



# INPUT OF INDIGENOUS PEOPLES ON THE ARTICLE 6.4 SUSTAINABLE DEVELOPMENT TOOL VERSION 4.0

April, 2024 | SB011

The International Indigenous Peoples Forum on Climate Change (hereinafter “Indigenous Peoples’ Caucus” or “Caucus”) notes that many of the recommendations made in our submission of February, 2024, were not incorporated in your most recent draft tool for the Article 6.4 Sustainable Development Tool (SDT). We therefore re-attach herewith in Annex 1 our previous submission of February, 2024. The “General Observations” contained in our February submission continue to be relevant to your latest draft tool, and we therefore incorporate those observations herein, as well as our other recommendations and comments from our February submission. We urge you to review and consider carefully the more detailed comments, recommendations, and proposals contained in the attached submission of February, 2024. In addition to (but not in lieu of) the input included in our February submission, the Indigenous Peoples’ Caucus notes the following regarding the most recent draft tool.

Under Principle 2: Air, Land and Water, Paragraph 23, the Caucus in its submission of February 2024 recommended inclusion of language expressly providing that Indigenous Peoples shall have full and effective participation in assessing the adequacy of these measures. The Body has ignored our recommendation. We ask that you revisit this section and incorporate our recommendation.

Under Principle 4, Human Rights, section 5.3.1, paragraphs 47 and 48 of your latest draft, the Caucus notes that you have ignored our recommendation to include express reference to the collective rights of Indigenous Peoples, and have opted instead to reference the Universal Declaration on Human Rights as the standard to which participants “shall commit.” While the Caucus applauds your inclusion of the Universal Declaration on Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes and sets forth the inherent collective rights of Indigenous Peoples, should be expressly included, as well, under Principle 4 of the draft tool.

Because of the collective nature of the rights of Indigenous Peoples, the Caucus urges you to revisit our previous recommendations regarding this section from our submission of February, 2024 (denoted as paragraphs 46 and 47 in that submission, corresponding with your paragraph numbers in your previous version of the draft tool). The language we propose in that submission for section 5.3.1 is necessary to ensure that the collective rights of Indigenous Peoples are respected, and that activity participants are on notice that they *must* avoid adversely impacting these rights.

With regard to Principle 8 of your most recent draft tool, “Land acquisition and involuntary resettlement,” the Caucus approves your inclusion of specific reference to Indigenous Peoples



and their right to free prior and informed consent. Likewise, the Caucus appreciates and supports your efforts to more fully describe the rights of Indigenous Peoples in draft Principle 9, “Indigenous Peoples.” In particular, we approve the inclusion of footnotes 46 and 47 expressly referencing the United Nations Declarations on the Rights of Indigenous Peoples. The Caucus does not, however, support your proposed deletion of key provisions in paragraphs 72 and 75 (previous draft paragraphs 69 and 73, respectively), P9.2 and P9.5. The deleted provisions in these paragraphs provide additional safeguards to ensure protection of Indigenous Peoples’ rights. These provisions should be reinstated.

In addition, the Caucus strongly advises that “International standards” be included throughout the draft tool wherever you have included reference to International law, including in, but not limited to, the provisions under Principle 9, “Indigenous Peoples,” paragraph 70 (paragraph 68 in the previous draft). This is because the UNDRIP is not a treaty document but is instead a declaration of internationally-acknowledged rights approved by the General Assembly and the 2014 consensus Outcome Document of the High Level Plenary Session of the General Assembly known as the World Conference on Indigenous Peoples, Res. 69/2 and, adherence to the rights recognized is expected. The term “International standards” should be included to ensure the implementation of those rights, including under Principle 9 of the draft tool.

Further, we emphasize that many of the Caucus’ proposed amendments included in our February 2024 submission that were not incorporated in the most recent draft tool, particularly under Principle 9, “Indigenous Peoples,” are necessary for the protection of Indigenous land, resources and lifeways. For example, in paragraph 70 of the current draft (paragraph 68 of the previous draft), you have failed to include the precise language recommended by the Caucus in our submission of February, 2024. This language is essential for the protection of Indigenous Peoples rights and must be incorporated, just as proposed by the Caucus in February, in the draft tool. Any requirement that Indigenous legal systems must be in line with national legislation is directly violative of the UNDRIP Articles 3 on self-determination and 5 on strengthening their distinct legal institutions, among others. In addition, in paragraph 73 of the current draft (paragraph 71 of previous draft) at P9.3, the Caucus previously recommended the inclusion of the qualifying phrase “as defined by Indigenous Peoples.” This is necessary because without such provision activity participants may simply say that the land or resources are not Indigenous and therefore the FPIC requirement does not apply. Indigenous Peoples must be the ones to identify and determine the extent of their lands or territories, and whether an activity affects them, their lands or territories.

There are similar nuanced issues remaining in other draft paragraphs under Principle 9, “Indigenous Peoples.” For example, with regard to current paragraph 71 (previous draft paragraph 68), P9.1, while the Caucus notes with approval that you have carefully included most of our proposed language, we believe that it is important to include the other proposed language not incorporated, which would make expressly clear that “self-identification of Indigenous Peoples is a fundamental criterion.”

In current draft paragraph 74 (previous paragraph 71), P9.4, the Caucus in its submission of February 2024, proposed this express provision: “No activities can take place on these lands and territories without the free, prior and informed consent of Indigenous Peoples involved.” We urge you to incorporate this language in the draft tool, as well.



Likewise, with regard to paragraph 76 (previous paragraph 74), P9.6, the Caucus recommended important language in its submission of February, 2024, that you have not incorporated, including specific reference to free, prior and informed consent of Indigenous Peoples. We ask that you revisit and incorporate the proposed language into this paragraph of the draft tool.

With regard to paragraph 75 (paragraph 72 of the previous draft), P9.5, the Caucus notes with approval that you have incorporated our proposed language regarding FPIC, almost verbatim, into your footnote 47 of paragraph 75 of the draft tool.

With regard to Principle 11, Cultural heritage, paragraph 80 (Paragraph 77 of the previous draft) P11.1, the Caucus previously recommended in its February submission that qualifying language be added to this paragraph, expressly clarifying that Indigenous Peoples shall determine when any cultural heritage site, object, structure or any other form or manner of cultural heritage has significance to them. This language was not incorporated into your latest draft tool, and we ask that you revisit and incorporate this language, as provided in the Caucus' submission of February, 2024.

With regard to paragraph 81 (previous paragraph 80), P11.2, the Caucus notes with approval your incorporation of the revised requirements of Principle 9, "Indigenous Peoples" into Principle 11, "Cultural heritage," as well as your express reference to the right of Indigenous Peoples to free, prior and informed consent into this section.

With regard to Paragraph 82 (paragraph 81 of the previous draft), P11.3, express reference to Indigenous Peoples should be made, in accordance with the Caucus recommendation provided in our submission of February, 2024, as follows (the additional proposed language denoted in **bold font**):

*Where an activity proposes to utilize cultural heritage, including the knowledge, innovations, or practices of **Indigenous Peoples or local communities, they shall be informed of their respective rights, the scope and nature of the proposed commercial development, and the potential consequences of such development. Utilization of the cultural heritage, including the knowledge, innovations, or practices of Indigenous Peoples requires their free, prior and informed consent.***

The Caucus thanks you for your attention to these provisions highlighted above and in our more detailed previous submission of February, 2024. We request that you review carefully our input provided herein and in our accompanying attached submission of February, 2024, and consider and include any of the Caucus' proposals not yet incorporated in your draft tool.



## ANNEX 1:

# INPUT OF INDIGENOUS PEOPLES ON THE SUSTAINABLE DEVELOPMENT DRAFT TOOL

February, 2024 | SB010

### **General observations**

- **Deficiencies in Human Rights language:** The human rights section remains deficient, the rights of Indigenous Peoples must be specifically mentioned.
- **References to International Standards:** References to international standards have been removed, which could undermine the protection and enforcement of human rights, rights of Indigenous Peoples and environmental standards.
- **Lack of a Human Rights-Based Approach:** The draft does not adopt an overall human rights-based approach<sup>1</sup>, raising concerns about the prioritization of the right to development over other human rights.
- **Failure to Provide Full and Effective Participation of Indigenous Peoples in the Design and Implementation of the Sustainable Development Tool:** It is imperative that Indigenous Peoples are able to self-identify as rights holders and have the full and effective participation in the assessment of risks to their rights. Additionally, in the sections addressing risks to Indigenous land rights, for example, there is a lack of clarification regarding the methodology for arriving at answers and the implications of responding with "yes" or "potentially" on the final decision-making process.

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<sup>1</sup> <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>



## **Recommendations**

### **Principle 2: Air, Land and Water**

#### **Paragraph 22**

*Proposed activity shall avoid **the release of pollutants** to air, land and water, this includes both hazardous and non-hazardous pollutants across solid, liquid, and gaseous phases. **This principle covers all forms of environmental degradation**, including but not limited to thermal discharges to water bodies, emissions of both short-lived and long-lived climate pollutants, plastics, biomedical waste, nuisance odours, noise, vibration, radiation, electromagnetic energy, excessive water consumption, water discharge, and the creation of potential visual impacts, such as light pollution.*

#### **Paragraph 23**

*P2.1.1: **The activity participant is required to rigorously avoid the release of pollutants. In the exceptional circumstance where avoidance is not possible, comprehensive measures must be implemented to minimize and control** the intensity and mass flow of their release, going beyond the minimum standards set by host country regulations. **This includes adopting the best available techniques and practices that prioritize environmental and public health, especially in Indigenous territories.** This applies to the release of pollutants due to routine, non-routine, and accidental circumstances with the potential for local, regional, and transboundary impacts. **Indigenous Peoples must have full and effective participation in assessing the adequacy of these measures.***

#### **Paragraph 24**

*P2.1.2: **In cases of historical pollution, such as air contamination, the activity participant must conduct a thorough investigation to ascertain responsibility for mitigation measures. Should the activity participant be found legally responsible, resolution of these liabilities must respect the rights of Indigenous Peoples. The process should be governed by the highest standard among national, international and Indigenous standards and conducted with the full and effective participation of Indigenous Peoples,***

### **Principle 4: Human Rights**

#### **Paragraph 46**

*The activity participant developer shall uphold international human rights commitments, emphasizing the rights to sustainable development, poverty alleviation, and the equitable distribution of development opportunities and benefits. Furthermore, it is imperative that the implementation of any activity is conducted with the highest respect for human rights, ensuring **that it does not violate the human rights or the rights of Indigenous Peoples under any circumstances. This includes actively preventing any infringement on these rights and promptly addressing any adverse human rights impacts that the activity may cause or***



*contribute to. Special attention must be given to the rights of Indigenous Peoples, ensuring that activities do not proceed without their free, prior, and informed consent, and that measures adopted with the full and effective participation of Indigenous Peoples are in place to mitigate any potential negative impacts on their communities, traditional territories, or cultural heritage.*

#### **Principle 8: Land acquisition and involuntary resettlement**

##### **NEW PARAGRAPH**

*No activity shall result in the removal of Indigenous Peoples from their lands and territories, see paragraph 70. No restriction shall be placed on Indigenous Peoples' rights to their lands, territories and resources without their free, prior and informed consent.*

#### **Principle 9: Indigenous Peoples**

##### **Paragraph 67:**

*The activity participant shall respect and take into account the rights of Indigenous Peoples and individuals as outlined in applicable legal obligations, commitments and international standards as well as Indigenous **customs, traditions, rules and** legal systems. Activity participants must recognize Indigenous juridical systems or customs that are in accordance with international standards, **regardless of their specific recognition or lack thereof under national laws**. Furthermore, activity participants should **also acknowledge that Indigenous Peoples often play a pivotal role in promoting, owning and managing activities and enterprises as partners in development.***

##### **Note:**

This approach underscores the importance of integrating Indigenous perspectives, rights, legal systems, cultural values and customs into development activities, towards fully recognizing their contributions and rights.

##### **Paragraph 68**

*P9.1: Activity participants shall identify all communities of Indigenous Peoples within the activity area of influence **or who may be affected by the activity. Self-identification as Indigenous Peoples is a fundamental criterion. This process must be conducted with respect, sensitivity, and transparency, ensuring that Indigenous Peoples are fully informed and voluntarily participating in the identification process.***

##### **Paragraph 69**

*P9.2: The activity participant, **with the full and effective participation of Indigenous Peoples involved**, shall carry out an environmental and social analysis of the activities that may affect or involve Indigenous Peoples by completing the A6.4 Environmental and Social Safeguards Risk*





Assessment Form, and **adequate resources for Indigenous Peoples full and effective participation shall be provided.** The analysis shall verify whether Indigenous Peoples reside in the proposed activity areas and/or if the activities may affect Indigenous Peoples outside of activity areas. The assessment shall include the potential impacts on their rights, lands, territories, gender relations and resources.

#### **Paragraph 70**

*P9.3: The activity shall not result in the forcible removal of Indigenous Peoples from their lands or territories as defined by Indigenous Peoples.*

#### **Paragraph 71**

*P9.4: The activity participant shall recognize and respect the Indigenous Peoples' collective rights to own, use, develop, and control the lands, resources, and territories that they have traditionally owned, occupied, or otherwise rightfully used or acquired, including lands and territories for which they do not yet possess title. **No activities can take place on these lands and territories without the free, prior and informed consent of Indigenous Peoples involved.***

#### **Paragraph 72**

*P9.5: The activity participant shall respect the cultural, intellectual, religious, and/or spiritual property of Indigenous Peoples and shall not access or utilize it without their free, prior, and informed consent (FPIC). FPIC must be obtained when there are impacts on (i) the territory; (iii) cultural heritage; or (iv) places containing sacred elements of special value for the community. **FPIC is an ongoing process that involves regular and open dialogue, ensuring that Indigenous Peoples have all necessary information and the capacity to participate fully and effectively. This process, along with any agreements reached, must be clearly documented, reflecting a commitment to good faith negotiation and the acknowledgment of Indigenous Peoples' rights and autonomy.***

#### **Paragraph 73**

*The activity participant shall ensure that Indigenous Peoples are provided with the equitable sharing of benefits derived from the utilization and/or commercial development of natural resources on their lands and territories, or the use of their traditional knowledge and practices by the activity. This shall be achieved **by engaging in dialogue and negotiations that are conducted in accordance with the principle of free, prior, and informed consent (FPIC), and carried out in a manner that is culturally appropriate, inclusive, and respects the rights of Indigenous Peoples to self-determination. These negotiations should aim not only to avoid impeding land rights or equal access to basic services, including health services, clean water, energy, education, safe and decent working conditions, and housing, but also to proactively support these rights. Negotiation requires transparency, respect for Indigenous Peoples' timeframes, their legal and decision-making structures, cultural values, and customs, and the provision of all necessary information in relevant***



***languages and accessible formats. Furthermore, it necessitates a genuine intent to reach an agreement that honors the contributions and rights of Indigenous Peoples, ensuring their participation in decision-making processes and the realization of development benefits in a manner that they deem beneficial, just, and fair.***

### **Principle 11: Cultural heritage**

#### **Paragraph 77**

***P11.1: The activity shall not involve or be complicit in the alteration, damage, or removal of any sites, objects, structures, or other cultural heritage tangible or intangible **including those of significance to Indigenous Peoples as determined by them.*****

#### **Paragraph 80**

***P11.3 4: Where an activity proposes to utilize cultural heritage, including the knowledge, innovations, or practices of **Indigenous Peoples** or local communities, **they** shall be informed of their respective rights, the scope and nature of the proposed commercial development, and the potential consequences of such development. Utilization of the cultural heritage, including the knowledge, innovations, or practices of Indigenous Peoples requires their free, prior and informed consent.***