

Indigenous Peoples: Consultation and participation



General overview

- Consultation and participation are fundamental rights of indigenous peoples
- These rights are expressed in different forms in various instruments
- ILO C169 refers to consultation, with the objective of achieving agreement or consent



General overview (2)

UN Declaration on the Rights of Indigenous Peoples refers to Free, Prior and Informed Consent (FPIC)

Other instruments/references include:

- CERD General Comment No. 23 (Indigenous peoples) – Free, prior and informed consent in relation to rights to lands, territories and resources
- World Bank: Bank Policy 4.10; and IFC Performance Standard No. 7 on indigenous peoples – concept of free, prior and informed consultation



Consultation in Convention No.169

Elements of the process of consultation:

- Prior consultation
- Good faith
- Appropriate procedures
- Through representative institutions of indigenous or tribal peoples
- Not just “information”



Objectives/elements of consultation

- “concept of consultation under the Convention must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach consensus. The tripartite committee concluded that a meeting conducted merely for information purposes or meetings or consultations conducted after the granting of an environmental licence did not meet the requirements of Articles 6 and 15(2) of the Convention” *ILO Governing Body, complaint on Colombia*)
- “to enable indigenous peoples to participate effectively in their own development...consultation must take place in accordance with procedures that are appropriate to the circumstances...there is no single model, which should take into account national circumstances, the circumstances of the indigenous peoples concerned and the nature of the measures which are the object of the consultation process” (*ILO Governing Body in a case against Brazil*)



Objectives/elements of consultation

“Free and informed consent of indigenous and tribal peoples is required where relocation of these peoples from lands which they occupy is considered necessary” *ILO Committee of Expert, General Observation 2010)*

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Three following key steps of a consultation process that you might want to consider:

- 1) The Government should first establish or design, with participation of indigenous peoples, a consultation mechanism
- 2) The Government should then undertake
- 3) The Government should undertake “periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned”.



Objectives/elements of consultation

- “The Declaration establishes that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. In this regard, ILO Convention No. 169 provides that consultations are to take place “with the objective of achieving agreement or consent on the proposed measure” (art. 6, para. 2). The somewhat different language of the Declaration suggests a heightened emphasis on the need **for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures**, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process” ([Report of the UN Special Rapporteur, 2009, A/HRC/12/34](#))



When should consultation take place?

- When considering legislative or administrative measures (article 6.1(a))
- Prior to exploration or exploitation of sub-surface resources (article 15.2)
- When any consideration is being given to ITPs' capacity to alienate their lands or to transmit them outside their own communities (article 17)
- Prior to relocation, which should take place only with the free and informed consent of ITPs (article 16)
- On the organization and operation of special vocational training programmes (article 22)



Obligation to consult

“Like the Declaration, ILO Convention No. 169 requires States to consult with indigenous peoples in good faith, with the objective of achieving their agreement or consent on the aspects of management schemes or projects that affect them, and calls upon States to carry out consultations with indigenous communities in connection with a variety of contexts (arts. 6, paras. 1 and 2, 15, para. 2, 17, para. 2, 22, para. 3, 27, para. 3, and 28). A tripartite committee of the ILO Governing Body has in fact said that “the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based”.³ The jurisprudence of the ILO draws out some of the contours of the duty to consult, which are referenced below” ([Report of the UN Special Rapporteur, 2009, A/HRC/12/34](#))



Participation

Elements of participation:

- Free participation at all levels of decision-making (article 6)
- Establishment means for development of ITPs' own institutions and initiatives (article 6)
- Participation in formulation, implementation and evaluation of plans and programmes for national and regional development (Article 7)



Lessons from ILO experience

- Consultation should not be seen as an ad-hoc activity – it is a process
- Consultation and participation require systematic, regular, institutionalized mechanisms and coherent frameworks in which to operate



Lessons from ILO experience (2)

- Mechanisms for consultation should, where possible, work through existing structures for purposes of longevity, sustainability and legitimacy
- Adapt working methodologies to the structure and capacity of indigenous partner organizations and communities
- Sustained capacity building required to operationalize consultation processes
- Operational tools should be adaptable to local circumstances

