

Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances



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Foreword

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) recognise that companies can have an impact on virtually the entire spectrum of internationally recognised human rights, including those of indigenous peoples. In recent years, National Contact Points for Responsible Business Conduct (NCPs) have been called upon to handle a growing number of specific instances that concern the activities of multinational enterprises and the rights of indigenous peoples.

This resource note addresses some of the key challenges that NCPs have faced or are likely to face in their handling of specific instances that involve the rights of indigenous peoples. It examines what is understood by the term “indigenous peoples”, the relationship between the OECD Guidelines and indigenous peoples, explores relevant NCP cases and the key topics that arise from the cases. The note then puts forward practical considerations to help NCPs better manage cases involving the rights of indigenous peoples.

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Table of contents

Foreword	3
Introduction	5
What does the term “indigenous peoples” mean?	6
Where is the intersection between OECD standards and guidance on RBC and the rights of indigenous peoples?	8
OECD Guidelines for Multinational Enterprises	8
OECD Due Diligence Guidance	8
Other relevant international instruments	11
NCP cases relating to the rights of indigenous peoples	14
Practical considerations for good offices involving indigenous peoples	17
Conclusion	20
Annex A. Overview of international human rights frameworks related to indigenous peoples	22
Annex B. Resources	24
Annex C. List of NCP cases involving indigenous peoples	26
Notes	27

Tables

Table 1. Ratifications of the Indigenous and Tribal Peoples Convention (No. 169), 1989 by Adherents to the OECD Guidelines	11
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Figures

Figure 1. Breakdown of NCP cases by sector (2000-2020)	15
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Introduction

According to the commentary of the Human Rights chapter of the OECD Guidelines for Multinational Enterprises (OECD Guidelines), enterprises should “respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations (UN) instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families.”¹ The key international human rights instruments² addressing indigenous peoples are the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples (1989), the International Covenant on Civil and Political Rights (ICCPR), paragraph 27, the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), and the Convention on the Elimination of all forms of Racial Discrimination (CERD) (1965). It should be noted that the ICCPR, ICESCR, CERD and ILO Convention No. 169 are legally binding on ratifying states, whereas the UNDRIP falls under the broad category of ‘soft law’.

In recent years, National Contact Points for Responsible Business Conduct (NCPs) have handled a growing number of specific instances, or NCP cases, that concern multinational enterprises and the rights of indigenous peoples. Issues that have led to specific instances involving indigenous peoples have occurred in Latin America (Mexico, Guatemala, Ecuador, Chile and Peru), Africa (Cameroon, Ethiopia, Nigeria and Kenya), Asia (the Philippines, Indonesia, India, Malaysia) and Europe (Sweden). To date, 31 specific instances involving indigenous peoples have been submitted to NCPs,³ often by NGOs on behalf of the indigenous peoples concerned (see Annex C). In one specific instance, the submitter was an indigenous community that was directly affected by the company’s activities who brought a case directly to the NCP.⁴

This resource note addresses some of the key challenges that NCPs have faced or are likely to face in their handling of specific instances that involve the rights of indigenous peoples.

The note begins by examining what is understood by the term “indigenous peoples” before setting out the relationship between the OECD Guidelines and indigenous peoples, the next section explores relevant NCP cases and the key topics that arise from the cases and finally the paper looks at some practical considerations for entering into good offices involving indigenous peoples.

What does the term “indigenous peoples” mean?

Groups that identify as indigenous peoples can be found in all regions of the world. Although indigenous peoples’ unique relationship with the land and resources that they have traditionally owned, occupied or used is a determining feature of indigenous peoples, their customs and livelihoods vary widely between and within countries.

There is no single definition for indigenous peoples agreed on at the international level.⁵ “Indigenous peoples” is a term of art that is not necessarily reflected in national legislation, and it may be perceived as having negative overtones in some contexts⁶. However, no easy substitutes have been found. Similarly, the term tribal, used in standards developed by the ILO are not easily accepted in other regions. As such, applying the concept of “indigenous peoples” – and associated human rights standards – has presented a challenge in some geographic contexts.

In practice, there is convergence among international agencies on what groups can be considered indigenous peoples and should enjoy special protection as such. An important criteria for defining indigenous people is related to their connection to a traditional area, as defined in ILO Convention No. 169, Article 1, which states that the convention applies to:

“(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.⁷

ILO Convention 169 also states in article 2 that: “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply”.

International law differentiates between the terms minorities, national minorities (in Europe) tribal and indigenous, and these terms have different legal consequences. Indigenous peoples have the strongest legal protection, since both minority protection and the international law related to indigenous peoples apply to them. Within the international human rights system, the term “indigenous peoples” has typically been extended to groups that:

- Self-identify as members of a distinct social and cultural group;
- Self-identify as indigenous;
- Maintain a traditional lifestyle, culture and way of life partly different from the other segments of the national population;

- Have their own social organisations that may include traditional customs and/or laws.
- Have historical attachment to ancestral territories from the time of conquest or colonisation or the establishment of present state boundaries.

While indigenous peoples, in general, can be characterised as vulnerable or disadvantaged, the reasons for their vulnerability differ from that of other groups (such as women, children, persons with disabilities, religious minorities etc.). In part, the vulnerability of indigenous peoples is rooted in their distinct ways of life that is linked to their relationship with their traditional lands, territories and resources.

In essence, what makes indigenous peoples “indigenous”, and different from other groups in a vulnerable situation, are the links that they have with lands, territories and resources that they have traditionally owned, used or occupied and that, with few exceptions, remain largely insufficiently protected by national regulatory frameworks. The economic, social, and legal status of indigenous peoples typically means that they have limited possibilities to defend their rights to and interests in land and resources, and are rarely consulted about the design or implementation of projects that can profoundly affect their lives or communities.⁸ Specific human rights standards for indigenous peoples respond to the need to protect their distinct historical, cultural, social and economic characteristics. In short, international human rights standards for indigenous peoples seek to ensure that indigenous peoples can remain partly different and, as peoples, pursue a development path of their own choosing.

The ILO Convention No. 169 establishes minimum standards for the protection of the rights of indigenous peoples in a wide range of fields, including land and resources and traditional livelihoods.

In 2007, following more than 25 years of negotiation, the General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). It is increasingly serving as a reference point in private sector human rights statements and policies.⁹

A core tenet of the Declaration is the right to self-determination, that is, the recognition that indigenous peoples are *peoples*, and, as such, not only have individual rights (i.e. the right to be free from discrimination due to indigenous status) but also collective rights (i.e. the right to continue to exist as distinct groups, for example, by exercising their traditional livelihoods and having property rights over the lands, territories and resources that they have traditionally owned, used or otherwise occupied).

Both the Declaration and the ILO Convention No. 169 also make explicit mention of the rights to land and resources that indigenous peoples have traditionally occupied and used; the right to be consulted and FPIC - Free, prior and informed consent, as well as cultural and language rights.

It should be underscored that indigenous peoples have the right to make use of new technologies and that they are not bound to be “conserved” in their original state. ICCPR paragraph 27 relates, according to the UN Human Rights Committee, to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.¹⁰ This also encompasses the indigenous peoples’ use of, and relationship to, land and water.¹¹

Where is the intersection between OECD standards and guidance on RBC and the rights of indigenous peoples?

OECD Guidelines for Multinational Enterprises

The OECD Guidelines note that companies can have an impact on virtually the entire spectrum of internationally recognised human rights, including those of indigenous peoples. The human rights chapter of the OECD Guidelines establishes that companies should carry out due diligence within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations.¹² The Commentary to the OECD Guidelines highlights that depending on the context in which they operate, companies may need to consider additional relevant human rights standards – in this case the human rights standards addressing the rights of indigenous peoples – as part of their due diligence.¹³

It is important to note that the OECD Guidelines refer to UN instruments on the rights of indigenous peoples in the context of adverse human rights impacts, but do not include any language on FPIC. The OECD Guidelines note that obeying domestic law is the first obligation of enterprises but that in countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.¹⁴

OECD Due Diligence Guidance

Engagement with indigenous peoples is also addressed by the OECD due diligence guidance instruments. Firstly, the OECD-FAO Guidance on Responsible Agricultural Supply Chains (2016) includes several important considerations for companies with regards customary land tenure rights of indigenous peoples. The OECD-FAO Guidance also contains a dedicated section on engagement with indigenous peoples (Annex B), which highlights the international instruments and standards – such as the UNDRIP and ILO Convention No. 169 – that express a state commitment to engage in consultation in order to obtain the free, prior and informed consent (FPIC) of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources.¹⁵

Similarly, the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector (2017)¹⁶ highlights the importance of understanding the local context of operations that impact indigenous peoples in particular, notably with regard to the legal status and rights of indigenous peoples, the historical marginalisation or discrimination of certain groups and their cultural and organisational characteristics.

Both the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector and the OECD-FAO Guidance for Responsible Agricultural Supply Chains (OECD-FAO Guidance) emphasise that indigenous peoples often have a special connection to and customary rights to the lands or territories that they have traditionally owned or customarily used, and that this relationship to land is a distinguishing feature of indigenous peoples. As such, impacts related to land (for example reduced, or loss of, access to land or environmental degradation) will typically affect indigenous peoples, their livelihoods and culture, more severely than other groups.

Indigenous peoples' long-term occupancy of lands and resources is the basis for their property rights. In addition, the UNDRIP provides extensive recognition of indigenous peoples' individual and collective rights to land and resources under customary use.¹⁷ It requires States to "give legal recognition and protection to these lands, territories and resources" with due respect to the customs, traditions and land tenure systems of the peoples concerned.¹⁸

In some cases, as a protective measure and until indigenous peoples' lands have been delimited, demarcated and titled, some Human Rights mechanisms have emphasised that States should abstain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the peoples concerned. Such is the case of the Maya indigenous communities of the Toledo District (Belize), where the Inter-American Commission on Human Rights found that the State had violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of such communities, and reiterated to the State of Belize to carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities.¹⁹ Interim measures of this kind can be effective to ensure respect for indigenous peoples' rights before these rights have been clarified and formalised through national legal frameworks and processes.

In this sense, the OECD-FAO Guidance highlights that States have the primary responsibility to recognise and protect indigenous peoples' customary tenure rights. However, companies should not presume that national frameworks and practice adequately do so and highlights, by way of example, that national laws may not reflect the full extent of legitimate tenure rights or, where they do, be poorly implemented.²⁰ The guidance notes that enterprises may be at particular risk of not meeting their responsibility to respect tenure rights if national rules are not sufficient to ensure appropriate engagement with the holders of tenure rights.²¹ In view of these risks, and as part of their due diligence, companies should ensure that they proactively respect legitimate tenure rights, including those of indigenous peoples.²²

To understand risks related to tenure rights of indigenous peoples, the OECD-FAO Guidance suggests, amongst other, that companies should hold early and ongoing good-faith, effective and meaningful consultations with potentially affected communities, with due regard for the international standards on the rights of indigenous peoples, and invite affected communities to be involved in conducting the impact assessment, soliciting information from them, and providing them with regular feedback throughout all stages of the impact assessment.²³

More specifically, to mitigate risks related to tenure rights, the OECD-FAO Guidance suggests that enterprises:

- Identify rights holders, who consist not only of holders of officially recognised tenure rights, but also of indigenous and customary tenure rights that may not have been officially registered and titled, including women's tenure rights;²⁴
- Establish a committee representative of the relevant stakeholders (giving special consideration to the adequate representation of indigenous peoples) to advise on impact assessments, particularly on initial phases (screening and scoping) and on management, monitoring and contingency plans;

- Consider feasible alternative investments if proposed investments lead to the physical and/or economic displacement of local communities, recognising that states should expropriate only where rights to land, fisheries or forests are required for a public purpose and that they should clearly define the concept of public purpose in law;
- When tenure right holders are negatively impacted by operations, work with the government to ensure that tenure rights holders receive a fair, prompt and appropriate compensation for those tenure rights negatively impacted by the operations by: holding good-faith, effective and meaningful consultations on the compensation offered and ensuring consistent and transparent application of compensation standards giving preference to land-based compensation, that is commensurate in quality, size and value, and otherwise providing compensation at full replacement cost for lost assets - including assets other than land (crops, water resources, irrigation infrastructure and land improvements) - and other assistance to help them improve or restore their standard of living or livelihoods monitoring the implementation of the compensation arrangement, and
- Where government capacity is limited, play an active role in the resettlement planning, implementation and monitoring.²⁵

The OECD-FAO Guidance notes that in some circumstances, enterprises may be negatively impacted in their reputation and operations if they are connected to an expropriation for which the government has not obtained the free, prior, and informed consent of the indigenous peoples concerned. This is likely to cause tensions and conflicts between enterprises and communities that feel excluded or unfairly treated. In such cases, the OECD-FAO Guidance suggests that enterprises consider options to withdraw from planned operations.²⁶

Likewise, the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector (Stakeholder Engagement Guidance) contains a stand-alone component on engagement with indigenous peoples (Annex B). The Stakeholder Engagement Guidance highlights that companies are expected to respect internationally recognised human rights concerning indigenous peoples.²⁷ The Stakeholder Engagement Guidance suggests a number of practical steps for companies to do so, including:

- Agreeing with the peoples concerned on the process for working towards FPIC, and consulting with them on what constitutes appropriate consent;
- Ensuring that consultations seeking consent occur before activities commence or any adverse impacts have occurred;
- Recognising that consent is an ongoing process rather than a one-off activity;
- Providing all information relating to the activity to indigenous peoples in a manner that is timely, objective, accurate and understandable to them;
- Agreeing on what specific activities have been given consent for, what negotiations are ongoing and if and when consent for other activities or project milestones is required;
- Documenting commitments/agreements that have been reached; and
- Determining what action (s) can be taken in the event that the peoples concerned refuse to enter into negotiations; and/or do not provide consent for activities in their territory.²⁸

The Stakeholder Engagement Guidance notes that if, through their due diligence, enterprises conclude that consent is required to proceed with an activity, and the agreed process has not arrived at consent, activities should not proceed unless FPIC is subsequently forthcoming.

Also, the Stakeholder Engagement Guidance notes that in countries where FPIC is mandated, enterprises should consider local expectations, the risks posed to indigenous peoples and to the operations as a result of local opposition. In countries where domestic laws and regulations mandate different approaches to engaging with indigenous peoples or fall short of clear recommendations on community consultation, companies should consider local expectations and seek an engagement strategy that meets stakeholder expectations to the extent that it does not place them in violation of domestic law.

Other relevant international instruments

Under international human rights instruments on the rights of indigenous peoples, such as the UNDRIP and ILO Convention No.169, States have an obligation to consult with indigenous peoples on decisions affecting them²⁹ (see Table 1 below for an overview of the ratification of ILO Convention No. 169 by Adherents to the OECD Guidelines). This duty to consult is also grounded in the core human rights treaties of the International Bill of Human Rights.³⁰

Table 1. Ratifications of the Indigenous and Tribal Peoples Convention (No. 169), 1989 by Adherents to the OECD Guidelines

Out of a total of 23 ratifications, the following 12 Adherents of the OECD Guidelines have ratified Convention No. 169:

Country	Date
Argentina	03 Jul 2000
Brazil	25 Jul 2002
Chile	15 Sep 2008
Colombia	07 Aug 1991
Costa Rica	02 Apr 1993
Denmark	22 Feb 1996
Luxembourg	05 Jun 2018
Mexico	05 Sep 1990
Netherlands	02 Feb 1998
Norway	19 Jun 1990
Peru	02 Feb 1994
Spain	15 Feb 2007

Source: ILO, NORMLEX, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO

In light of indigenous peoples' particular vulnerabilities, special and differentiated consultation procedures are required when decisions will have a significant impact on affected groups' particular interests, such as their traditional land tenure or related cultural patterns. As such, stand-alone consent-seeking consultations with indigenous peoples³¹ should take place where impacts of a planned activity may significantly impact their rights and interests (for example, in the case of impacts on land under customary use).

The objective of all consultations should be to obtain consent or agreement to the proposed measures. Consulting with indigenous peoples with the objective of reaching their agreement is a good faith process and functions as a means to avoid that one party – be it the State, the multinational enterprise or the affected indigenous peoples – can singlehandedly impose its will over the other, and is intended to foster the reaching of an agreement that both parties find acceptable.³² As such, FPIC is not a stand-alone right afforded to indigenous peoples, but a procedural safeguard or principle that is meant to ensure respect for their rights. Consultation and FPIC work as a “check and balance” to ensure that any decisions made will not unintentionally undermine basic rights of the indigenous peoples concerned.

Such consent-seeking process will often be governed by domestic law, but as a general rule, the requirement to obtain consent will depend on the circumstances and the interests involved. There are some instances where the level of consent will necessarily be higher than in others. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent.³³ For example, the requirement for consent for involuntary resettlement of indigenous peoples from their traditional lands and natural resources is generally considered to require consent, as reflected not only in international instruments on the rights of indigenous peoples but also safeguard standards of international finance institutions, including the IFC.

Financial institutions and benchmark initiatives are reflecting FPIC in their social and environmental safeguard frameworks or corporate human rights policies. In large, this development follows the adoption of the IFC Performance Standards and, closely modelled on these, the Equator Principles, which include a stand-alone standard on indigenous peoples and requirements with regards FPIC.

The IFC Performance standards are part of the IFC Sustainability Framework, which articulates its commitments to sustainability and is an integral part of IFC risk management. The framework provides guidance on how to conduct an evaluation of those performance standards and what information to look for, covering a wide range of issues, including indigenous peoples.

The IFC’s standard on indigenous peoples (Performance Standard 7) requires clients to engage in consultation with indigenous peoples that may be affected by project activities with a view to obtain their consent for proposed measures. In three circumstances specified in the Standard, obtaining FPIC of the peoples concerned is an absolute requirement:

- If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected;
- Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use; and
- Where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples’ lives.

The IFC has noted that FPIC will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.³⁴

The Equator Principles is a risk management framework that defines minimum standards for due diligence in project finance transactions to support responsible risk decision-making.³⁵ So far, 105 financial institutions in 38 countries have adopted the Equator Principles.³⁶ The Equator Principles are based on the IFC Performance Standards. With regards to their scope, the Equator Principles go further than the IFC as they require that *all* projects affecting indigenous peoples will be subject to a process of informed consultation and participation consistent with the special circumstances described in the IFC's Performance Standard on indigenous peoples. The Equator Principles note that, overall, projects with adverse impacts on indigenous people will require their FPIC.

NCP cases relating to the rights of indigenous peoples

Since 2000, over 500 specific instances have been received by NCPs, of which 31 involve indigenous peoples according to the OECD Secretariat's records (see Annex C). Of these 31 specific instances, 18 have been concluded; 8 are in progress; and 5 were not accepted.

The following NCPs have been engaged in specific instances involving indigenous peoples: Australia, Belgium, Canada, France, Ireland, Italy, the Netherlands, New Zealand, Norway, Peru, South Korea, Spain, Sweden, Switzerland and the United Kingdom.

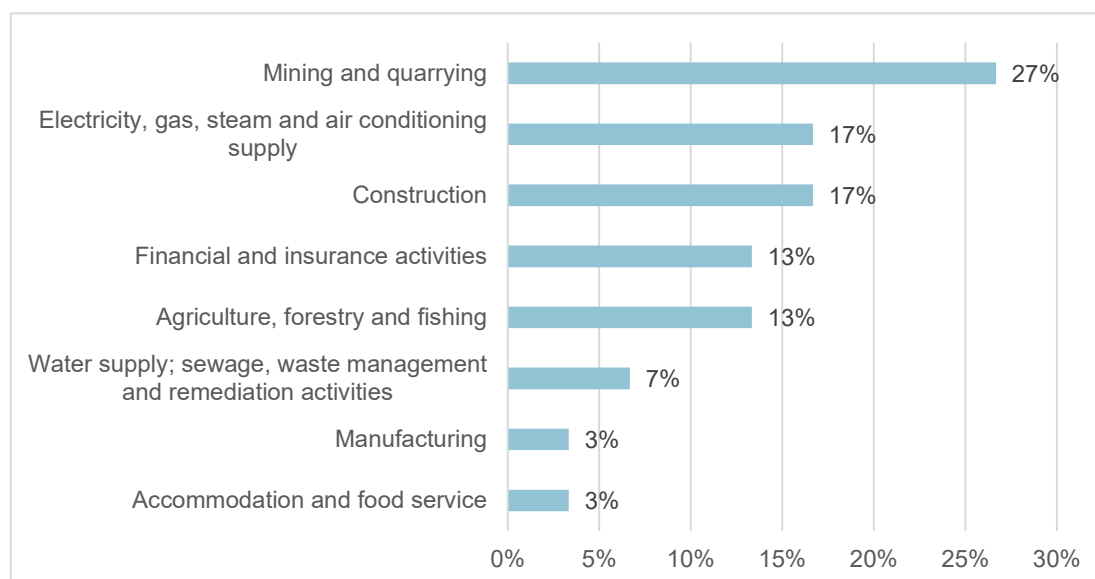
NGOs have submitted all but three of the specific instances to date, often on behalf of the indigenous peoples concerned. In two specific instances, the submitters were (members of) indigenous communities directly affected by the company's activities;³⁷ and in one specific instance, the submitters were two human rights defenders belonging to an indigenous sub-community and an NGO.³⁸

The specific instances that have involved indigenous peoples can be divided into two categories: those that have been framed in terms of indigenous peoples' rights, and those that involved indigenous peoples but the issues are not framed in that way.

Whether or not a specific instance has been presented in terms of indigenous peoples' rights, if the specific instance involves an indigenous community, NCPs can make reference to relevant international human rights standards to inform their assessments of the issue at hand. Identifying whether the groups involved are indigenous peoples is particularly important since it may be that certain individuals were not recognised as such.

Given the unique relationship with land that characterises indigenous peoples, an overwhelming majority of the specific instances concern companies operating in land-consuming sectors, in particular mining and quarrying, energy, construction and agriculture/forestry/fishing.

Figure 1. Breakdown of NCP cases by sector (2000-2020)



Notes. Updated 1 July 2020. Sectors as defined by [UN ISIC top-level industry sectors](#).

Source: OECD Database of specific instances <http://mneguidelines.oecd.org/database/>.

An example is the specific instance Forum vs Cermaq regarding Salmon farming in Canada and Chile³⁹. In a joint statement by the parties annexed to the Final Statement in this case, Cermaq expressed that the company “respects indigenous rights in line with ILO Convention No. 169 and the UN Declaration of Indigenous Peoples (UNDRIP). Cermaq’s operations in areas with indigenous peoples in Chile, Canada and Norway will be in accordance with the provisions of these agreements. Cermaq will seek to enter into mutually beneficial agreements with indigenous people in all areas where their rights are affected by Cermaq’s operations, including in Chile.”

In 20 of the 31 specific instances, the issue involves consultation processes with and/or lack of FPIC of the peoples concerned. Property rights – including the right to own, access and use land and resources under customary use by the groups concerned – are also commonly invoked in specific instances. Where property rights are invoked, these tend to be closely linked to claims over lack of consultation/consent. Impacts on livelihoods were specifically highlighted in six specific instances, while cultural heritage was an issue in three. Some of the specific instances concerned procedural aspects (due diligence) or policy level issues (such as corporate human rights policies not specifically, or insufficiently, addressing the rights of indigenous peoples⁴⁰). In terms of the sectors involved in the specific instances, mining and quarrying represented the highest proportion, followed by energy and then construction, as set out in the chart above.

Indigenous peoples’ customary land rights is an issue that underpins several NCP cases. For example, in the case of Survival International and the World Wide Fund for Nature (WWF), handled by the Swiss NCP in 2017, the submitters alleged that in supporting the establishment of environmentally protected areas in Cameroon, WWF did not make its support for the demarcation of the protected areas conditional upon the consent of the Baka indigenous people and curtailed their access to their traditional territories and natural resources.

In the specific instance of Michelin Group and four NGOs and a trade union, handled by the French NCP in 2013, the complainants alleged that the enterprise had not complied with the Guidelines in assessing the impact of the construction of a plant on a land which was notably used by members of an indigenous people.

Similarly, in the specific instance of EDF & EDF Renewables and an NGO and an Indigenous and Agrarian community representatives, handled by the French NCP from 2018 to 2020, the complainants alleged that the enterprise had not complied with the Guidelines in acquiring land for the construction of a wind farm, noting that lease contracts negotiated with members of an indigenous community and administrative authorizations were obtained without appropriate information and FPIC local indigenous community.

At issue, in the specific instance Amadiba Crisis Committee and MRC Ltd, received by the Australian NCP in 2013, was a land concession, obtained by an Australian company, for mining on the community's ancestral land.

Major energy projects can have severe negative consequences for indigenous populations and the environment in project areas. It is important that the social and environmental consequences are reduced to a minimum and that such projects consider and respect indigenous people's rights and are carried out on the basis of the most stringent requirements for safety and respect for the community. In the specific instance Norconsult AS and the Norwegian Association for International Water Studies (FIVAS), which concerned a major hydropower project, Norconsult agreed to ensure that its Group Code of Ethics and governing documents were in compliance with the OECD Guidelines. In their statement, Norconsult noted that they "respects indigenous people's rights in accordance with ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Norconsult's operations in Sarawak in Malaysia and elsewhere shall be in accordance with the provisions of these instruments".⁴¹

In the case of Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village, handled by the Swedish and Norwegian NCP and which concerned human rights due diligence and FPIC in relation to a windfarm project, while the NCPs indicated that they did not find "any grounds for concluding that Statkraft has failed to comply with the Guidelines", they also stated that "the company could work in a manner that even more clearly promotes indigenous rights and the implementation of the Guidelines" particularly as the company "was aware that indigenous groups and reindeer herders in the area where the company wanted to set up the wind park were in a particularly vulnerable situation and would be negatively affected by the project."⁴² The parties subsequently reached agreement on compensation for the impact and negative effects of the windmills.⁴³

As noted above, the majority of the specific instances submitted to NCPs involve consultation processes and/or FPIC of the indigenous peoples concerned.

The allegations in the specific instances that involve issues around consultation and FPIC can broadly be divided into two categories:

- Company activities have taken place without adequate consultation processes or consent of the indigenous peoples concerned; or
- Internal corporate responsibility procedures are not coherent with international standards relating to the rights of indigenous peoples and/or are not adequately implemented.

An example of the second category is found in a case closed in October 2019 by the Swiss NCP, where the company committed to include the concept of FPIC in its internal sector specific policies for Oil & Gas, Mining and Forestry & Agribusiness.⁴⁴ In a case concluded by the Dutch NCP in 2016, the implementation of the company's palm oil supply chain policy and reference to FPIC was questioned.⁴⁵ The company agreed to address the consequences of non-compliance with the FPIC requirement in the provisions of its palm oil policy.

Practical considerations for good offices involving indigenous peoples

In cases involving indigenous peoples, a recurring challenge is representation. While almost all specific instances to date have been submitted by NGOs that work with the peoples concerned, engaging with indigenous peoples' own representative institutions and governments is key especially to determine during the initial assessment the interest of the submitter in respect of group rights. This issue was central in the initial assessment of the specific instance between John Podgorelec (on behalf of Andrew Starkey and Robert Starkey) and ElectraNet,⁴⁶ handled by the Australian NCP. This case, which the Australian NCP accepted, was submitted by an individual on behalf of two members of an indigenous community who claim to have 'traditional custodial responsibilities' over Aboriginal heritage sites that have been affected by the construction of a power line by the company. NGOs and local authorities may play a crucial role in identifying representative institutions, providing technical and legal support to the peoples concerned however, indigenous peoples often have their own traditional decision-making structures that will need to be engaged with as part of the process to facilitate problem solving in a specific instance.

Where indigenous peoples are concerned, international standards and current best practice by the private sector most often calls for engagement with them through the representatives chosen by them and with due regard for their own decision-making processes. Doing so has been noted to be the best way of ensuring broad community support.⁴⁷ As part of an early assessment of a case, NCPs may therefore wish to work with the private sector and relevant authorities to map existing governance structures within the community or communities concerned and seek to understand how to best mobilise them in the process.

Under international standards, UNDRIP and ILO Convention 169, States have specific duties to comply with regard to indigenous people's rights. As part of the initial assessment and during the SI procedure, NCPs may therefore wish to map existing legal, administrative and institutional frameworks relevant to the case at hand of the country where issues about indigenous people are raised in order to better understand local context. If necessary, the lead NCP should ensure close coordination with the NCP of the country where the issues are located. This might be particularly relevant in countries which have ratified ILO 169. To assist with this aspect, in one case the French NCP has consulted the ILO on the implementation of ILO Convention 169 with regard to the case at hand.⁴⁸

Identifying and mobilising representation among indigenous peoples may be a significant challenge. In some circumstances, there may be uncertainty about which indigenous representatives should be engaged. For example, there may be several indigenous communities, organisations and individuals affected by a particular project. Cases that involved direct engagement with affected indigenous communities can be challenging sometimes due to internal divisions within the communities concerned, including over whether to bring a case or specific instance to the mechanism or not, and whether there is scope for the NCP to involve parties who have a clear interest but may not have been explicitly identified by the complainant when the specific instance is first lodged. Where communities are subject to impacts from company activities which may affect and or have far-reaching consequences on their livelihoods, this

can affect group dynamics. In these circumstances, it can be helpful for NCPs to understand the ways in which people and information enter and leave the group. Accordingly, in the absence of a decision taken by the group regarding suitable representation, which should be reached through a credible process and upheld by the group itself, the NCP can use this information to seek to ensure an inclusive process where different members will have equal opportunities to contribute. To address these challenges, it is also important to recognise the need for additional time to allow the communities concerned the opportunity to organise themselves and to define the representative institutions via which they will engage in consultations.

In most instances when companies enter into consultations or negotiations with indigenous peoples, there are significant imbalances of power, owing to gaps in technical and financial capacity and access to information.⁴⁹ Because of this, indigenous peoples typically require additional support – financial and technical – to be able to meaningfully engage with consultative processes, including those facilitated by NCPs. For example, in the specific instance between Jijnjevaerie Saami village and Statkraft SCA Vind AB (SSVAB), the NCP took a positive view of the fact that Statkraft covered parts of the Saami village's outlays and travel expenses in connection with participation in consultation. The NCP underlined that such measures may be necessary in order to achieve genuine consultations during which indigenous groups are given an opportunity to promote and safeguard their rights.

Practical measures to address power imbalances could also include establishing funding mechanisms that would allow indigenous peoples to have access to independent technical assistance and advice and developing standardised procedures for the flow of information to indigenous peoples.⁵⁰ Some non-judicial grievance mechanisms have also engaged NGOs to provide capacity-building support to indigenous communities on how to engage in problem-solving and mediation in a constructive and effective manner.⁵¹ Within the limit of their resources and with full respect for established and functional community relationships, NCPs could also encourage dialogue between affected indigenous communities and national/international indigenous institutions that have the necessary expertise that could be leveraged to support community decision making. Offering this kind of support can also be an effective means of ensuring that the participants to the process understand what the NCP is and what it can and cannot do, as well as what outcomes may be realistic. For example, the difference between a 'meeting', a 'mediation' and a 'court hearing' may not be clear, and, as such, submitters may struggle to understand their own roles and responsibilities, and the choices they have within the process.⁵²

Access to information regarding the impacts may also be at issue as issues may be taking place in a non-adhering country and factual accounts by the submitter and the company may diverge. In order to address this obstacle, in the case Nickel project in the Philippines, the Norwegian NCP requested its embassy in Manila to commission a fact-finding mission in the region of the issues, based on terms of reference agreed by the parties.⁵³ NCP could also seek the input of indigenous institutions that have expertise in evaluating the impacts of the submitter.

Language may also create significant challenges for NCPs when handling specific instances that involve indigenous communities, in particular in regions where the national language is not widely used. This relates, on the one hand, to the technical use of language that NCPs may be used to from specific instances where submitters are NGOs or trade unions. Where the submitters have not benefitted from NGO or trade union support to file the specific instance, NCPs may face a submission that is challenging to understand and that does not clearly elaborate how the Guidelines have been breached. In such cases, it may be appropriate for the NCP to help the submitter in completing or clarifying its submission.⁵⁴ Language barriers also relate to receiving a specific instance in a language that is unfamiliar to the NCP. For example, in 2018, the Peruvian NCP received a specific instance entirely in an indigenous language.⁵⁵ Finally, the cost and modalities (e.g. to ensure confidentiality) of providing translation services during mediation sessions may also be a challenge.

As for choosing the timing for meetings, cultural characteristics of the communities concerned may also challenge standard NCP processes. For example, representatives of communities that engage in traditional livelihoods (for example reindeer herding among the Saami indigenous people in Finland, Sweden, Norway and Russia) may not be as readily available to participate in meetings if these conflict with key seasonal migration points of the herds. Addressing this challenge can be done by ensuring that all parties agree on a time-frame that works for all – the NCP, mediator(s), submitters of the specific instance/key indigenous community representatives and the company/companies concerned.

More generally, in order for indigenous peoples to be able to freely enter into agreements on an informed basis they should not feel pressured by time demands of others and their own temporary considerations should be respected, notably with respect to possible adjustments to the indicative timeframe established in the procedural guidance to the Guidelines for concluding a specific instance.⁵⁶

Conclusion

This resource note aims to address the ways in which NCPs can better address specific instances involving indigenous peoples, and to present practical avenues that NCPs can consider, depending on their resources and other particular circumstances, to accommodate the particular position of indigenous peoples vis-à-vis corporate impacts and the specific instance process, while remaining within the flexible scope of the Guidelines and the Procedural Guidance.

Given the increasing numbers of specific instances involving indigenous peoples or communities, NCPs may wish to take steps to prepare, within the limits of their resources. For instance, where relevant NCPs may consider targeting some of their outreach activities to indigenous peoples and to civil society organizations working on indigenous issues, and to companies that operate in land-consuming sectors that may pose particular risks for indigenous peoples. Where the NCP does thematic outreach activities, for example on risk-based due diligence in the extractives sector, separate modules on how to assess and address impacts on indigenous peoples could be included.⁵⁷

In conducting an initial assessment of a specific instance, NCPs may wish to engage proactively with the submitters to determine whether the specific instance involves indigenous communities, in particular where the initial request appears to correspond to the subject matter but has not been framed as such (for example where the submitters are a local community). Likewise, coordination with the NCP where the issues are located, and the consultation of experts where relevant may also be useful.

Secure land and resource tenure is a key feature of international standards on the rights of indigenous peoples. When handling specific instances where indigenous peoples' customary land tenure is impacted, NCPs may wish to draw upon the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector and the OECD-FAO Guidance for Responsible Agricultural Supply Chains which contains practical recommendations and useful considerations for the private sector in engaging with indigenous communities over impacts on land tenure. Similarly for cases that involve consultation processes or FPIC.

Experience of problem-solving that involves indigenous peoples has demonstrated the need for non-judicial grievance mechanisms such as the NCPs to be willing and prepared to adopt, to the extent permitted by the Procedural Guidance, flexible approaches to meet the specific characteristics of indigenous peoples. For example, identifying and mobilising representation among indigenous peoples is often an important challenge and in some circumstances, there will be ambiguity about which indigenous representatives should be engaged. As part of an early assessment of a specific instance, NCPs may wish to map existing governance structures within the community or communities concerned and seek to understand how and who is best to mobilise these in the process.⁵⁸

Additional practical measures to ensure the full participation of impacted indigenous communities in the NCP process can also be considered, such as providing capacity-building support to indigenous communities on how to engage in problem-solving and mediation in a constructive and effective manner, and ensuring a time-frame for the process that works for all – the NCP, mediator(s), submitters of the

specific instance/key indigenous community representatives and the company/companies concerned - taking into account the cultural characteristics of the communities concerned. To further assist NCPs when dealing with cases relating to indigenous peoples, this resource note includes an overview of the international human rights framework related to indigenous peoples (Annex A), as well as a list of suggested tools and resource materials (Annex B) and a list of NCP cases involving indigenous peoples (Annex C).

Annex A. Overview of international human rights frameworks related to indigenous peoples

International instruments	Year	Comments
<u>International Covenant on Civil and Political Rights and the Human Rights</u>	1966	The International Covenant on Civil and Political Rights protects rights that are important to indigenous peoples, such as the right to self-determination (art. 1) and the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion or to use their own language (art. 27) ¹ .
<u>International Covenant on Economic, Social and Cultural Rights</u>	1966	The International Covenant on Economic, Social and Cultural Rights, like the International Covenant on Civil and Political Rights, includes the right to self-determination in article 1, which the Committee on Economic, Social and Cultural Rights has similarly applied in the indigenous peoples' context. Many of the Covenant's rights related to employment, family, health, food, education and especially culture are relevant to situations faced by indigenous peoples, and the Committee has applied them to call for the recognition of indigenous peoples' communally held land rights, under its State review process.
<u>International Convention on the Elimination of All Forms of Racial Discrimination and the Committee on the Elimination of Racial Discrimination</u>	1969	The International Convention on the Elimination of All Forms of Racial Discrimination is focused, as its title suggests, on the elimination of racial discrimination. Its Committee has addressed a number of indigenous peoples' issues, from around the globe, through that lens.
<u>Convention against Torture</u>	1985	The Committee's general comment No. 2 (2008) on the implementation of article 2 by States parties underlines their obligation to take measures to prevent torture and ill-treatment, especially to protect individuals and groups vulnerable to discrimination or marginalization. It states that: "The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status,

		economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum seekers, refugees or others under international protection, or any other status or adverse distinction.”
<u>ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169)</u>	1989	This is the only Convention specifically dealing with indigenous peoples rights. Convention No. 169 covers indigenous peoples’ rights to non-discrimination, development, customary laws, lands, territories and resources, employment, education and health.
<u>Convention on the Rights of the Child</u>	1989	The Convention on the Rights of the Child is the only global United Nations human rights treaty to specifically mention indigenous children. Emulating article 27 of the International Covenant on Civil and Political Rights, its article 30 states: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.
<u>The United Nations Declaration on the Rights of Indigenous Peoples</u>	2007	The Declaration is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, containing minimum standards for the recognition, protection and promotion of these rights. While not a legally binding instrument and not uniformly implemented, the Declaration regularly guides States and indigenous peoples in developing law and policy that have an impact on indigenous peoples, including in devising means to best address the claims made by indigenous peoples.

Annex B. Resources

OECD (2017), [Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector](#), Annex B: Engaging with Indigenous Peoples.

OECD-FAO (2016), OECD-FAO [Guidance for Responsible Agricultural Supply Chains](#)

[UN Special Rapporteur on the Rights of Indigenous Peoples. Country-reports of the UN Special Rapporteur on the rights of indigenous peoples](#): as part of the mandate, the UN Special Rapporteur on the rights of indigenous peoples undertakes country visits, on the invitation of the Government, and issues recommendations on how to improve the human rights situation of indigenous peoples in the country. These reports can provide an indication of whether a country has groups that fall within the scope of the rubric indigenous peoples.

International Working Group on Indigenous Affairs. [The Indigenous World](#) – reports with country profiles by IWGIA and released on an annual basis. In addition to highlighting which groups in a country self-identify as indigenous, the country briefs provide an overview of legal and policy developments and highlights areas of concern.

[African Commission on Human and Peoples' Rights. Reports of the Working Group of Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights](#) contextualize what is meant by indigenous peoples in the Africa region (addressing also the situation of indigenous peoples in Northern Africa).

[Inter-American Commission on Human Rights Rapporteur on the Rights of Indigenous Peoples](#) for country reports, reports on friendly settlements, the mechanism of precautionary measures, orders and provisional measures filed with the Inter-American Court.

Asia Indigenous Peoples Pact: reports and country briefs by the [Asia Indigenous Peoples Pact \(AIPP\)](#) [The Interlaken Group and the Rights and Resources Initiative, 2015](#). Respecting Land and Forest Rights – an introduction. Risks, opportunities and a guide to support companies.

The Rights and Resource Initiative. [Private Sector Risk Analysis Tools](#).

[IAN products](#): tools which draw on geospatial data to help investors identify and manage tenure risk; enhance environmental, social, and governance (ESG) diligence; and engage local people in land and natural resource deals.

[IFC Performance Standard 7](#) on Indigenous Peoples (2012) and associated guidance

[UN Special Rapporteur on the Rights of Indigenous Peoples, 2011-2014](#), Thematic reports addressing the company responsibility to respect the human rights of indigenous peoples, in particular in the context of extractive industries.

IFAD, 2016. [How to do note: seeking free, prior and informed consent](#).

FAO, 2014. [Respecting free, prior and informed consent](#) – practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition. Governance of tenure technical guide 3. Available at

International Council of Mining & Metals, 2013. [Indigenous peoples and mining position statement](#).

ILO, 2013. Handbook for ILO Tripartite Constituents – Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (see particularly Section 4 – Implications for private sector)

ILO Convention 169 and the Private Sector – Questions and Answers for IFC Clients (2007)

European Union. e.g. On 24 and 25 February 2020, [roundtable consultations](#) took place between representatives EU and indigenous peoples from all continents, which consisted in an interactive dialogue. The event sought to identify ways for the EU to enhance its policies and programs to prevent discrimination or violence against indigenous peoples and contribute to the protection of natural resources, the environment, biodiversity and the fight against climate change.

Annex C. List of NCP cases involving indigenous peoples

Name of case and link in OECD Database	Lead NCP	Year received	Status
Activities related to a hydro-electric plant in Laos	Belgium	2004	Concluded
Nikel project in the Philippines	Norway	2009	Concluded
Environmental impacts of a planned bauxite mine in India	United Kingdom	2008	Concluded
Mining in Guatemala	Canada	2009	Concluded
Salmon farming in Canada and Chile	Norway	2009	Concluded
Financing of a wind park project in Sweden	Sweden	2010	Not accepted
Fisheries and fish processing in Western Sahara	Norway	2011	Concluded
Michelin Group, and four NGOs and a trade union	France	2012	Concluded
Statkraft AS and the Sami reindeer herding collective in Jijnjevaerie Sami Village	Sweden	2012	Concluded
Displacement of local populations and environmental degradation in Bangladesh	United Kingdom	2012	Concluded
Mining in South Africa	Australia	2013	Not accepted
Copper mining in Ecuador	Canada	2013	Not accepted
Rabobank, Bumitama Agri Group (BGA) and the NGOs Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie	Netherlands	2014	Concluded
Hydropower development in Malaysia	Norway	2014	Concluded
World Wide Fund for Nature International (WWF) and Survival International Charitable Trust	Switzerland	2016	Concluded
Salini Impregilo S.p.A and Survival International Italia concerning activities in Ethiopia	Italy	2016	Concluded
Crédit Suisse and Society for Threatened Peoples Switzerland (North Dakota Access Pipeline)	Switzerland	2017	Concluded
Environment and indigenous issues in Guatemala concerning a Spanish NGO and a Spanish construction Multinational	Spain	2017	Concluded
Roundtable for Sustainable Palm Oil and TUK Indonesia: Land Conflict in Indonesia	Switzerland	2018	Concluded
Shell Petroleum Development Company of Nigeria Limited (SPDC), Royal Dutch Shell (RDS) and Obelle Concern Citizens (OCC)	Netherlands	2018	Concluded
KEXIM, Daewoo E&C and JRPM, PSPD, KTNC WATCH	South Korea	2018	Not accepted
EDF / EDF Energies Nouvelles and Prodesc / Union Hidalgo Agrarian and Indigenous Sub-Community	France	2018	Concluded
[Confidential]	[Confidential]	2018	In progress
[Confidential]	[Confidential]	2018	In progress
Human rights and bribery issues involving a U.S. multinational in the hotel industry in Peru	Peru	2018	Not accepted
POSCO International, National Pension Service, The Export Import Bank of Korea (KEXIM) and KNTC Watch	South Korea	2019	In progress
[Confidential]	[Confidential]	2019	In progress
Indigenous federations from Peru et al. (FEDIQUEP, FECONACOR, OPIKAFPE, ACODECOSPAT, Peru Equidad, SOMO, Oxfam Peru, Oxfam Novib) & Pluspetrol Resources Corporation B.V.	Netherlands	2019	In progress
BKW Group and Society for Threatened Peoples Switzerland	Switzerland	2020	In progress
[Confidential]	[Confidential]	2020	In progress
Individuals & ElectraNet Pty Limited	Australia	2020	Concluded

Note: Pending cases marked as confidential are not yet referenced in the OECD case database in application of the NCP's rules of procedure.

Source: OECD Database of specific instances <http://mneguidelines.oecd.org/database/>. This list is up to date as at 1 September 2020.

Notes

¹ See OECD Guidelines for Multinational Enterprises (2011); Chapter IV, paragraph 40.

² Norway's NCP recently published a report together with the Norwegian National Human Rights institution focusing on business and indigenous peoples' rights. This report, Annex B (page 29-32) gives a good overview of the International Human Rights Framework related to indigenous people. The report is available at: <https://www.responsiblebusiness.no/files/2019/11/NIM-OECD-NCP-Karasjok-Seminar-Report-Final.pdf>

³ OECD Database of specific instances: <http://mneguidelines.oecd.org/database/>

⁴ See Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB).

⁵ For a relevant comparison, it should be noted that the category minority has not been defined in the UN Declaration on Minority Rights.

⁶ See: UN Permanent Forum on Indigenous Issues, “who are indigenous peoples?” Available at: https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

⁷ See Indigenous and Tribal Peoples Convention, 1989 (No. 169), article 1. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

⁸ IFC Performance Standard 7 (2012).

⁹ See, for example, ICCM's Indigenous Peoples and Mining Position Statement, available at <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>

¹⁰ HEC General Comment No. 23, paragraph 9

¹¹ Ibid paragraph 7.

¹² OECD Guidelines 2011. Chapter IV, Human Rights: chapeau.

¹³ OECD Guidelines, 2011. Commentary to Chapter IV (Human Rights). Paragraph 40.

¹⁴ OECD Guidelines, Chapter I, para. 2.

¹⁵ OECD/FAO (2016), OECD-FAO Guidance for Responsible Agricultural Supply Chains; Annex B of the OECD-FAO Guidance also contains references to the ‘Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security’ (known as the VGGT) and to the Committee on World Food Security's Principles for Responsible Investment in Agriculture and Food Systems (CFS-RAI Principles).

¹⁶ OECD (2017), OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector, Annex B: Engaging with Indigenous Peoples.

¹⁷ Specifically, it establishes that “indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.

¹⁸ UN Declaration on the Rights of Indigenous Peoples, Article 26. It has been observed that that there is not one blue-print or best model for recognizing indigenous peoples' rights over their customary lands and resources, and international human rights standards do not offer detailed guidance on how to do so. In most cases, the regularization of land ownership of indigenous peoples is a complex task that involves a variety of stakeholders and steps, beginning with the adoption of legislation, the definition of adequate procedural steps and the establishment of institutional mechanisms for implementation and resolution of competing claims to land. See ILO Indigenous and Tribal Peoples' Rights in Practice – a guide to ILO Convention No. 169 (2009), p. 96.

¹⁹ See Inter-American Commission on Human Rights, Report No. 40/04, Case 12.053, Maya indigenous communities of the Toledo District (Belize), October 12, 2004, paragraph 197 – Recommendation 2. Available at: <http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm>

²⁰ OECD-FAO Guidance, 2016, p. 61.

²¹ OECD-FAO Guidance, 2016, p. 62.

²² Ibid.

²³ OECD-FAO Guidance, 2016, p. 52.

²⁴ See Understanding the Indigenous and Tribal People Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents / International Labour standards Department. International Labour Organization. – Geneva, 2013, p. 21.

²⁵ OECD-FAO Guidance, 2016, p. 63.

²⁶ OECD-FAO Guidance, 2016, p. 62.

²⁷ OECD (2017), Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector Annex B: Engaging with Indigenous Peoples, <http://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>

²⁸ OECD (2017), Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector Annex B: Engaging with Indigenous Peoples, <http://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>

²⁹ This is referenced throughout the UN Declaration on the Rights of Indigenous Peoples in relation to particular concerns (arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38), and it is affirmed as an overarching principle in article 19, which provides: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” 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, 7, 15, para. 2, 17, para. 2, 22, para. 3, 27, para. 3, and 28).

³⁰ In particular the International Covenant on Civil and Political Rights.

³¹ See notably OECD-FAO Guidance, p. 80, which describes the step to set up FPIC seeking consultations as follows: 'Agree with affected indigenous peoples on a consultation process for working towards seeking FPIC. This should identify the specific current and future activities where consent should be sought. In some cases it might be appropriate to commit to this process through a formal or legal agreement.¹⁰ The process should always be based on good faith negotiation free of coercion, intimidation or manipulation.'

³² See the report of the former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, A/HRC/12/34 (2009).

³³ Ibid. para. 47.

³⁴ IFC Performance Standard 7 (2011): Indigenous Peoples.

³⁵ Equator Principles, June 2013. (pp. 7-8).

³⁶ See Equator Principles full list of Association Members in <https://equator-principles.com/members-reporting/>

³⁷ Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB) and [Individuals & ElectraNet Pty Limited](#).

³⁸ [EDF / EDF Renewables and Prodesc / Union Hidalgo Agrarian and Indigenous Sub-Community](#)

³⁹ Forum vs Cermaq specific instance final statement,: <http://www.oecd.org/daf/inv/mne/48732651.pdf>

⁴⁰ See for example the specific instance *Nikel project in the Philippines*, where the NCP of Norway advised the Norwegian-owned Mindoro Nickel Project in the Philippines that it should consult a broader group of indigenous peoples and be more transparent about adverse environmental impacts, The company was also advised to perform due diligence to know and show that it minimises risk for adverse impacts in the environment and on local communities, especially indigenous peoples. The Norwegian NCP also recommended the company to identify primary and secondary indigenous groups potentially affected by the MNP and consult all indigenous peoples affected by the mine and associated infrastructure.

⁴¹ Norconsult and FIVAS. Joint statement available at: https://www.responsiblebusiness.no/files/2015/11/150622-Joint-Statement-by-Norconsult-AS-and-FIVAS_FINAL.pdf

⁴² Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB). Final statement available at: https://nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2013/12/08022016_Final-statement_ENG.pdf (see p. 15).

⁴³ See https://nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2016/08/ENG_Press-release-on-agreement_FINAL.pdf.

⁴⁴ Crédit Suisse and Society for Threatened Peoples (North Dakota Access Pipeline).

⁴⁵ Rabobank, Bumitama Agri Group (BGA) and the NGOs Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie, 2016.

⁴⁶ Individuals & ElectraNet Pty Limited, 2020.

⁴⁷ See Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. UN Doc. A/HRC/24/41.

⁴⁸ [EDF / EDF Renewables and Prodesc / Union Hidalgo Agrarian and Indigenous Sub-Community.](#)

⁴⁹ See Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. UN Doc. A/HRC/24/41.

⁵⁰ Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. UN Doc. A/HRC/24/41, para. 64.

⁵¹ See, e.g. the Compliance Advisor Ombudsman of the International Finance Corporation in the case of Cambodia / VEIL II-01 Ratanakiri Province: http://www.cao-ombudsman.org/cases/case_detail.aspx?id=212

⁵² National Alternative Dispute Resolution Advisory Council, 2006. Indigenous Dispute Resolution and Conflict Management <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Indigenous%20Dispute%20Resolution%20and%20Conflict%20Management.PDF>

⁵³ Nickel project in the Philippines, 2009, Final statement available: http://www.oecd.org/daf/inv/mne/Norwegian%20NCP%20intex_final.pdf, p. 13.

⁵⁴ See OECD (2019), Guide for National Contacts Points on the Initial Assessment of Specific Instances, OECD Guidelines for Multinational Enterprises, p. 19.

⁵⁵ Specific Instance “Quechua indigenous group vs. Marriott International”. The original specific instance in Quechua language is available here: https://complaints.oecdwatch.org/cases/Case_529/1781/at_download/file and here the translation in Spanish: https://complaints.oecdwatch.org/cases/Case_529/1778/at_download/file

⁵⁶ See Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. UN Doc. A/HRC/24/41.

⁵⁷ In June 2019, the Norwegian NCP launched the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector in Sami language at the Sami Parliament in Karasjok, Norway. This was followed by a seminar organised with the Norwegian National Human Rights Institution which focused on indigenous people’s rights and business development.

⁵⁸ Information and resources regarding indigenous peoples is collected by the United Nations and can be accessed here: <https://www.un.org/development/desa/indigenouspeoples/publications/desktop-publications.html>.

¹ The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights and the Human Rights, has adopted a broad interpretation of article 27, noting that Indigenous cultures are closely linked to a way of life associated with the use of lands and resources. Therefore, article 27 Article 27 may “requires States to establish and implement processes recognizing and adjudicating indigenous peoples’ rights in relation to their lands, territories and resources.” See UN Office of the High Commissioner for Human Rights. “Indigenous Peoples and the United Nations Human Rights System”. Fact Sheet No. 9/Rev.2, 2013. Pg. 6. Available at: <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>

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