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# Indigenous Peoples' Right of Free Prior Informed Consent with Respect to Indigenous Lands, Territories and Resources (June 28, 2010)

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# INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

June 28, 2010

## **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 is meant by “free, prior and informed consent” as it is referred to in the UN Declaration on the Rights of Indigenous Peoples. Free, prior and informed consent is an important principle deriving from indigenous peoples’ collective rights to self-determination and their lands and resources. It is not a substantive right in and of itself, as are the rights to property or self-determination. As used in the Declaration, it does not give indigenous peoples a right of veto. Rather, free, prior and informed consent refers to a certain process that states must follow before taking action that would otherwise constitute an infringement of a right or a taking of property.

The United Nations Declaration on the Rights of Indigenous Peoples references “free, prior and informed consent” in six separate articles,<sup>1</sup> most of which focus on free, prior and informed consent as the desired goal arising from the consultation and cooperation process with indigenous peoples regarding issues that may affect them. The most important provisions dealing with free, prior and informed consent are Articles 19 and 32.

### *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.

### *Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

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<sup>1</sup> These are Articles 10, 11, 19, 28, 29, and 32, UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007).

These articles mandate a process of consultation and cooperation in good faith, with the end goal being the free, prior and informed consent of the affected indigenous peoples. Stated differently, the obligation incurred by these articles is the process (namely the consultation and cooperation), not an obligation to achieve a particular result. This interpretation is in accord with that of Luis Enrique Chavez, Chairperson of the Working Group on the UN Declaration on the Rights of Indigenous Peoples from 1999-2006. “[Article 19] therefore established only an obligation regarding the means (consultation and cooperation in good faith with a view to obtaining consent) but not, in any way, an obligation regarding the result, which would mean having to obtain that consent.”<sup>2</sup> Chavez’s interpretation of these articles is entirely in keeping with the intentions and understandings expressed by states during the negotiations of the Working Group.

The obligation to consult for the purpose of obtaining free, prior and informed consent is also reflected in the ILO Convention 169. Article 6 of the ILO Convention 169 states:

- (1) In applying the provisions of this Convention, governments shall:
  - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- (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.

Although the ILO Convention does not specifically refer to “free, prior and informed consent,” it refers to the free participation of indigenous peoples. Further, it is clear that consultations require early participation by indigenous groups.<sup>3</sup> Numerous interpretative opinions offered by the committees in response to individual complaints state that in order for a consultation process to be consistent with the obligations of the Convention, the consultation process must occur

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<sup>2</sup> Chavez, Luis Enrique, *The Declaration on the Rights of Indigenous Peoples Breaking the Impass: The Middle Ground*, 103-104, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, eds. Claire Charters and Rodolfo Stavenhagen, 2009, available online at <http://www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/Books/Making%20the%20Declaration%20Work.pdf>.

<sup>3</sup> Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 38, ILO Doc. 162000ECU169 (2001).

before any final decisions are made.<sup>4</sup> Finally, such consultations must be informed. The ILO committee reviewing one complaint recognized this, stating: “The adoption of rapid decisions should not be to the detriment of effective consultations for which sufficient time must be given to allow the country’s indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.”<sup>5</sup> The ILO Convention, like the UN Declaration, does not require that consultations end in agreement or consent, only good faith negotiations to that end.<sup>6</sup>

This interpretation of free, prior and informed consent as a right of process, does not create right of veto by indigenous peoples in relation to proposed state actions that may affect them. “... [I]n principle, the declaration could not recognise indigenous peoples [sic] preferential or greater rights than those granted to other members of society, as would be the case with a right of veto.”<sup>7</sup>

The concepts of consultation and cooperation, as well as the goal of obtaining free, prior, and informed consent of indigenous peoples, are in accord with the federal tribal consultation policy in established under President Clinton’s Executive Order 13175 in 1994. These concepts were reinforced by President Obama’s Executive Memorandum issued last November.

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<sup>4</sup> Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at paras. 95, 106, ILO Doc. 162004MEX169A (2004). The complainants’ proposals are recited principally in paras. 37-43.

<sup>5</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at para. 79, ILO Doc. 161999COL169A (2001).

<sup>6</sup> Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at paras. 57, 59, 61-63, ILO Doc. 161999COL169B (2001).

<sup>7</sup> Chavez, Luis Enrique, *The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground*, 103, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, eds. Claire Charters and Rodolfo Stavenhagen, 2009.