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INDIGENOUS RIGHTS AND THE EXTRACTIVE INDUSTRIES: IMPLEMENTING INTERNATIONAL STANDARDS



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This briefing note arises from the seminar on Public Participation in Arctic Extractives Industry Seminar held by the AOGRC at Ilisimatusarfik, 17th October 2017. The seminar presentations and public discussion can be viewed at: <http://uk.uni.qi/research/arctic-oil-and-gas-research-centre/videos.aspx>.

Policy recommendations

- Ongoing engagement, information sharing and research with communities builds understanding and makes consultation on specific issues easier.
- Governments and companies both have a responsibility for early consultation with affected communities.
- Free, prior and informed consent (FPIC) should be standard for Greenlandic local communities who are culturally, socially and economically dependent on the land, whether or not they consider themselves 'indigenous'.
- A key question is who has the legitimacy to represent the interests of affected communities; a further challenge is how to develop collective visions of the future.
- Communities need greater control over assessment and consultation methods, and participation in data gathering and analysis.
- 'Meaningful consultation' means that affected communities can influence or determine outcomes; consent is maintained over time, and FPIC processes are repeated if circumstances change significantly.

International standards have evolved since the 1960s and especially since the 2000s to protect the rights of indigenous and local communities in the context of extractive industry developments. Many companies have made public commitments to international standards and have adopted targeted policies to protect indigenous rights. Yet the implementation of these standards remains a challenge, in relation to both the interpretation and the practical implementation of the standards. Frequently, the challenges relate to the lack of involvement of affected communities in planning, impact assessments and decision-making. This briefing note provides an overview of key international standards and guidance that are relevant to indigenous peoples and the extractive industries, with a particular focus on public engagement and participation.

Risk management

Companies and investors use international standards as a way to understand and manage risks to their investments. Due diligence (e.g. impact assessments, lender audits) is a way to understand risks and develop ways to monitor and mitigate them. Public engagement and consultation obligations become more, not less, critical to business managers when viewed through the lens of business risk.

Voluntary business standards, such as those related to project finance, have evolved in response to the challenges of weak governance in certain countries, many of which are rich in minerals. International good practice thus emphasises the need for companies to go over and beyond legal requirements, and not to take advantage of a lack of enforcement of national legislation in their countries of operations. Businesses also respond to public expectations and awareness of international good practice, particularly where bad publicity would affect their reputation.

Increasingly public scrutiny is turning towards governments, as governments and businesses are seen to have an equally important role in ensuring that industrial development does no harm to the environment or indigenous and local communities.

Scope and influence of standards

International standards may take many forms and their implementation depends on various factors. For instance the 1989 **ILO Convention 169 on Indigenous and Tribal Peoples (ILO 169)** is a significant instrument, but has been ratified by just 22 countries to date (including the Kingdom of Denmark). The 2007 **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** is not legally binding, but, as a UN instrument, is more universally adopted, and is particularly valued by indigenous peoples owing to their extensive involvement in its drafting. Similarly the 2011 **UN Guiding Principles on Business and Human Rights (UN Guiding Principles)** enjoy wide acceptance, including by business, as companies were involved closely in the drafting.

Standards developed by international financial institutions such as the **International Finance Corporation (IFC)**, other development banks, and the **Equator Principles Financial Institutions (EPFIs)** only apply if a project is using project finance from these institutions. However, the **IFC Performance Standards** are also considered to be a benchmark of industry good practice and are used to inform corporate policy and guidance drawn up by industry associations, such as the **International Council on Mining and Metals (ICMM)** and **IPIECA, the global oil and gas industry association for environmental and social issues.**

International standards also have considerable influence on societal expectations of industrial activity. They have influenced the work of civil society organisations to hold industry and government to account; they have helped to empower local communities to understand and assert their rights; and they are frequently used by legislators and their advisors to shape legislation and regulations. As such, these standards have helped to establish universal understanding of industry good practice and in many cases helped to improve performance.

The **UN Guiding Principles** focused business attention on human rights as a core aspect of the responsible business agenda, and they have also influenced other standards. For instance, the **OECD Guidelines for Multinational Enterprises (OECD Guidelines)** incorporated a new human rights chapter in their 2011 update, based largely on the UN Guiding Principles.

Commentaries by James Anaya, then-**UN Special Rapporteur on the Rights of Indigenous Peoples**, in 2012 and 2013 helped to ensure that indigenous rights have been considered alongside other human rights in interpreting the UN Guiding Principles. This helped to promote a greater focus on indigenous rights in industry standards and policy, as part of businesses’ efforts to respond to the wider human rights agenda. This includes ongoing efforts to develop effective approaches to implementing free, prior and informed consent (FPIC).

Guidance on FPIC has been produced for business by the **UN Global Compact** and others. The industry associations ICMM and IPIECA have developed considerable amounts of guidance on human rights and indigenous rights, including FPIC. The OECD Guidelines’ 2016 guidance on meaningful stakeholder engagement in the extractive sector includes a detailed annex on engagement with indigenous communities, including FPIC.

A key aspect of the UN Guiding Principles is that government and business responsibilities are defined in relation to one another within the ‘Protect, respect and remedy’ framework. This emphasises the government responsibility to protect human rights in line with international standards; the business responsibility to respect human rights by following legal regulations, carrying out human rights due diligence, and engaging meaningfully with stakeholders; and the obligation of both to ensure access to remedy in cases of human rights violations.

Table 1: Key standards and guidance
ILO Convention 169 on Indigenous and Tribal Peoples (ILO 169) (1989)
UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)
UN Guiding Principles on Business and Human Rights (2011)
OECD Guidelines for Multinational Enterprises (2011)
IFC Environmental and Social Performance Standards (2012), especially Performance Standard (PS) 7 on Indigenous Peoples
The Equator Principles (2013)
ICMM Position Statement on Indigenous Peoples & Mining (2013)
IPIECA Guidance on indigenous peoples

The public engagement cycle

The public engagement cycle includes: ongoing research and engagement; pre-consultation; consultation/consent; and participation in decision-making. However, the 'consultation' element frequently gets the most attention while other elements are often neglected.

As emphasised by the UN Guiding Principles, it is important to understand how government and business responsibilities relate to one another. A key area is the responsibility for early engagement and consultation with local communities.

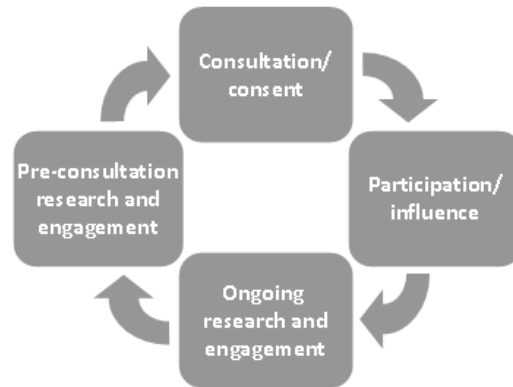


Figure 1: The public engagement cycle

For instance, according to ILO 169, governments should carry out early consultation, including prior to exploration licencing. Early consultation by companies (e.g. prior to seismic testing) is seen as good practice as a risk mitigation strategy, even when it is not required by law.

The OECD Guidelines state that enterprises should 'engage with relevant stakeholders to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that could significantly impact local communities' (Article A14). In their 2016 guidance, the OECD defines meaningful stakeholder engagement as 'ongoing engagement with stakeholders that is two-way, conducted in good faith and responsive'.

According to ILO 169, governments should assess the social, spiritual, cultural and environmental impact of proposed activities in co-operation with the affected peoples, and the results of the studies should be seen as 'fundamental criteria for the implementation of these activities' (Article 7(3)). The UN Guiding Principles state that the assessment of human rights impacts should 'involve meaningful consultation with potentially affected groups and other relevant stakeholders' (Principle 8). Impact assessments thus need to ensure that public engagement is accessible, appropriately timed and located, and culturally appropriate.

Impact assessment is not an isolated intervention. For instance, social impact assessment (SIA) is the basis of social management plans, community agreements, and FPIC processes. Communities are calling for greater local control over priority setting, choice of consultants, participation in data gathering and analysis, and influence over decision-making and outcomes. SIA should assess opportunities as well as impacts. It should also treat anxiety, expectation and social tension as impacts (even before a project begins).

Free, prior and informed consent

Free, prior and informed consent (FPIC) is a meaningful consultation process by which indigenous communities can determine (not only 'influence') how development decisions are made. It is rooted in indigenous rights to self-determination, and to property through ownership or traditional use. In ILO 169 and UNDRIP, it is primarily a government responsibility, but it is increasingly becoming a fundamental element of industry good practice standards (e.g. in the IFC Performance Standard 7 on Indigenous Peoples, and the ICMM Position Statement on Indigenous Peoples).

There are still many issues related to the implementation of FPIC. Firstly it is not always easy to identify who is indigenous. Some peoples are not recognised by national legislation; others prefer not to use the term 'indigenous', and so on. Some standards have sought to address this matter by extending the application of FPIC to all significantly affected local communities. A key factor is the close relationship of these people to the land and their dependence on the land, not only socially and economically, but also culturally. As such, local Greenlandic communities should not be denied the rights of indigenous communities in the context of mineral projects taking place on their lands, even if they prefer not to identify themselves as 'indigenous'.

Further issues relating to FPIC include the extent to which a community can agree internally on their future development choices, and who represents the interests of the community in negotiations with external developers. One approach to addressing both of these issues is the use of community protocols. Community protocols enable communities to clarify their expectations in advance of a consultation process, independently from the developer; to build consensus in advance of external negotiations; and to establish their priorities, favoured procedures and expectations relating to consultation, consent and benefit sharing.

Good practice guidance emphasises the need for developers and communities to mutually agree consultation and consent processes in advance. For a consent process, they should agree in advance what the consent is for, how it will be reached, which representatives will take part in the process on behalf of the community, and how they will communicate with their fellow community members. Consent needs to be maintained, and repeated at critical points in project development if there is a significant change in circumstances. Critically, if a community says 'no', this should be respected.

Lessons for Greenland

In 1974 Justice Thomas Berger led an in-depth public consultation to investigate the potential social, environmental and economic impacts of a proposed pipeline through the Yukon and Mackenzie Valley, in Canada's Northwest Territories. Known as the Mackenzie Valley Pipeline Inquiry or the Berger Inquiry, this took 3 years, cost C\$5.3 million, and produced 40,000 pages of evidence in 283 volumes. It gave voice to the aboriginal peoples who would be affected by the proposed pipeline and is still considered to be an outstanding example of international good practice in community consultation.

The outcome of the Berger Inquiry was a recommendation that no pipeline should be constructed through the Yukon at all, and that pipeline construction be delayed for 10 years through the Mackenzie Valley. It was only in 2011, following further in-depth consultation, that the Mackenzie Valley pipeline was finally approved.

The current slow pace of extractive industry development in Greenland provides the government with a huge opportunity systematically to engage with its people to understand their wants and needs for the future, and to build understanding about what the extractive industries are and their potential impacts and opportunities. This will enable citizens to participate meaningfully, in an informed manner, in decision-making, if and when they are faced with a national-level decision (such as the uranium moratorium) or a local-level decision on a mine that might affect their own resource-use practices.

To build awareness and understanding among Greenland's citizens, the government can work together with Greenland's researchers, civil society organisations, youth groups and industry associations, as well as those communities who have had experience of the extractive industries. These individuals and groups are committed, innovative and possess valuable local knowledge, although frequently there are insufficient funds to support extensive knowledge-sharing activities. Nonetheless, by working together there is considerable potential to ensure that the country's future development is sustainable and that Greenland makes the right decisions on future development issues, including but not limited to extractive industry developments.

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