KONRAD ADENAUER STIFTUNG

REGIONAL PROGRAM INDIGENOUS POLITICAL PARTICIPATION IN LATIN AMERICA

Best practices guide to **PRIOR CONSULTATION** in the Americas

AUTHOR

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FOREWORD

The Regional "Indigenous Political Participation" Program (PPI) of the Konrad Adenauer Foundation, periodically evaluates the priorities related to the rights of the region's indigenous peoples. In this assessment and analysis framework, indigenous and non-indigenous experts from more than 10 countries in the region have accompanied us every year since 2011, in the task of developing actions that might respond to the Latin American indigenous agenda's challenging and changing needs.

As part of our understanding, it is clear that Prior Consultation processes are a priority issue in today's indigenous agenda context. As we develop greater depth and understanding of Prior Consultation, we established a need for relying on an academically rigorous document that would reflect and standardize diverse consultation experiences.

Along the road traveled, we had the honor of making acquaintance with Canadian Prior Consultation specialist, Jay Hartling, the author of this not-to-be-missed contribution to the regional debate on prior consultation. Ms. Hartling's experience is most ample, both in Canada as in Latin America. Working as a consultant based in Halifax, Nova Scotia, she is a specialist on indigenous consultation issues and indigenous community relations in Canada and Latin America. Ms. Hartling has more than 16 years of experience in advising the Canadian federal and provincial governments, as well as international organizations, Latin American governments, indigenous communities and organizations, and the private sector. She develops and implements policies, programs and fair, transparent and permanent consultation practices for all sectors involved in Prior Consultation, as well as developing and implementing corporate social responsibility programs.

On this opportunity, and owing to her valuable wealth of experience, we offer a publication of enormous added-value that translates into delivering a practical perspective on different Prior Consultation processes in Latin America and in Canada. A perspective that covers an ample geographic spectrum and takes into account very particular national contexts from which she extracts valuable lessons learned, including the establishment of similarities and differences in Prior Consultation processes in Canada and Latin America. All of the above while taking into account the academic rigor necessary for addressing Prior Consultation. Throughout the text, fundamental Prior Consultation experience based issues are deeply explored, including the relevance of international agreements on the matter and concrete case studies in Canada, Peru, Panama and Chile.

We are confident that whoever accesses this contribution shall have, a very valuable resource on hand that will allow them to delve deeper into these processes and understand them from the practice itself, without losing perspective of process and the legal frameworks that regulate their application.

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INTRODUCTION

The Indigenous right to consultation and free, prior and informed consent has been widely examined and debated. This guide is meant to provide a window to best practice in consultation and free, prior and informed consent (FPIC) with Indigenous peoples, particularly from a practical process and practice perspective.

The guide describes briefly the principle international normative instruments that support consultation and FPIC; the key issues that have emerged regarding the implementation of consultation with Indigenous peoples in Latin America (and Canada)[1]; a step-by-step high-level guide to consult practice; and, four very different "best practice" case studies for illustration.

The Indigenous consultation processes emerging in Latin America are experiencing growing pains, criticisms, setbacks and some resistance – from all parties. There must be a commitment to the proper implementation of institutionalized processes of Indigenous consultation at the state level. There is a tendency to believe that processes need to be perfect in order to proceed, and all associated issues need to be resolved ahead of time. The cases in this guide illustrate all, that the system don't need to be perfect before consultation can proceed; and, that a commitment to learning and improve the process will result in increased trust, better outcomes and a foundation for future consultation.

1 Author Note: While the Canadian context is different than Latin America, the fundamentals, process and issues associated with the implementation of Indigenous consultation are similar.

SUMMARY OF KEY INTERNATIONAL AND REGIONAL FRAMEWORKS

The historical development of indigenous rights and codification in agreements, treaties, and declarations of international law, for example, the Universal Declaration of Human Rights, the Conference and Decade Against Racism, the Declaration of Patzcuaro, and pivotal studies by Martinez Cobo (1981-83), led the two predominant international instruments relating to the rights of indigenous peoples – *International Labour Organization Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries* in 1989 (ILO 169), and the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 (UNDRIP). These two documents (one or the other, or both), provide the framework for the implementation of prior consultation in most countries in Latin America along with regional and national jurisprudence.

The creation of separate legal instruments to protect indigenous rights, such as ILO Convention 169, does not create a special class of rights, that is – *additional* rights for indigenous peoples. Rather, it provides the equal opportunity and treatment already enjoyed by others to a historically disadvantaged or discriminated group. Indigenous peoples enjoy individual rights, however, the specific indigenous rights, by ILO Convention 169 and the UNDRIP, are collective rights – the expression of culture or organization with collective characteristics. For example, ILO Convention 169 and UNDRIP both deal with a number of collective rights in the following areas – justice, land, territories and natural resources, employment, professional training, social security, education and culture – as well as consultation and participation.

It is important both, to differentiate and to understand the relationship between the two key pieces of international legal text that frame the rights of indigenous peoples.

ILO Convention 169 (1989), which replaced ILO 107 (1957), was developed earlier than the UNDRIP and is the central element of the contemporary international normative framework for the promotion and protection of the rights of indigenous and tribal peoples. ILO Convention 169 is a legally binding, international instrument, and once ratified, the state has one year to align legislation, policies and programs to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision and comment with regards to its implementation by an oversight committee (see ILO Convention 169: Mechanism below).

The UN Declaration on the Rights of Indigenous Peoples resulted from a lengthy dialogue and negotiation process and was adopted by most countries in 2007.[2] The UNDRIP sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It is not considered to be a legally binding instrument on its own, but along with other human rights instruments and a growing body of jurisprudence on indigenous rights, the UNDRIP is an important global document, and concepts in the document are slowly finding their way into the Canadian legal system and consultation vernacular.

2 Four countries (USA, Australia, Canada and New Zealand) initially voted against the adoption of the UNDRIP, but later endorsed it, with reservations. One hundred and forty-three countries endorsed, 11 countries abstained, two of which later endorsed, and a number of countries were absent during the vote.

It is important to note that ILO Convention 169 and the UNDRIP are complementary and are meant to reinforce one another. For example, ILO 169 establishes the right to participation, consultation and self-government; while the UNDRIP affirms the right to self-determination.

ILO Convention 169

The ILO is historically a labour rights organization and part of the UN network. It is not commonly understood, why the ILO is involved in a convention related to indigenous rights. Indigenous peoples are covered by a number of ILO conventions related to labour rights[3]. The ILO's involvement with indigenous rights began in the 1920's with the rural workers' rights movement, many of those members were indigenous, and continued through the 1950's-70. There are two significant ILO Conventions related to indigenous rights - Convention 107 in 1957, and 169 in 1989. The fundamental shift from ILO 107 to 169 is still focused on the protection of rights, but is based on indigenous peoples own customs, traditions, culture and forms of decision-making, rather than through assimilation.

Once ratified, the Convention becomes law and then it is the state's responsibility to apply/implement the convention to protect and promote indigenous rights. In doing so, the Convention is broad enough to allow some flexibility in its implementation.

The countries that have ratified ILO Convention 169 in order of date are:

COUNTRY	YEAR OF RATIFICATION
México	1990
Norway	1990
Colombia	1991
Bolivia	1991
Costa Rica	1993
Paraguay	1993
Peru	1994
Honduras	1995
Denmark	1996
Guatemala	1996
Ecuador	1998
Fiji	1998
Netherlands	1998
Argentina	2000
Venezuela	2002
Brasil	2002
Dominica	2002
Nepal	2007
Spain	2007
Chile	2008
Nicaragua	2010
Central African Republic	2010

3 ILO Conventions 29, 100, 111, 138, 182.

Contents:

ILO Convention 169 is a broad international treaty that covers the following rights pertaining to indigenous and tribal peoples:

- Justice
- Land, territory and natural resources
- Employment
- Professional training
- Social security
- Education
- Culture
- **Participation and consultation**

The treaty contains three fundamental pillars for the implementation of indigenous rights:

4. Article 2 – systematic and coordinated action required by the state to implement ILO 169;
5. Article 6 – the right to consultation;
6. Article 7 – the right to participation.

The **right to consultation** is one of the several rights, described in the treaty. Article 6 is the most explicit and descriptive of the duty to consult:

- Consultation with indigenous peoples should be undertaken through appropriate procedures, in good faith, and through the representative institutions of these peoples;
- Indigenous peoples should have the opportunity to participate freely at all levels in the formulation, implementation and evaluation of measures and programs that affect them directly;

Article 6 focuses on three essential aspects of consultation:

4. It is a collective right of indigenous peoples to be consulted;
5. The agreements reached during consultation must be respected;
6. The basic requisites/minimum standards of consultation should be respected.

Those basic requisites of consultation are described in the Convention in the following way:

- The consultation must take place prior to make
- decisions that have the potential to affect rights;
- The proper procedures, policies, guidelines, capacity, funding must be in place to support consultation;
- Procedures for consultation must respect indigenous peoples' preferred forms of organization and decision-making.

The procedures for consultation may vary slightly according to the context, however, there are basic principles that should govern all consultation. A consultation process begins when there is a possibility that a proposed government measure may affect the collective rights of indigenous people. Consultation is a process of intercultural dialogue, with the finality of reaching an agreement, or consent. Consultation should be undertaken by the government with the active participation of indigenous peoples, and should respect indigenous people's traditional or preferred structures or methods of decision-making. All agreements reached through consultation are obligatory or binding and should be provided in writing.

In summary:

- The consultation process must be carried out in good faith.[4]
- The "finality" or goal of the consultation should be agreement, consensus and/or consent.
- If consent is not obtained, despite all good faith efforts to do so, governments still have the power to decide. However, they must not ignore or discard the results of the consultation, and should make substantial efforts to address concerns.
- Indigenous peoples should always have legal avenues available to them, to seek redress to ensure their rights are respected.

According to ILO Convention 169, the following types of administrative and legislative measures require consultation:

- **Article 15:** Authorization or undertaking of exploration or exploitation of natural resources in indigenous territories;
- **Article 16:** Prior to relocation (which requires consent);
- **Article 17:** Prior to considering the transfer of indigenous lands;
- **Article 22:** When organizing or implementing any special professional training programs;
- **Article 28:** When considering the adoption of measures to teach reading and writing to children in their own language.

With specific reference to Article 15 and the exploration or exploitation of natural resources, indigenous peoples have the right to participate in the utilization, administration and conservation of those resources. If, as in many cases, the subsurface rights belong to the state, at a minimum, the state should consult to understand the level of effect any proposed measures may have on rights. Indigenous peoples also have a right to participate in the benefits, derived from the exploitation of natural resources and be eligible for indemnification for unanticipated harms, should they occur (Article 15 (2)).

Article 7 focuses on the broader concept of participation: Indigenous peoples have the right to decide their own priorities regarding development that affect their beliefs, institutions, spiritual well-being and the lands that they occupy or use in some manner.

UN Declaration on the Rights of Indigenous Peoples

The **UN Declaration** focuses on many of the same consultation-related issues included in ILO Convention 169 and adds a new dimension with the purpose of obtaining free, prior and informed consent.

Similar to ILO 169, the collective rights addressed in UNDRIP include:

- Self-determination
- Self-government
- Education
- Language

4 At a minimum, **good faith** should be indicated by following any and all agreed to procedures, beginning the consultation early, providing information promptly and in an appropriate format, respecting established timeframes, striving for understanding and agreement, or consent; and, there is the possibility of influencing the decision.

- Past, present and future expressions of culture
- Media
- Employment
- Health (including traditional medicines and plants)

The following articles of the UN Declaration describe the **right to consultation** with the purpose of obtaining free, prior and informed consent:

Article 18: Indigenous peoples have a right to participate in decision-making with regard to issues that may affect their rights. Participation should take place through their own representatives chosen by their own procedures and maintained and developed by their own decision-making institutions.

Article 19: States must consult and cooperate in good faith with interested indigenous peoples via their representative institutions prior to adopting or implementing legislative or administrative measures that may affect them, with the aim of obtaining their free, prior and informed consent.

Article 32(2): States will carry out consultation and cooperate in good faith with interested indigenous peoples via their own representative institutions, with the goal of obtaining their free and informed consent prior to approving any project that affects their lands and traditional territories, resources, particularly in relation to development, and the use or exploitation of mineral, water or any other types of resources.

Consent is specifically required for the event of:

- Transfer or displacement of indigenous peoples;
- Storage or disposal of toxic materials in indigenous territory/lands;
- High social, cultural or environmental impact that puts the very existence of the indigenous peoples at risk.

Other Protocols, Agreements and Guidance

To support international frameworks, a number of financial institutions and private sector international organizations have developed standards and principles for private sector clients seeking to finance large-scale projects. The documents outlined below are the most recent and broadest in scope, however, there are also guidelines available on indigenous consultation and related issues produced by the Asian Development Bank (2009), and the European Bank for Reconstruction and Development (2008), among others. The relevance of these documents becomes apparent when you consider the challenges for multi-national corporations operating in a number of regimes – some who have indigenous rights frameworks in place and some who do not.

International Finance Corporation (World Bank Group) Performance Standard 7 (2012): Indigenous Peoples

As one of a series of performance standards developed to support the World Bank Group's environmental and social sustainability framework, Performance Standard 7 establishes a set of objectives for clients related to environmental and social impacts on indigenous peoples. Commercial clients/investees are required to ensure that their business activities respect the identity, culture and natural resource-based livelihoods of indigenous peoples and reduce exposure to impoverishment and disease. Specifically, Performance Standard 7's objectives are:

- To ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.
- To anticipate and avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not possible, to minimize and/or compensate for such impacts.
- To promote sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner.
- To establish and maintain an ongoing relationship based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project's life-cycle.
- To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present.
- To respect and preserve the culture, knowledge, and practices of Indigenous Peoples[5].

There are four key/interesting elements of the IFC Performance Standard 7:

- The introduction to Performance Standard 7 includes a good plain language analysis of why indigenous peoples may be particularly vulnerable to natural resource development and exploitation, and how that might be avoided, mitigated, and/or compensated. This supports the legal framework for a separate duty to consult with indigenous peoples. The introduction also includes a detailed definition of the IFC's concept of "who is indigenous".
- The key UN Conventions are recognized as the core of the international indigenous rights framework. International organizations are using the UN Conventions as their interpretive measure for the implementation of the right to prior consultation. This includes an attempt to define the application of FPIC.
- While the UN instruments address the responsibilities of states, it is increasingly expected that private sector companies will conduct their affairs in a way that would uphold these rights and not interfere with states' obligations to indigenous peoples. This recognizes the important role of the private sector in state-indigenous relations. The IFC has done some good work to support the private sector – developing best practices guidelines for addressing social and economic impacts, and a document entitled ILO 169 and the Private Sector.
- The performance standards are accompanied by guidance notes to support the implementation of an integrated, project-based environmental and social risk management framework. The guidance note for consultation includes the definition of an appropriate consultation process and concrete examples of how to accommodate adverse impacts on indigenous rights.

The IFC is required to verify a client's compliance with their performance standards as part of its due diligence. If commercial clients are found not to be in compliance, they can be required to develop a corrective action plan and further funding would be contingent upon meeting the requirements of that plan.

The Equator Principles III (2013)

The Equator Principles III is the response of the financial industry to the management of environmental and social risk for client loans associated with large infrastructure and industrial projects that have a minimum loan value of $100 million. These are complex, high profile projects that have the potential to have high impacts on

5 International Finance Corporation, World Bank Group, *Performance Standard 7,* Indigenous Peoples, January 1, 2012, p 1.

the environment and local communities. There are 81 banks and financial institutions in 36 countries that have voluntarily adopted the Principles[6]. The Equator Principles outline a series of principles and a process to respect the rights of indigenous peoples – requiring projects developed by member groups to be developed in a socially-responsible manner, reflecting sound environmental management practices.

Similar to the IFC Performance Standard 7, clients must develop an environmental and social management plan to demonstrate how they will meet the standards, set out by the Equator Principles. Medium-to-high impact projects require the development of Environmental and Social Impact Assessments.

Principle 5 outlines requirements for indigenous and stakeholder engagement: "projects involving indigenous peoples will be subject to a process of Informed Consultation and Participation ..... Projects with adverse impacts on indigenous peoples will require their free, prior and informed consent. FPIC does not require unanimity, does not confer veto rights to individuals or subgroups, and does not require the client to agree to aspects not under their control."[7]

The Equator Principles draw on similar content in the IFC Performance Standard 7 and rely on standards established in each country. In countries where standards are weak, the "fallback" mechanism is considered to be the IFC document.

International Council on Mining and Metals (ICMM) (2013)

The ICMM developed a set of ten sustainability principles in 2003 – these are commitments to sustainable practices required of ICMM's 23 members that have associated reporting requirements and a third party verification process. Many of the principles intersect with indigenous rights, including Principles 3, 6 and 9.

Principle 10 outlines the requirement for stakeholder engagement:

"Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

- report on our economic, social and environmental performance and contribution to sustainable development
- provide information that is timely, accurate and relevant
- Engage with and respond to stakeholders through open consultation processes."[8]

In May 2013, the ICMM released a position statement on "Indigenous Peoples and Mining". The positions outlined in the statement may be summarized as committing members to:

- respect the rights, interests, special connections to lands and waters, and perspectives of Indigenous Peoples, where mining projects are to be located on lands traditionally owned by or under customary use of Indigenous Peoples

6 This covers 70% of international project finance debt in emerging markets: http://www.equator-principles.com/

7 *The Equator Principles III,* June 2013: A financial industry benchmark for determining, assessing and managing environmental and social risk in projects, p. 8.

8 Ibid, p. 10.

- adopt and apply engagement and consultation processes that ensure the meaningful participation of indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation
- Work to obtain the consent of Indigenous Peoples where required by the ICMM position statement.

Some interesting observations about the ICMM position statement on Indigenous Peoples and Mining:

- Unlike some of the stronger language found in the UN or some NGO descriptions of FPIC, the ICMM position statement appears to be less "committed" to FPIC in the most radical sense, by acknowledging that most countries have limited its application through legislation or the legal system.
- At the same time, the document leaves the door open for the possibility of the application of FPIC to broader non-indigenous communities, at their members' discretion. Their reasoning is sound – if there are non-indigenous communities negatively impacted by a project, they should also have an influence on the outcome.
- Similar to other documents, there is a recognition of UN instruments as the primary framework for implementation.

Issues/Analysis

The implementation of prior consultation with Indigenous peoples in Latin America really began in earnest within the last five-to-ten years. Comprehensive state institutionalization of a consultation framework with Indigenous peoples is a recent phenomenon and is really limited at this time to Colombia, Peru and Chile. Other states are in the legislation or policy development stage, and much more have yet to consolidate an approach.

The following section examines a number of common challenges arising from the requirement to implement prior consultation and the actual difficulties that have been experienced by various states and by Indigenous peoples. These issues have been debated and discussed at various international fora, including the KAS Council of Experts on Prior Consultation with Indigenous Peoples.

Changing commitment of governments

One of the most challenging issues facing consultation is regime change. Regime change tends to occur frequently in most Latin American countries due to constitutional laws regarding re-election. This poses a challenge to both the development of an institutionalized approach to consultation, as well as continuity. When different political parties assume the reins of government, they may have different perspectives, approaches and even levels of commitment to advance Indigenous rights. Governments are also heavily influenced by commodity markets – particularly those, that are natural resource dependent. Falling or consistently low commodity prices make governments more cautious about involving others in decision-making. Social unrest and political instability may also be drivers to challenge the advancement of Indigenous rights.

An example of changing the level of commitment due to regime change can be seen in Peru, where the former government of Alan Garcia refused to pass the Prior Consultation Law developed under its own governance. When a new government was elected under the leadership of Ollanta Humala, it was one of the first acts of government to adopt and implement the Prior Consultation legislation.

Governments are also influenced by public opinion. Public debate in the mainstream media concerning prior consultation has centered on two issues: 1) the potential negative impacts of consultation on investment; and, 2) internal government debates and competitive positions between ministries of government. This has contributed to the slow reaction of governments, who are cautious to dissuade investors.

Low Capacity

In a region where there is little consultation, and further – very little "best practice" – it stands to reason that there would be a low level of capacity regarding consultation with Indigenous peoples. There is a high level of theoretical and academic debate on the topic in Latin America, and publications regarding prior consultation are abundant. However, most of these are based on theory and critique, and either no or very little practical experience of actually "doing" consultation with a focus on the full process. There are very real and practical capacity problems that exist within government, indigenous communities, the private sector, NGOs, academia and the general public.

In Latin America, the Peruvian and Colombian governments have institutionalized training for state employees. The Ombudsman's office in Peru also regularly provides training and supports debates for the advancement of prior consultation. International organizations like the UN High Commission for Human Rights and the UN Development Program support capacity building seminars and workshops for government officials (including the political level) and indigenous groups.

Weak Institutional Frameworks

There are a number of mechanisms that the state and Indigenous peoples must put in place in order for the implementation of consultation to advance. One of those is an adequate institutional framework that supports a government and indigenous participation. An institutional framework should include policies, guidelines and protocols that clearly define the consultation process; tools to support consultation – such as methodologies, databases, templates, interpreters and facilitators; adequate financial resources to support both the state and Indigenous peoples' participation; and, properly trained staff to undertake consultation on behalf of the state. If institutionality is lacking, fractures begin to show in the process – for example, different ministries with different agendas formulate and implement their own decentralized responses to national policy direction on consultation. Inappropriate staff is conducting consultation with no training or background. There are very few funds to support government consultation, let alone indigenous groups; and, many governments are lacking the appropriate tools to advance consultation.

Different Interpretations of Consultation Concepts

There are varying interpretations of some consultation concepts, such as the terms "consent", "prior" consultation, "good faith" and the "binding" nature of agreements reached in consultation. The interpretations do not just vary between government and indigenous groups. Even *within* broad government, indigenous organizations, and NGOs – there are varying interpretations.

Consent

"In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should *at least be sought, even if consent is not strictly required.*"[9]

9 *Extractive industries and indigenous peoples: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya.* Report to the Human Rights Council A/HRC/24/41, 2013.

Consent is meant to signal there is general support for a decision or project by an indigenous group. However, "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree."[10] In terms of undertaking consultation, the basic assumption for the process should *always* be to try to reach agreement or consensus. Therefore, consent is always implied as an objective of any consultation process - even if it is not always achievable. If a government wants to achieve agreement or consent on a particular issue, they should undertake a genuine consultation process that is carried out in good faith, with the identified representatives of the indigenous peoples potentially impacted by a particular decision.

The more difficult question is "what happens when consent is not achieved"? In reality, and in most cases – particularly when issues are multi-dimensional - it is difficult to reach full agreement or consensus. In those instances, final decisions should be made by elected governments. However, a full consultation process should have taken place, and governments should address or reconcile the interests and concerns of Indigenous peoples to the fullest extent possible.

Good Faith

Consultation with the appropriate representatives of Indigenous communities or organizations and according to an agreed-upon process for intercultural dialogue is the process used to arrive at consent. It begins prior to decisions being made that have the potential to affect indigenous rights; and continues until decisions are made and agreements are implemented. Consultation is an obligation or requirement of the state, and any agreements reached during the consultation (which would indicate consent[11]) are binding on all parties. All parties have a responsibility to participate in the consultation, but that participation should be on equal footing. Companies or other groups seeking government permits to operate should also be part of a consultation process, but ultimately it is the state's responsibility to undertake proper consultation.

"Prior" Consultation

The debate around the word "prior" is related to how far in front of a decision consultation has to take place, and at what juncture of the decision-making process. A good example of this is the debate in the mining sector regarding the "moment" or "trigger" of consultation. Some argue exploration licenses do not cause an impact on rights, and therefore, should be exempt from consultation because they are exploratory in nature, and do not confer any specific rights to a company to undertake work. Conversely, production/exploitation can have direct impacts on rights and should be the subject of consultation. Others argue exploration can impact rights, and once exploration has concluded and a decision is made to pursue production/exploitation, there is less opportunity for influence on the final decision.

Who is Indigenous?

The question of who is recognized by the state as Indigenous, and who is not is complex. In most regions of the world, the question of indigenous identity is usually defined by the principle UN documents – and relies on self-identification according to a number of criteria. Some countries, such as Peru and Colombia, have set up a database of indigenous peoples when their Consultation Directorates were initiated – the data is still being populated. Debates center on whether or not those who do not practice customary traditions are indigenous, and if the "mestizo" population that lives in the highlands are indigenous. Determining "who is indigenous" (and

10 International Finance Corporation, World Bank Group, Performance Standard 7, Indigenous Peoples, January 1, 2012, p 3.

11 Author note: Benefit agreements are well-established in Canada. There is some debate regarding whether or not benefit agreements indicate consent.

particularly who gets to decide and according to which criteria) is essential to determining who are the "legitimate" participants in consultation.

Third Party Observation

Indigenous-state relationships in most parts of the world are characterized by a lack of trust. The request for third party accompaniment or observation of consultation processes is particularly prevalent where there is a lack of trust, often due to violent and oppressive historical relationships between indigenous people and the state and/or private sector. Trusted third parties perceived as neutral, such as churches, the public Ombudsman, national electoral tribunals, academic institutions, non-governmental organizations – particularly those involved in conflict resolution, and some high ranking "neutral" organizations (i.e. UN) – are asked to observe, and at times evaluate a consultation process to ensure it adheres to international principles. The requirement for third party accompaniment can provide a sense of security and legitimacy for a process, but can also be unwieldy and prolonged – since many of these institutions have other "day jobs". In order for an organization to effectively monitor consultation with Indigenous peoples, their own internal capacity needs to be developed and their role in the process clearly defined.

Community-driven Consultation

Where there is an absence of the state, previous negative experiences with consultation or a high level of mistrust of the state, communities themselves organize community consultation processes – often supported by third party NGOs or international aid organizations. This is a practice internal to communities and does not include the state or private sector. While these are good internal practices and should be considered part of the consultation process, they do not absolve the duty of the state to consult, or achieve any type of understanding and reconciliation, and are often posed as binary votes of "yes/no". In other words, they do not meet the criteria set out by international norms like ILO Convention 169 or the UNDRIP regarding consultation.

Representation

In order for the state and indigenous representatives to undertake any dialogue, appropriate representatives from both parties must be identified. Many states addressing implementation issues have expressed frustration in identifying the appropriate indigenous representatives. For any variety of reasons, including interference by the state, traditional "representative" models may have been lost in practice. It is also possible that the western concept of representation is not always a good fit with every indigenous decision-making or governance structure, or their particular cosmovision.

Government imposed/introduced structures are not always accepted by all communities. That is why an upfront discussion regarding an appropriate process for consultation is always advisable. Splinter or rival organizations may develop within the same group, or in association with overall power structures. There is also the question of the disconnection between the political/decision-making level of indigenous communities and how they represent those at the grassroots level. According to international norms, governments and third parties should respect and follow the decision-making structure and representation preferred by indigenous communities. Indigenous groups should be clear about their representation, and so should governments.

Unresolved Land Issues

The land is central to indigenous peoples' lives, cultural and social patterns, and conflicts over land are common. Without land, or as a result of losing land, many indigenous peoples struggle to maintain their own economic foundations, subsistence and culture. Defining territories and control of those territories is a key priority for indigenous

peoples everywhere. Each country deals with land and territorial issues in a different manner. Some countries have either not resolved the long-standing disputes regarding the designation of indigenous territories; or have not enforced the legal nature of those designated territories – allowing transfer of ownership to non-indigenous owners who, in some cases, have become the majority landholders in titled and recognized indigenous territory. There are also examples of development occurring on recognized Indigenous territory without consultation or consent. Unresolved land issues are very relevant to prior consultation and the determination of location and extent of potential impacts on indigenous rights.

When to consult; and, what is the topic of consultation.

These are two technical questions that are the subject of much debate and discussion. The question of when you consult relates to the moment in the decision-making process that triggers consultation. The trigger for considering whether or not consultation is needed and is the presence or existence of an upcoming government decision that may have the potential to impact Indigenous rights. The process of consultation is determined according to the level of impact that decision may have on indigenous rights. If the decision itself has no impact, then consultation is not necessary. Some argue that the earliest decision regarding a project that has the potential to impact rights requires consultation – for example, deciding whether or not a highway in a certain area is needed, and who gets the concession to build that highway should first be the subject of consultation. The rationale for this is that the first decision is really the one that decides the future for the rest of the project's associated decisions. Governments will argue that the first decision is a strategic one that governments make as the elected representatives of the interests of all its citizens. In countries where consultation legislation has been or is being developed in Latin America, most governments are putting boundaries on the types of decisions that will be subject to consultation.

Equally important is the question of "what is the topic of consultation" – or, what are you consulting about? It is important to be clear about the boundaries/limitations of the decision at hand and how it relates to potential impacts on rights. Many marginalized indigenous communities have not had contact with governments or received any service or support from the government in their lifetime, and as such, have a long list of grievances that need to be addressed – these may become part of a consultation process. Being clear focuses the discussion on the subject of consultation.

What is considered to be "good" or "meaningful" consultation?

Consultation should never be measured according to a checklist of required steps or items, although having a process checklist does assist in carrying out a process. There needs to be fluidity and flexibility in consultation. The question should be – what is reasonable and meaningful consultation, given the potential level of impact on Indigenous rights? All consultation processes depend on the type of decision under consideration, and the potential for impacts on Indigenous rights, as well as the extent of those impacts.

Meaningful consultation is that which covers the following:

- Appropriate notification is given to the potentially impacted indigenous groups – this would include as much information as is available at the time about the decision. Support is provided for cultural and language considerations, where appropriate.
- Support is provided to potentially impacted indigenous groups to participate in the consultation process.

- A consultation process is developed by both parties[12] – and respects the decision-making structures indigenous groups have in place.
- The process and information provided are transparent, accurate and accessible.
- Indigenous groups have adequate time to review information, discuss that information internally within their communities, and respond.
- If further studies are required that will fill gaps in knowledge contributing to a greater understanding of potential impacts on rights, those studies should be facilitated by government and/or industry with the support of indigenous groups (for example, traditional indigenous knowledge studies).
- The government, the private sector and indigenous groups undertake a dialogue process to understand each other's points of view and to identify and discuss any potential impacts on rights.
- Ultimately, all parties should reach an agreement on whether/how the project will proceed. This includes agreements on avoidance and mitigation measures, as well as any compensation and/or economic or other benefits. It is not always possible to reach an agreement. In that case, disagreement should also be noted and recorded by the process.
- Governments have the elected mandate to make decisions that may impact indigenous rights. However, they cannot do so without (at a minimum) prior consultation with indigenous groups.

The Role of the Private Sector

International frameworks regarding Indigenous consultation are clear that the duty to consult belongs to the state. Indigenous groups are clear that they expect all levels of government to carry out the consultation. However, in practice it is the private sector that often takes on the largest portion of the consultation process, including any avoidance, mitigation or compensation measures. In some cases, companies may participate with government in a consultation process, but because there are so few institutionalized cases of government consultation in Latin America, in the absence of any coherent and ongoing consultation companies are often working on their own with little guidance. It is more common to hear about companies that are not doing a good job of community engagement. However, there are dozens of examples of companies that are undertaking respectful work with indigenous communities. A best practice for improving the performance of the private sector in the consultation is to ensure the private sector knows its role, carries out that role, and that they are given the tools and proper support to do so.

12 It is possible, as is the case in some places in Canada – that a long-term consultation process agreement (i.e. protocol, terms of reference) can be developed and followed for all consultation to avoid negotiating a new consultation process each and every time. See Case Studies for more information.

BEST PRACTICES IN CONSULTATION: PROCESS

The process of consultation is grounded in a number of guiding principles. Examining and comparing consultation process guidelines in different jurisdictions, there are nuances in principles, but most consultation is guided by the same principles – some of which are found in the UN Declaration or ILO Convention 169, and emerging jurisprudence in a number of jurisdictions.

The most common principles found in consultation legislation, policies or guidelines are:

Good Faith

- Free – participation should be without coercion or force
- Prior – consultation should take place well in advance of decisions being made
- Informed – appropriate information should be provided in advance of any dialogue, and Indigenous peoples should have the opportunity to discuss their concerns and views within their own community.

Meaningful

- Flexible – adapt to individual circumstances of each process, and the cultural context of individual communities;
- Take adequate time to consider potential impacts – sometimes, these can be quite complex to resolve;
- All concerns should be taken seriously and addressed, where possible.
- Appropriate resources must be provided both to responsible state agencies and Indigenous peoples to support the consultation process and participation in that process.
- Consent/agreement is always the objective, but is not always possible.

Respectful

- Establish appropriate process timelines, and respect those timelines – particularly if they are legislative in nature;
- Utilize appropriate language, locations and cultural considerations;
- Indigenous representation is recognized by Indigenous communities.

Accountability

- Participation is the responsibility of all parties in the process.
- Representatives are accountable to their own constituencies.
- Agreements are binding, and their implementation should be monitored.

Similar to the guiding principles for consultation, the actual steps of the process of consultation that should lead to agreement/consent are similar in a number of countries, and across numerous guidelines that have been developed by agencies, governments, international and non-governmental organizations. There is no "magic

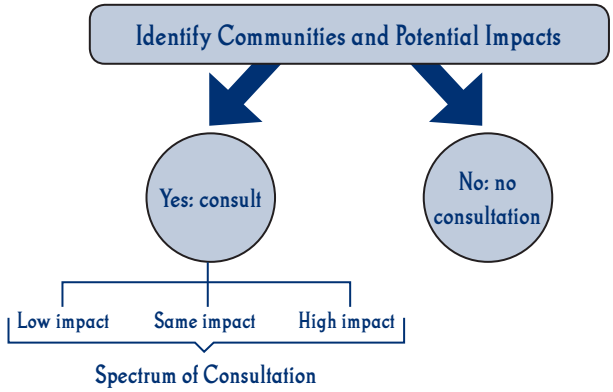
formula" for consultation. All good consultation process should follow these basic steps. The important thing to note is that process can always be improved upon, changed, revised and reviewed – that is how consultation processes evolve and improve over time. Participants should be mindful of this and be prepared to "auto-correct" from time to time.

As stated previously, it is the government's responsibility to consult with indigenous peoples. Therefore, these consultation steps are aimed at a government-led process.

Step 1: Internal Analysis

Assume that the state needs to make an administrative or legislative/policy decision. Part of the process when the state becomes aware of the need to make this decision is to undertake an analysis to identify potentially-impacted communities and any impacts that may occur. While it is important to consider potential impacts from the outset of a decision-making process, those initial considerations are not likely to be conclusive – that is why there is a need to consult – to determine if there are any impacts on affected indigenous communities.

Once this analysis has been made, a decision whether or not to consult must be made, as well as the extent of consultation.



The level of involvement and complexity of the consultation depends on the level of impact on rights. Decisions at the lower end of the spectrum of impact do not usually require a complex and lengthy consultation process. However, the degree of complexity and intensity of consultation increases with the level of impact.

Step 2: Organize and Initiate Consultation

Once the decision is made to consult with indigenous peoples, the internal planning process should begin:

- Identify all decision-makers, their representatives and ensure they are trained in consultation;
- Develop a joint consultation protocol with Indigenous groups. A blanket protocol that describes how consultation will take place can be useful for future consultation. However, consultation processes may also be designed decision-by-decision. A protocol can include process design, appropriate locations and dates for meetings, identification of participants and their roles, and what information will be shared.
- Provide information regarding the decision to participants:

- Information should be shared as soon as possible, and any new information that becomes available during the cóonsultation process should also be shared.
- Information should be transparent and accurate, and available in the appropriate language and format.
- Assistance should be provided by the state for technical support – this can take the form of the state providing technical support, or resources for Indigenous groups to hire their own technical support.

Step 3: Dialogue and Identification of Impacts/Concerns

- Provide resources to support additional studies that may increase understanding of impacts on rights (for example, indigenous traditional knowledge studies);
- Ensure there is adequate time built into the process to provide an opportunity for Indigenous groups to conduct their own internal community deliberations.
- Conduct appropriate multi-party dialogue with Indigenous representatives, the state, and the proponent[13]. This may consistent of several meetings, workshops, seminars, etc.
- Use an appropriate dialogue methodology that will encourage positive participation.

Step 4: Agreement/Consent

The purpose of the consultation is to identify and understand potential impacts; and, to reach agreement/consent on the resolution of potential impacts through avoidance, mitigation or compensation.

The level of mitigation or compensation depends on the level of impact. The following table provides some examples of avoidance, mitigation and compensation techniques, but is by no means comprehensive.

AVOIDANCE
Specific habitat protections
Alter/change project location
Reduce the project footprint
Modify or abandon project components
Use different techniques (i.e. reduce quantity of materials extracted)
Adjust/change timing of work to avoid impacts on species of interest (i.e. fish, animals or plants)
Reject project

13 Author note: Although the duty of consultation is the obligation of the state, private and public sector proponents play an important role in the process, as they will implement avoidance, mitigation and compensation measures.

MITIGATION
Habitat restoration
Include Indigenous communities in environmental monitoring
Involve Indigenous communities in site restoration and reclamation
Use techniques to minimize disturbance
Add, modify or remove sections in legislation, regulations and policies
COMPENSATION
Profit and/or resource sharing
Land transfers
Direct payments
Mutual Benefits Agreements
Trusts
Board of Directors appointments
Scholarships
Skills Training
Employment contracts
Direct contracting and procurement opportunities

Step 5: Decision

The state is ultimately responsible as the democratically-elected body that represents the entire population to make decisions. Decisions and agreements should be communicated clearly, and any agreements are binding. In some countries, a consultation record is developed and signed by all parties to signal and record agreement. The consultation record will also include all agreement details.

Step 6: Monitoring

Agreements must be monitored to ensure appropriate and timely implementation. There should be a dispute resolution clause built into agreements to ensure there is a grievance mechanism that Indigenous communities can access when agreements are not implemented. Third parties can play a role in monitoring and dispute resolution to ensure neutrality.

BEST PRACTICES IN CONSULTATION: CASE STUDIES

It is important to consider and learn from successful examples of consultation already underway in different countries. As previously stated, even where contexts are quite different, consultation principles and the process should be consistent.

There are no examples of perfection anywhere – everyone makes mistakes. The most important thing is to demonstrate good faith by learning from and improving on those processes. The right to prior consultation exists regardless of whether conditions are exact for its implementation. A joint commitment to meaningful consultation and an understanding of what that entails can contribute to the construction of good faith consultation over time.

It should be noted that the following examples are from very different contexts (legal, economic, cultural and historical, etc.). However, all of them provide very good ideas and ways of considering challenges that the reader may find helpful.

The following criteria were used to determine whether or not the case was a good fit to provide lessons learned:

General:

- The presence of an established normative structure: ILO 169, UNDRIP, recognition of Indigenous peoples in the constitution, a body of jurisprudence regarding consultation, laws and regulations, policies and practices.
- State-driven consultation with the involvement of the private sector.
- Willing participants.

Process:

- Follows general principles of prior consultation (free, prior, informed, good faith, meaningful)
- Follows generally-accepted consultation process (see the previous section).

Outcome:

- Results of the process are clear – disagreement, partial agreement, full agreement/consent.

Case Study #1.: Energy Consultation in Nova Scotia, Canada

This case study describes the consultation process regarding energy matters between the Government of Nova Scotia and the Mi'kmaq of Nova Scotia.

Canada's 1.5 million Indigenous peoples (approximately 4% of the total population) are comprised of First Nations, Inuit, Metis, and those that do not have official "status" under the single most significant piece of legislation regarding Indigenous peoples in Canada – *The Indian Act.* There are more than 500 First Nations communities in Canada. For the purposes of this case study, the Indigenous group is the Mi'kmaq of Nova Scotia – comprised of 13 communities. Nova Scotia is geographically the same size as Costa Rica. Many indigenous groups in Canada signed historical

treaties with the British Crown that surrendered their land. The Mi'kmaq signed Peace and Friendship Treaties with the British Crown – those did not include the surrender of territory.

Prior to the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2010, Canadian law related to the right to prior consultation – referred to in Canada as the "duty to consult" – was already well established. Canadian courts continue to provide guidance on consultation through court rulings at many levels, and that has led to clarity and substantial improvements implementing consultation across the country. In fact, Canadian courts have been much clearer regarding consultation than UNDRIP or ILO 169. They also provide a direct avenue for redress on consultation-related issues.

Canada is a federal parliamentary democracy made up of ten provinces, three territories and the federal government – all with different responsibilities, and for the most part – different Indigenous rights contexts. As a result, the development and implementation of Indigenous consultation policy and practice vary slightly from province to province.

Canadian common law emanating from the Supreme Court of Canada directs all governments to consult with Indigenous peoples when decisions they are making have the potential to adversely impact Indigenous rights. In Canada, Indigenous rights are recognized in the Constitution. Because Indigenous consultation is already established in the law, there is no need to create specific legislation or regulations around consultation. Instead, governments have opted for policies, guidelines and protocols to implement the duty to consult.

The Government of Nova Scotia, the Mi'kmaq of Nova Scotia (represented by the Assembly of Nova Scotia Mi'kmaq Chiefs) and the Government of Canada entered into a consultation arrangement in 2007. A consultation protocol[14] was developed jointly by all three parties that lay out how consultation will function for all government decisions that have the potential to impact rights. Therefore, there is no need to develop consultation protocols or processes on a case-by-case, decision-by-decision basis. This was the first agreement of its kind in Canada.

All three governments – federal, provincial and Mi'kmaq – have a consultation office staffed by experts in the field with annual operating budgets. As consultation has progressed, sector specific consultation guidelines have also been developed (i.e. in the areas of forestry, Crown land, energy, mining, highways, bridges and other infrastructure projects, and aquaculture).

The Nova Scotia Department of Energy leads consultation on energy issues, coordinated with the Office of Aboriginal Affairs. To facilitate dialogue on energy-related issues, a Consultation Table on Energy Matters meets at least twice per year to discuss high-level issues. "Table" participants include the Deputy-Minister of Energy and ministerial officials, the Office of Aboriginal Affairs, and the Mi'kmaq of Nova Scotia – led by a Chief who holds the energy portfolio – supported by consultation office staff. Discussions at these meetings may include sharing information on available hydrocarbon exploration blocks, proposed legislation, economic development opportunities, or project-specific initiatives.

When specific energy projects arise, the three parties follow the consultation process outlined in the protocol (similar to the process described in the previous section of this document). In 2010, the Government of Nova Scotia decided to develop a renewable energy plan. During discussions at the Energy Consultation Table, it was determined that the Mi'kmaq of Nova Scotia had a substantial interest in clean energy and energy efficiency

14 http://novascotia.ca/abor/docs/April%202015_GNS%20Mi'kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf

and had concerns, regarding the potential impacts of the construction and operation of wind farms and other renewable energy projects could have on their rights. A consultation process was initiated using the Consultation protocol.

Typically, the consultation process is practiced in the following manner:

- The "measure" or decision that has the potential to impact rights is identified by the responsible authority.
- Impacted Indigenous peoples are identified by the Office of Aboriginal Affairs (OAA).
- A letter is sent to the Mi'kmaq of Nova Scotia from the government outlining the decision that is under consideration, providing initial information (including proponent information, if relevant), and offering consultation.
- The Mi'kmaq of Nova Scotia respond to the request for consultation (positive or negative, but experience shows that Indigenous peoples in Nova Scotia rarely reject a request for consultation).
- All information pertinent to the decision is provided to the Mi'kmaq Consultation Office. This may be an ongoing process as more information becomes available, and is often provided by the project proponent as well as government.
- The government contacts the proponent and provides direction on engagement with the Mi'kmaq.[15] While the responsibility or obligation to consult belongs to the government, proponents/companies can play an important role in the consultation process.
- Mi'kmaq hold internal deliberations regarding the proposed decision or measure.
- Bilateral meetings are held to discuss concerns and identify impacts, including mutually-satisfactory accommodations. The accommodations will outline any avoidance, mitigation or compensation measures to be taken by the government or the proponent.
- A decision is made by the government, and this decision is communicated to the Mi'kmaq, including any relevant accommodation measures.

In the case of the Department of Energy's development of a Renewable Energy Plan, aside from meetings with the Mi'kmaq of Nova Scotia to discuss potential impacts, the process was augmented with the following:

- The creation of a Mi'kmaq Advisor/Liaison position within the Department of Energy to support indigenous participation in business opportunities associated with energy projects;
- Inclusion of Mi'kmaq participants in technical advice and scientific studies;
- Funding for research to develop a Mi'kmaq Renewable Energy Plan that included Mi'kmaq community energy production and energy consumption (see below).

The agreement was then reached with the Mi'kmaq of Nova Scotia on the proposed legislation.[16] Accommodation of Indigenous concerns and impacts included the following:

- Changes to the draft legislation to include and recognize the Mi'kmaq of Nova Scotia;

15 http://novascotia.ca/abor/docs/Proponents%20Guide%20November%2020111%20ecopy.pdf

16 It is important to note that Canadian law has been clear that there is no requirement to reach an agreement in consultation. This is where Canadian law differs slightly from UNDRIP. Regardless, reaching agreement is always sought in consultation.

- Funding and development of a Mi'kmaq Renewable Energy Plan (Kweso'tm'ukw) that includes:
  - 20 megawatts of available power to Mi'kmaq community projects;
  - 13 community wind turbines (one for each community), although this was put on hold to pursue industrial opportunities;
  - Partnership in two industrial wind farms:
    - 51-100% Mi'kmaq investment
    - Transfer of technology
    - Gross income of $8M/year – includes all renewable projects
    - Benefits Plan: capacity-building, employment, preferential contracts, scholarships
  - Mi'kmaq Energy Authority (collective ownership) to finance and manage renewable energy projects
  - Energy Efficiency Program for Indigenous communities
  - Development of pilot electrical car charging station in one community
  - Environmental and cultural protections.

Case Study #2. National Forestry and Wildlife Law - Regulations, Peru

Peru ratified ILO Convention 169 in 1995 and the UNDRIP in 2007. In 2011 the national government passed the Law of the Right to Prior Consultation for Indigenous Peoples (No. 29785), associated regulations, and established a consultation office within the Ministry of Culture. Over the next few years, the state established an institutional framework, based on a centralized advisory model much like the example above in Nova Scotia, Canada. As with most new consultation systems, they have experienced some frustration and growing pains in the process. Regardless, the government continued with its commitment to implementation and has now coordinated at least 21 consultations with Indigenous peoples on a variety of issues and projects. Moreover, a body of jurisprudence related to prior consultation with indigenous peoples is emerging that reinforces the right to prior consultation, and further shapes how consultation will be practiced in the future.

In 2011, the Peruvian Congress passed a new Forestry and Wildlife Law (No. 29763) after a lengthy public consultation process. In 2012, the Forestry Service of Peru (SERFOR) introduced a set of associated draft regulations. The regulations are focused on territorial comprehensive management, reforestation and community forestry management. A first step in the development of the regulations was to design a consultation process with Indigenous peoples, given the obvious potential implications the Forestry Law and Regulations would have for indigenous peoples and the practice of their rights in traditional territories. The Vice-ministry of Interculturality (VMI) of the Ministry of Culture coordinated consultation efforts with the decision-maker – SERFOR. The VMI provides technical assistance and support to the consultation process both to government entities and indigenous peoples and communities.

The process followed by SERFOR is described in Peru's Prior Consultation Law:

Step 1: Identification of the Measure

In this case, the measure to be consulted on is the draft regulations.

Step 2: Identification of Impacted Indigenous Peoples

Using the state's database of Indigenous peoples, the VMI identified 52 indigenous groups (48 in the Amazon and 4 in the Andean Region), and seven national indigenous organizations.

Step 3: Promote the Measure and Develop a Consultation Plan

On October 13, 2014, the seven national indigenous organizations met with SERFOR to review the introduction of the measure,[17] and the draft consultation plan. In total, four meetings were held to discuss the content of the plan. The draft consultation plan included the following:

- The general content of, and information associated with the approved Forestry and Wildlife Law and draft Regulations;
- Proposed number of workshops/meetings, dates, locations on a national scale;
- Timeframe for internal dialogue in indigenous communities;
- Description of intercultural dialogue phase (government-to-government);
- Roles and responsibilities and numbers of participants/representatives, including advisors, facilitators and interpreters.

It is important to note that at the same time, the VMI conducted a number of informational workshops on prior consultation for both state entities and indigenous communities. This was an important preparatory component to the discussions on the draft regulations, given the lack of capacity and practice of consultation in Peru in general.

Step 4: Provide Information

During the information phase of the consultation process, SERFOR/VMI held eleven workshops throughout the country. The process outlined in the Prior Consultation Law was followed over a three-year period and resulted in an agreement (which, in this case, signified consent) with the seven principal national indigenous organizations in March 2015. The consultation process included:

- State collaboration between various ministries and state entities involved in forestry;
- The promotion of the process through various media, workshops, radio interviews, flyers and posters;
- Workshops on the draft regulations with national indigenous organizations, such as AIDESEP, CONAP and UNCA – to provide technical subject-matter assistance.
- Eight workshops in seven regions of the country. These included the participation of 296 indigenous leaders – 28% female and 72% male.

Step 5: Internal Dialogue and Evaluation of the Proposed Measure by Indigenous Peoples

According to international standards, Indigenous peoples must be given sufficient time and support to hold internal discussions within their communities on the proposed measure.

The VMI developed an evaluation methodology for indigenous peoples to use during their internal discussions. The internal evaluation timeframe was initially one week, however, this had to be extended to two weeks, given the

17 http://consultaprevia.cultura.gob.pe/wp-content/uploads/2014/11/ACTA-PUBLICIDAD.pdf

complex nature of the regulations. Interestingly, the internal dialogue phase was divided into three phases – and as each phase progressed, representation numbers decreased (on purpose) to allow for consensus.

Indigenous organizations presented SERFOR with comments on the 55 articles of the regulations that were initially provided by the state entity, plus an additional 97 articles that outlined impacts on rights.

Step 6: State-Indigenous Peoples Dialogue

Prior to initiating the government-to-government (Intercultural) dialogue, the representatives of the participating state entities met to develop a dialogue methodology. This dialogue methodology – which is principally a debate style methodology – proposes that a proposal is presented by an indigenous representative, followed by a round of debate, and then closing remarks by the indigenous representative. If agreement or understanding is not reached in this round, it is repeated.

The final dialogue stage concluded in the following manner:

- Over a period of approximately 1.5 months, representatives of national indigenous organizations met to discuss their proposals with SERFOR and other government entities.
- Participation was limited to two accredited representatives from each national organization (and their alternates), and two advisors. It is important to note that only accredited indigenous organization representatives are spokespeople and decision-makers. The advisors have a restricted role of providing technical advice or clarification at the request of one of the indigenous representatives.
- During the entire consultation process, the Ombudsman's Office of Peru (Defensoría del Pueblo) was an impartial observer.
- On March 16, 2015, all participants met to sign the final Consultation Record (Acta de Consulta).18 The consultation record is a substantial document that contains all participants names and social security numbers, all input provided to the process by indigenous peoples, the dialogue methodology, and all agreements and disagreements. Part of the introduction of the Consultation Record publicly acknowledges the quality of the consultation as viewed and experienced by the participants. The process is described in the following way:
  - The process was carried out by the state in good faith
  - Sustained and respectful dialogue
  - Focus on intercultural dialogue and gender participation equity
  - Mutual learning
  - Indigenous views were respected and valued

Step 7: Decision

On September 15, 2015, the regulations were brought into effect by an act of Congress.

18 http://consultaprevia.cultura.gob.pe/wp-content/uploads/2014/11/Acta-Consulta-RLFFS-FIRMADA.pdf

Case Study #3: Consultation Course Correction in Panama[19]

The following case study examines a "consultation course correction" in Panama regarding two controversial hydroelectric projects known colloquially as Chan I and Chan II on the Changuinola River in western Panama. A series of hydroelectric projects were strategically developed by the Panamanian government to increase energy sovereignty, focus on green energy, and sustainable economic growth. The case demonstrates how lessons learned through inappropriate consultation can be instructive and contribute to improvements in consultation overall, even in the absence of any normative or institutionalized consultation framework. Although consultation on Chan II is still a work in progress and required the intervention of the Inter-American Court of Human Rights (IACHR) to activate an appropriate consultation process that respects Indigenous rights, the case demonstrates how mistakes with consultation can be corrected in good faith if all parties are willing to participate.

There are seven indigenous groups in Panama occupying thirteen territories. According to 2010 census figures, there are more than 400,000 self-identified indigenous peoples in Panama (approximately 12% of the total population). There are five legally-recognized territories (Comarcas) of indigenous peoples which cover 35% of national territory. Although the Government of Panama does recognize Indigenous peoples and has made some advances in the areas of land titles and cultural recognition, Panama has not ratified ILO Convention 169, and currently has no specific provisions for prior consultation in legislation or regulation. However, some legislation does make reference to the need for consultation as part of a broader permitting process.

The story of Chan I is not unusual – there are many examples of hydroelectric and other large development projects all over the world that have been built with no consultation or free, prior and informed consent, and characterized by violence, oppression and in many cases - tragedy.

The government approved a concession for more than 6,000 hectares of land in traditional Ngöbe Bugle territory to US-based AES for the construction of a hydroelectric project. To further complicate matters, the project site is located in a protected forest and an internationally recognized biosphere reserve. The project impacts approximately 5000 Ngöbe, and required the company to flood four communities with 1000 Ngöbe residents. Article 10 of the UNDRIP states: "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." In the case of Chan I, consent would be required, and a new location would have to be of equal or better quality. Without prior consultation or consent, the company began bulldozing communities and removing community members by force. A perimeter was built around the project, police were sent in to protect the area, and the Ngöbe were prohibited from accessing their lands. Potential impacts of the project were obvious:

- Flooding and forced relocation of Ngöbe communities
- Destruction of transportation routes
- Complete restriction of access to agricultural lands relied on by the Ngöbe for sustenance
- Impacts on fishing
- Environmental impacts to the biosphere and species at risk

19 Thank you to Josue Ospino Chung for information and analysis related to this case study.

AES and the Panamanian government conducted a public consultation process that did not engage the affected Indigenous communities and made no attempt to provide a separate process for those communities. They also negotiated agreements with whoever would sign them – which caused community divisions. This would have long-lasting impacts.

In 2008, the Ngöbe, with the assistance of several international NGOs, petitioned the Inter-American *Commission* on Human Rights and the commission provided precautionary measures (an injunction) to the Panamanian government in 2009 ordering the government to suspend construction and other activities. The IACHR gave the Panamanian government 20 days to respond with their compliance measures. Instead of complying, the government and AES stepped up construction and informed the commission that they had no intention of stopping construction. Then, in 2010 the Inter-American *Court* of Human Rights ruled on the case, and that forced the Panamanian government into dispute resolution. A Tripartite Dialogue Table was set up that included the company, the state and affected communities – led by Panama's Minister of External Relations. Over the last three years, some advances have been made in mitigation and compensation. Regardless of the court ruling, Chan I is now in operation.

Chan II (upstream from Chan I) followed closely on the heels of the Chan I process. Chan II is a strategic partnership between the state, EGESA (state-owned) and Odebrecht (Brazilian) – called Bocas del Toro Energy. The impacts on Ngöbe communities are the same as those listed above in the description of Chan I. Prior to the beginning of the environmental assessment process, the company started a process of consultation in Ngöbe communities – setting up consultative councils and a community relations process far in advance of permitting. The company hired a local consulting firm that specializes in community and Indigenous relations. This helped the company set up a continuing dialogue regarding the project with local communities.

The Chan II indigenous consultation process included the following best practices:

- The company began to establish relations with affected Ngöbe communities long before any government decision-making processes began (with the exception of the concession).
- The relationship was characterized by transparency, with free access to information and meetings held in impacted communities.
- Communities elected their representatives and those representatives were recognized and respected by the state and the company.
- A joint consultation plan was developed that established an Agreements Table. The plan included dates and locations for meetings and created a dialogue process.
- The Agreements Table focused on addressing impacts on Indigenous rights (mitigation, benefits and compensation), including relocation. The new community location was agreed upon, and housing designs discussed in collaboration with community representatives.

What makes any of this case study a "best practice"? First, the intervention of courts and tribunals to strengthen the right to prior consultation has been successful in many countries – most notably Canada, Colombia, Chile and more recently Peru. For example, in Canada – there have been dozens of court cases over the last 20 years related to the consultation that has solidified the right to consultation, forced governments to respect Indigenous rights – including the right to prior consultation - and given very clear direction to governments and proponents. The same is true for Colombia, Chile and Peru – this is helping to advance the implementation of the right to prior consultation.

Although the first attempts at reaching out to the community in Chan I were a disaster, the government has shown leadership by participating in a conflict resolution process and setting up a tripartite commission involving the state, the company and affected communities. The process outlined above follows established international norms for Indigenous consultation – this demonstrates how mistakes with consultation can be corrected; and how establishing respectful, mutually-beneficial dialogue processes can change the future of indigenous communities for the better.

However, there are lingering effects of Chan I that have permeated the Chan II process:

- Some indigenous community members negotiated agreements/compensation directly with the company during Chan I – this has created a level of expectation and distorted the current process to a mere "cash grab" that does not have broad-reaching benefits for all members of the community. This continues to divide Ngöbe communities.
- Outside organizations, such as international NGOs and other indigenous communities not impacted by the project have advised the Ngöbe NOT to participate in the consultation. Of course, Indigenous peoples always have a choice whether or not to participate in the consultation. However, this advice equates to asking Indigenous peoples not to defend their rights.
- Indigenous representatives, although willing to participate in dialogue, have also tried to slow down the process by agreeing to and then canceling meetings. This will have a direct impact on the project's bottom line – which could eventually impact the level of benefits received by the community.
- The process has been slowed down because of outstanding land issues between the Ngöbe and the state – these issues need to be resolved.

Case Study #4: Creating a New Ministry of Culture in Chile

Indigenous peoples in Chile are not formally recognized by the Chilean constitution. They are, however, recognized in Indigenous Law (1993) and de facto through Chile's ratification of ILO Convention 169 (2009). There are nine indigenous nations in Chile recognized by Indigenous Law 19.253 (1993): Aymara, Quechua, Atacameño, Colla, Diaguita, Rapa Nui, Mapuche, Yagán and Kawésqar. According to Chile's 2012 Census, the total indigenous population equates to approximately 10% of the total population. Of the total indigenous population, approximately 90% are Mapuche, who are primarily located in the south and in urban areas. The Indigenous Law created the National Corporation for Indigenous Development (CONADI) in 1993.

In 2014, the Chilean government passed a Regulation on Prior Consultation (Decree #66), although there are criticisms that the regulations were developed without the support of all indigenous groups. Regardless, the regulations were brought into force in June 2014 – making Chile the second country in Latin America to do so. The regulations follow a similar process described in the case studies above – designed in accordance with international norms.

Two very important consultation processes took place in 2014-15 – one to create a Ministry of Indigenous Affairs, a Council of Indigenous Peoples and nine regional councils; and, one to create a new Ministry of Culture. This case study examines the consultation process undertaken by the National Council for Arts and Culture (NCAC) to create the Ministry of Culture. It should be noted that the Chilean government elected to undertake both of these very complex consultation processes on a national scale during the same timeframe. Repercussions of this decision are discussed in conclusion.

The idea to create a new Ministry of Culture took form under the former government, but was revived with the current government. Chile's current government has given considerable focus and priority to addressing indigenous rights issues. Despite the criticisms of Decree #66, the consultation process followed the steps outlined in the regulations:

6. Planning:

- The consultation was led by the national assembly's National Council of Arts and Culture.
- The National Institute of Human Rights was designated as independent process observer, although they were only able to cover 5% of the total meetings held nationwide.
- Sixteen specialist teams were created to undertake the consultation process, which included 30 intercultural facilitators.
- A number of capacity workshops were held to train the specialist teams.

7. Dissemination of the Consultation Process and Provision of Initial Information:

- Information on the subject was translated into five indigenous languages.
- All information was posted on a public website for easy access
- The process was publicized in national newspapers, radio (in three different languages), the government gazette process, written letters of invitation and personal communications.

8. Internal Deliberation by Indigenous Peoples:

- An appropriate timeframe was provided for indigenous groups and organizations to consider the information provided by the NCAC. It is unclear how this process proceeded, given the regional and national indigenous councils had not yet been created.

9. Dialogue (Nation-to-Nation):

- 510 meetings were held in 15 regions over a seven month period.
- All regional meetings reached agreement on a number of recommendations.
- Each region assigned delegates to the final national meeting (212 in total). These delegates were responsible for presenting their regional agreements.
- More than 11,000 Indigenous people participated in regional sessions. A gender breakdown was not provided.

10. Decision and Results of Consultation:

- A number of agreements were reached at the final national meeting, including:
  - Name change for the new Ministry to the Ministry of Culture, Arts and Heritage.
  - Creation of an Indigenous Peoples Council within the new ministry
  - Incorporation of the principles of recognition, respect and promotion of the existing pluricultural nature of the country in all work associated with the new ministry.
  - Inclusion of the concept Indigenous Cultural Heritage

As discussed above, for its first consultation process using Decree #66, the Chilean government chose to run two extremely complex and important consultation processes at once. Since the consultation process and associated representative structures had not been tested previously, this was probably not a good idea – given representatives would have to choose their preferred issue. According to the observation report by the National Institute of Human Rights, the two government entities running the two separate consultations did not coordinate their processes, and attendance at some meetings was low.

The use of a third party independent observer was helpful. The NIHR report describes the process as sound and followed the principles of indigenous consultation set out in ILO 169. The recommendations in the NIHR report allow the government to examine the process and make improvements.

Because the adoption of Decree #66 was so controversial, there was skepticism and non-acceptance of the process by some Indigenous communities. However, this dissipated by the time the process concluded and Indigenous groups had concrete proof that consultation can work.

A number of indigenous rights issues were brought to the table as demands for a resolution that were not directly related to the subject matter. Until such time that these issues are resolved (for example, constitutional recognition of Indigenous peoples), they will continue to resurface at every opportunity.

In conclusion, the following chart compares the normative and institutional contexts for Indigenous consultation in the four countries discussed above:

Country	ILO 169 and/or UNDRIP?	Constitutional recognition?	Consultation Legislation?	Jurisprudence on indigenous consultation?	Institutional Framework?	Active Consultations?	Agreements?[20]
Canada	UNDRIP	√	X	√	√	√	√
Panama	UNDRIP	√	X	√	X	√	√
Chile	Both	X	√	√	√	√	√
Peru	Both	X	√	√	√	√	√

20 "Does consultation ever result in agreement?" – This does not assess the frequency or quality of agreements - only that agreements are occasionally reached through consultation.

REFERENCES

National Institute for Human Rights. Observers Report on the Process of Prior Consultation on the Draft Law to Create the Ministry of Culture, Art and Heritage (Chile). August 2015.

Glossary of Acronyms

- **CIDH -** Corte/Comisión Interamericana de Derechos Humanos / ***IACHR*** - *Inter-American Court/ Commission of Human Rights*
- **CLPI** - Consentimiento Libre, Previo e Informado / ***FPIC*** - *Free, Prior, and Informed Consent*
- **CNAC (Chile) -** Consejo Nacional de Arte y Cultura / *National Council for Arts and Culture*
- **CONADI (Chile)** - Corporación Nacional de Desarrollo Indígena / *National Corporation for Indigenous Development*
- **ICP** - / Consulta Informada y Participativa / *Informed Consultation and Participation*
- **OAA (Canadá) -** Oficina de Asuntos Aborígenes / *Office of Aboriginal Affairs*
- **OIT** - Organización Internacional del Trabajo / ***ITO*** - *International Labour Organization*
- **SERFOR (Perú)** - Servicio Forestal del Perú / *Forestry Service of Peru*
- **NIHR** - Instituto Nacional de Derechos Humanos / *National Institute of Human Rights*
- ***UNDRIP*** - Declaración de las Naciones Unidas Sobre los Derechos de los Pueblos Indígenas / *United Nations Declaration on the Rights of Indigenous Peoples*
- **VMI (Perú)** - Vice-Ministerio de Interculturalidad / *Vice-ministry of Interculturality*