-owned sub-surface resources on indigenous peoples' lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources and have a right to any benefit-sharing arrangements
- Permits for extraction and even prospecting of natural resources on indigenous land should not be granted if the activity hinders indigenous peoples to continue to use and/or benefit from these areas or where the free, prior and informed consent of indigenous peoples concerned has not been obtained.

Summary

The United Nations Development Group recognizes the complicated relationship of land and resource rights on native lands. The Guidelines set out the broad normative, policy and operational framework for implementing a human rights-based and culturally sensitive approach to development for and with Indigenous Peoples. The Guidelines provide lines of action for planning, implementation and evaluation of programmes involving Indigenous Peoples. Including in the Guidelines are three main sections. Section one provides an overview of current realities confronting Indigenous Peoples and the international norms and standards established to address Indigenous Peoples' issues, section two provides a practical table and checklist of key issues and related human rights and section three looks at the practical implications for addressing and mainstreaming Indigenous Peoples' issues.

Government's role

The Guidelines developed by the United Nations Development Group recognises Indigenous Peoples rights to land; however, they recognize that land and resource access/ownership rights are often further outlined in legally binding agreements. Even in situations where the state owns sub-surface resources, the government must obtain FPIC.

Expectations from business

The Guidelines do not outline responsibilities and obligations of businesses in relation to Indigenous Peoples. As they recognise the land rights of Indigenous Peoples, the state needs to grant authorisation for the extraction of resourcing on indigenous lands, after the FPIC process.

United Nations Guiding Principles on Business and Human Rights (2011)

Relevant sector

Article 18

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- a) Draw on internal and/or independent external human rights expertise;
- b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Summary

The UN Guiding Principles on Business and Human Rights (UNGPs) were proposed by UN Special Representative on business & human rights John Ruggie, and endorsed by the UN Human Rights Council in June 2011. These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. The UNGPs is grounded in the recognition of the following:

- a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b) The role of business enterprises as specialised organs of society performing specialised functions; required to comply with all applicable laws and to respect human rights.
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

In addition, the UNGPs explores the potential to ensure that the rights of business-affected Indigenous Peoples are respected, protected and fulfilled. It examines the relationship between the UNGP and Indigenous Peoples' substantive rights, in particular the rights to self-determination, land and resources, from which inter alia ensues the right to Free, Prior and Informed Consent.

Government's role

The UNGPs acknowledge States' existing obligations to respect, protect, and fulfil human rights and fundamental freedoms. This requires action to prevent, investigate, punish and redress any violations of human rights in its respective territory or under its jurisdiction, which includes holding businesses accountable. States must protect against human rights abuse within their territory, including business enterprises through prevention, investigation, punishment, and retribution.

Expectations from business

The UNGPs asserts that businesses should respect human rights and avoid any adverse effects in operations. In order to assess and address risks and the impact of its operations, businesses should have meaningful consultations with potential affected groups and stakeholders, this is regardless of whether States have met their human rights obligations under international law. In addition,

business enterprises should respect all internationally recognised human rights and assess any actual or potential human rights impacts resulting from their own activities and business relationships.

IFC Performance Standard 7 (2012)

Relevant section

Article 11

Affected Communities of Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the General Requirements of this Performance Standard, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples in the circumstances described in paragraphs 13–17 of this Performance Standard. FPIC applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous Peoples. When any of these circumstances apply, the client will engage external experts to assist in the identification of the project risks and impacts.

Article 13 to 17

These Articles deal with ‘Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use,’ ‘Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use,’ and ‘Critical Cultural Heritage.’

Article 15:

... If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained as described above...

Article 16:

... Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain FPIC of the Affected Communities of Indigenous Peoples.

Summary

The International Finance Corporation (IFC) articulates the Corporation’s strategic commitment to sustainable development, and is an integral part of IFC’s approach to risk management. The Performance Standards are directed towards clients, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities.

Under Performance Standard 7 clients are required to identify adverse impacts on indigenous communities and develop action plans to address them with the informed consultation and participation of affected indigenous communities. In addition companies are expected to seek the FPIC of communities when:

- The project will impact the lands and natural resources subject to traditional ownership or under customary use;
- The project will require relocation of communities; or
- The project will significantly impact critical cultural heritage or Indigenous Peoples

Notably, this is the first time the Performance Standard has included a requirement of FPIC for Indigenous Peoples.

Impact on government and business

Although the IFC acknowledges corporations commitment to sustainable development in Performance Standard 7, it does not go on to define or differentiate between its clients. However, it does require clients to collaborate with governments when Indigenous Peoples are identified or impacted. If the government lacks the capacity, the client must take an active role during planning, implementation, and monitoring.

Equator Principles III (2013)

Relevant section

Principle 5: Stakeholder Engagement

For all Category A and Category B Projects, the EPFI will require the client to demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with Affected Communities and, where relevant, Other Stakeholders. For Projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation process. The client will tailor its consultation process to: the risks and impacts of the Project; the Project's phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation.

To facilitate Stakeholder Engagement, the client will, commensurate to the Project's risks and impacts, make the appropriate Assessment Documentation readily available to the Affected Communities, and where relevant Other Stakeholders, in the local language and in a culturally appropriate manner.

The client will take account of, and document, the results of the Stakeholder Engagement process, including any actions agreed resulting from such process. For Projects with environmental or social risks and adverse impacts, disclosure should occur early in the Assessment process, in any event before the Project construction commences, and on an ongoing basis.

EPFIs recognise that indigenous peoples may represent vulnerable segments of project-affected communities. Projects affecting indigenous peoples will be subject to a process of Informed Consultation and Participation, and will need to comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law. Consistent with the special circumstances described in

IFC Performance Standard 7 (when relevant as defined in Principle 3), Projects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC).

Summary

The Equator Principles require clients to demonstrate effective and on-going stakeholder engagement that is culturally appropriate in affected communities. Clients' will be responsible for conducting informed consultation and participation processes if their proposed projects have adverse effects on communities or involve indigenous peoples. With that being said, if their projects have adverse impacts on Indigenous Peoples, clients are required to secure FPIC.

Government's role

The Equator Principles do not outline requirements exclusively for governments.

Expectations from business

As with other funding schemes, the Equator Principles outline the responsibilities and obligations of clients or potential clients—many of which are businesses. In situations where proposed projects have potential adverse impacts on communities, companies are responsible for informed consultation and participation processes. But if proposed projects have potential adverse impacts on indigenous communities, companies are responsible for obtaining, FPIC.

United Nations Global Compact- A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples (2013)

Relevant section

"... The concept of FPIC is still nascent at a State level. While States bear the primary obligation for carrying out FPIC, the practical role of government in ensuring compliance with FPIC varies by country, and many governments are still in the early stages of working out how to best comply with international FPIC standards. The independent corporate responsibility to respect indigenous peoples' rights gives rise to opportunities for business to partner with governments and indigenous peoples to advance FPIC practices. While international legal standards explicitly address the role of States, a variety of influential standards, such as the lending policies of multilateral banks and industry groups, have articulated the expectations that companies obtain FPIC...

FPIC should be obtained whenever there is an impact on indigenous peoples' substantive rights (including rights to land, territories and resources, and rights to cultural, economic and political self-determination). The UN Declaration expressly refers to FPIC in the following circumstances:

- Removal and relocation of indigenous peoples (Article 10);
- taking of cultural, intellectual, religious or spiritual property (Article 11);
- Adoption and implementation of legislative or administrative matters that may affect indigenous peoples (Article 19);
- confiscation, taking, occupation, use or damage of indigenous people' lands or territories (Article 28);

- Storage or disposal of hazardous materials on indigenous peoples' lands or territories (Article 29); and
- projects affecting indigenous peoples' lands, territories or other resources, particularly in connection with the development, use or exploitation of mineral, water or other resources (Article 32).

Taken together with indigenous peoples' right to self-determination, which means that indigenous peoples are entitled to decide their own paths of economic, political and cultural development, FPIC will be required in a broad range of situations.

FPIC is an on-going process that should be maintained throughout the life cycle of planning, researching, developing, implementing, and executing a project. This will involve regular engagement with affected indigenous peoples. FPIC applies to existing projects and agreements between businesses and indigenous peoples. To the extent a business is operating without FPIC, it should strive to obtain the consent of the indigenous peoples as soon as possible before continuing activities impacting indigenous peoples. In some circumstances, an indigenous community may be entitled to withdraw the consent that they have previously given. Changes to projects that impact indigenous peoples' rights should be based on obtaining their consent."

Summary

The Business Reference Guide produced by the United Nations Global Compact aims to increase understanding among business of the rights of indigenous peoples and to provide practical suggestions for respecting and supporting these rights. The guide was an international collaborative effort and is the result of a dialogue among Global Compact business participants.

Government's role

Similar to the UN Declaration on the Rights of Indigenous Peoples, the Global Compact's Business Reference Guide indicates that States have the primary duty to respect, protect and fulfil human rights. The Guide also suggests that where governments do not recognise the rights of Indigenous Peoples, businesses still have the responsibility to respect such groups

Expectations from business

The Guide aims to help businesses understand the rights of Indigenous Peoples and recommends practical actions to respect and support these rights. It outlines the following 'fundamental actions' for businesses to meet this responsibility:

1. Adopt and implement a formal policy (whether on a stand-alone basis or within a broader human rights policy) addressing Indigenous Peoples' rights and committing the business to respect Indigenous Peoples' rights.
2. Conduct human rights due diligence to assess actual or potential adverse impacts on Indigenous Peoples' rights, integrate findings and take action, track and communicate externally on performance.
3. Consult in good faith with Indigenous Peoples in relation to all matter that may affect them or their rights.
4. Commit to obtain (and maintain) the FPIC of Indigenous Peoples for projects that affect their rights, in line with the spirit of the UN Declaration.

5. Establish or cooperate through legitimate processes to remediate any adverse impacts on Indigenous Peoples' rights.
6. Establish or cooperate with an effective and culturally appropriate grievance mechanism.

It is important to note that the Guide does not outline requirements for businesses to carry out FPIC.

'Guidelines on Free, Prior and Informed Consent' - UN-REDD (2013)

Relevant section

Defining Free, Prior and Informed Consent

The "principles of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights... including the right to property ... and other rights that may be implicated in natural resource development."

FPIC applies to REDD+ regarding potential changes in resource uses that could significantly impact the substantive rights of indigenous peoples and, where relevant, other forest-dependent communities. Under these circumstances, consistent with international human rights instruments and other treaty obligations, potentially impacted peoples have the right to participate in and consent to or withhold consent from a proposed action.

FPIC can have the effect of reversing the historical pattern of exclusion from decision-making in order to avoid the future imposition of important decisions on indigenous peoples, allowing them to continue to live as distinct communities on lands to which their cultures remain attached.

What is required of UN-REDD Programme Partner Countries?

... Partner countries are required to develop consultation and participation plans for engagement of stakeholders. This is consistent with the increasing adoption at the domestic level of such plans, policies and laws that have been called for pursuant to international treaties and conventions.

The UNDRIP recognizes several situations in which the State is under an obligation to not just seek, but secure the consent of the indigenous peoples concerned. Particularly relevant to the UN-REDD Programme, States must consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to:

- I. Relocating an indigenous population from their lands;
- II. Taking "cultural, intellectual, religious and spiritual property;"
- III. Causing "damages, takings, occupation, confiscation and uses of their lands, territories and resources;"
- IV. "Adopting and implementing legislative or administrative measures;" and
- V. Approving "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

Summary

UN-REDD established guidelines for community engagement and consultation and outlines the normative, policy and operational framework for seeking and obtaining FPIC in the context of REDD+. It asserts that FPIC is required if there are potential changes in resource use that could impact Indigenous Peoples and other forest-dependent communities. In addition, the guidelines is aligned with the United Nations Declaration of the Rights of Indigenous Peoples and requires consent if: relocation of Indigenous People is required; there is a seizure of cultural, intellectual, religious, and spiritual property; and there is potential impact or damage to Indigenous Peoples' land.

Government's role

UN-REDD guidelines allocates sole responsibility of consultation and FPIC to states—specifically states that are members to UN-REDD.

Expectations from business

Although the consultation and FPIC are the responsibility of states, it affects business operations. In order for companies to get authorization for extraction, they need government approval. If a state is a member of UN-REDD, a consultation and FPIC process must occur.

Vienna Declaration and Programme of Action (1993)

Relevant section

31. The World Conference on Human Rights urges States to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.

Summary

The Vienna Declaration and Programme of Action recognizes the importance of indigenous peoples' free participation in matters that affect them and asks states to protect this right.

Government's role

The Declaration urges states to protect Indigenous Peoples' participation in matters that affect them, which includes the use of their land and its natural resources.

Expectations from business

The Vienna Declaration does not explicitly outline business responsibilities in relation to Indigenous Peoples.

Report of the workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights - UN Commission on human rights (2002)

Relevant section

Recommendations

1. The workshop recommended that a study be undertaken on existing and emerging human rights standards, other relevant standards and industry guidelines relevant to indigenous peoples and private sector resource development on their lands, taking into account existing research and documentation.
2. The workshop recommended that consultation between indigenous peoples and the private sector should be guided by the principle of free, prior, informed consent of all parties concerned.
3. The workshop recommended that private sector development on indigenous peoples lands ensure mutually acceptable benefit sharing.

Summary

The Working Group on Indigenous Populations from the Sub-Commission on the Promotion and Protection of Human Rights issued a report that recommended companies' consultations with Indigenous Peoples be in line with FPIC. It also recommended that development projects be mutually beneficial for companies and Indigenous Peoples.

Government's role

The Working Group did not mention the responsibilities of governments in relation to Indigenous Peoples. It did, however, recommend that states—along with the United Nations and other institutions—continue reviewing experiences between companies and Indigenous Peoples in order to develop best practices, including one focused on consultation.

Expectations from business

The Working Group encouraged companies to develop consultation processes in line with FPIC.

'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights' - United Nations (2003)

Relevant section

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

Summary

'The Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights' indicates that states have the responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized by both international and national laws. Likewise, transnational corporations have to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international and national laws. In both situations, these rights include the rights of Indigenous Peoples and vulnerable groups. The Norms further outline rights, which include economic, social and cultural rights, and the rights to development.

Government's role

According to the norms, states have the responsibility to uphold and protect human rights bestowed through international and national legislation. This includes protections of Indigenous Peoples—although it does not explicitly mention what those rights are.

Expectations from business

Like governments, business has to protect the human rights bestowed through international and national legislation, including the rights of Indigenous Peoples. The Norms go on to outline specific rights, which include the 'right of development.'

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - Extractive industries operating within or near indigenous territories (2011)

Relevant section

Conclusions and recommendations

82. On the basis of the experience gained during the first term of his mandate, the Special Rapporteur has come to identify natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.

86. The Special Rapporteur considers that his mandate is well placed within the wider United Nations human rights system to promote the operationalization of indigenous peoples' rights and related institutional guarantees in the context of resource extraction and development operations, in a manner that builds on the work of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. This effort could be pursued through the development of specific guidelines or principles aimed at helping States, corporate actors and indigenous peoples in fulfilling the responsibilities that arise from international indigenous rights standards.

Summary

The Special Rapporteur provides an overview of the activities carried out during his third year and offers an analysis on the impact of extractive industries operating within or near Indigenous People's territories. In his report, he acknowledges that natural resource extraction is one of the most significant violations of Indigenous Peoples' rights. He goes on to recommend the development of specific guidelines aimed at helping governments and companies when interacting with Indigenous Peoples.

Government's role

The Special Rapporteur does not acknowledge the role of governments in relation to Indigenous People or their impact. He does go on to suggest guidelines should be developed for governments and corporations to help them in their engagement with Indigenous Peoples.

Expectations from business

The Special Rapporteur acknowledges that resource extraction is one of the most significant abuses of the rights of Indigenous Peoples. He then goes on to suggest that guidelines and principles should be developed to help states and corporations when interacting with Indigenous Peoples.

'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - Extractive industries operating within or near indigenous territories' (2012)

Relevant section

V. Conclusions- Extractive industries

79. The common focus on consultation and free, prior and informed consent as a point of departure for discussing the issue of extractive industries in relation to indigenous peoples is blurring understanding of the relevant human rights framework by which to understand the issue. A better approach is first to consider the primary substantive rights of indigenous peoples that may be implicated in natural resource extraction. These include, in particular, rights to property, culture, religion, health, physical well-being and to set and pursue their own priorities for development, as part of their fundamental right to self-determination.
80. In this connection, consultation and free, prior and informed consent are best conceptualized as safeguards against measures that may affect indigenous peoples' rights. Other such safeguards include but are not limited to carrying out prior impact assessments, the establishment of mitigation measures, benefit-sharing and compensation for any impacts, in accordance with international standards.
81. The "protect, respect and remedy" framework, which is incorporated into the Guiding Principles on Business and Human Rights, should apply to advance the specific rights of indigenous peoples in the same way as it applies to advance human rights more generally, when those rights are affected or potentially affected by business activities, including extractive industries.
82. In this connection, the State's protective role in the context of extractive industries entails ensuring a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in corporate behaviour; and that provides effective sanctions and remedies when those rights are infringed either by Governments or by corporate actors.
83. For their part, business enterprises have a responsibility to respect human rights, including the rights of indigenous peoples. The corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their own human rights obligations, and it exists over and above compliance with national laws and regulations protecting

human rights. Businesses must carry out due diligence to ensure that their activities do not infringe or contribute to the infringement of the rights of indigenous peoples that are internationally recognized, regardless of the reach of domestic laws.

84. A focus on the rights implicated in the context of a specific extractive or development project is an indispensable starting point for devising appropriate consultation and consent procedures, in the exercise of the State duty to protect and corporate responsibility to respect human rights. The particular indigenous peoples or communities that are to be consulted are those that hold the potentially affected rights, the consultation procedures are to be devised to identify and address the potential impacts on the rights, and consent is to be sought for those impacts under terms that are protective and respectful of the rights.
85. Where the rights implicated are essential to the survival of indigenous groups and foreseen impacts on the rights are significant, indigenous consent to those impacts is required, beyond simply being an objective of consultations. It is generally understood that indigenous peoples' rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive project taking place within the officially recognized or customary land use areas of indigenous peoples, or that otherwise affect resources that are important to their survival.
86. Lastly, there is a fundamental problem with the current model of natural resource extraction in which the plans are developed by the corporation, with perhaps some involvement by the State, but with little or no involvement of the affected indigenous community or people, and in which the corporation is in control of the extractive operation and is the primary beneficiary of it.
87. The Special Rapporteur is convinced that new and different models and business practices for natural resource extraction need to be examined, models that are more conducive to indigenous peoples' self-determination and their right to pursue their own priorities for development. In his future work on extractive industries, the Special Rapporteur plans to examine various models of natural resource extraction in which indigenous peoples have greater control and benefits than is typically the case under the standard corporate model, drawing on a review of the experiences of indigenous peoples in various locations.

Summary

In his 2012 report, the Special Rapporteur summarizes his activities and acknowledges the accomplishments and challenges throughout the year. Thereafter, he makes recommendations moving forward. A section of interest is 'Extractive industries.' In this section, the Special Rapporteur concludes that focusing on consultation and FPIC are blurring understanding of human rights of Indigenous Peoples—rights that include property, culture, religion, health, and physical well-being. Rather the consultation and FPIC processes should be conceptualized as safeguards for potential affected Indigenous Peoples. The report goes on to assert that states must protect the rights of Indigenous Peoples, including rights over their land and development. It also asserts that businesses have to respect the rights of Indigenous Peoples, which include securing consent—not just consultation—if operations have significant impacts on Indigenous Peoples.

Government's role

The Special Rapporteur asserts that states have a protective role of Indigenous People in relation to extractive industries. In that, states must ensure regulatory frameworks that fully recognize Indigenous Peoples' rights over lands and natural resources and other rights that may be affected by extractive operations.

Expectations from business

The Special Rapporteur asserts that business has a responsibility to protect human rights, including those of Indigenous Peoples. In all situations, businesses must carry out due diligence and must seek to ensure fair and adequate consultation and negotiation procedures. Significantly, the human rights due diligence should take place at the earliest stages of planning for an extractive project. If the due diligence process reveals violations to Indigenous Peoples rights the project should not be pursued.

‘Convention for the Safeguarding of Intangible Cultural Heritage’- UNESCO (2003)

Relevant section

Section 1, Article 2:

For the purposes of this Convention,

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:
 - a. oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
 - b. performing arts;
 - c. social practices, rituals and festive events;
 - d. knowledge and practices concerning nature and the universe;
 - e. traditional craftsmanship.
3. “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

Summary

Intangible cultural heritage includes the cultural spaces of communities, groups, and in some cases, individuals that are vital to identity and its continuity. If spaces are recognized as being intangible cultural heritage, then it must be safeguarded—meaning preserved, protected, and promoted—by states.

Indigenous Peoples and Mining Position Statement - International Council on Mining & Metals (2013)

Relevant section

1. Engage with potentially impacted Indigenous Peoples with the objectives of: (i) ensuring that the development of mining and metals projects fosters respect for the rights, interests, aspirations, culture and natural resource-based livelihoods of Indigenous Peoples; (ii) designing projects to avoid adverse impacts and minimizing, managing or compensating for unavoidable residual impacts; and (iii) ensuring sustainable benefits and opportunities for Indigenous Peoples through the development of mining and metals projects.
2. Understand and respect the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts. Social and environmental impact assessments or other social baseline analyses will be undertaken to identify those who may be impacted by a project as well as the nature and extent of potential impacts on Indigenous Peoples and any other potentially impacted communities. The conduct of such studies should be participatory and inclusive to help build broad cross-cultural understanding between companies and communities and in support of the objectives described in commitment 1 above.
3. Agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making. Where required, support should be provided to build community capacity for good faith negotiation on an equitable basis. These processes should strive to be consistent with Indigenous Peoples' decision-making processes and reflect internationally accepted human rights, and be commensurate with the scale of the potential impacts and vulnerability of impacted communities. The processes should embody the attributes of good faith negotiation and be documented in a plan that identifies representatives of potentially impacted indigenous communities and government, agreed consultation processes and protocols, reciprocal responsibilities of parties to the engagement process and agreed avenues of recourse in the event of disagreements or impasses occurring (see commitment 6 below). The plan should also define what would constitute consent from indigenous communities that may be significantly impacted. Agreed engagement and consultation processes should be applied in collaboration with potentially impacted indigenous communities, in a manner that ensures their meaningful participation in decision making.
4. Work to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impacts on critical cultural heritage are likely to occur. Consent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights to individuals or sub-groups nor require unanimous support from potentially impacted Indigenous Peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.
5. Collaborate with the responsible authorities to achieve outcomes consistent with the commitments in this position statement, in situations where government is responsible for

managing Indigenous Peoples' interests in a way that limits company involvement. Where a host government requires members to follow processes that have been designed to achieve the outcomes sought through this position statement, ICMM members will not be expected to establish parallel processes.

6. Address the likelihood that differences of opinion will arise, which in some cases may lead to setbacks or delays in reaching a negotiated agreement in good faith. Companies and potentially impacted indigenous communities should agree on reasonable tests or avenues of recourse at the outset, to be applied where differences of opinion arise. This might include seeking mediation or advice from mutually acceptable parties. Where commitment 4 applies and consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply. In such circumstances, ICMM members will determine whether they ought to remain involved with a project.

Summary and expectations from ICMM members

The International Council on Mining and Metals (ICMM) issued a position statement in 2013 (replacing the previous 2008 statement) outlining its members' view of FPIC as a process based on good faith negotiation, through which Indigenous Peoples can give or withhold the content to a project. The position statement recognises six commitments agreed by ICMM members including:

1. To engage with potentially impacted Indigenous Peoples.
2. To understand and respect the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts.
3. To agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making.
4. To obtain the consent of indigenous communities for new projects (and changes to existing projects) that is located on lands traditionally owned by or under customary use of Indigenous Peoples.
5. To collaborate with the responsible authorities to achieve outcomes consistent with the commitments in this position statement.
6. To address the likelihood that differences of opinion will arise, hence companies and impacted indigenous communities should agree on reasonable tests or avenues of recourse at the outset.

Overall the commitments address engagement with Indigenous Peoples, understanding their rights and interests, building cross-cultural understanding, agreeing appropriate processes for consultation and engagement, and participation in decision making. The commitments in the statement come into effect from May 2015.

RESOURCES ON FPIC

Organization	Instrument/Report	Date
International Instruments and guidelines		
International Labour Organization	ILO 169: Convention on Indigenous and Tribal Peoples in Independent Countries	1989
World Bank	Operations Directives 4.10 on Indigenous Peoples	2005
Inter-American Development Bank	Operational Policy on Indigenous Peoples	2006
United Nations	Declaration on the Rights of Indigenous	2007
European Bank for Reconstruction and Development	Performance Requirement 7	2008
Asian Development Bank	Safeguard Policy Statement	2009
United Nations Development Programme	Guidelines on Indigenous Peoples' Issues	2009
United Nations	Guiding Principles on Business and Human Rights	2011
International Finance Corporation	Standard 7	2012
Equator Principles	Equator Principles III	2013
United Nations Global Compact	A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples	2013
UN-REDD Programme	Guidelines on Free, Prior and Informed Consent	2013
Relevant guidelines, meetings and reports		
Adopted by the World Conference on Human Rights	Vienna Declaration and Programme of Action	1993
The Working Group on Indigenous Populations from the Sub-Commission on the Promotion and Protection of Human Rights	Report of the workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights	2002
United Nations	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights	2003
Human Rights Council	Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya- Extractive industries operating within or near indigenous territories	2011
Human Rights Council	Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya- Extractive industries operating within or near indigenous territories	2012

Related reports, guidance, texts, and conventions		
United Nations Environment Programme	Convention of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	1998
Rotterdam Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	1998
United Nations Educational, Scientific and Cultural Organization	Convention for the Safeguarding of Intangible Cultural Heritage	2003
Foley-Hoag LLP	Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges	2010
Oxfam Australia	Guide to Free Prior and Informed Consent	2011
Boreal Leadership Council	Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities	2012
First Peoples Worldwide	Indigenous rights risk report for the extractive industry (US), preliminary findings	2013
International Institute for Environment and Development (IIED)	FPIC and the extractive industries, International Institute for Environment and Development (IIED)	2013
Oxfam America	Free Prior and Informed Consent in the Philippines: Regulations and Realities	2013
PIPLinks, Middlesex University, ECCR	Making Free, Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector	2013
IBIS: Education for development	Guidelines for Implementing the Right of Indigenous Peoples to Free, Prior and Informed Consent	2013
International Council on Mining and Metals	Indigenous Peoples and Mining Position Statement	2013
Oxfam America	Free, Prior, and Informed Consent in Africa: An emerging standard for extractive industry projects	2014