

# GLOBAL ISSUES AND FPIC

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# OUTLINE

- I. Overview of FPIC and global processes
  - International Human Rights Law
  - Perspectives of Indigenous Peoples on FPIC in the UN Declaration on the Rights of Indigenous Peoples (HRC 29 June 2006)
  - Other processes
- II. IFI policies on FPIC
- III. Operationalization
- IV. Conclusions

# Overview

- Indigenous peoples in many parts of the world are in the process of trying to renegotiate their relations with post-colonial Nation States and with the private sector operators seeking access to the resources on their lands.
- Using the language of international human rights law, treaty rights and inherent sovereignty they assert their right to self-determination in their dealings with governments and to free, prior and informed consent as expressed through their own representative institutions in dealing with the many other interests seeking access to their lands.

# International Human Rights Law

- International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- International Labour Organization's Conventions 107 and 169 on Tribal and Indigenous Peoples,
- African Charter on Human and Peoples' Rights,
- American Convention on Human Rights,
- UNESCO Declaration on Race and Race Prejudice

# Jurisprudence of International Treaty Bodies

- The jurisprudence of the international human rights committees, that review implementation of the main human rights instruments, interpret the recognition of collective rights and right to free, prior and informed consent as applying to indigenous peoples,
- Human Rights Committee, Committee on the Elimination of all forms of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights, Committee on the Rights of the Child, CEDAW ,etc.

# CERD

- *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.
- called upon states-parties to 'ensure that members of indigenous peoples have equal 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.

# Elements of FPIC

- In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general.
- Consent must be
  - ✓ freely given,
  - ✓ obtained prior to implementation of activities, and
  - ✓ be founded upon an understanding of the full range of issues implicated by the activity or decision in question;

# Definition of FPIC in the Philippines (IPRA, 1997)

- **Free** - from any external manipulation, interference coercion
- **Prior** – before project is approved either through EIA process or other licensing process
- **Informed** - obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community
- **Consent** - to be determined in accordance with their respective customary laws and practices;

# Article (3) Right to self-determination: UN Declaration on the Rights of Indigenous Peoples

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Indigenous peoples have the right of self determination. By virtue of that right they freely determine, their political status and freely pursue their economic, social and cultural development.

# UN Declaration on the Rights of Indigenous Peoples: **Article 10**

- ❖ **7 out of 46 Operational Articles of the UNDRIP refer to FPIC**

**Article 10:** Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without **the free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

# A11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous Peoples, with respect to their cultural, intellectual, religious and spiritual property taken without **their free, prior and informed consent** or in violation of their laws, traditions and customs.

## A26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

## A27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. **Indigenous peoples shall have the right to participate in this process.**

## A28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged **without their free, prior and informed consent.**
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

## A29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples **without their free, prior and informed consent.**

## A30

- Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or **otherwise freely agreed with or requested by the indigenous peoples concerned.**
- States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

# A31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

## A32

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 co-operate 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 their 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

# Other Processes

1. World Bank Commission on Dams Report
2. Extractive Industries Review Report
3. National Laws – e.g. IPRA; case studies done by Tebtebba
4. Working Group on Indigenous Populations (Legal Commentary on FPIC by Motoc and Tebtebba)
5. UN Permanent Forum on Indigenous Peoples  
International Expert Workshop on Methodologies of FPIC

# IFI Policies: ADB Policy on Indigenous Peoples

## Article 31:

Initiatives should be conceived, planned and implemented, to the maximum extent possible, with the **informed consent** of the affected communities, and include respect for indigenous peoples' dignity, human rights and cultural uniqueness."

## WB O.P. and B.P. 4.10

6. A project proposed for Bank financing that affects Indigenous Peoples requires:
  - a) screening by the Bank to identify whether Indigenous Peoples are present in, or have collective attachment to, the project area (see paragraph 8);
  - b) a social assessment by the borrower (see paragraph 9 and Annex A);
  - c) a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project (see paragraphs 10 and 11);

## Para. 10 WB OP/BP 4.10

10. *Consultation and Participation.* Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:

- (a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;

## Para 10

- (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and
- (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.

# Para 11

11. In deciding whether to proceed with the project, the borrower ascertains, on the basis of the social assessment (see paragraph 9) and the free, prior, and informed consultation (see paragraph 10), whether the affected Indigenous Peoples' communities provide their broad support to the project. Where there is such support, the borrower prepares a detailed report that documents:
- (a) the findings of the social assessment;
  - (b) the process of free, prior, and informed consultation with the affected Indigenous Peoples' communities;

# Para 11

- (c) additional measures, including project design modification, that may be required to address adverse effects on the Indigenous Peoples and to provide them with culturally appropriate project benefits;
- (d) recommendations for free, prior, and informed consultation with and participation by Indigenous Peoples' communities during project implementation, monitoring, and evaluation; and
- (e) any formal agreements reached with Indigenous Peoples' communities and/or the IPOs.

# Para 11

- The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples' communities have provided their broad support to the project.
- The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior, and informed consultation with the affected Indigenous Peoples' communities as a basis for ascertaining whether there is such support.
- The Bank does not proceed further with project processing if it is unable to ascertain that such support exists.

# Operationalization: Effects

- when a company is granted the legal right by a government to exploit resources in certain territories, locals and indigenous peoples may be:
  - evicted from their traditional lands or lose access to land that may hold cultural and survival significance to them.
  - without talking to and receiving the consent of those who live there, it can result in a breakdown of communities and cultural norms, as well as cutting people off from their livelihood.

# Operationalization: problem

- consent is not obtained or is frequently engineered, and
- indigenous institutions are out-manuevered by competing interests seeking access to indigenous peoples' common resources.

# Operationalization: good practice

- Successful outcomes are most often achieved when:
- collective land tenures are secure,
- when IPs control the speed and process of negotiation, and deal with outside interests through their own institutions or hybrid institutions which remain underpinned by customary norms, cosmovisions and values.

# 1V. Conclusions

1. FPIC institutionalizes a process of meaningfully integrating input from affected peoples early in the development process—and, most significantly, at a time when integrating this input is easiest and most cost-effective. (Development Effectiveness)
2. Incorporating this input through FPIC influences project outcomes in ways that are deeply in touch with local needs, priorities and concerns.
3. Addressing these local needs and concerns—which so often determine project success—is critical to do early on; addressing these needs and concerns at the end of the process becomes increasingly difficult, costly, and time-consuming to do.

# Conclusions

4. FPIC signals to all affected and interested parties that indigenous peoples have rights and interests that will be protected in the development process, where they are often left in worse positions.  
(Policy instrument)

**MARAMING SALAMAT!**