

Handbook on Free, Prior and Informed Consent For Practical Use by Indigenous Peoples' Communities

Prepared by

**the International Alliance of Indigenous and Tribal People of the
Tropical Forests (IAITPTF) and**

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(IPF)**

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ACKNOWLEDGEMENT

Free, Prior and Informed Consent (FPIC) is a very important issue that needs to be understood by indigenous peoples so that they are able to exercise their rights. Additionally, States, companies and other actors, such as NGOs and members of the academe, need to learn about it so as not to use the excuse that it is a very complicated process. This handbook is our small contribution to the efforts of building better understanding on this complex yet very important process. The Indigenous Peoples Foundation for Education and Environment and the International Alliance of Indigenous and Tribal People of the Tropical Forests (IAITPTF) wish to acknowledge the invaluable support extended by MISEREOR in realizing this project. Without their financial and moral support, we would not have been able to complete this guide.

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Kittisak Rattanakrajangsri and Minnie Degawan

I. Background

This handbook on free, prior and informed consent (FPIC) is meant for practical use by indigenous peoples' communities. Produced by the International Alliance of Indigenous and Tribal People of the Tropical Forests (IAITPTF) and the Indigenous Peoples Foundation for Education and Environment (I.P.F), it is largely based on the experiences of indigenous communities in different countries. These include, but not limited to, the Philippines, Malaysia, Tanzania, Nepal, Panama, Suriname and Costa Rica.

From the studies conducted in these countries, we found that the application of the concept and principle of FPIC at the local level has remained a source of concern for many indigenous communities, even in countries where the rights of indigenous peoples are legally recognized at more advanced levels such as the Philippines, Costa Rica and Panama.

For instance, in the Philippines, indigenous peoples' right to FPIC has been enshrined in the Indigenous Peoples Rights Act (IPRA), and clear guidelines on the FPIC process have been enunciated with the issuance of an administrative order by the National Commission on Indigenous Peoples (NCIP). It is explicitly required that any project involving extraction, development and utilization of resources within the indigenous peoples' ancestral domain must obtain FPIC of communities before running any activities. However, the procedures designed to secure the right to FPIC have been reduced to a mere perfunctory process complied with by the government and companies in order to get a certificate that allows them to conduct extractive developments within indigenous territories.

Such is the case of the Bagobo-Tagbanwa Tribes in Davao del Sur where, despite their opposition, a flawed FPIC process has enabled a hydropower plant construction project to proceed. The certificate of FPIC the company obtained was not valid because only individuals in favor of the project were invited to consultations, including people from neighboring towns. Also, the consultations used technical language the people did not understand, and signatures were reportedly forged. Protests were widespread and several organizations filed complaints against the project. To date, the opposition is sustained while the project continues to operate.

Another case is that of indigenous peoples in Tanzania. Not recognized by the government as indigenous peoples, they were displaced from their traditional lands and resources without alternative livelihoods or land compensation. These forced evictions were carried out by the government in the guise of implementing development policies without the participation of indigenous peoples. Pastoralists have lost their land due to communal land tenure, establishment of protected areas, tourism, cultivation, alleged damage caused to the environment by their way of life, among others. The anti-pastoralist policies have also resulted in conflicts between them and farmers, protected areas authorities, investors, the military, and even the government. Corrupt government officials have worsened the situation by imposing excessive penalties and confiscating livestock for their own personal use.

It is obvious therefore that the application of or compliance with agreed international laws by governments and private companies is far from ideal and remains a big gap. One way to

overcome this problem is to empower indigenous communities to ensure they have the necessary knowledge and are confident in dealing with their own causes.

We therefore attempted to develop a handbook on FPIC which we hope will help indigenous peoples' communities to understand the intricacies of the process and to use this information to develop their own practical guidelines suited to their social, economic and political context to safeguard and defend their rights.

In addition, we hope it will help promote the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly on free, prior and informed consent as contained in articles 10, 11, 19, 28, 29 and 32.

This handbook provides general information about the basic concept of FPIC, its sources, what and who it involves, and how and when to use it. By no means a complete material, it remains a work in progress that will be further enriched by the actual experiences of indigenous communities.

II. What is FPIC

Free, prior and informed consent is the practice of giving or withholding permission. It is the right to choose or to make decisions. It is a right of all peoples. It emanates from the recognition of the full property rights of a group over a certain area/ resource. It is part and parcel of the right to self-determination. As indigenous peoples, we have the right to self-determination.

FPIC, while not explicitly called such, has long been practiced by societies. Members of a community know they cannot just barge into the house of other members without being invited in. Nor can one just enter the garden of another and take away what she/he wants without asking permission from the recognized owner. All societies, indigenous or non-indigenous, recognize and practice this as a fundamental rule to ensure harmonious relationships. Intricate rules have been enacted and continue to be practiced to this day to ensure that this basic tenet is enforced.

The process of giving permission, while differing from one culture to the next, is essentially a process of decision making. Different societies have their own mechanisms to arrive at a decision and their own ways to implement it. FPIC basically is how people reach a decision on matters that affect their community. The decision making process differs from one community to the other and participation in the process depends on the gravity of the impact to the community as a whole. Where and how long decisions are made also varies. What is common is the basis for such a process – recognition of ownership rights. Obviously one does not ask permission if one does not recognize the other as the owner of a resource base or as one who has the right to give such permission.

In our indigenous societies, traditional decision making is often in the form of consensus, wherein members of the community participate in various ways (both formal and informal) in coming up with a decision which the community then implements. Our traditional ways of governance have instituted procedures which seek and incorporate different views in the decision

of the entire community. The views of different groups in the community are sought in different ways and not always in a formalized way.

FPIC is therefore not a new right or a new concept. It has been practiced and continues to be practiced in various forms.

However, because of our long history and persistence in struggling for the recognition of our rights, we have institutionalized the right to FPIC as among our distinct rights as collectivities. Our history as indigenous peoples is a history of displacement and dispossession, as outsiders came in and took away resources found in our lands without the permission of our peoples. Many of the struggles we launched to defend our lands and cultures were a response to others' disregard of civilized society's basic rule of asking permission first.

To justify their acts, exploiters came up with the myth that indigenous peoples do not have rights over these resources, either because we do not exist or because we have never owned these resources. Laws were then enacted and implemented to support this myth and to justify the continued exploitation of our resources.

The plunder of indigenous resources by State and non-State actors under the guise of development resulted in the building of an international indigenous movement. For many years, we, indigenous peoples, launched various movements to defend our lands and resources at the community level. However, as the threats became bigger, we came together at the international level to work towards a common norm or standard for the recognition of our rights as distinct peoples. This movement sought to have the basic rights of indigenous peoples recognized, including the right to free, prior and informed consent.

FPIC AS AN EXERCISE OF THE RIGHT TO SELF-DETERMINATION

The recognition of FPIC as a right of indigenous peoples stems from the recognition that indigenous peoples have also the right to self-determination, as do all peoples. The right to self-determination includes the right to decide freely how, when and for what the resources that we hold will be used. It explicitly recognizes that these resources are our properties as indigenous peoples.

Self-determination is the right to decide our way of life – how we govern ourselves, how, who and where we worship, how we dress, how we talk, etc. All aspects of life are determined by the people within the community and not by others. The right to self-determination emanates from the control of a people over their territory and the resources within. Without this control, a people cannot be truly self-determining as others will always decide for them.

It is obvious then that indigenous peoples, because of our unique relationship with our lands and resources, have always been self-determining. When our ancestors decided to establish communities, and develop and nurture these, they were exercising self-determination. This later changed with colonization.

The right to self-determination is an inherent right of all peoples. It is not given by States or the United Nations nor is it protected by declarations or conventions; but it is recognized in various instruments. It is a right that people exercise in their daily lives – in coming up with decisions on how to use the resources in their territories. While many indigenous peoples do not have written laws or systems of governance, these exist and are practiced in different levels and forms. What is important is how strong the communities are in asserting their right to control their lands and resources.

FPIC IS A COLLECTIVE RIGHT

The right to FPIC is accorded to indigenous peoples as collectives – meaning as entire communities and not as individuals. This is because indigenous peoples exist as collectives – their identities are linked with their communities. Thus, when the right to FPIC is invoked and practiced, it involves not just one or two but ALL members of the community. While there is recognition of the leadership roles that certain individuals play in societies, FPIC is not meant to recognize just the decision of the leader but rather of the community as a whole.

This is linked to the fact that FPIC is a process and as such must be undertaken by the collective rather than by individuals.

Other groups now claim the right to FPIC, and as earlier explained, it has been practiced by all societies as part of good governance. Hence, while it is not entirely wrong for other groups to claim FPIC, it would be good to point out the historical origin of the term, the process and the right.

FPIC AS A DECISION MAKING PROCESS

The exercise of FPIC is a process; there is no one set of rules to govern it, as each community differs from another. The community sets the process by which it arrives at its decision, including the time and place where such a decision is reached.

Often in traditional societies, decisions are arrived at by consensus. By consensus, it means that a majority of the community agrees to it. It does not automatically mean that community decisions are all agreed to by everyone in the community. Often there are disagreements, no community is ever fully united on one issue, minor dissensions are common and the resolution of such conflicts, in fact, strengthen the community.

For instance, when one family is adversely affected by a community decision, it is logical that there would be dissent. But how such is resolved without breaking the community is indicative of the capacity of indigenous communities to govern themselves.

FPIC must not be taken to mean that once properly implemented, it will mean an automatic and united response. It is a process that should allow for diverse views to be heard and for internal conflicts to be resolved.

Also, it must not be taken to mean that once the FPIC process is conducted, the process is ended. Since the effects of any activity are continuing, so must the process go on. The community continues to discuss issues related to a project and it is inevitable that positions can change.

FPIC is not a one step process wherein once a decision is reached, the process ceases. For indigenous peoples the end result of the FPIC process is an empowered community – the people are capacitated to arrive at decisions, implement such and when necessary amend the decisions.

FPIC AS A DEFENSE MECHANISM

As stated earlier, the movement for the recognition of indigenous peoples rights came about as a result of the wanton disregard of our rights. The demand for FPIC is essentially a means by which we can protect our lands and resources.

By calling for the recognition of our right to FPIC, we are affirming our prior rights to our lands and resources as owners and custodians. If the basic right to FPIC is implemented before any activities that would impact our communities are undertaken, we would be in a better position to ensure that the environment and our cultures are protected. This would also enable us to benefit from such activities. The recognition of the right to FPIC is a *de facto* recognition that indeed we, indigenous peoples, are the rightful owners of the resources within our territories.

In effect, therefore, FPIC connotes the right of a community to veto a decision, action, project or program of the State or a company. In other words, if a community says no to an activity, like building a dam in their territory, the State should stop the project. In entering into the FPIC process, a community seeks not just to reach a decision (whether to give consent or withhold it) but more importantly to redefine relations with those who seek to enter into an agreement with them. The FPIC process is not just a decision making process but also a means by which indigenous peoples can protect their property rights.

III. Where does FPIC come from?

As we have seen in the previous chapter, FPIC has different aspects and we can look at it from various angles. In this chapter we will see the various reasons why FPIC is a strong and well recognized right.

Customary law and traditions

We as indigenous peoples have our own governance systems; in other words, we have our own ways and structures to make decisions, to select our leaders, to solve conflicts, to make plans for the future, to give and get information, to ask and give feedback, to protest, to consider and weigh conflicting interests. We also have our own legal systems to take decisions if people are in disagreement or want a final answer to difficult questions, to punish persons who have done something wrong, to know who has certain rights within the community, e.g. to family land or heritage.

A central element in our governance and legal systems is that decisions are taken only if we know that the person, persons or group that will be affected by such decisions have given permission for such activities to happen. Or, if it concerns something that is theirs, their property or something that they have been taking care of, we should then also ask their permission to do something. If we know that the affected person(s) or group(s) are not in agreement, we will not undertake such activities (unless we are willing to take the risk of creating conflicts).

There are many examples, just look around in your own community. You will not start a new agricultural field in an area which you know belongs to another family without asking permission. Your community leader will have to ask the community's permission first, before agreeing to some industrial activity within the community's land. You cannot undertake activities upstream in a river area if you know it will negatively affect communities downstream. For collecting medicinal plants from an area that you know someone else is using, you would need his or her permission. A marriage needs the consent of the parents and maybe even of the whole family.

These logical rules are often not written down but they are very firm and are observed by the community members. They are customary law, rules that have existed for a very long time and are generally observed and respected, even if not written down. It can happen that they are not followed, but that will obviously lead to conflicts. Thus we have been practicing the principles of consent since time immemorial; it is part of our customary law and traditions. Asking consent comes from our own cultures and ancestral systems, among others; it now has a modern name but it is something that has existed and been practiced all along.

Other non-indigenous people(s) also know the concept and principle of informed consent. It is a universal human right; and everyone has the same human rights. Indigenous peoples' rights are also the same human rights, but they are understood and applied in a way that is respectful of our

collective norms and values, respectful of our collective way of living, our identity, our cultures and our traditions. FPIC is one of the human rights of peoples -- to give permission in matters that affect them, to get information in understandable forms, to get the opportunity to make decisions in appropriate ways, etc.

Most people only know the individualized version, for example consent to a medical treatment: a patient has to sign for agreement to undergo a risky operation or use experimental medicines. Or a government has to get permission from a land owner to build a highway in his or her backyard. Or a municipality holds a referendum on the construction of a new airport. The concept of FPIC is not strange. So, in addition to our own customary laws and traditions, FPIC also derives from customary law in general.

However, what we demand is the right to FPIC for us, as collectivities, with rights as peoples, indigenous peoples with the right to self-determination, to decide for ourselves autonomously and freely, in sovereign ways, over our lands and resources; not just as individuals. We have fought hard for this demand through advocacy, lobbying, legal processes in many countries, protest demonstrations and even physical clashes in cases where our consent was not asked. And the results are visible; as we will briefly describe in the next section, international law has recognized our collective right to FPIC!

International, regional and national standards and obligations

The right to FPIC of indigenous peoples has been clearly recognized in various international legal instruments. That is because we have advocated, with success, that the world has to recognize our collective right to FPIC as indigenous peoples. Governments have recognized our rights in the UN Declaration on the Rights of Indigenous Peoples, including our right to FPIC. We are peoples, not just a number of random individuals together. We have rights as peoples, including the right to self-determination, the right to define our own priorities and plans, the right over our ancestral territories and resources, the right to self-governance. And we do have also the right to say 'yes' or 'no' to the plans, projects and programs of others. This includes the right to amend proposals so that they are more in keeping with our needs and aspirations.

Another reason why our right to FPIC has been recognized is because everyone knows the injustices and devastating impacts that our peoples have suffered because of projects and programs that were implemented without their consent. We only have to think of the many examples of projects by governments, multinational and national companies, banks and multilateral financing institutions, and even international organizations and environmental organizations. Such projects and programs were (and are!) often an outright violation of universal rights to live in freedom and dignity, to our property, to be protected, to name a few. Ensuring that our peoples must give their explicit permission first, before any project or program that will affect them can start or even before it is designed, is therefore a way to prevent such injustices and human rights' violations.

We will mention some important international legal instruments or mechanisms in which the right to FPIC of indigenous peoples is clearly recognized. This list is not complete; there will certainly be many more international instruments from which we can distill the right to FPIC:

- United Nations Declaration on the Rights of Indigenous Peoples, 2007
- Convention 169 of the International Labour Organization, 1989
- UN Committee on the Elimination of Racial Discrimination (CERD), various observations and recommendations on State obligations
- UN Commission on Economic, Social and Cultural Rights, various observations on State obligations
- Convention on Biological Diversity (CBD), 1992, and various decisions of the Conference of the Parties to the CBD
- Various multilateral institutes, banks, donor agencies and donor countries, and international and regional organizations that make reference to FPIC in their decisions or guidelines, including the European Union, Association of South-East Asia Nations, World Bank, Asian Development Bank, Inter-American Development Bank, many UN specialized agencies and programs
- The Inter-America Commission on Human Rights
- The World Commission on Dam

(for the full text of these key instruments see annex I)

There are also decisions made during the policy and strategy meetings of such conventions, treaties and international organizations that establish that FPIC must be obtained before activities that impact indigenous peoples are undertaken.

In addition to these international instruments, obligations to respect the right to FPIC also come from various regional juridical court decisions, among others of the Inter-American Court on Human Rights and the African Court on Human Rights. The fact that these international courts have very explicitly recognized and also obliged governments to respect the right to FPIC is highly significant because we can go to them if national governments do not want to respect our rights at the national level.

An increasing number of countries have national legislation that recognizes the right to FPIC by indigenous peoples, e.g. the Philippines and Bolivia. Countries are also bound by their international obligations that establish respect for FPIC, including the UNDRIP, ILO Convention 169, human rights courts' decisions, among others, as mentioned above.

Moreover, various multilateral or international organizations have guidelines and/or policies that prescribe, to a certain extent, obligations to obtain the consent of the impacted indigenous peoples before they finance or support a program or project of a country. Among these are UN organizations, multilateral financing institutions such as the World Bank and development banks, and development agencies of donor countries.

Finally, there is a fast increasing number of (academic) publications that emphasize the importance and procedures for respecting FPIC by indigenous peoples, written by a great variety

of actors including UN agencies, development banks, multinationals, multilateral and international organizations, international NGOs and indigenous peoples' organizations.

Domestic legislation

Apart from the international legislation and other agreements or guidelines, the concept and principle of Free, Prior and Informed Consent is also integrated into many national legislation. It is not always called that (free, prior and informed consent), only in a few cases. Sometimes the national law only refers to 'consultation' but not to consent, because the lawmakers recognize the right to consultation but not the right to give consent (permission). Other laws talk about 'participation' of indigenous peoples in decision-making processes, or about the right 'to be heard'. And there are of course those that do not say anything at all about the right of indigenous peoples to consent or consultation. In some cases the national laws recognize the right to consultation or participation in general, not specifically for indigenous peoples, for example in a law on 'good governance' or citizen participation or decentralization.

It is therefore important to continue to advocate for the inclusion of FPIC in national legislation as a specific, collective right of indigenous peoples. Without that recognition, we continue to be at risk of violation of our collective rights as peoples, and of suffering the negative impacts of far-reaching decisions that are taken top-down, without us.

Jurisprudence

A very important recognition of the right of FPIC of indigenous peoples comes from jurisprudence, in other words from court cases or other binding legal procedures in which the judge(s) or legal experts have decided in favor of the application of the right of FPIC of indigenous peoples. If internationally high-level legal bodies recognize this right and even sentence and oblige national governments to apply it, it is very clear that the international (legal) community very well recognizes this right! So no one should come and tell you that this right does not exist. A number of such judgments and conclusions have been given by the UN Committee on the Elimination of Racial Discrimination, the UN Commission on Human Rights which nowadays is the UN Human Rights Council, and the Inter-American Commission and Inter-American Court on Human Rights within the OAS system. So if the national legislation does not recognize the right to FPIC, it may sometimes be possible to seek justice through those international paths.

Doctrine

Another 'source' that supports the existence of FPIC as a hard right of indigenous peoples is doctrine, that is all the written materials by experts (legal and in other fields), e.g. books, academic articles, research publications, etc. If there is a dispute on the application (or even about the existence) of this right, one can do background research to see what has already been written about the topic. And if the vast majority of publications are determinedly supporting a certain perspective, in this case the existence and need for respecting the right to FPIC, it would be strange to continue to deny it.

In conclusion, the right to free, prior and informed consent is a strong and well-recognized right that we must continue to defend, and we must continue to demand its recognition and full application, even if governments do not want to apply it.

IV. What does FPIC involve

In this chapter we will discuss what FPIC precisely means and what should be included in the process of obtaining it. In practice it may not happen like this but we (our communities) should look carefully that all elements are fulfilled as much as possible.

It is important to also remark that obtaining FPIC is not only meant to get approval from a community. Some governments, organizations, institutes or companies think that they should simply go through a simple process of holding a workshop or two, wait for a few days, and then the community should put its signature on a piece of paper, and that is FPIC. No, that is not FPIC!

Obtaining free, prior and informed consent is meant to give a community and/or a people the opportunity to carefully consider a proposal and form their own, uninfluenced decision about it. FPIC is also a way to empower people(s) who may otherwise take a bad decision because they did not have sufficient information or enough opportunity to discuss big issues among themselves. And above all, FPIC is a right that must be respected; it cannot be brushed aside with excuses such as 'there is no money to organize consultations'. It is a human right of indigenous peoples that must be fulfilled if we are serious in demanding and fulfilling human rights for everyone.

FPIC also includes the right to say "no". Often proponents of projects insist that the FPIC process should lead to consent. They will try to prolong or rig the process just so communities will give consent. But FPIC includes the right to reject any proposals which the community believe will be detrimental to them. It also includes the possibility of making amendments to a proposal.

The process should not just achieve a simple "yes" or "no", it should lead to a good relationship between the proponent and the community. Even after the community has decided to accept a proposal, care must be taken to ensure that their rights are recognized and protected all throughout the project cycle and beyond.

ELEMENTS OF FPIC

We will now go through every ‘element’ of FPIC so that our communities are reminded of the background of this concept¹ along with some examples of the things not to forget. These elements should be remembered by communities and companies or any project proponent.

‘Free’ is meant to ensure that the decision, and also the process to get to that decision, is free of pressure or manipulation from outside. For example, if a company proposes to start a mine within an indigenous peoples’ territory, it should not put pressure on the community to take a fast decision. Or to make threats to the community, such as: ‘if you don’t decide in favor of the mining, then we will not build that school we planned to put up’. Or ‘only with this project will you be able to get employment opportunities; this is your only chance’. Or the other way around, they put pressure on the community by making promises (for example, ‘we will build a school and clinic but only if you decide in favor of our proposal’). That is also putting pressure. In fact, if they do that, they take advantage of the unequal position that our communities are often in; the communities are in such need of certain development opportunities that they would accept a bad deal rather than nothing at all.

Intimidation is closely linked to pressure. Sometimes it is very open intimidation, for example: ‘if you don’t take a decision in favor of our proposal, we will arrest the leaders of your community for rebellious activities’. Or this could even be threats to burn down houses or to put military forces in the region because of acts against the government. Outside influencing may also take the form of bribery or corruption, where key persons are simply paid or given certain gifts or privileges in order to get their support for a favorable decision.

Another influence that may not be used is manipulation. Outside persons try to divide the community or talk bad about the leaders to bring about divisions and conflicts -- the old ‘divide and rule’ tactics. Promises are very often used to get persons behind a proposal, and as we all know, indigenous peoples have often believed such nice promises. But we have become wiser, the hard way.

These are all forms of how ‘free’ is sometimes not so ‘free’. Real free decision-making should be a process where the community and the leaders are not negatively influenced by outside forces such as described above. The community should not feel any pressure to make a certain decision. It should also have the freedom to take a decision in its own ways and at its own tempo. If the community is used to make a decision through a lengthy process of multiple community meetings, for example, or through individual hearings, or both, an outside company or other ‘party’ should not put pressure to speed up that decision-making process. If certain cultural or spiritual acts must be undertaken before a decision can be taken, that must also be respected, even if it means to wait for months for the right circumstances under which such a cultural act must be performed. Or, if the community simply does not want to talk about it or it is not their priority, that is also a decision in itself; it means that the community is not ready to discuss it and a decision should not be expected or forced. That is what freedom means.

‘Prior’ means ‘in advance’. The community must be given the opportunity to form their opinion and make their decision before the proposed activity or project starts, and also before a final decision is taken that such activity or project will be implemented. In the ideal situation, the community must be asked about the very initial idea even before the project or activity is further designed in more detail. So if someone has an idea or proposal, it must not be designed in detail and it is then that they should come and ask us what we think of it. Ideally, we should say at the very conceptual phase already if we want that proposal or activity. Sometimes an idea can really be good, but it is designed in a very bad way that does not reflect our priorities and perspectives. It then becomes a threat instead of a good proposal.

In advance also means that the time requirements of the community must be taken into account. Often we see that companies or the government come with a pre-cooked plan that they want to implement, and only at the last minute do they come and inform our communities about it, expecting us to immediately agree. Or they ‘give’ us a few days or a few weeks to discuss it and then give a final answer. Most indigenous communities do not work that way.

We have other mechanisms of decision-taking, especially if it regards something that can have big impacts on our lives or way of living. Some communities may have well-functioning structures and mechanisms for regular meetings to take decisions, but others may not have them. Some communities want to have multiple village gatherings to discuss the proposal with time in between to let the matter ‘sink in’ or to discuss further in family circles ahead of the next village meeting. Other communities have to wait for the proper moment to consult their elders or their shamans. Some communities make big decisions only after house-to-house consultations.

Sometimes it is necessary to have the views of other communities before your community can take a decision. Or a certain topic is very sensitive and the community simply does not want to discuss it at that time. Maybe there are cases of unexpected deaths or diseases in the village and everyone is busy with the funeral or taking care of family. Or it is the season for planting and everyone is in the fields. These are simple but very legitimate reasons why outsiders cannot simply expect a community to take a decision within the timeframe that they want. Of course it can also happen that the community indeed wants to make a decision on short notice, but that is up to the community to decide, and not for the company or government to demand. In short, the requirement of asking our consent ‘in advance’ must properly take into account and respect the time requirements of the involved community.

‘Informed’ means that the involved community or communities must receive all information that is needed to make a good decision. That includes information on many things that are sometimes overlooked by the proponents of the activity, maybe because it is not important for them while it can be very important for the community! Some of the aspects of ‘full information’ are as follows:

- The people must know exactly what the exact purpose of the activity or project is. Sometimes people will approach you with a seemingly good proposal, but if you ask further you will find out that they actually want to get hold of a piece of your land! So do not be afraid to continuously ask 'Why?' if someone comes with proposals that are too nice to be true.
- How long would the activity last? In some cases it may seem good to have a new activity in your region for some weeks or months, but what if it becomes structural and is there for many years? Or the other way around, proponents promise that this will become a structural activity that you can depend on, but they do not mention that they have financing for only six months. Another example is that only the time of actual implementation is mentioned but not the time of preparation or time of closing/termination/cleaning/restoration, etc.
- Where exactly would all related activities take place? It is not sufficient to know the location of the principal activities or only the activities within your communities, but also of related activities. If it concerns logging, for example, the logging area may be relatively small but it must also be considered that there will be a road through your territory, transport of heavy loads with heavy trucks, noise, access to your territory for 'strangers' through the transport road, etc. Or the activity will be undertaken in multiple locations, some of which may not be in indigenous lands but may affect your location, either through smoke or water deposits. The failure of a related activity in another location that you did not know about may cause the activity in your location to be abolished, even though everything went fine in your location.
- You should also know how the activities will be managed, in particular who will make decisions? The community should not only be involved at the beginning of the initiative or project but ideally you can continue to be involved in decision-making. It is also necessary to think about a potential situation where the community disagrees with what happens, even if they initially approved of the activities.
- It must be clear who will be involved in the activities. You may learn only afterwards that certain groups are involved that you would rather not have in your area, e.g. military units or special security forces. Or the proponent promises employment opportunities for your community, but it is not clear upfront how many persons will find employment and in which positions (for example, only as low-level laborer or cleaning jobs).
- It must further be clear how the benefits arising from the activities, e.g. profits for the company, will also benefit the community IF the activity would be approved. Is it sufficient to only have some additional employment vacancies? How much profit does a company or organization make in your lands or with your resources and shouldn't your community have a share in those profits? Building a school in your community may be 'peanuts' in comparison with the tons of money that are being made annually from gold mining, for example.
- The information that is provided to the community must be in understandable language and/or forms. Yes, we do want to see the full technical reports to be sure that we have seen everything, but we **also** need to get that information in understandable language which the community uses, and/or in forms that are more appropriate. For example, it doesn't always have to take formal workshops held in the city for only a few representatives to discuss the idea or activity but also community meetings or even house-to-house visits. Or a stage performance or a public discussion between supporters and opponents. Or the community may want to see a video of another community where a similar project has taken place.
- It is also important who gives the information. It makes a big difference if a trusted person or organization explains all the pros and cons, or if the proponent (company, organization, government) does that. Some people may be afraid to talk openly in formal settings whereas they have very good views, questions and proposals in a more trusted group.

- A critical matter is also the representation of your community(ies). It may not be allowed, for example, that the proponent defines who it wants to invite for discussions or information-sharing; it is a sovereign right of your people and community to decide who your representative(s) is (are).
- The excuse of insufficient money for proper consultations and information-sharing is often used. However, the availability of money is almost always a matter of prioritization; the proponent should make the consultations a top priority and allocate money for it. Why is there often sufficient money to do other things, ranging from research, publicity, workshops in the city, overseas travel, etc. but not to properly consult indigenous peoples?
- The community must have all necessary information about the potential consequences from the activities, both positive and negative effects. What we often see is that the proponents of the activity only tell you the positive effects (or at least what they see as positive) and only a few of the negative effects. That can also be due to the fact that they simply do not look at the activities in the way that the indigenous community does.

For example, the proponent may not know anything about the relation between certain fruit trees and game animals, or between noise and fish, or the existence of certain sacred or spiritual areas that should not be disturbed. Other more obvious negative impacts could be the influx of strangers who may disrupt the social dynamics in the villages, or the opening up of the territory by roads through which intruders may come to log or hunt illegally or even try to get land in your territory.

And then there can of course also be many environmental impacts, depending on the kind and size of activity that is proposed, e.g. pollution, reduction of biodiversity, disappearance of certain species, etc. In many cases the community must therefore demand that an environmental, economic and social and human rights impact assessment be done, in which relevant experts assess all the potential impacts. Don't forget that these experts can also be our own indigenous experts who know about indigenous peoples' cultures, traditions, social structures, among others! Such an impact assessment must be done by an independent company, not by a company affiliated to the proponent, otherwise it may not be independent anymore. Importantly, the assessment must be done prior to the decision whether to undertake the activity, not afterwards.

All too often we see that the government of a country already gives permission or a concession/license, and only later is an assessment done of the impacts. The issue of impact assessments is a big subject that would be too much to go into further detail in this handbook. Finally, the community may want to also do its own assessment in its own ways, e.g. house-to-house interviews of the community members on what they think of it and what they think can be the consequences.

- In addition to potential impacts, the community should also think about potential risks that may arise from the activities, and how to deal with these risks. For example, what happens if the company that makes the proposal goes bankrupt? Or if the expected profits do not materialize? Or if the company has to withdraw from that region or country, leaving the community behind with unfulfilled promises? Or if there is an oil spill or water contamination or some other unexpected calamity (depending on the type of activity)? A very different risk is that the proponent in fact wants your land but comes to you with a proposal for some industry, which has happened in certain countries. Once they have a foot on the ground (literally), they might suspend the productive activities but they already have some land title in your territory.
- On the other hand, the community must also carefully consider what the benefits may be. Not all proposals are bad and sometimes there are indeed good partners who really want to do something good. Also, due to the economic situation, a community sometimes actually wants certain economic activities, even if it comes with some disadvantages. The key issue is that the community should have **all** available information to take a balanced, well-informed decision.
- Information-sharing does not end at the consultation phase. Clear agreements must also be made about continuous information-sharing. Also, if new information arises after talks on the proposal have already started, such information must also be made available without delay to the community so it can be taken into account when taking a decision. And even after a decision is made, for instance consent to the proposal, you still need to be fully informed and involved; your community's involvement does not end with your consent!
- Finally, also make sure that your representatives are involved in the reporting of consultation and consent processes. We have many ugly examples of how we say one thing during a meeting and in the reports (written by the other party) we read very different things that we never agreed to. It even happens that we are invited to a meeting and oppose an idea, but the report says that 'decisions were taken with the full participation of the indigenous representatives'!

Consent means the agreement of the community to a proposed plan. The plan can either be amended to take into consideration the expressed needs of the community or it can be the original plan. Consent in indigenous communities means that all have been duly consulted and there is a general consensus; it means that the major problems have been addressed while recognizing that some elements may need to be worked on. Consent is not necessarily 100% agreement, it can be conditional and can be revisited once the conditions have been or not been met.

There are many ways by which the community will know that it has reached a decision. If a decision is what the community actually wants, there will be no dissent. It may not be necessary to hold a votation or even secret balloting; in fact, in many communities this is a counter-productive way of arriving at a decision. Secret balloting allows for the manipulation of results and often, community members expect that people can stand by their decisions and there should be no need for secrecy.

Community processes have to be recognized and respected. While communities have formal leaders, they are not empowered to make decisions for the whole community and are expected to consult and listen to what the community as a whole will say about an issue. To assume that leaders are the decision makers will put to disadvantage the interests of the community, as well as put to question the credibility of the leaders. What should be emphasized and strengthened is the community decision making process.

In many communities, once a decision is reached, the community undertakes some rituals to signify the end of a process and to firm up the agreements made. The rituals provide the community an opportunity to reflect on the decision and to clearly identify the people who will be responsible for which element of an agreement. It will also include penalty provisions in case the agreement is broken or breached. The rituals make the agreement formal and binding.

It is therefore important that in FPIC processes this aspect of the community process is not forgotten. It signifies that the community has arrived at a decision.

Consent is different from consultation as it means that the community's decision is acknowledged and respected. Consultation, on the other hand, means that the community decision is noted but disregarded. Many companies and some governments are now saying that indigenous communities need to be *consulted* but that their *consent* is not necessary for projects to proceed as planned. Consulting is very different from getting the consent of a community and it is the latter that indigenous peoples have long struggled for. Our right is to give consent not just to be consulted.

Summary:

All in all, FPIC is an exercise in self-determination. It is the people who will decide whether to accept or reject a proposal. It is also the people who will decide whether they want to go through a process and what that process will be in order to reach a consensus. Often, proponents of a project will say that since a community has decided to undertake an FPIC process, then they have agreed to their proposal. Or they can also say that a community refuses to go through an FPIC process, therefore, they will proceed because the community is being unreasonable. To go through or not an FPIC process is a decision that a community must make and whatever the outcome should be respected.

V. COMMUNITY EMPOWERMENT TO ENFORCE COMMUNITY DECISIONS: What the community needs to do when the right to FPIC is violated or not respected

Often, indigenous peoples rights are completely ignored, or even when the FPIC process is undertaken, the decision of the community is not respected. Companies or even governments just continue to do what they want to the detriment of indigenous communities. In such instances, the community must resort to its own rules and enforce its decisions.

Indigenous communities have different systems that are in place to ensure that their territories are protected. These range from taking legal actions, such as bringing companies or other entities to court, to launching campaigns aimed at stopping whatever destructive project is being planned, to taking up arms against such entities. Indigenous peoples have also managed to combine these different forms to ensure the protection of their rights. In recent times, indigenous peoples have also used international (UN) mechanisms to bring attention to their issues. In all these, what is important is indigenous unity and clarity of position.

It must be stressed that indigenous strength lies in their unity. It is therefore important that throughout the process, the community must strive to keep its unity. There will be many ways by which project proponents will try to divide the community and there will be times when they may succeed. But if the community retains its united position to defend its territory, the battle will be half won.

In FPIC processes, care should be taken to allow the community to have time to discuss freely among themselves. Community discussions are important to keep everyone informed of what is really happening and will prevent divisive rumours from spreading unchecked. These community discussions must be for the community members only so that the unity of the community is kept intact. It is essential that as soon as a project is introduced, the community is able to meet and discuss among themselves to map out their strategy. Such a strategy should include a process to ensure the implementation of any decision.

In cases where the community decision is completely ignored, the community should be able to have an alternative plan in place. It should be ready to undertake various measures to ensure that its rights are not trampled upon. Some of these are:

1. Obtaining support from the media – often indigenous peoples are ignored simply because not much is known about them. It is important that the community get to network with the media as early as possible to ensure that their plight is known by a wider population. While often media can be instruments for deception, they can also be allies of the indigenous peoples. Companies are sensitive to public opinion, so it is important that the public is informed of the position of the community, and not just that of the project proponent.

Once a decision is reached by the community, it should be disseminated widely to the public to lessen if not thwart any opportunity of manipulation by any

entity. The community must ensure that it has access to the media and that the media are also able to get in touch with designated community representatives.

2. Side by side with getting the media involved is getting in touch with indigenous organizations and their supporters. There are many campaigning organizations on various issues and it would be good to network with them. For instance, if the issue is mining then the community should get in touch with those groups that work on this issue. Whether the decision is favorable or not, it is important to reach out to other groups in order to build a network of support. In instances where the community decides to agree to a project, it is important that other organizations are informed so there will be no confusion.
3. An advocacy group should be formed by the community to ensure its voice is heard at various levels – national and international. This is urgent when the chances of the project proponent going against the decision of the community are high. There are many avenues where the community can bring its grievance, for instance at regional inter-governmental bodies (OAS, Inter-African Commission, ASEAN, etc.) or at the many UN bodies that deal with indigenous issues. But these bodies have strict rules and the community must be prepared to comply with the rules of procedure.
4. It is also possible for the community to file a suit against the proponents in court. Again this will require specialized skills which the community may not have, but there are groups that provide legal advice and services which the community can tap. However, the community must be ready to accept the ruling of the courts.
5. More importantly, the community must ensure that everyone within the community is informed of developments. It will be necessary for the community to constantly have meetings in order to ensure that unity is kept. All of the above options can be combined so the community must also be organized to be able to respond to the different needs of each action. The community cannot delegate the chief or any one person to undertake all the above actions.

The above actions will similarly be needed if the community decides to accept a project. It becomes even more imperative that the community is well prepared to ensure that the provisions of the agreement are adhered to by the proponent. There will be instances when companies will try to renege on their contractual obligations and it will be necessary for the community to resort to any or all of the above actions. Often the agreement by a community to a project is not a guarantee that its rights will be respected; companies are intent on making profit and this may at times contradict some of the promises they made at the consultation stage. It will be necessary for the community to be vigilant at all times to ensure that the agreement reached is adhered to.

6. Community Protocol as a pro-active response

A possible way for indigenous communities to ensure that their rights and systems are respected is to develop their particular protocols to govern the entry of

projects in their territories. Most communities have informal laws that govern the conduct of others entering their communities, but with the expected rise of extractive industries and other projects in indigenous communities, it would be good to formalize these rules and make them more specific.

Communities can start by checking what exists in their rules. They can then identify what types of activities (will it just be for big extractive projects like dams or logging concessions, or should it also include research activities?) need to be included in the community rules, determine if these rules are enough, and if not what needs to be added. After the community has agreed on such rules, they can register these with the proper government bodies so that outside entities can be informed of the existence of such rules.

This is just one option and many more exist, but what is most important is that the community is united in enforcing such rules.

VI. Note to companies and other project proponents

Project proponents often ask “how then do we obtain FPIC”? It is not easy for an indigenous community to tell you what should be done. However, the following general principles should be borne in mind. A more detailed guide can be developed later with your help and participation.

FREE – means that you should not try to influence in any manner the decision of the community. The communities may need some services but these should not be used to obtain their consent to your project. Do not use force or intimidation. Avoid bringing in military or security personnel as the presence of armed men will unnecessarily make the situation tense. All meetings should be transparent in order to avoid mistrust. Always deal with the community with respect, do not pressure them with lavish gifts or promises of better life.

PRIOR – means before planning, securing funds, obtaining licenses and any other activity related to the project, the community is consulted. Often you will say that you already have all the legal requirements, such as clearances, etc. so you can proceed, but it is important that the community is involved from the very beginning of the project conceptualization. Sometimes, proponents would say that they have already spent large amounts of money to get all the preparations done and to cancel the project would be too costly, but the community should not be blamed for such a loss if the proponents have not done their jobs well and ahead of time.

INFORMED – means all information regarding the project should be made available to the community in appropriate and timely ways. Funding for the project, duration, possible environmental and social impacts, scope, etc. are just some of the basic information that need to be made available. If the community asks for specific information, this should be made available to them as soon as possible.

CONSENT – is the decision of the community, reached after they have deliberated on the issue with all the information. It may include a conditional agreement or a total rejection of your proposal. Often you will be tempted to ask for a vote just to see if indeed this is the decision of the community. In some cases the community will actually conduct such a votation but not all communities are comfortable with such a system. Respect the process and the decision of the community. Community consensus does not necessarily mean agreement by 100% of the community. Each community has its own way of determining when a decision has been reached. This should also be recognized.

VII. Annexes:

Annex I: Full text of key different instruments on FPIC

Annex II: Examples of Case studies on FPIC

Annex III: Further reading on issue related to FPIC

Annex I: Full text of key different instruments on FPIC

Instruments	The whole texts	For more information
<p>United Nations Declaration on the Rights of Indigenous Peoples, 2007</p>	<p>Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.</p> <p>Article 11: 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.</p> <p>Article 19: 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.</p> <p>Article 28: 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been</p>	<p>http://www.un.org/esa/socdev/unpfii/en/declaration.html</p>

	<p>confiscated, taken, occupied, used or damaged without their free, prior and informed consent.</p> <p>Article 29: 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.</p> <p>Article 32: 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.</p>	
<p>Convention concerning Indigenous and Tribal Peoples in Independent Countries no. 169 of the International Labour Organization, 1989</p>	<p>Article 6</p> <p>2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.</p> <p>Article 7 recognize indigenous peoples’ “right to decide their own priorities for the process of development” and “to exercise control, to the extent possible, over their own economic, social and cultural development.”</p> <p>Article 16</p> <p>2. Where the relocation of these peoples is considered necessary as an</p>	<p>http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169</p>

	<p>exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.</p>	
<p>UN Committee on the Elimination of Racial Discrimination (CERD), 1965</p>	<p>In its general recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination calls upon States to “ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent” (para. 4 (d)). The Committee makes repeated reference to the right to consent and general recommendation XXIII in its concluding observations.</p>	<p>http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/73984290dfea022b802565160056fe1c?OpenDocument</p>
<p>UN Committee on Economic, Social and Cultural Rights</p>	<p>highlighted the need to obtain indigenous peoples’ consent in relation to resource exploitation. In 2004, for instance, the Committee stated that it was “deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities” (E/C.12/1/Add.100, para. 12). A few years earlier it observed “with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem” (E/C.12/1/Add.74, para. 12)</p>	<p>http://www2.ohchr.org/english/bodies/cescr/index.htm</p>
<p>The Convention on Biological Diversity (CBD), 1992</p>	<p>Article 8(j) requiring States to respect & preserve indigenous knowledge, innovation and practices and (its)...application with the approval & involvement of IP’s, see also Fifth Conference of the Parties (COP) CBD Decision V/16 requiring States to obtain prior informed approval and to ensure the effective involvement of IP’s in decisions relating to the conservation and sustainable use of biological</p>	<p>http://www.cbd.int/decisions/cop/?m=cop-05</p>

	<p>resources;</p> <p>The Fifth Conference of Parties (COP) to the CBD Decision V/16 expresses a firm commitment to the implementation of PIC in its general principles:</p> <p style="padding-left: 40px;"><i>“access to traditional knowledge, innovation and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices/.”</i></p> <p>Decision V/16 further calls upon:</p> <p style="padding-left: 40px;"><i>“Parties to take measures to enhance and strengthen the capacity of indigenous and local communities to be effectively involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity subject to their prior informed approval and effective involvement/”</i></p>	
<p>The Inter-American Development Bank’s (IADB) 1990</p>	<p>Strategies and Procedures on Socio-Cultural Issues as Related to the Environment provides that</p> <p style="padding-left: 40px;"><i>“In general the IDB will not support projects affecting tribal lands and territories, unless the tribal society is in agreement.”</i></p> <p>FPIC is already included in the IADB’s policy on Involuntary Resettlement.</p>	<p>www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc</p>

Asian Development Bank	ADB's safeguard policy should include the following: Ascertain the consent of affected Indigenous Peoples communities to the following project activities where Indigenous Peoples groups are deemed to be particularly vulnerable: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical relocation of Indigenous Peoples from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or on cultural, ceremonial, or spiritual uses of the lands that define the identity and community of Indigenous Peoples.	http://www.adb.org/safeguards/ http://www.adb.org/Documents/Policies/Safeguards/Safeguard-Policy-Statement-June2009.pdf
the Inter-American Commission on Human Rights	The Commission has stated that the Inter-American human rights law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent." In 2003, the IACHR stated that FPIC is generally applicable "to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories."	http://en.wikipedia.org/wiki/Inter-American Commission on Human Rights
The World Commission on Dam	The World Commission on Dams commissioned a thematic review on <i>Dams, Indigenous Peoples and Ethnic Minorities</i> which examined the experience of indigenous peoples and ethnic minorities with the planning, implementation and operation of large dams. Having documented the conflict and damage to communities associated with many previous dam projects, the thematic review identified some key principles to guide the development of energy and water resources: 1. Indigenous peoples and ethnic minorities should be involved from the beginning in planning and decision-making processes. 2. The principle of free, prior and informed consent should guide the building of dams that may affect indigenous peoples and ethnic minorities.	http://www.dams.org/docs/kbase/thematic/drafts/tr12_execsumm.pdf

Annex II: Examples of Case studies on FPIC

- 1) Philippines (to be uploaded on the IPF website www.thai-ips.org)
- 2) Malaysia (to be uploaded on the IPF website www.thai-ips.org)
- 3) Suriname (to be uploaded on the IPF website www.thai-ips.org)
- 4) Panama (to be uploaded on the IPF website www.thai-ips.org)
- 5) Costa Rica (to be uploaded on the IPF website www.thai-ips.org)

Annex III: Further reading on issue related to FPIC

- 1) Oxfam guide to FPIC: <http://www.oxfam.org.au/resources/filestore/originals/OAUs-GuideToFreePriorInformedConsent-0610.pdf>
- 2) Free, Prior, and Informed Consent in REDD+: <http://forclime.org/index.php/en/news/8-news/61-free-prior-and-informed-consent-fpic-in-redd-guidebook-launched>
- 3) Free, Prior, and Informed Consent by the Forest Peoples Programme (FPP): <http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic>