



**SDSG**

**SUSTAINABLE DEVELOPMENT  
STRATEGIES GROUP**

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**INDIGENOUS RIGHTS AND  
PRINCIPLES FOR  
CONSULTATION**

SDSG is an independent, nonprofit research institute advancing best practices for sustainable management of renewable energy and natural resources.







# Indigenous Peoples

Although the indigenous population is no more than 5% of the world's total, indigenous communities occupy nearly 25% of the planet's surface, and their territories contain possibly 80% of our remaining biodiversity.

“Indigenous and tribal peoples are found in all regions of the world, from the Arctic to the tropical forests.”





Reference points for the protection of rights of indigenous peoples include:

- Inter American Convention on Human Rights (Pact of San Jose)
- ILO Convention No. 169 *On the Rights of Indigenous and Tribal Peoples in Independent Countries*
- United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") (2007)
- Numerous other dispositions of international human rights law





## Convention 169

Based on respect for the cultures and lifestyles of indigenous and tribal peoples, it recognizes their right to define their own development priorities.

Its two basic postulates are:

1. their right to maintain and strengthen their cultures, lifestyles and institutions; and,
2. their right to participate effectively in decisions that affect them.

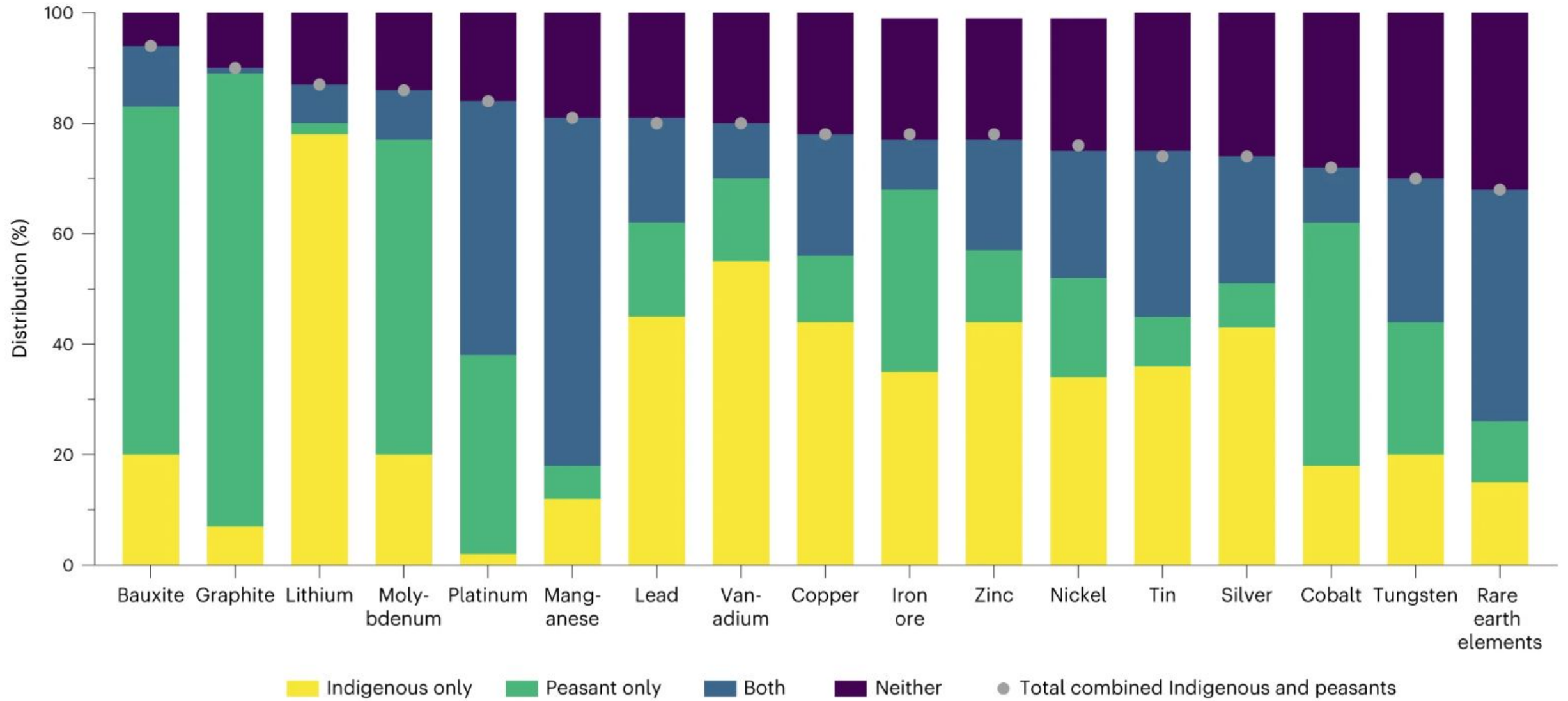




There is a long list of minerals associated with the transition to renewable energy.

**Many of these minerals are found on indigenous lands.**

Without adequate recognition of the indigenous right to participate in decision-making, the “green energy” boom may be another round of despoliation of indigenous peoples in the search for minerals



# OUR WORK

- Began with a request by the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, <https://www.igfmining.org/> for Technical Assistance to the Government of Ecuador
- And continued with another Technical Assistance Project to the Government of Mexico
- We assembled a balanced group of experts from several countries to perform this work. Our group includes people who have worked in responsible positions in government, for international organizations, as advocates for indigenous rights, and as lawyers for private sector companies
- Our work focused both on the rights of indigenous communities, and traditional communities such as those described in *Saramaka v. Suriname*



# OUR PUBLICATION

- Our group of experts decided to publish the results of our work
- It will shortly be published in Spanish as Vol. 103 of the Cuadernos Deusto de Derechos Humanos, by the Human Rights Institute of the University of Deusto as **El camino hacia la paz y el desarrollo** *Marco jurídico emergente para el desarrollo de recursos naturales en tierras indígenas*
- Thanks to the generosity of FNREL it has been translated into English and is part of the proceedings of this meeting

# OUR TEAM

- Luke Danielson      Lead Author
- Flavia Noejovich      Peru
- Sebastian Donoso      Chile
- Leonardo Alvarado      International law
- Carlos Cante Puentes      Colombia
- Volker Frank and Daniel Barragan      Ecuador
- Jose Claudio Mozo      Guatemala and Mexico
- Andres Rodriguez      Private Industry Perspective



Potential recourse in international law has not always been adequate to restrict decisions by states that do not meet the requirements of the Convention

The 'news' in our work is that national court systems are now providing remedies, making these rights even more effective



Image: Demonstrators in Brazil  
terradedireitos.org.br



We have identified more than 25 major rulings on indigenous rights in superior courts of the countries studied. A number of them have overturned government decisions that did not comply with the Convention's requirement of prior consultation.

These include cases from Chile, Colombia, Ecuador, Guatemala, Mexico, and Peru

There are others in other countries, e.g. Argentina

Decisions overturned include the granting of mining concessions





The obligations of ILO Convention 169 are now being recognized and applied by national courts.

Not every case is being won by indigenous peoples, but many are.

Even those that don't win in court help establish legal points helpful to the cause .





The Inter-American Court has also issued rulings of great importance in the development of indigenous jurisprudence.

The treaty obligations clearly apply not just to indigenous communities but to traditional communities such as the Maroons of Suriname, Afro-Peruvian communities and others



Examples:

- *Saramaka v. Suriname*
- *Sarayaku v. Ecuador*



The fundamental idea of the Convention has been to establish an equitable framework for shared decision-making with indigenous and traditional communities.

This provides for the possibility of a less conflictive future that can support sustainable development processes in the country and the communities.

This recognizes that indigenous rights are collective rights

And the importance of traditional leadership structures



# Fundamental Requirement

- Where traditional indigenous territories, resources, communities, or cultural resources may be impacted
- There is a duty of government to consult with these populations
- Through their traditional leadership structures
- Prior to the action being taken

# Cross Cutting Issues: An Architecture in Development

- Do we need a law or regulation that sets out how the consultation is conducted?
- How must we adopt such a provision (see Art. 6(a) of the Convention)
- At present we have a confusing array of regulations, protocols and policies adopted by individual agencies. Isn't consultation an obligation of the state? Shouldn't the basic rules be the same for all?
- What communities are regarded as indigenous?
- What triggers the need for consultation?
- When does the process occur?



# Cross Cutting Issues (2)

- Addressing the imbalance of resources and capacity of the parties to the consultation
- How does the consultation relate to the environmental impact assessment process?
- What activities cannot be undertaken before the consultation?
- Is one point of consultation enough over a changing project that may last for decades and pass through many phases?
- How long should the consultation last?
- What is the role of the private sector?
- What happens if there is no agreement?

# Indigenous Peoples are distinct social and cultural groups

- That may self-identify as indigenous
- That share collective ancestral ties to lands and natural resources where they live, occupy or from which they have been displaced.
- The land and natural resources on which they depend are inextricably linked to their identities
- They often subscribe to their customary leaders and organizations for representation that are distinct or separate from those of the mainstream society or culture.
- Many Indigenous Peoples still maintain a language distinct from the official language or languages of the country or region in which they reside; however, many have also lost their languages due to eviction from their lands and/or relocation to other territories







# Identification of Indigenous Peoples

- Is not always simple
- Needs to depend heavily on self-identification
- Governments should avoid trying to solve the problem of consultation by defining indigenous peoples out of existence

Image: Mongolian Kazakh  
Man

[www.un.org](http://www.un.org)



Several countries have decided to “regulate the consultation.”

This means promulgating laws or regulations that set forth how the process of consultation should be conducted.

Under Article 6 of the Convention, a law or regulation of this nature *must itself be consulted with indigenous peoples*







There is a tendency in certain sectors to imagine the regulatory process as another **opportunity to limit the participation and rights of indigenous peoples** in the interest of supposed efficiency and more expeditious decision-making.

If there is a desire to “regulate consultation,” there must be a **“consultation about the consultation.”**



The majority of regulations or protocols that now exist only apply to one government agency. This in my view has limitations as an approach. The duty to consult is a duty of the state, not of the Ministry of Transportation or the Mines Ministry

- Who decides when the process begins and who is invited to participate?
- What are the objectives?
- Does it have one or more time limits?
- What information will participants receive, and how much time do they have to absorb it and discuss it internally?
- If there are private sector interests involved, how can a company participate in a government-community dialogue?







The Constitutional Court of Peru has taught us that:

“The exact timing of the prior consultation could not be determined as a standard that applies interchangeably to every community. ... The timing of the prior consultation should consider the uses and customs of indigenous and native communities for decision-making and the type of measure it intends to approve... (IDLADS Peru Case, Findings 41, 42, and 43).

“A first lesson learned is the importance of reaching a consensus with indigenous peoples on the methodology for *consultation about the consultation*”



## When does consultation take place?

“[Consultation] must be a constant dialogue throughout the process of elaboration and implementation of the measure. (Findings 41, 42, and 43).

Consultation must be carried out in all phases of planning and implementation of the measure or activity in question.

There must be constant communication between the State, as guarantor of the consultations, and the indigenous party.





There is a need for a **preliminary negotiation** concerning the rules for negotiation.

- When and where should the negotiation take place and who should the participants be?
- Will decision-making be postponed until an agreement is reached, or not?

Once the preliminary rules are agreed upon, the negotiation that follows over substance is often surprisingly easy.





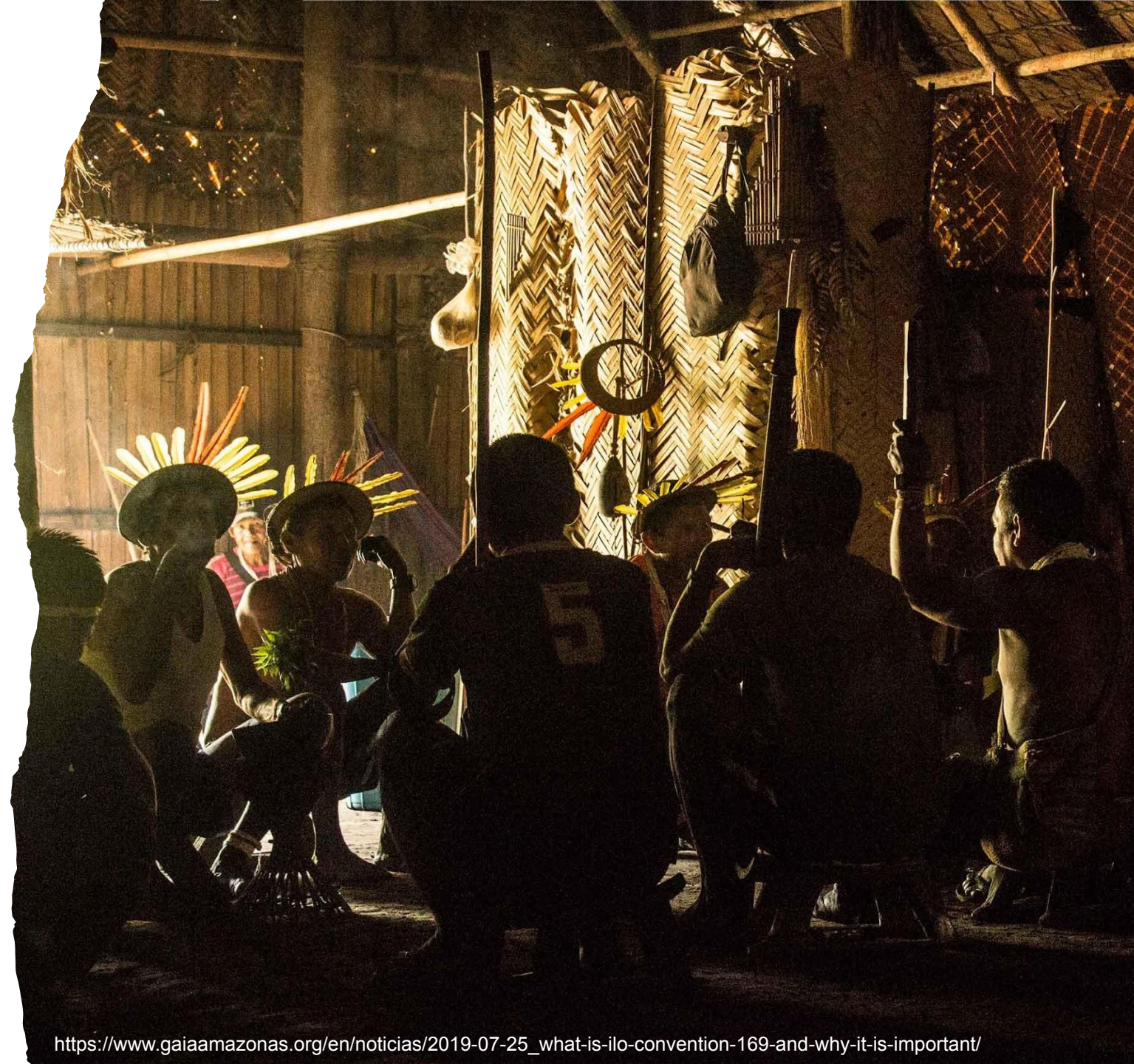
## Resources to Support Communities

Consultations should be conducted under culturally appropriate procedures.

The community has the right to determine what information it needs and how it should be presented for cultural relevance.

Funds may be necessary to allow the affected peoples access to experts in relevant subjects. Expertise may be needed to evaluate the specialized information they are receiving.

This is an opportunity not to slow things down, but **an opportunity to build trust and generate agreements.**





Not all problems of representativeness are on the side of traditional and indigenous peoples.

Internal conflicts exist in government as to who is the government's voice.

Strong leadership is essential -- national leadership must decide how the various interests within the government can be represented in a dialogue on how to regulate consultation.





## Participation of private interests

The States must protect the community from third-party activities that aim to divide or interfere with their decision-making processes. See *Sarayaku*.

Examples:

- Supporting parallel structures that undermine established tribal leadership
- offering money or economic benefits to obtain member consent,
- entering into secret agreements with members of the group or
- carrying out activities of exploration and exploitation of natural resources in a way that undermines the right to consultation or other rights.







Investors may be in a position to offer things that indigenous or tribal peoples want.

Examples:

- Employment , the promotion of small businesses;
- transportation, like better roads, railroads, or airports;
- basic services such as electricity, cell towers, drinking water, and sewage treatment;
- internet access;
- support for schools;
- health care

## The “Right of Veto”

A hindrance in the debate on consultation is the question of whether “communities have the right of veto.”

“We will not talk with these people unless they acknowledge that they have no veto”

“The UN Rapporteur on Indigenous Peoples has emphasized that reducing the principles of consultation and consent to a debate on the existence of a veto **loses sight of the spirit and nature of these international principles.**”







**"Indigenous peoples' rights are not "special" rights but are articulations of universal human rights, as they apply to indigenous peoples."**

<https://news.un.org>

Example: All people have rights related to human reproduction. But giving effect to those rights requires different approaches in the case of women.

Rights must be contextualized to the situation of indigenous peoples which requires taking the collective aspects of these rights into account.





As James Anaya, the previous Special Rapporteur on indigenous peoples explained,



“consultation and free, prior and informed consent must also be understood as an extension of the right of indigenous peoples to self-determination. Therefore, they should be able to decide their own social, cultural, economic and political destinies and ultimately safeguard their rights recognized under the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights sources.”





## Benchmarks

These support the idea that indigenous consent is required:

- United Nations Declaration on the Rights of Indigenous Peoples of 2007 (144 nations voted in favor)
- IFC performance standards (Standard 7) -applicable to all its lending and loans
- Initiative for Responsible Mining Assurance Initiative (IRMA)

**Thank You!**

**Questions?**





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