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**Expert Mechanism on the Rights of Indigenous Peoples**

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**Study and advice on free, prior and informed consent**

 Draft study on Free, Prior and Informed Consent:
A human rights based approach

 Study of the Expert Mechanism on the Rights of Indigenous Peoples

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 I. Introduction

1. During its 10th session in July 2017, the Expert Mechanism on the Rights of Indigenous Peoples (the Expert Mechanism), under its mandate in resolution 33/25, decided to produce a study on “free, prior and informed consent” (FPIC), as it appears in several provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). For this purpose, the Expert Mechanism held a seminar in Santiago, Chile, on 5 and 6 December 2017. This study was informed by informed by presentations shared at this seminar, and subsequent information provided by member States, indigenous peoples, non-governmental organisations, national human rights organisations, and academics. [[1]](#footnote-2) The Expert Mechanism would like to thank all those who contributed to this study enriching its own knowledge of the subject matter.

2. This report seeks to contribute to an understanding of FPIC in the context of developing practices and interpretations of this human rights norm enshrined in the UNDRIP. Taking into account eleven years of advocacy and jurisprudence following the adoption of the UNDRIP, this study is not intended to be either exhaustive or definitive but should contribute to the body of interpretative guidance now available to States, indigenous peoples and others actors working on indigenous peoples’ issues.

 II. Human rights basis of FPIC

3. FPIC is a human rights norm grounded in the fundamental right to self-determination and freedom from racial discrimination, guaranteed by the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Convention on the Elimination of Racial Discrimination (ICERD). The provisions referring to FPIC in the UNDRIP do not create new or special rights for indigenous peoples but “rather provide[s] a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples”, [[2]](#footnote-3) as shown in the following sections.

4. FPIC leading to mutual agreement resounds like the historic treaty-making powers of indigenous peoples and the important relationships between indigenous peoples and governments in particular. As concluded by Mr. Miguel Alfonso Martinez in 1997,[[3]](#footnote-4) “the process of negotiation and seeking consent inherent in treaty-making (in the broadest sense) is the most suitable way of, not only securing an effective Indigenous contribution to any effort toward the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict-resolution of indigenous issues at all levels with Indigenous free and educated consent.” He also referred to “a widespread desire on the Indigenous side to establish (or re-establish) a solid, new, and different kind of relationship, quite unlike the almost constantly adversarial, often acrimonious relations it has had until now with the non-indigenous sector of society in the countries where they coexist.”[[4]](#footnote-5)

 A. Self-determination

5. The right to self-determination is the fundamental human right on which FPIC is grounded. Historically, the right to self-determination, which is rooted in the decolonisation movement, was devised to ensure subjected nations and peoples recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.[[5]](#footnote-6) The right to self-determination was indeed construed as a pillar right, including other rights of peoples and nations to be free from coercion of any sort, to live in dignity, and to enjoy all rights equally, including the right to be responsible for their futures, to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programmes, and proposals that affect them or their resources.

6. The concepts of “being free”, “being fully informed”, “having the right to say yes or no”, and “having control over their own lands and resources” as nations or peoples are not therefore new in international human rights law.[[6]](#footnote-7) These concepts derive from the multiple constituting elements of the right to self-determination, on which the UNDRIP bases all its provisions on “Free, Prior and Informed Consent” as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples.

7. The international legal framework that conceptualised the right to self-determination paid particular attention to peoples and nations recovering from control over their lands and natural resources as an important constituent element of the right to self-determination.[[7]](#footnote-8) It is for this reason that FPIC is of particular relevance to lands and resources.

 B. Non-discrimination

8. FPIC is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against indigenous peoples. The Doctrine of Discovery,[[8]](#footnote-9) and other doctrines of dispossession, that justified the legal and policy framework for dispossessing indigenous peoples of their lands and annihilating their cultures was based on racial theories and principles that considered indigenous peoples as inferior human beings who could not possibly own lands and decide their own futures. The international indigenous rights movement in the 1960s and 1970s highlighted systemic racial discrimination and human rights violations faced by indigenous peoples, prompting a study on the issue by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[[9]](#footnote-10) This eventually led to the elaboration of the UNDRIP, as a dual framework combining remedial rights with ongoing rights.

9. As early as 1997, ten years before the adoption of the UNDRIP by the General Assembly, the Committee on the Elimination of Racial Discrimination (CERD) concluded that racial discrimination constituted the main underlying cause of most discrimination suffered by indigenous peoples. CERD affirmed that “discrimination against indigenous people’s falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”[[10]](#footnote-11) With a view to addressing the situation and its persisting consequences, CERD pointed specifically at “consent” as a human rights norm seeking to negate false doctrine and dismantle conceptual structures that dispossessed and disempowered indigenous peoples. CERD called 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”[[11]](#footnote-12). With specific reference to lands and resources, CERD called upon, “States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”[[12]](#footnote-13)

 III. FPIC as a human rights norm

A. Rationale

10. FPIC, as provided for in the UNDRIP, has three major rationales. First, FPIC seeks to restore to indigenous peoples control over their lands and resources, as specified in article 28. One scholar argues that, “FPIC has its origins in the native title principle, according to which native people have their right to lands based on their customary law and sustained connexion with the land”[[13]](#footnote-14), and another that “historical legal doctrine firmly establishes indigenous peoples' sovereign rights over ancestral lands and resources as a matter of long-standing international law”[[14]](#footnote-15).

11. Second, FPIC has the potential to restore indigenous peoples’ cultural integrity, pride and self-esteem long taken away and destroyed. Indigenous peoples’ cultural heritage, including human remains, taken without consent, are still held by others. This intention to restore indigenous peoples’ pride in their cultures and identities, including through the norm of FPIC, is reflected in article 11 of the UNDRIP. Third, FPIC has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties[[15]](#footnote-16), as reflected in articles 18 and 19 of the UNDRIP.

 B. Nature of FPIC as a human rights norm

12. The UNDRIP recognises collective rights, protects collective identities, assets and institutions notably culture, internal decision-making and the control and use of land and natural resources[[16]](#footnote-17), and FPIC, located therein, is intended to be received from the collective.[[17]](#footnote-18) The collective character of indigenous rights is inherent to their culture and is a bulwark against disappearance by forced assimilation.

13. FPIC operates fundamentally as a safeguard for the collective rights of indigenous peoples. It therefore cannot be held or exercised by individual members of an indigenous community. The UNDRIP provides for both individual and collective rights of indigenous peoples. Where the UNDRIP deals with both individual and collective rights, it uses the language that distinguishes both: “indigenous peoples and individuals have the right to…”. Understandably, however, none of the provisions of the UNDRIP dealing with FPIC (articles 10, 11, 19, 28, 29, 32) makes any reference to individuals. To “individualize” these rights would frustrate the purpose they are supposed to achieve.”[[18]](#footnote-19)

 C. Scope of FPIC

 a. FPIC, Consultation and Participation

14. FPIC is a manifestation of indigenous peoples’ right to self-determine their political, social, economic, and cultural priorities. Therefore, FPIC is wider in scope than, and must be differentiated from, other terms in the UNDRIP including “participation” and consultation,” upon which we elaborate below. ILO Convention 169 also differentiates “consultation” from “participation”, which are cornerstone concepts of this international instrument.[[19]](#footnote-20)

15. States’ obligations under Article 19 to “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” should consist of a qualitative process of dialogue and negotiation, with consent as the objective,[[20]](#footnote-21). This Article envisions neither a single moment nor action but a process of dialogue and negotiation over the course of the project/proposal, from planning to implementation and follow-up.[[21]](#footnote-22) The UNDRIP’s use of the combined terms “*consult and cooperate*” denotes a right of indigenous peoples to influence the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes[[22]](#footnote-23) or merely to have their views heard on measures affecting them.[[23]](#footnote-24) It should also include the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.

16. Former Special Rapporteur on the Rights of Indigenous Peoples James Anaya (“Former UNSR Anaya”) has underscored, “the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.”[[24]](#footnote-25) Consultation will also often be the starting point for seeking FPIC under articles 10 and 29.[[25]](#footnote-26)

17. The right of indigenous peoples to participate in decision-making is provided for separately in article 18 of the UNDRIP. This provision of the UNDRIP seeks to achieve two objectives. First, correcting *de jure* and *de facto* exclusion of indigenous peoples from public life or decision-making processes due to many factors, including prejudiced views, low level of education, inaccessibility to citizenship or identification documents, non-participation in electoral processes and political institutions. Second, the right to participation of indigenous peoples seeks to revitalise and restore indigenous peoples’ own decisions-making and representative institutions that were also either disregarded or abolished.

18. The Human Rights Committee (HRCttee) has also elaborated on indigenous peoples’ right to participate as separate from consultation: “...participation in the decision-making process must be effective, which requires not mere consultation ...”[[26]](#footnote-27) The ILO supervisory bodies have underlined the interconnectedness of the concepts of consultation and participation.[[27]](#footnote-28) Participation connotes more than mere consultation and should include the development of initiatives by indigenous peoples. “In this sense, the intertwined concepts of consultation and participation are mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development”.[[28]](#footnote-29) It has been shown that there is a particularly low risk of indigenous peoples’ strong opposition or “veto” in a national context where they enjoy an effective right to participation in all decision-making.

 b. Constituent elements of FPIC

19. A consultation process leading to consent, as provided for by UNDRIP, should be ***free****.* The term “free” is understood as addressing both direct and indirect factors that can hinder indigenous peoples’ free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur:

* The context or climate of the process should be free from intimidation, coercion[[29]](#footnote-30), manipulation[[30]](#footnote-31) and harassment[[31]](#footnote-32) ensuring that consultation process does not limit or restrict indigenous peoples access to existing policies, services and rights;
* Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalisation[[32]](#footnote-33), violence towards indigenous peoples[[33]](#footnote-34) or prejudiced views towards them;
* Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs, and protocols, with attention to gender and representation of other particular groups within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them.[[34]](#footnote-35) They should therefore enjoy the freedom to resolve international representation issues without interference;
* Indigenous peoples should have the freedom to guide and direct the process of consultation: indigenous peoples should have the power to determine how to consult and the course of the consultation process. This includes, being consulted when devising the process of consultation per se and having the opportunity to share and use their own protocols on consultation where available. They should exert some control over the process and should not feel compelled to get involved or continue;
* Indigenous peoples should have the freedom to set their expectations, contribute to defining methods, timelines, locations, assessment and evaluation intervals.

20. If these precautions and measures are not taken or respected, it may call into question the legitimacy of the consultation process. A consultation with the objective of consent should be ***prior***to the proposal*.* The Inter-American Court of Human Rights in the Saramaka case uses the terms “early stage” and “early notice”[[35]](#footnote-36). To that end, the *prior* component of FPIC should entail:

* Involving indigenous peoples at an early stage: Consultation should be undertaken as early as conceptualisation and design phases and not launched at a late stage in a project’s development, when crucial details are already decided upon[[36]](#footnote-37); and
* Providing the time necessary for indigenous peoples: to absorb, understand, analyse information and the time necessary to allow indigenous peoples to undertake their own decision-making processes.[[37]](#footnote-38)

21. Consultation in the FPIC context should be ***informed,*** implying:

* Qualitative and quantitative elements of information to indigenous peoples: information that is objective, accurate, and clear;
* Packaging or format of the information should be presented in a manner and form understandable to indigenous peoples, with translation services and in a language that they understand; consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organisation of the indigenous peoples concerned;[[38]](#footnote-39)
* The substantive content of the information should include, “the nature, size, pace, reversibility and scope of any proposed project or activity”; the reasons for the project; the areas to be affected; social environmental and cultural impact assessments; and the kind of compensation or benefit sharing schemes involved;[[39]](#footnote-40) and all of the potential harm and impacts of a proposed activity.[[40]](#footnote-41)
* Adequate resources and capacity for indigenous peoples’ representative institutions or decisions-making mechanisms, while not compromising their independence[[41]](#footnote-42). Indigenous peoples’ representative institutions or decision-making processes must be enabled to rise to technical challenges, including if necessary, capacity building initiatives prior or parallel to the process of consultation. For example, the Australian Referendum Council recommended to the Australian government proposals designed by ATSI peoples during 13 regional dialogues and a national Indigenous constitutional convention in May 2017, proposing a new First Nations representative public institution called, "The Voice to the Parliament" based on articles 18 and 19 of the UNDRIP.[[42]](#footnote-43) Also, in two cases before the Supreme Court of Norway (Nesseby/Ungjarga and Jovsset Ante Sara), the Court referred to the consent provided and participation of the Sámi Parliament as support for its decision that national legislation was in accordance with international law on indigenous rights, including the UNDRIP, the ICCPR, CESCR and C169.[[43]](#footnote-44)

22. Establishing who can represent indigenous peoples may causes difficulties. The UNDRIP is clear that States and third parties should consult and cooperate with indigenous peoples, “through their [indigenous peoples] own representative institutions” (article 19 and 32). All parties should ensure representation from women, children[[44]](#footnote-45), youth, and persons with disabilities and efforts should be made to understand the specific impacts on them.[[45]](#footnote-46) States should be mindful of situations where indigenous peoples have lost their decision-making institutions, where communities have been dispersed, dispossessed of land and/or relocated, including to urban areas, as well as groups that remain in voluntary isolation[[46]](#footnote-47). These situations may demand assistance by the State to rebuild their capacity to represent themselves appropriately. Further exploration may also be required of States or third parties in ensuring that institutions supporting indigenous peoples and claiming to represent them are so mandated. Failure to ensure legitimate representation can undermine any consent received.

 D. Consent

23. As the Former UNSR Anaya has stated: “consent is not a free-standing device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a yes to a predetermined decision.”[[47]](#footnote-48) In our view, this means that consent can only be received for proposals when it fulfills the three threshold criteria of having been *free, prior* and *informed*, and is then evidenced by an explicit statement of agreement.

24. Consent is a key principle that enables indigenous peoples to exercise their right to self-determination, including development that comprises control or otherwise affects their lands, resources and territories. Within such an understanding, indigenous peoples are considered to engage with and are entitled to give or withhold consent to proposals that affect them.

25. A “yes” or “no” by indigenous peoples is a result of their assessment of their best interests with regard to a proposal. An indigenous peoples’ yes provides an important social licence and favourable environment to any actor operating on and around their lands, territories and resources, as many studies and research have shown, including by the private sector[[48]](#footnote-49). An indigenous peoples’ “no”, can occur in a number of situations and for various purposes or reasons, all guided by the overriding goal of ensuring that indigenous peoples choose what is best for themselves and their future generations.

* A “no” by indigenous peoples can result from an assessment of the proposal and conclusion that it is not in their best interests. An affirmative “no” or “withholding of consent” expresses the indigenous peoples’ opposition to the project and is expected to convince the other party not to take the risk of proceeding with the proposal. On the one hand, commentators have noted that the UNDRIP does not expressly provide indigenous peoples with a “veto” right. Yet, a number of countries and stakeholders have endorsed a policy line not to proceed following a “no” by indigenous peoples. The Global Compact guide on the UNDRIP advises its members not to proceed with a concerned project after the “withholding of consent” by indigenous peoples. A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples’ moves into a legal grey area and exposes itself to judicial review and other types of recourse mechanisms, potentially including international, regional, and national tribunals, and by indigenous peoples themselves;
* A “no” can also represent an indigenous peoples’ request to put the process on hold because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the pre-consent constituent elements of FPIC (free, prior and informed). An indigenous community can for instance require that its representative institutions are trained on specific issues before continuing negotiations and arriving at a decision. An indigenous community can also issue a temporary or interim “no”, requiring certain pre-conditions for its full and effective contribution to the process or that a particular climate of intimidation or harassment is ended before continuing an FPIC process. Such a “no” can also mean that the concerned indigenous peoples seek adjustment or amendment to the proposal, including even suggesting an alternative proposal;
* A “no” by indigenous peoples can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, arrested, and even being killed for resisting “trap-like” consultations offers are numerous. [[49]](#footnote-50) While these situations may damages other parties and stakeholders, including the private sector, these parties should not “blame” indigenous peoples for trying to protect their lives, lands, and resources. On the contrary, member States and other actors should work to recognize indigenous peoples’ rights and improve opportunities for participation and consultation, toward the conditions that may facilitate FPIC.

26. As one can see, an indigenous peoples’ “no”, which is often branded as a destructive or unwarranted “veto right”, can be a positive mechanism for democratic and inclusive governance. The withholding of consent by indigenous peoples can be of critical importance to the ultimate success of a proposal or project. FPIC seeks to re-set the relationship between States and indigenous peoples, grounded in rights, common objectives and trust. Indigenous peoples’ consent should be given “in accordance with international human rights standards” (article 34, UNDRIP) and particular attention “to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities”, including in the elimination of all forms of discrimination and violence against indigenous children and women” (article 22, UNDRIP).

27. Assuming the process of obtaining FPIC has been carried out in line with the UNDRIP, the issue of whether indigenous peoples have a “veto”, a concept not contained in the UNDRIP, to prevent or impede measures or projects, would be unlikely to arise. Where indigenous peoples effectively and meaningfully participate in decision-making processes and their rights, concerns and future goals are taken on board by the State, it will be easier to reach consent on specific measures or projects affecting them. On the other hand, particular caution should be taken regarding indigenous peoples in voluntary isolation or of recent contact, including the non-imposition of contact and the obligation to protect their territories, natural resources and lives.[[50]](#footnote-51) Arguments on whether indigenous peoples have a “veto” only serve to detract from and undermine the legitimacy of the FPIC concept.[[51]](#footnote-52) In the case of indigenous peoples in voluntary isolation, the decision and expression not to be in contact or not to have constant interaction with other societies and the government can be an expression of non-consent. States should respect their will and are obliged to protect their lives through the protection of their territories and natural resources.[[52]](#footnote-53)

28. If indigenous peoples choose to say “yes” to a project, consent should be consistent with indigenous peoples’ own laws, customs, and protocols as well as best practices, including representation by legal counsel whenever possible and/or as required by law. In many, if not all, instances, consent must be recorded in a written instrument, negotiated by the parties, and signed affirmatively by a legitimate authority or leader of the relevant indigenous peoples, which may of course include more than one group (see para… below). Full understanding by indigenous peoples must be ensured and additional measures should be taken by the State in cases involving indigenous peoples of recent contact.

 E. Operationalization of FPIC

 a. When is FPIC required?

29. The UNDRIP contains five specific references to FPIC (articles 10, 11, 19, 29, 32) providing for a non-limitative list of situations when FPIC should apply. As a general matter, FPIC is required for adoption and implementation of “legislative or administrative measures, and …any project affecting [indigenous peoples] lands, territories and other resources” (article 19, 32). It also specifically applies in instances of relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (article 10, 29).

30. In Article 32, the UNDRIP speaks to the role of FPIC in the realm of natural resource development. This provision on FPIC is particularly importantly given the well-known risks and impacts of extractive industries on indigenous peoples.[[53]](#footnote-54) As stated by the Former UNSR Anaya, the general rule, in the case of projects involving the extractive industries within the territories of indigenous peoples is that the FPIC of indigenous peoples is *required*. Indigenous peoples’ consent may also be required when extractive activities otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights.[[54]](#footnote-55)

 b. The proportionality principle

31. In several articles, the UNDRIP calls for FPIC regarding matters, projects, or issues that “affect” indigenous peoples. This concept is not limited to matters that affect indigenous peoples exclusively. To the contrary, matters of broad societal application “may affect indigenous peoples in ways not felt by others in society[[55]](#footnote-56)”. Measures and projects will be considered to “affect” indigenous peoples to the extent that FPIC will be *required* under articles 19 and 32, in matters of “fundamental importance to their rights, survival, dignity and well-being”. Relevant factors in this assessment include: the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities[[56]](#footnote-57) and historical inequities faced by the indigenous peoples concerned.[[57]](#footnote-58)

32. The perspective of the indigenous peoples concerned on the potential broader impact of the decision is the starting point for assessing whether a measure/project affects indigenous peoples[[58]](#footnote-59). Indigenous peoples should have a major role in establishing whether the measure/project affects them at all and if it does the extent of the impact.Indigenous peoples may highlight possible harms that may not be clear to the State/project proponent, and may suggest mitigation measures to address those harms.[[59]](#footnote-60)

33. As to impact, if a measure/project is likely to have a *significant, direct impact*, on indigenous peoples’ lives or land, territories, or resources, then consent is required [[60]](#footnote-61). This view is supported by the Human Rights Committee (HRCttee)[[61]](#footnote-62), which uses the language “substantive negative impact” and the Committee on Economic, Social and Cultural Rights (CESCR). Both have linked the issue of FPIC to the nature and the effects that a proposed initiative will have on indigenous peoples treaty rights, in line with the jurisprudence of the IACrtHR[[62]](#footnote-63) and the Africa Court[[63]](#footnote-64). Assessment of the impact requires consideration of the nature, scale, duration, and the long-term impact of the action eg. damage to community lands or harm to the communities cultural integrity.

34. The IACrtHR and the African Court also share the view that in the case of large-scale developments or investment projects, States parties have a duty not only to consult with indigenous peoples but also to obtain their “free, prior and informed consent”. Other projects *requiring* FPIC and tending to have “adverse impacts” as defined by the International Finance Corporation (IFC), Performance Standard 7, includes: projects located on lands, or natural resources on lands, subject to traditional ownership or under customary use; projects significantly impacting on critical cultural heritage of indigenous peoples or using cultural heritage, including knowledge, innovation or practices for commercial purposes.[[64]](#footnote-65)

35. These principles are supported by a number of domestic court decisions. An expansive view of consent was recently taken by the Supreme Court of Canada in the case of Tsilhqot’in Nation v. British Colombia.[[65]](#footnote-66) As a general principle, the Court decided that once the right of an indigenous community to control a portion of land has been recognised, no use of that land will be permitted without the *consent* of that community.[[66]](#footnote-67) The Constitutional Court of Colombia recognises three situations in which *consent* is mandatory: displacement of indigenous peoples; the storage of toxic waste; and when the existence of the group is put at risk (remains undefined).[[67]](#footnote-68) The Constitutional Court of Bolivia has recognised similar situations as warranting consent, as established by the IACrtHR[[68]](#footnote-69). The need for *consent* in the case of large-scale development projects on indigenous lands was generally agreed by the Constitutional Court of Colombia.[[69]](#footnote-70) The Supreme Court of Belize has made express references to FPIC, including article 32 of the UNDRIP, ultimately finding that the failure to obtain the latter’s *consent* prior to granting the relevant concessions and permissions was unlawful.[[70]](#footnote-71)

36. In accordance with article 46, para. 2, any limitation of rights under the UNDRIP must be subject to limitation by the State[[71]](#footnote-72); necessary and proportionate for the purpose of achieving the human rights objectives of the society as a whole and non-discriminatory.[[72]](#footnote-73) As Former UNSR Anaya has said: “No valid public objective is found in mere commercial purpose, private gains or revenue-raising objective”[[73]](#footnote-74). Given the nature of the impact of large-scale development projects on the rights of indigenous peoples, it will often be difficult to justify such projects under these permissible restrictions.

37. The burden of proof is on the State to demonstrate that the decision to pursue the activity meets these exceptional criteria and thus consent is not required in matters that may affect indigenous rights. In the case of Tsilhqot’in Nation v. British Colombia, the Supreme Court of Canada held that consent may only be overridden in strict circumstances when the government can demonstrate that: it has discharged its procedural duty to consult; the action is aimed at pursuing an objective that appears compelling and substantial, from the perspective of the broader public and the indigenous community; the action will not substantially deprive future generations of an aboriginal group of the benefits of their land; and the principle of proportionality applies.[[74]](#footnote-75)

38. Any decision to limit indigenous peoples’ rights within the exceptional circumstances of Article 46 must be accompanied not only by necessary safeguards including redressing balance of power issues, impact assessments, mitigation measures, compensation, and benefit-sharing, but also by remedial measures taking into account any rights violations. The latter has been referred to in the Saramaka case, as well as CERD, and the African Court in Endorois, which stated that benefit-sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the community. Of course in some cases, including injuries to human life, sacred sites, and cultural practices, it may be difficult or impossible to put a financial valuation on rights violations. Any tensions which may arise within indigenous communities in the process of seeking FPIC should be resolved by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, through their own representative institutions.

39. Given that the pursuit of an activity/measure that affects indigenous peoples may result in a violation of their human rights, there should be a possibility for judicial or administrative review in the event that indigenous peoples wish to challenge that decision.[[75]](#footnote-76) Such judicial/administrative review should be based on indigenous peoples’ rights in the UNDRIP, including their rights to self-determination and effective remedies[[76]](#footnote-77), and their rights under human rights treaty law, regional and domestic law, and indigenous peoples’ own laws, customs, and protocols.

 c. Documenting, monitoring, reviewing and recourse mechanism for FPIC

40. FPIC should be documented, capturing the essence of agreement reached by the concerned parties, in accordance with indigenous peoples’ customary norms and traditional methods of decision-making. Agreement does not necessarily mean “yes” to a proposal; it should capture the essence of whatever the parties discussed, including diverging opinions and conditional views. Guidelines and a model by either States or private actors should not prevail over indigenous peoples’ own community protocols or traditional practices of capturing or recording agreements that differ from community to community. The Former UNSR Anaya has indicated that, “…measures to safeguard against or to mitigate environmental and other impacts that could adversely affect the rights of indigenous peoples in relation to their territories are an essential component of any agreement”[[77]](#footnote-78).

41. Forms of consent may include, for example, a “Memorandum of Agreement,” “Memorandum of Understanding,” or another form of contract that is satisfactory to the indigenous peoples. Translation services must be provided where needed. Indigenous peoples must have the opportunity, moreover, to provide consent to each relevant aspect of a proposal or project. A generalized or limited statement of consent that, for example, does not expressly acknowledge different phases of development or the entire scope or impact of the project, will not be considered to meet the standard for consent.

42. Forms of consent should include detailed statements of the project, its duration and potential impacts on the indigenous peoples (including their lands, livelihoods, resources, and cultures); provisions for mitigation, assessment, and reimbursement for any damages to those resources; statements of indemnification of indigenous peoples for injuries caused to others on their lands; methods and venues for dispute resolution; detailed benefit-sharing arrangements (including investment, revenue sharing, employment, infrastructure and so on); and a timetable of deliverables, including opportunities to negotiate continuing terms, licenses, and so on. For example, if a project envisions a leasehold between the indigenous peoples and a company or state, the indigenous peoples should have regular opportunities to revisit the terms and pricing of such a leasehold per changes in the market. As a matter of best practices, we recommend that any form of consent include a detailed description of the process of notice, consultation, and participation that preceded the consent.

43. As a dynamic process, the implementation of FPIC should also be monitored and evaluated regularly to ensure it continues to serve its purpose as a safeguard of indigenous peoples’ rights, including their self-determination. United Nations bodies have indicated that such agreement must “include mechanisms for participatory monitoring”[[78]](#footnote-79). The ILO Committee of Experts underlines the need for “periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, should be undertaken to continue to improve their effectiveness.”[[79]](#footnote-80) The implementation of FPIC should also include accessible recourse mechanisms for disputes and grievances, devised with effective participation of indigenous peoples including judicial review.

 IV. Review of FPIC Practices

44. The UNDRIP and C169 are complementary and mutually supportive. While C169 is a binding international instrument dealing explicitly with the right of indigenous peoples, the UNDRIP is a UN General Assembly Resolution that has been endorsed by 148 countries across the world: both are cited by judicial and quasi-judicial bodies. The concept of FPIC may be informed by but cannot be equated with similar concepts in other treaties, including C169, which has a limited number of ratifications[[80]](#footnote-81). The consultation and cooperation requirement of FPIC under the UNDRIP goes beyond consultation, as currently interpreted by some States and others, particularly in the Latin America Region, where the ILO is most widely ratified[[81]](#footnote-82). This includes a requirement for FPIC in a number of additional situations to that of C169, like large-scale development projects.[[82]](#footnote-83) As emphasized by the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz (“UNSR Tauli-Corpus”), following a visit to Guatemala, “the compliance with the obligations of ILO Convention 169 is not limited to the regulation of the right to consultation, but requires the application of the full range of rights affirmed in that instrument.”

45. The UNDRIP, including its FPIC requirements, is founded on the right to self-determination, which was not necessarily at the heart of C169 when drafted in 1971. While C169 contains different wording from FPIC, elements of consent requirements are present in C169,[[83]](#footnote-84) which would not preclude a substantive FPIC-driven approach.[[84]](#footnote-85) As expressed by the HRCttee, the Covenant “should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present–day conditions, noting that, “the protection of human rights evolves.[[85]](#footnote-86) A similar approach applied to C169 might avoid accusations that it’s narrow interpretation is not entirely in line with the needs of indigenous peoples, the rights-holders.

46. As stated by the UNSR Tauli-Corpus, C169 “must be interpreted in accordance with other international obligations of Guatemala in relation to the rights of indigenous peoples, in particular the standards contained in the United Nations Declaration on the Rights of Indigenous Peoples and in the jurisprudence of the Inter-American Court of Human Rights”.[[86]](#footnote-87) The interpretation of C169 could be aligned with the emerging consensus of human rights bodies on FPIC as imposing both procedural and substantive requirements, including the emerging consensus in international law that large scale development projects affecting indigenous peoples will often trigger FPIC requirements.

47. In the private sector, FPIC is developing into an international standard for companies operating on indigenous lands. First Peoples Worldwide published, the “Indigenous Rights Risk Report”[[87]](#footnote-88), finding inter alia that 89% of the projects assessed have a high or medium risk exposure “to indigenous community opposition or violations of indigenous peoples rights” and that “Governments that disregard their commitments to UNDRIP (often with the justification that they are obstacles to development) actually propagate volatile business environments that threaten the viability of investments in their countries”. Many entities such as extractive industries are aware of these risks inherent in not soliciting FPIC and have endeavoured to create their own FPIC protocols.

48. There are numerous publications outlining the business case for FPIC[[88]](#footnote-89) and an increase in policy commitments to FPIC by companies between 2012 and 2015: a report from Oxfam concluded that, “extractive industry companies are increasingly seeing the relevance of FPIC in their operations”.[[89]](#footnote-90) In a guide for businesses by the UN Global Compact, “Consent can be understood as a formal documented social license to operate. Indigenous peoples have the right to give or withhold consent, and in some circumstances, may revoke their consent previously given”.[[90]](#footnote-91) Thus, as an example, it is increasingly common for public corporations and private industry to offer to negotiate agreements with First Nations in Canada. Between 1975 and 2015, First Nations entered into formal “Impact Benefit Agreements” in respect of 198 mining projects in Canada. Sometimes however these are agreed upon in situations of an unwanted project to which First Nations believe they cannot object.

49. One third of the Sustainable Development Goals (SDGs) targets are linked to the rights in the UNDRIP[[91]](#footnote-92) and a number of them have been connected to FPIC.[[92]](#footnote-93) In its Voluntary National Report, Malaysia referred to SDG 15 (Life on Land), in its aim to include indigenous and local communities in the management of natural resources, and empowering them to give or withhold consent to proposed projects that may affect their lands. Indigenous peoples demand the recognition of FPIC in the implementation of the SDGs to address their distinct circumstances with a view to ensuring that “no one is left behind”.

50. The Convention on Biological Diversity’s article 8 (j) of the Convention, which refers to access to traditional knowledge being subject to “approval and involvement of the holders of traditional knowledge”, has been consistently interpreted as “prior and informed consent”, and “free prior and informed consent”, as substantiated in the Akwé: Kon Guidelines. The Nagoya Protocol, a legally binding protocol, establishes that access to traditional knowledge associated with genetic resources, is based on “prior informed consent” or “approval and involvement”, and on an equitable sharing of benefits. Its governing body includes two indigenous representatives on its compliance committee. The Green Climate Fund (GCF), an implementing mechanism of the Paris Agreement on Climate Change, established within the framework of the United Nations Framework Convention on Climate Change (UNFCCC) to assist developing countries in adaptation and mitigation practices to counter climate change, has developed its own interpretation of FPIC with general language on the UNDRIP.

51. Performance Standard 7 adopted by the International Finance Corporation (IFC)[[93]](#footnote-94) in 2012, conditions funding of the private sector, on documenting consent in certain circumstances and implying that its implementation must be consistent with human rights.[[94]](#footnote-95) The receipt of FPIC is also one of the nine fundamental principles guiding engagement with indigenous peoples by the International Fund for Agricultural Development (IFAD). The World Bank’s new Environment and Social Standard 7 (ESS7), adopted in August 2016, which came into effect in 2018, is more aligned with a human rights based approach to consultation than its predecessor (Operational Policy 4.10). Borrowers should carry out consultations with indigenous peoples’ representative bodies and organizations (e.g., councils of elders or village councils, or chieftains). This links consultation to the grass-roots indigenous organizations whose lands and resources might be adversely affected.[[95]](#footnote-96) The Equator principles is a “risk management framework” that has been adopted by 80 financial institutions and its edition in 2013 expressly requires that “[p]rojects with adverse impacts on indigenous peoples will require their … FPIC”.[[96]](#footnote-97)

52. However, despite the recognition of FPIC by financial institutions and the private sector the experience of indigenous peoples show that problems remain with its implementation. The process of seeking FPIC is, at times, viewed as merely procedural in nature, rather than focused on human rights. It is sometimes seen as a good will gesture to indigenous peoples and can lead to serving third party interests rather than the interests of the rights holders. A debate around the “Green Fund’s” first project in Peru in 2015, “PROFONANPE”, is a good example as it suggests that there is a lack of understanding about the operative implications of the implementation of free, prior and informed consent and issues related to full and effective participation and consultation of indigenous peoples.[[97]](#footnote-98) Questions also remain on the application of FPIC as now recognised in World Bank Performance Standard 7. It is hoped that the implementation of this policy does not lower the level of protection achieved for indigenous peoples.[[98]](#footnote-99)

53. Some concerns have been raised by some of the many guidelines on FPIC, including that language used in these policies is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin (at the earliest stage possible prior to activities commencing in indigenous territories). Sometimes these guidelines do not address the issue of indigenous peoples wishing to define their own FPIC process and to control aspects of the impact assessments. In addition, in some there is ambiguity in the event that consent is not forthcoming.[[99]](#footnote-100)

54. To ensure that financial institutions and the private sector can better align their policies with the rights protected in the UNDRIP, there is a need to: develop and adopt stringent social and environmental safeguards; an indigenous peoples’ policy based on international human rights standards and the UNDRIP; effective oversight and compliance mechanisms; and ensure that indigenous peoples are involved throughout the process. As States are the duty bearers in implementing indigenous peoples’, rights their human rights obligations cannot be delegated to a private company or other entity[[100]](#footnote-101) and they remain responsible for any inadequacy in the process.

55. Indigenous peoples are also establishing their own protocols for FPIC, particularly in Latin America, including in Belize, Bolivia, Brazil, Colombia, Guatemala, Honduras, Paraguay, and Suriname.[[101]](#footnote-102) In some States, these practice has developed from a lack of State regulation, failed attempts at regulation, or the growing judicialization of cases due to the absence of consultation and FPIC and lack of institutional capacity to fully understand and respect indigenous peoples’ rights.[[102]](#footnote-103) These protocols are an important tool in preparing indigenous peoples to engage in a consultation or FPIC process, setting out how, when, why and whom to consult. The establishment of these protocols is an instrument of empowerment for indigenous peoples, closely linked to their rights to self-determination, participation and the development and maintenance of their own decision-making institutions.[[103]](#footnote-104) Also the right to be consulted “through their own representative institutions”, mentioned in several articles relating to FPIC, suggests the importance that States should give them and the seriousness with which they should be recognised. In some cases, these protocols have been recognised by the State (egs (Brazil)[[104]](#footnote-105) and others by the World Bank (Belize).[[105]](#footnote-106) In January 2018, a Federal Court in the State of Amazonas in Brazil demanded compliance of FPIC for the Waimiri Atroari people regarding any law or development plan affecting them as well regarding military activities within their lands.[[106]](#footnote-107)

56. Many States have started to adopt legislation, practices, and guidelines on consulting and obtaining consent. In the Latin America region, States have either enacted or are discussing enacting laws on consultation with indigenous peoples. A very recent general mechanism has recently been established by Costa Rica. Assuming that the necessary measures will be taken to ensure its implementation, it is hoped that it could be used as a good practice for other States [[107]](#footnote-108). There are also laws, practices or guidelines in Venezuela, Ecuador, Chile, Mexico, Argentina, Guatemala, Peru, the Philippines, Finland, Canada and the USA, to name but a few. Some States are in the process of developing protocols on FPIC, including Suriname, Paraguay, Honduras, the Democratic Republic of the Congo, Chile, New South Wales in Australia. The development of some of these laws has not been without criticism.[[108]](#footnote-109) EMRIP’s Advisory Note submitted to Finland and the Sami Parliament, after its first mission under its expanded country engagement mandate highlighted some of the requirements that such legislation should contain to ensure FPIC, including adequate resources, equality, and a mechanism to monitor agreements.[[109]](#footnote-110) During its technical cooperation mission to Mexico City, the Expert Mechanism welcomed the inclusion of free, prior and informed consent in the City’s Constitution, adopted in January 2017.

57. In Colombia, there is no law regulating FPIC.[[110]](#footnote-111) However, between 1991 and 2012, around 156 consultations have taken place[[111]](#footnote-112) pursuant to obligations laid down by the Constitutional Court (see above…), three out of 10 cases have been opposed by indigenous peoples[[112]](#footnote-113) and 95% of projects and development activities reach favourable outcomes.[[113]](#footnote-114) Also, South Africa does not have a mechanism, but consultation and consent procedures have been successfully pursued through the Nagoya Protocol in the Rooibos case.[[114]](#footnote-115) In the Russian Federation, “Ethnological impact assessments” are carried out prior to the decision-making on planned economic and other activity.[[115]](#footnote-116)

58. However, there are concerns about some of the legislation and practices on FPIC emerging around the world. These include that some consultations laws have been elaborated, quite ironically and problematically, without consultation with indigenous peoples. Additional concerns include a narrow focus on obligations under C169 and not the UNDRIP or regional or international human rights obligations; only focus on the procedural steps of a consultation process, without ensuring the genuine participation and protection of the rights of affected indigenous peoples; and fail to address the structural concerns that violate the rights of indigenous peoples. Often, the right to consultation has not been translated into a law guaranteeing its enforcement, and the requirements of what constitutes consent is not clarified. Indigenous peoples also raise concerns about “consultation fatigue”, “manufactured” consent, limits put on consultation, lack of a common understanding of international standards relating to FPIC, the increase in encroachments of extractive industries and lack of structural change to ensure FPIC at the institutional level.[[116]](#footnote-117) For these reasons, the need for mechanisms operationalization FPIC are becoming urgent. The absence of regulatory mechanisms defining how to carry out a consultation encourages contradictory interpretations of which measures and projects need to be preceded by consultation processes and which require consent.[[117]](#footnote-118)

59. National Human Rights Institutions play an important role in contributing towards the implementation of FPIC. As bodies acting independently from the government, some with an expertise in the area of indigenous peoples, they can and do fulfill many roles in the FPIC context. For example, in Argentina, the NHRI intervened in a project by ArSat co. telecommunications, where it had several roles including, as general coordinator of the whole process, facilitator, and guarantor controlling compliance with the legal framework. Its engagement included an open consultation process which overcame three years of roadblocks.[[118]](#footnote-119) In Venezuela, the NHRI promoted the application of prior consultation mechanisms like “Pdvsa”, ensures that the right to consultation is incorporated in legislation and carries out activities promoting the right to prior consultation.[[119]](#footnote-120)

Annex

 Expert Mechanism Advice No. 11 on indigenous peoples and free, prior and informed consent

* The United Nations is an important venue for facilitating FPIC in negotiations with states. To the extent that agencies including WIPO, UNESCO, UNDP, WHO and others encounter indigenous peoples’ issues, they are advised that the human rights expressed in the UNDRIP apply broadly in all of these settings. In particular, WIPO’s Intergovernmental Committee is currently in the process of negotiating several multilateral instruments on traditional knowledge, genetic resources, traditional cultural expressions, and other forms of intellectual and cultural property. In the negotiation and drafting of these instruments, WIPO and member states should reference the UNDRIP, and especially the norm of free, prior, and informed consent, with respect to the ownership, use, and protection of indigenous peoples’ intellectual property and other resources;
* States should observe the human rights approach to FPIC, including promoting capacity building to state authorities and officials, including judges and law makers;
* States should establish an appropriate regulatory mechanism/s at the national level, preferably at the constitutional/legislative level, including references to the UNDRIP, together with indigenous peoples, to hold consultations in situations where FPIC is required or FPIC is sought as the objective of the consultation.[[120]](#footnote-121) The establishment of such a mechanism itself necessitates a process of consultation in a context of trust and good faith, and should be accompanied by the development of adequate implementing institutions, employing well-trained officials and ensuring adequate funding. Such a mechanism could also act as an oversight mechanism;[[121]](#footnote-122)
* States should engage directly with indigenous peoples. When direct negotiations between indigenous peoples and private enterprises might be more efficient, companies must themselves exercise due diligence to ensure the adequacy of consultation procedures. States remain responsible for any inadequacy and should ensure measures are in place to oversee and evaluate procedures undertaken by business enterprises;
* States should establish pre-conditions for an effective free, prior and informed consent, including building trust, good faith, culturally appropriate methods of negotiation. The process should be formal and carried out with mutual respect;
* States should ensure that consent is always the objective of consultations and consultations should start at the planning phase (i.e. prior to the State/enterprise committing to undertake a particular project or adopting a particular measure such as the licensing of a project) so indigenous peoples can influence final decisions[[122]](#footnote-123). The measures to be consulted on should be clear to avoid, inter alia, immobilization by the State. Consultations should occur throughout the evolution of the project, entailing “constant communication between the parties”[[123]](#footnote-124) and should not be confused with public hearings for environment and regulatory statutes;[[124]](#footnote-125)
* States should ensure that all information, including about the potential impact of the project/measure is provided to indigenous peoples and presented in a manner and form understandable to them, culturally appropriate and in accordance with their inherent traditions and is independent. If necessary, it should also be presented orally and in indigenous languages;[[125]](#footnote-126)
* States should ensure that there is institutional capacity and political will within the State to understand the meaning and process to seek and obtain FPIC, including by respecting existing indigenous protocols;[[126]](#footnote-127)
* States should ensure that indigenous peoples have the resources and capacity to effectively engage in the processes by supporting the development of their own institutions, while not compromising the independence of those institutions (articles 4 and 5, UNDRIP). States and the private sector should promote and respect indigenous peoples own protocols, as an essential means of preparing indigenous peoples to enter into consultations with the State and for the smooth running of the consultations;
* States should ensure equality throughout the process and ensure that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations, establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice;[[127]](#footnote-128)
* States should engage broadly with all potentially impacted indigenous peoples, consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children[[128]](#footnote-129), youth, and persons with disabilities and bearing in mind that governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and those with disabilities;[[129]](#footnote-130)
* States should ensure that the FPIC process supports consensus building within the indigenous peoples’ community, and practices that might cause division should be avoided (including when indigenous peoples are in situations of vulnerability like economic duress). Special attention should be given in this regard to indigenous peoples representing distinct sectors in the community, including dispersed communities, indigenous peoples’ no longer in possession of land and/or who have moved to urban areas[[130]](#footnote-131) and groups in voluntary isolation;[[131]](#footnote-132)
* Indigenous peoples are encouraged to establish robust representative mechanisms, as well as laws, customs, and protocols for FPIC. At the start of a consultation process indigenous peoples should agree on and make clear, how they will make a collective decision, including the threshold to indicate when there is consent;[[132]](#footnote-133)
* States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural, and social), which should be undertaken prior to the proposal.[[133]](#footnote-134) Such impact assessments should be objective and impartial. In making such assessments, States should seek full knowledge of the indigenous peoples’ social, economic and political environment and evaluate the advantages and disadvantages to them;[[134]](#footnote-135)
* States should limit measures or projects, which may cause “significant harm” to indigenous people, including cumulative harm from competing land use forms, beyond which development projects may not be undertaken;[[135]](#footnote-136)
* States should establish procedures necessary to regulate, verify and monitor the consultation process ensuring that free, prior and informed consent, was sought and if consent was required was received;
* States should ensure that, when relevant, indigenous peoples are provided with redress (article 11, UNDRIP), “which may include restitution” and that indigenous peoples are able to make their own decision about the form of redress best able to restore and protect their rights. States should not limit redress to cash compensation or arbitrarily exclude the potential for return or restoration of lands.[[136]](#footnote-137) “Compensation should as far as possible take the form of lands and territories;”[[137]](#footnote-138)
* States should ensure that indigenous peoples who have unwillingly lost possession of their lands, or those lands have been “confiscated, taken, occupied or damaged without their free, prior and informed consent”, are entitled to restitution or other appropriate redress (article 28, UNDRIP). If direct financial benefits in the form of compensation are agreed upon they should accrue to indigenous peoples irrespective of whether or not they own the land or resources, for any adverse effects caused by the project.[[138]](#footnote-139) This may require amendments to legislation;
* States should ensure that any consent agreements are in writing and include inter alia impact mitigation, compensation, and an equitable distribution of the benefits from the project, joint management arrangements, grievance procedures and a dispute regulation mechanism with equal capacity of both sides.[[139]](#footnote-140)Access to justice for claims by indigenous peoples should be guaranteed;
* States should facilitate and support processes to draw up long-term development plans in collaboration and cooperation with indigenous peoples, including National Action Plans, as committed to by States in the Declaration at the World Conference on Indigenous Peoples;[[140]](#footnote-141)

1. See link for the submissions: …. [↑](#footnote-ref-2)
2. Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 (11 August 2008), para. 86. [↑](#footnote-ref-3)
3. “Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations”. [↑](#footnote-ref-4)
4. Para. 267. [↑](#footnote-ref-5)
5. UN General Assembly resolution 1514 (XV) of 14 December 1960. [↑](#footnote-ref-6)
6. General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources". Self-determination of peoples and sovereignty over natural wealth and resources, *Nicolaas Schrijve.* [↑](#footnote-ref-7)
7. Marion Mushkatt, the Process of Decolonization International Legal Aspects, in *University of Baltimore Law Review,* Volume 2, Issue 1 Winter 1972, pp. [↑](#footnote-ref-8)
8. E/C.19/2012/L.2: “The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples)”. [↑](#footnote-ref-9)
9. Martinez Cobo Study. [↑](#footnote-ref-10)
10. General Comment - (GR XXIII 51 concerning IPs adopted at the Committee’s 1235th Meeting, 1997). [↑](#footnote-ref-11)
11. Ibid. [↑](#footnote-ref-12)
12. Ibid. [↑](#footnote-ref-13)
13. Marcus, Colchester, 2017. [↑](#footnote-ref-14)
14. Anaya, Colorado Journal of International Environmental Law, Spring 2005. [↑](#footnote-ref-15)
15. A/HRC/EMRIP/2010/2. [↑](#footnote-ref-16)
16. The collective right to land has been recognised by both the Inter-American Court in Mayagna (Sumo) Awas Tingni vs Nicaragua, and the African Court in the Endorois case. [↑](#footnote-ref-17)
17. E/CN.4/Sub.2/AC.4/2005/WP.1. [↑](#footnote-ref-18)
18. Siegfried Weissner, “Rights and Status of Indigenous Peoples” Harvard Human Rights Journal, Vol. 12 Spring 1999, ISSN 1057-5057 pp. 120-121, [↑](#footnote-ref-19)
19. 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), para. 31. [↑](#footnote-ref-20)
20. A/HRC/18/42, para. 9 and Sarayaku v. Ecuador in Doyle pg 129. [↑](#footnote-ref-21)
21. RCA. [↑](#footnote-ref-22)
22. Rombouts. [↑](#footnote-ref-23)
23. EMRIP A/HRC/18/42. [↑](#footnote-ref-24)
24. A/HRC/12/34, 15 July 2009. [↑](#footnote-ref-25)
25. A/HRC/21/55, para. 8. [↑](#footnote-ref-26)
26. Poma Poma v Peru, CCPR/C/95/D/1457/2006. [↑](#footnote-ref-27)
27. ILO CEACR, General Observation on indigenous peoples, Observation 2010/81. [↑](#footnote-ref-28)
28. ILO guide 2010. http://www.ilo.org/wcmsp5/groups/public/@ed\_norm/@normes/
documents/publication/wcms\_205225.pdf. [↑](#footnote-ref-29)
29. Eg threatening the use of compulsory acquisition powers to coerce indigenous peoples to consent. [↑](#footnote-ref-30)
30. A/HRC/18/42, Ngurupai submission. [↑](#footnote-ref-31)
31. Barelli. [↑](#footnote-ref-32)
32. See UNSR, Tauli-Corpuz new report on the criminalization of human rights defenders. [↑](#footnote-ref-33)
33. Amnesty International submission. [↑](#footnote-ref-34)
34. Additional comments of the UNSR, Tauli-Corpus, on Honduras, 9 June 2017. [↑](#footnote-ref-35)
35. Saramaka case, para.133. [↑](#footnote-ref-36)
36. Amnesty International submission. [↑](#footnote-ref-37)
37. A/HRC/18/42. [↑](#footnote-ref-38)
38. A/HRC/18/42, E/C.19/2005/3, Barelli. [↑](#footnote-ref-39)
39. Saramaka case. [↑](#footnote-ref-40)
40. UN-REDD Guidelines. [↑](#footnote-ref-41)
41. Australia, RCA. [↑](#footnote-ref-42)
42. https://www.referendumcouncil.org.au/final-report. [↑](#footnote-ref-43)
43. <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-collecetive-rights-of-use-to-land-in-nesseby-finnmark/> and https://www.domstol.no/en/Enkelt-domstol/norges-hoyesterett/rulings/rulings-20171/order-to-reduce-reindeer-herd-was-not-a-violation-of-minority-rights-under-iccpr-article-27-or-echr-p1-1/. [↑](#footnote-ref-44)
44. See CRC, General Comment on Indigenous Children above. [↑](#footnote-ref-45)
45. EMRIP in A/HRC/18/42, Gunn, Métis, Uni Manitoba, AI, Guatemala State submission. [↑](#footnote-ref-46)
46. Constitution of Ecuador specifically protects this latter group but has not yet enacted legislation implementing it – NHRI Ecuador submission. [↑](#footnote-ref-47)
47. A/HRC/24/41. [↑](#footnote-ref-48)
48. Doyle. [↑](#footnote-ref-49)
49. Recent Global Witness report. [↑](#footnote-ref-50)
50. OHCHR guidelines, recent IACHR decision and UNSR, Tauli-Corpus. [↑](#footnote-ref-51)
51. Amnesty Submission. [↑](#footnote-ref-52)
52. http://periodicos.unb.br/index.php/ling/article/view/26661. [↑](#footnote-ref-53)
53. Former UNSR, Anaya, and UNSR, Tauli-Corpus, EMRIP HRC/C/2012/2. [↑](#footnote-ref-54)
54. A/HRC/24/41. [↑](#footnote-ref-55)
55. A/HRC/12/34, para. 43, A/HRC/21/55. [↑](#footnote-ref-56)
56. Saramaka case. [↑](#footnote-ref-57)
57. A/HCR/18/42 and A/HRC/21/55. [↑](#footnote-ref-58)
58. EMRIP. [↑](#footnote-ref-59)
59. Amnesty International. [↑](#footnote-ref-60)
60. A/HRC/21/55 and A/HRC/12/34, para. 47, and many other submissions. [↑](#footnote-ref-61)
61. Lansman and others v. Finland (CCPR/C/52/D/511/1992). In Poma Poma v. Peru

(CCPR/C/95/D/1457/2006), the Committee considered whether there was a “substantive negative impact” on the author’s enjoyment of her right to the cultural life on her community due to a water diversion which forced her and her community to abandon their traditional economic activity and found that the State action had “substantively compromised the way of life and culture of the author, as a member of her community”. [↑](#footnote-ref-62)
62. Saramaka case. [↑](#footnote-ref-63)
63. Endorois case. [↑](#footnote-ref-64)
64. International Finance Corporation (IFC) Performance Standard 7 (2012) on Indigenous Peoples. Cathal Doyle, Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent. (chpt 5). [↑](#footnote-ref-65)
65. 2014 SCC 44, [2014] 2 S.C.R. 256. [↑](#footnote-ref-66)
66. For more Canadian Supreme Court cases see AFN, Barelli. [↑](#footnote-ref-67)
67. Case T129 of 3 March 201, Colombia NHRI (“A” Status under the Paris principles), Barelli. [↑](#footnote-ref-68)
68. Case No. 2003/2010 R, 25 October 2010 and Barelli. [↑](#footnote-ref-69)
69. Case T-769/09, 29 October 2009, Case T-129, 11 March 2011, and Case t-376/12, 18 May 2012 and Barelli. [↑](#footnote-ref-70)
70. Claim No. 394, Decision 3 April 2014. [↑](#footnote-ref-71)
71. For example, not the right to be free from torture, which is an absolute right. [↑](#footnote-ref-72)
72. IACHR came to the same conclusion. [↑](#footnote-ref-73)
73. Anaya, State Sovereignty. [↑](#footnote-ref-74)
74. Barelli. [↑](#footnote-ref-75)
75. Amnesty International and Anaya Statement. [↑](#footnote-ref-76)
76. See Poma Poma in ft 61. [↑](#footnote-ref-77)
77. A/HRC/24/41 para.73. [↑](#footnote-ref-78)
78. Ibid. [↑](#footnote-ref-79)
79. General Observation of 2010 on indigenous peoples. [↑](#footnote-ref-80)
80. Australian submission – “While a number of multilateral treaties require States to consult, or otherwise engage with, indigenous peoples on matters that affect them, these requirements are specific to those treaties and they do not equate with the concept of FPIC in the Declaration. For example, Article 16 of the International Labour Organisation Indigenous and Tribal Peoples Convention 1989 requires that relocations of Indigenous and tribal peoples should only occur with their ‘free and informed consent’.” [↑](#footnote-ref-81)
81. UNSR, Tauli-Corpus, report on Guatemala and in Additional Comments on Honduras, 9 June 2017. [↑](#footnote-ref-82)
82. Rombouts. [↑](#footnote-ref-83)
83. Rombouts. [↑](#footnote-ref-84)
84. Doyle. [↑](#footnote-ref-85)
85. Judge v. Canada. [↑](#footnote-ref-86)
86. The UNSR, Tauli-Corpus made the same point in her report following her mission to Brazil: “consultations should be conducted to see their free, prior and informed consent in a manner that takes into account the specificities of each indigenous people, as affirmed in ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples and the Organization of http//www.firstpeoples.org.

 See for example the Foley-Hoag report and the Boreal Leadership Council report.

 AFN.

 UN Global Compact, The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples. American States draft American Declaration on the Rights of Indigenous Peoples.” [↑](#footnote-ref-87)
87. http//www.firstpeoples.org. [↑](#footnote-ref-88)
88. See for example the Foley-Hoag report and the Boreal Leadership Council report. [↑](#footnote-ref-89)
89. AFN. [↑](#footnote-ref-90)
90. UN Global Compact, The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples. United Nations Global Compact Office, 2013, p.29. Amnesty Intl. CHECK. [↑](#footnote-ref-91)
91. Danish Institute for Human Rights: http://nav.indigenousnavigator.com/images/Documents/Tools/Navigator\_UNDRIP-SDGs.pdf. [↑](#footnote-ref-92)
92. SDG 3 (Good health and wellbeing), SDG 6 (Clean Water and Sanitation), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation and Infrastructure), SDG 11 (Sustainably cities and Communities), and SDG 15 (Life on Land). [↑](#footnote-ref-93)
93. The World Banks Private sector arm. [↑](#footnote-ref-94)
94. Doyle. [↑](#footnote-ref-95)
95. Other international financial institutions and intergovernmental development agencies have

also incorporated free, prior and informed consent into their policies and programmes on indigenous peoples, including the United Nations Development Programme policy on indigenous peoples, the Food and Agricultural Organisation, the Inter-American Development Bank and the European Bank for Reconstruction and Development. [↑](#footnote-ref-96)
96. <http://www.eduator-principles.com/>. Fredericks. [↑](#footnote-ref-97)
97. http://www.forestpeoples.org/sites/fpp/files/publication/2015/12/briefingpaper-fpic-ippolicy\_0.pdf]. [↑](#footnote-ref-98)
98. <http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy>. [↑](#footnote-ref-99)
99. Doyle. [↑](#footnote-ref-100)
100. A/HRC/12/34. [↑](#footnote-ref-101)
101. <http://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2041&context=articles> OHCHR supported some of these processes leading inter alia to four autonomous protocols in Colombia following a process from 2015 to 2016. http: // [www.hchr.org.co/files/eventos/2017/Note-tecnica-protocolos-pueblos-etnicos.pdf](http://www.hchr.org.co/files/eventos/2017/Note-tecnica-protocolos-pueblos-etnicos.pdf).

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http://www.forestpeoples.org/sites/default/files/publication/2010/08/fpicsurinamemar07sp.pdf. [↑](#footnote-ref-102)
102. RCA, A/HRC/EMRIP/2010/2, Doyle. [↑](#footnote-ref-103)
103. A/HRC/EMRIP/2010/2. [↑](#footnote-ref-104)
104. The state and federal government are using the Wajãpi Protocol, in the case of the expansion of a non-indigenous settlement neighbouring the Wajãpi indigenous land in the state of Amapá. [↑](#footnote-ref-105)
105. Cristine Coc. [↑](#footnote-ref-106)
106. http://www.mpf.mp.br/am/sala-de-imprensa/docs/decisao-liminar-acp-waimiri-atroari-ditadura. [↑](#footnote-ref-107)
107. James Anaya in State Sovereignty and Vega. [↑](#footnote-ref-108)
108. UNSR, Tauli-Corpus, reports on Mexico, Peru, Honduras, and Guatemala. [↑](#footnote-ref-109)
109. Advisory Note of the EMRIP, Country Engagement Mission, Finland, 28 March 2018. [↑](#footnote-ref-110)
110. Garavito and Diaz. [↑](#footnote-ref-111)
111. Garavito and Diaz. [↑](#footnote-ref-112)
112. Gerber. [↑](#footnote-ref-113)
113. Colombia NHRI. [↑](#footnote-ref-114)
114. Lesle Jansen. [↑](#footnote-ref-115)
115. Russian Federation, submissions seminar in Chile. [↑](#footnote-ref-116)
116. Guatemala states that the problem, including in Guatemala, is that there is no mechanism/regulatory framework defining in concrete terms how to carry out a consultation. Aboriginal Land Council of NSW, Australia. [↑](#footnote-ref-117)
117. RCA. [↑](#footnote-ref-118)
118. NHRI, Argentina. [↑](#footnote-ref-119)
119. NHRI, Venezuela. [↑](#footnote-ref-120)
120. Amnesty International; A/HRC/21/55; the ILO Supervisory bodies - CEACR, General Observations on Convention No. 169, 2009 and 2011; RCA. [↑](#footnote-ref-121)
121. James Anaya, State Sovereignty. [↑](#footnote-ref-122)
122. A/HRC/21/55, Gerber on Sarayaku case. [↑](#footnote-ref-123)
123. Saramaka case. [↑](#footnote-ref-124)
124. Gerber. [↑](#footnote-ref-125)
125. A/HRC/21/55, Sarayaku case. [↑](#footnote-ref-126)
126. AFN. [↑](#footnote-ref-127)
127. James Anaya, State Sovereignty. [↑](#footnote-ref-128)
128. CRC, General Comment on Indigenous Children above. [↑](#footnote-ref-129)
129. A/HRC/18/42, Gunn, Métis, Uni Manitoba, Amnesty International, Guatemala submission. [↑](#footnote-ref-130)
130. Chile. [↑](#footnote-ref-131)
131. For example, the Constitution of Ecuador specifically protects this latter group but has not yet enacted legislation implementing it - NHRI Ecuador. [↑](#footnote-ref-132)
132. A/HRC/21/55, Australia. [↑](#footnote-ref-133)
133. Gerber, Saramaka, art. 7.3 ILO 169. [↑](#footnote-ref-134)
134. Uwa Constitutional Court Decision of Colombia, Christian Courtis, James Anaya, State Sovereignty and A/HRC/21/55. [↑](#footnote-ref-135)
135. See Advisory Note of the EMRIP, Country Engagement Mission, Finland, 28 March 2018. [↑](#footnote-ref-136)
136. Amnesty International. [↑](#footnote-ref-137)
137. CERD, General Recommendation. [↑](#footnote-ref-138)
138. James Anaya, State Sovereignty. [↑](#footnote-ref-139)
139. James Anaya, State Sovereignty, Honduras. [↑](#footnote-ref-140)
140. General Assembly resolution 69/2, annex, following the World Conference on the Rights of Indigenous Peoples in 2014. Amnesty International. [↑](#footnote-ref-141)