**TWELVE BASIC PRINCIPLES OF CONSULTATION**

**WITH INDIGENOUS**

**PEOPLES**

This document[[1]](#footnote-1) describes basic principles of consultation under ILO Convention 169, which a considerable number of Governments have ratified. This document is intended to serve as a guide to fruitful discussion among governments officials, Indigenous Peoples, the private sector, and other stakeholders.

This document was created as part of our review of international jurisprudence on Indigenous rights, which focused on ILO Convention No. 169 *On Indigenous and Tribal Peoples in Independent Countries.[[2]](#footnote-2)*

We aim here to identify the basic principles of consultation to ensure that any legislation, regulation, or internal protocols adopted by signatory countries of the Convention are consistent with the obligations they assumed upon ratification.

**Countries that have Ratified the Convention**

Countries that have ratified the Convention are identified on the International Labour Organization’s website: <https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314b>.

**The Pact of San Jose**

Many of these countries have also ratified the American Convention on Human Rights, also known as the Pact of San José, which makes them participants in the Inter-American Human Rights System. Countries that have ratified this human rights convention are listed on the website of the Organization of American States[[3]](#footnote-3): <http://www.cidh.oas.org/basicos/Spanish/basicos2a.htm>

**United Nations Declaration on the Rights of Indigenous Peoples**

Most countries in the world voted for the United Nations Declaration on the Rights of Indigenous Peoples (2007), which received support from over 140 countries.  <https://www.ohchr.org/sites/default/files/UNDRIPManualForNHRIs_SP.pdf>

It is important to note that Article 34 of the Convention establishes a rule or 'principle of flexibility' according to which

"The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country..."

The observance of this rule or principle in no case is supposedto affect the essence of the rights of indigenous and tribal peoples as enshrined in the Convention.

We highlight the Convention and the Inter-American Court of Human Rights decisions because they are relevant to the development of a body of principles of consultation for the previous C169.

**TWELVE PRINCIPLES**

**PRINCIPLE 1**

**CONSULTATION APPLIES TO LEGISLATIVE OR ADMINISTRATIVE MEASURES**

Article 6 No. 1 (a) of the Convention requires the Government to consult the peoples concerned (indigenous or tribal) whenever consideration is being given to legislative or administrative measures that may affect them directly.[[4]](#footnote-4)

Therefore, a government should not adopt legislation, regulations, or administrative measures that could directly affect indigenous or tribal peoples without prior consultation with the representative institutions of the affected peoples.

This form of consultation requires careful consideration. In the case of a specific development project in a particular location, it may be clear which indigenous nation needs to be consulted. In the case of a legal provision of national application, it may be hard to determine how to involve all indigenous interests in the country in a proper consultation process, though that must be the objective.

**PRINCIPLE 2**

**SUSCEPTIBILITY TO DIRECT** **IMPACT**

There are several ways in which legislative or administrative measures may directly affect the rights, priorities, or interests of indigenous or tribal peoples. By way of example, the duty to consult may be required with respect to:[[5]](#footnote-5)

- Administrative decisions on projects that can be developed on lands or territories recognized as belonging to indigenous or tribal peoples.

- Decisions on activities affecting lands or territories which, although not officially recognized as belonging to indigenous or tribal communities, are disputed, claimed by, or have important links to particular communities.

- Decisions regarding projects that directly impact resources that are important to indigenous or tribal communities, such as water, wildlife, vegetation, or resources of historical or traditional use.

- Decisions regarding projects that impact sites of cultural or historical importance, sites of traditional use, ancestral tombs, etcetera.

- Decisions regarding activities that may directly impact indigenous peoples themselves, such as matters related to health, education, use of traditional languages, or maintenance of culture.[[6]](#footnote-6)

There must be flexibility in the application of consultation depending on the impact generated by the respective measure.

**PRINCIPLE 3**

**IDENTIFICATION OF INDIGENOUS OR TRIBAL PEOPLES TO WHOM THE CONVENTION** **APPLIES**

Tribal peoples are groups whose social, cultural, and economic conditions distinguish them from other sectors of the national community. Tribal peoples self-identify as members of their group[[7]](#footnote-7) and are governed wholly or partly by their customs, traditions, or special legislation.

Indigenous peoples are recognized as having descended from populations that inhabited the country or a geographic region to which the country belongs at the time of conquest or colonization, or prior to the establishment of present borders. Regardless of legal status, indigenous peoples retain their own social, economic, cultural, and political institutions, or parts of them, and are aware of their indigenous or tribal identity.

These should be considered fundamental criteria for determining the groups to which the provisions of the Convention apply.[[8]](#footnote-8)

If a particular group qualifies as indigenous or tribal under these criteria, the State should not adopt definitions or other provisions that disregard their Indigenous or tribal identity and thus affect their right to consultation.

**PRINCIPLE 4**

**PURPOSE OF THE CONSULTATION**

Consultations should be conducted in good faith and should aim at reaching an agreement or obtaining the consent of the people concerned.[[9]](#footnote-9)

The fulfillment of this purpose requires a process consisting of several stages, among which the following are essential: planning the elements or methodology of the consultation process and its implementation within the community; providing sufficient information about the project and its impacts to the community; providing time for internal discussion within each community, offering expert support where it is needed;, requesting and receiving additional information initiating conversations or meetings which genuinely seek an agreement; and other phases.[[10]](#footnote-10)

A system that does not allow room for these activities does not appear to be designed to reach an agreement or obtain consent.

**PRINCIPLE 5**

**INFORMED CONSULTATION**

If the process aims to reach an agreement, people must be provided with the necessary information to ensure all aspects of the project are understood.[[11]](#footnote-11)

The definition of what constitutes necessary information should be determined by listening to the voices of the people concerned.

**PRINCIPLE 6**

**CULTURALLY APPROPRIATE PROCESS**

Consultations should be conducted under culturally appropriate procedures.[[12]](#footnote-12)

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.

**PRINCIPLE 7**

**PRIOR CONSULTATION**

Consultation with Indigenous communities must occur prior to project development or implementation of a plan.

Conducting the consultation in the early stages of the development or investment plan should be prioritized, the process should not be initiated only where there is a need for permitting or a legal need to consult or obtain community approval.

Early notice provides adequate time for discussion within communities and allow communities to offer a thoughtful response to the State.[[13]](#footnote-13) It reduces the potential for conflict.

**PRINCIPLE 8**

**GOVERNMENT IS RESPONSIBLE FOR THE CONSULTATION**

The Government must conduct the consultation and cannot delegate this responsibility to third parties.

The obligation to consult is a State responsibility. Therefore, the planning and implementation of the consultation process is not a duty that can be delegated to a private company or to third parties, much less to a company interested in obtaining a permit for or interested in the exploitation of the respective resources where it is likely to affect indigenous or tribal peoples.[[14]](#footnote-14)

**PRINCIPLE 9**

**THE ROLE OF THE PRIVATE SECTOR**

Because Indigenous peoples have the right to their social and cultural development[[15]](#footnote-15), and the activities of the private sector can support this development, consultation must define a role for the company that intends to develop the project so that affected communities have an understanding of the possible benefits and risks of the project and can establish a genuine dialogue with the company.

In some instances, it may be recommended that a company in the process of soliciting a permit or authorization application play a role in some of the stages of the consultation. This would be decided by the body responsible for the consultation and the affected communities.[[16]](#footnote-16)

**PRINCIPLE 10**

**STATE SAFEGUARDS OF THE PROCESS**

To ensure that the survival of Indigenous peoples as such is not negated by decisions involving requests for the exploration or extraction of natural resources on land or territories owned or utilized by Indigenous peoples, the State must comply with the following safeguards:

1. conduct an appropriate and participatory process that guarantees the right to consultation, especially in regard to development or large-scale investment plans;
2. conduct an environmental impact assessment, and
3. as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), taking into consideration that the community itself will determine and decide who the beneficiaries of this compensation will be, according to their customs and traditions.[[17]](#footnote-17)

**PRINCIPLE 11**

**RESPECT THE AUTHORITIES AND DECISION-MAKING PROCESS OF EACH VILLAGE/COMMUNITY**

It is the obligation of the State to carry out consultation processes that respect the decision-making system of each tribe or indigenous people so that an adequate and effective relationship is established with other state authorities, social or political actors, and interested third parties.[[18]](#footnote-18)

It is necessary to respect the structures of authority and representativeness with both internal and external actors of the communities.[[19]](#footnote-19) [T]he State has the duty to consult actively with each community, according to its customs and traditions.[[20]](#footnote-20)

**PRINCIPLE 12**

**PROTECTION OF THE COMMUNITY**

The States must protect the community from third-party activities that aim to divide or interfere with their decision-making processes, such as offering money or other economic benefits to members of the community to obtain their consent, entering into secret agreements with members of the indigenous or tribal group, or carrying out activities of exploration and exploitation of natural resources in a way that affects their right to consultation or to other Rights.[[21]](#footnote-21)

*We express our appreciation to colleagues and experts who have reviewed this document and offered their comments.*

1. This document was written by Luke Danielson and Jose Mozo Hormann of SDSG, with valuable advice from colleagues inside and outside of SDSG. [↑](#footnote-ref-1)
2. Our forthcoming book, *El Camino Hacia la Paz y Desarrollo*, will be published in February of 2023 by the Human Rights Institute of the University of Deusto. [↑](#footnote-ref-2)
3. It is worth noting that the Inter-American Court indicated that the Pact of San Jose is also a source of obligation with respect to (*Saramaka vs Suriname* Recital 93). [↑](#footnote-ref-3)
4. ILO Convention 169 Art. 6 (a) [↑](#footnote-ref-4)
5. “Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) - Handbook for ILO Tripartite Constituents" available at <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205230/lang--es/index.htm>. [↑](#footnote-ref-5)
6. ILO Convention 169 Art. 7 (1) [↑](#footnote-ref-6)
7. ILO Convention 169 Art. 1 (2) [↑](#footnote-ref-7)
8. Sarayaku ¶177, 185-187 [↑](#footnote-ref-8)
9. Articles 8 to 16 Law Prior Consultation of Peru and 14 to 26 of the Regulation of Prior Consultation defines seven stages of consultation. [↑](#footnote-ref-9)
10. Sarayaku ¶ 208 [↑](#footnote-ref-10)
11. Sarayaku ¶ 208 [↑](#footnote-ref-11)
12. Sarayaku ¶ 177 [↑](#footnote-ref-12)
13. Sarayaku ¶ 180 [↑](#footnote-ref-13)
14. Sarayaku ¶ 187 [↑](#footnote-ref-14)
15. Sarayaku¶ 129 [↑](#footnote-ref-15)
16. Sarayaku ¶ 177 [↑](#footnote-ref-16)
17. Sarayaku ¶ 157 [↑](#footnote-ref-17)
18. Sarayaku ¶ 165 [↑](#footnote-ref-18)
19. Sarayaku ¶ 194 [↑](#footnote-ref-19)
20. Saramaka ¶ 133 [↑](#footnote-ref-20)
21. Sarayaku ¶ 261 [↑](#footnote-ref-21)