



FREE, PRIOR AND
INFORMED CONSENT
DUE DILIGENCE
QUESTIONNAIRE



First Peoples Worldwide

UNIVERSITY OF COLORADO **BOULDER**

FREE, PRIOR AND INFORMED CONSENT DUE DILIGENCE QUESTIONNAIRE

The following questionnaire provides a list of considerations for investors seeking to implement best practices as to operationalizing the free, prior and informed consent (FPIC) of indigenous peoples regarding development of resources on and near their lands and territories. This includes use and development of all resources including, but not limited to, land and marine resources, and intellectual property.

This questionnaire was developed to inform engagement between indigenous peoples and non-governmental entities from outside the community. The questionnaire is based on FPIC as enumerated in Articles 10, 19, 29, and 32 in the United Nations Declaration on the Rights of Indigenous Peoples but reflects all of the rights therein, including the right to self-determination in Article 3. It builds on the U.N. Guiding Principles on Business and Human Rights' assertion that businesses have responsibilities to respect the rights of indigenous peoples during development. Thus, this questionnaire provides guidance for investors to perform adequate due diligence that optimizes mutually beneficial development opportunities with indigenous peoples. First Peoples Worldwide views FPIC as a right in itself, and not solely a process, and nothing in this questionnaire shall be construed as a means by which to achieve consent.

Of note, this questionnaire makes the following three assumptions. First, that many indigenous communities are marginalized communities. This is a generalization that is not true for all communities however many indigenous communities face undesirable and intersecting socio-economic indicators such as poverty, racial and ethnic discrimination, lack of access to justice, and lagging local economies. Further, many indigenous communities are also located in rural areas, intensifying these indicators. What is most important for the purposes of this questionnaire, and what the questionnaire teases out, is to verify whether the community has access to the same infrastructure as communities in the majority of the host country and to account for the aspects where it does not.

Second, this questionnaire is responsive to commonly held traditional approaches to land in indigenous communities. Specifically, many indigenous peoples have cultural and spiritual ties to their land and resources that go beyond economic uses. These ties are vital to their cultural heritage and the modern practices that bind them as a community. Thus, development on indigenous peoples' lands and territories requires examination from several viewpoints and with different considerations than development on non-indigenous territories to understand the true value of the resources.

Third, while not universally true, in many countries indigenous peoples have been removed from their traditional territories or relocated to smaller sections within those territories. Thus, places with ancestral, cultural and spiritual ties may be located outside of the official boundaries of the community. In some countries, indigenous peoples may still have legal hunting, fishing or gathering rights that extend outside those official boundaries. This

questionnaire reflects this history in two ways. First, it refers to “potentially impacted indigenous peoples” as those whose territories extend outside of their currently demarcated community boundaries into the places where the project development will create impacts. Because these territories are still of value to indigenous peoples, they must also be screened for development impacts to avoid undue risk exposure. Second, this questionnaire encourages assessing development impacts to other uses of the land (i.e. cultural, spiritual, ancestral), as described in the U.N. Declaration on the Rights of Indigenous Peoples.

In short, this questionnaire provides an analytical framework to operationalize meaningful engagement and consultation between investors and indigenous peoples. The process of seeking the FPIC of indigenous peoples should be completed in alignment with international human rights standards in an independent investigation apart from other governmental procedures and approvals. Implementing this type of due diligence will expose project risks that could materially affect the project’s success. Finally, using this questionnaire provides the basis for forming a partnership with indigenous peoples that prioritizes human rights while establishing the context for mutually beneficial development.

PART 1: PROJECT DEVELOPER'S EXISTING POLICY COMMITMENTS

1. List existing policy commitments related to human rights.
2. Ensure the policies take into account international human rights standards such as those in the core commitments of the United Nations Guiding Principles on Business and Human Rights: the United Nations Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the eight International Labour Organization (ILO) core conventions.
3. If the project developer is a member of an organization that prioritizes human rights during development initiatives, such as the Equator Principles Association, ensure policies reflect the minimum recommendations of the organization(s).
4. List existing policy commitments to indigenous peoples.
 - a. Specify whether the policy:
 - i. is separate from but inclusive of the project developer's general human rights policy;
 - ii. reflects the minimum standards in the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169;
 - iii. applies to every stage of project development including planning, implementation, closure and risk-management.
 - b. Specify where the policy addresses consultation and whether it includes steps for an iterative consultation process.

PART 2: IDENTIFYING IMPACTED INDIGENOUS PEOPLES

1. List the impacted indigenous peoples and communities.
 - a. Provide information as to how impacted indigenous peoples were identified and through which sources.
 - b. Provide information about how indigenous communities' historical and ancestral ties to the land have been considered.
 - c. Disclose the methods by which the project has been assessed for impacts that may be different for a marginalized community (i.e. if there is only one road in or out of a community center, or only one water intake serves the entire community).
2. Provide a list of indigenous communities that are potentially impacted by the project. Potentially impacted communities are those with ties to the project impacted land and resources that could include hunting or fishing rights, or ancestral and historical ties.
 - a. Ensure this list is cross-referenced during the entire due diligence process.

PART 3: OPTIMAL DATA ON IMPACTED INDIGENOUS PEOPLES

1. Provide information about the legal regime in the host country specific to indigenous peoples.
 - a. Specify whether the host country:
 - i. is a signatory to International Labour Organization Convention 169 or the United Nations Declaration on the Rights of Indigenous Peoples; or,
 - ii. provides indigenous peoples' representatives with a formal seat or status within the host country's government.
2. Provide current maps of impacted indigenous peoples' land.
 - a. Ensure that mapping has taken place in coordination with impacted indigenous peoples.
 - b. Specify whether there are unresolved land disputes in the project area. Inquire with both the government and the indigenous peoples. If there are disputes, inquire as to the status of these disputes and verify whether the project runs through or adjacent to disputed areas.
 - c. Ensure that mapping exercises are inclusive of land use within and outside of official territorial boundaries, for example hunting and fishing uses, cultural and spiritual uses, and ancestral and historical sites, among others.
 - d. Ensure that mapping exercises are inclusive of practices by impacted indigenous peoples and potentially impacted indigenous peoples.
3. Provide information regarding impacted indigenous peoples' governance structures.
 - a. Provide a list of current leaders. Specify whether the formal leadership is designated by the community, by the host country, or by some other entity.
 - b. Besides formal leadership (e.g. tribal councils), determine whether there are informal decision makers or influencers within the community.
 - c. Provide information as to whether identified indigenous peoples have their own protocol for providing free, prior, and informed consent (FPIC) on projects that affect them and their rights.
4. Provide information regarding impacted indigenous peoples' plans for development as to their lands, territories and resources.
 - a. Provide information as to how impacted indigenous peoples' plans have been accounted for as to the current and future impacts of the planned project.
5. Provide the environmental and social impact assessment for this specific project.
 - a. Specify the portions that assess environmental, social and cultural impacts to indigenous peoples.
 - b. Enumerate the following:
 - i. by whom the assessment was conducted;
 - ii. whether the assessment was completed in direct consultation with the impacted indigenous peoples;

- iii. whether the assessment was inclusive of host country government data at all levels (i.e. local, state and federal); and,
- iv. whether the assessment is inclusive of community mapping and indigenous peoples' data.

PART 4: ENGAGEMENT WITH THE GOAL OF REACHING AGREEMENT

1. Ensure that all materials used for public engagement are translated into local languages and understandable by non-technical experts.
2. Document the process of engagement with indigenous peoples' representatives.
Documentation should include:
 - a. a timeline showing, at a minimum, when the process of engagement began relative to initial project planning and design; the process of engagement with non-indigenous government authorities; and the process of application for and acquisition of permits; and,
 - b. a record of correspondence and meetings that took place between the project developer and indigenous communities and their representatives.
3. Document the process of engagement with informal leadership and the broader public.
Documentation should include:
 - a. a record of correspondence and meetings that took place between the project developer and informal leadership;
 - b. the dates, locations, and attendance of meetings that were open to the public;
 - c. the mechanisms through which the meetings were made known to the public; and,
 - d. any other opportunities for input from the broader public (i.e. comment processes or government-led consultations).
4. Specify how the process of engagement addresses marginalized groups within the community such as elders, women and youth.
 - a. Address to what extent the developer's process was inclusive of the entire community's needs while seeking consent.
 - b. Specify through which mechanisms the developer creates space for public participation via meetings, comment periods, or other mechanisms.
5. Provide materials about the project that have been distributed to the indigenous peoples' government(s), informal leadership, and the broader public.
6. Disclose any financial or nonfinancial compensation provided to community members as part of the engagement process.
 - a. Disclose any conflicts of interest that have arisen or may arise.
7. Disclose a summary of feedback from impacted indigenous peoples in response to the process of engagement. The summary should include:
 - a. the indigenous peoples' representative's position on the project;

- b. feedback received from informal leadership and the broader public;
- c. indicators of divisiveness within the community; and,
- d. indicators of opposition such as negative media attention, legal actions, or protests.

PART 5: AGREEMENT AND POST-AGREEMENT RELATIONSHIP MANAGEMENT

1. Provide agreements in which impacted indigenous peoples give consent to the project.
2. Disclose whether there is a project-level grievance mechanism, or by what means grievances are managed.
3. Relative to the project-level grievance mechanism, provide specific information as to the following:
 - a. how the grievance mechanism has been described to impacted communities; and,
 - b. whether impacted communities can access this mechanism from their community.
4. Disclose whether grievances have been filed and, if so, disclose the quantity, reason and outcomes of grievances filed.
5. If there is no project-level grievance mechanism, describe other feedback loops that have been implemented to ensure that the project maintains broad community support.

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OF INDIGENOUS VALUES TO ACHIEVE A SUSTAINABLE
FUTURE FOR ALL.**

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