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UNITED NATIONS



NATIONS UNIES

DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS
Division for Social Policy and Development
Secretariat of the Permanent Forum on Indigenous Issues

**WORKSHOP ON FREE, PRIOR AND INFORMED CONSENT
(New York, 17-19 January 2005)**

**CONTRIBUTION OF THE INDIAN LAW RESOURCE CENTER
CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS**

**Indigenous Peoples' Right Of Free Prior Informed Consent
With Respect To Indigenous Lands, Territories and Resources**

The purpose of this paper is to clarify what we mean and what we understand to be the law in regard to the indigenous demand for “free prior informed consent” as it relates to indigenous lands, territories and resources. It is particularly important that the right of free prior informed consent not be misunderstood and that it not be used as a substitute for indigenous peoples’ rights to property, self-determination and other human rights. In all of our human rights work, whenever we focus our attention on one right or one subset of rights, we must keep in mind that our ultimate objective is full respect and protection for all of the rights of indigenous peoples. A cardinal principle of all human rights work is that one human right must never be abandoned or compromised to advance another human right.

Indigenous peoples have the right to collective ownership and use of their lands, territories and resources based on their longstanding use and occupancy of these lands and territories. These indigenous rights are recognized in international human rights law, and they arise independently of domestic laws of states.

Indigenous peoples also have the right of self-determination, which includes the right of self-governance. The right of indigenous peoples to self-governance includes the collective right to exercise full authority, free from outside interference or manipulation, over their lands, territories and resources.

As a part of their collective rights to ownership of their property and self-determination, indigenous peoples have the right to protect and to determine the use and disposition of

their lands, territories and resources. Indigenous peoples' right of free prior informed consent is one of the particularly important incidents of their collective rights to property and self-determination. The right of free prior informed consent refers to two things: 1) the right of indigenous peoples to forbid, control or authorize activities that are on their lands and territories or that involve their resources, and 2) the right of indigenous peoples to forbid, control or authorize activities not on their lands, but which may substantially affect their lands, territories and resources or may affect their human rights.

The right of indigenous peoples to self-governance, including the right to make all decisions with respect to their lands, territories and resources, is a collective right exercised through their governments and representatives in accordance with their own laws and customs. Indigenous individuals do not have a right when acting as individuals to authorize or veto any activity affecting the collective rights of indigenous peoples.

Indigenous peoples' right of free prior informed consent includes both the right to make all decisions related to development and other activities affecting their lands or resources and their right to make decisions about activities taking place outside of their lands that may significantly affect them, especially when those activities may affect their human rights. Full respect for indigenous peoples' human rights requires that such activities not proceed without the free prior informed consent of the people or peoples concerned.

For consent to be "free," it must be given without coercion, duress, fraud, bribery, or any threat or external manipulation.

For consent to be "prior," it must be given before any significant planning for the proposed activity has been completed, and before each decision-making stage in the proposed activity's planning and implementation at which additional relevant information is available or revised plans are proposed.

For consent to be "informed," it must be given only after the affected indigenous people is provided with all relevant information related to proposed activities in appropriate languages and formats, including information regarding indigenous rights under domestic and international law, the likely and possible consequences of the proposed activities, and alternatives to the proposed activities. All information must be provided free from external manipulation and with sufficient time for review and decision-making in accordance with the laws and customs of the affected indigenous people.

International law requires that international financial institutions respect all rights of indigenous peoples, including the right of free prior informed consent. These institutions should adopt and implement binding policies and procedures to fulfill their international human rights obligations. Other reasons such as the concepts of social license and development effectiveness, which are not necessarily based in international law, also support the adoption of binding policies and procedures requiring free prior informed consent for both indigenous peoples and non-indigenous communities

There is typically unequal bargaining power as between indigenous peoples and states, international financial institutions, and private development interests. This

requires particular care in ensuring that there is full and fair compliance with each element of free prior informed consent, and that the required indigenous consent is obtained in each phase of the planning, development and implementation of development and other activities affecting indigenous lands, territories and resources. There must also be full respect and protection for all of the other human rights of indigenous peoples. Special measures may be needed in some situations – for example, where development activities affect indigenous peoples living in voluntary isolation – to determine whether indigenous consent may be properly obtained.

Indigenous rights to lands, territories and resources are very often denied recognition or protection under domestic laws. In these situations the right of free prior informed consent is especially important. Large scale development or other activities can permanently remove resources, make land uninhabitable, and effectively destroy indigenous communities that have rightful claims to own the land and resources at issue. As a result, the right of free prior informed consent must be respected in all situations where indigenous rights and interests are claimed, even if the full range of indigenous ownership and governance rights is in dispute or may not be entirely clear or settled.

Fair and effective laws and legal procedures must be made available to resolve disputes about indigenous rights to lands, territories and resources and to help assure that indigenous consent is truly “free”, “prior” and “informed.” There is an urgent need to strengthen the rule of law at both the domestic and international levels in order to protect all of the human rights of indigenous peoples. Establishing and strengthening appropriate mechanisms of accountability to protect indigenous rights should be a priority concern for all states and for international institutions engaged in development and other activities on or affecting indigenous lands, territories and resources.