

Module

Free, Prior, Informed Consent

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Basic Argument

The value of consultation in development planning depends on how well it identifies and recognizes rights and needs of affected indigenous peoples.

Identification of Rights

Through meaningful consultation

Recognition of Rights

Only if consent is obtained

Only if share intervention benefits

Free, Prior and Informed Consent

- A form of governance
- General UN Standard; regional standard
- A vehicle for information disclosure
- A process to obtain consent
- Resist or veto an development intervention?
- A process to ensure communities benefit

Indigenous Peoples and FPIC

Consultation, participation, co-management

- Inclusion and sharing, not exclusion and domination
- Participatory model in place of top-down model
- Focusing on rights and needs of the vulnerable
- Room for deciding approaches to problem solving
- Dialogue through representatives
- Consent seeking

UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007

UNDRIP preamble emphasizes

IP control over development will:

- strengthens institutions, culture and traditions
- emphasizes IP aspirations and need

Recognition of IP rights:

- enhances relations between the state and IP
- Emphasizes justice, democracy, equality

Ensure that

- State rights including eminent domain.
- State uses its rights in consultation with IP
- Benefit sharing opportunities for IP

Key Characteristics of FPIC in UNDRIP

- UNDRIP balances IP rights and state rights,
- Congruence - national & IP interests
- State accommodation of indigenous rights
- Emphasis on *partnership* instead *state sovereignty*

Self-determination and FPIC Under UNDRIP

- Restates right to self-determination
- Contextualizes the right requiring FPIC for:
 - physical relocation (Article 10)
 - use of cultural, intellectual, spiritual property (Art 11)
 - adoption of legislation that impact them (Art 19)
 - restitution of land taken (Article 28)
 - storage of hazardous materials (Article 29)
 - approval of a project impacting on them (Article 32)

Legal Status of UNDRIP

- Non-binding.
- International (UN) standard
- By ratification adopts UNDRIP as domestic laws

Critique of FPIC

- Pro-forma exercise to defend pre-determined decisions
- No opportunity to influence decision making
- Why?
 - Inadequate access to information
 - Pre-determined outcomes: controlling issue definition
 - Privileging scientific/technical discourse
 - Use consultative forms of communication only one way
 - On paper? India - FRA and Philippines - IPRA

UN Machinery on IP Rights

- Expert Mechanism on rights of indigenous peoples
- Special rapporteur on human rights & fund. Freedoms
- Permanent forum on indigenous issues
- UN Voluntary Fund for Indigenous Peoples

Multilateral Development Agencies on IP Rights

- World Bank – IP Policy (2005)
- ADB – Safeguards Policy Statement – IP Policy (2009)
- IFC – Performance Standards on IP (2006)

FPIC Framework

FPIC - legal concept; no specific methodology/framework

Issues to address in a framework

- IP heterogeneity results in 'consent' taking many meanings
- 'legitimacy' of FPIC in different power structures
- Horizontal alliances rather than hierarchical leadership
- Reduced value of community leaders as representatives;
- uncertainty regarding 'consensus'
- Inherent characteristics of ancestral domain
 - non-commodity
 - customary laws and culture recognize?

Conclusion

Indigenous peoples may get moral victory from international law, but the real power remains vested in the hands of sovereign states who can and do ignore international norms (Kymlicka 1999).