

TRAINING MANUAL FOR INDIGENOUS PEOPLES ON

FREE, PRIOR AND INFORMED CONSENT (FPIC)



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Published by:



2014

With Support from:

Norwegian Agency for Development Cooperation (Norad)



AIPP also acknowledges the continuing support of its core donors--the International Work Group for Indigenous Affairs (IWGIA), Tamalpais Trust, and OXFAM- Australia

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Published by:

Asia Indigenous Peoples Pact (AIPP)
108 Moo 5, Tambon Sanpranate, Amphur Sansai,
Chiang Mai 50210, Thailand
www.aippnet.org
www.ccm.in.aippnet.org
www.iphrdefenders.net
www.iva.aippnet.org

ISBN: 978-616-91258-6-0

Cover Photo by: Christian Erni

Suggested Citation:

AIPP. 2014. Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC), Asia Indigenous Peoples Pact, Chiang Mai, Thailand

Printed by: AIPP Printing Press Co., Ltd.



The printing press has been established with support from the European Union's European Instrument for Democracy and Human Rights



AIPP PRINTING PRESS

Acknowledgement

Asia Indigenous Peoples Pact would like to thank the following for their contributions in the production of this training manual:

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Edited by: Jill Cariño

Illustrations: Aung Lart and Alex Tegge

Photos: AIPP Archives, Philippine Task Force for Indigenous Peoples' Rights (TFIP) Archives, Christian Erni

Lay-out and Design: Ana Kinja C. Tauli

Major References: This manual was put together using various sources and published material, which are useful references for indigenous peoples in understanding and conducting FPIC. Among the major sources used are:

Asia Indigenous Peoples Pact (AIPP) and International Work Group for Indigenous Affairs (IWGIA), 2012. Training Manual On Free, Prior And Informed Consent (FPIC) In REDD+ For Indigenous Peoples. Chiang Mai, Thailand.

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Cathal Doyle & Jill Cariño, 2013. "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" [www.piplinks.org/makingfpicareality]

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Introduction



Indigenous peoples today are faced with numerous challenges as their lands, territories and resources are targeted for exploitation by corporations, governments and other external entities. Indigenous peoples all over the world increasingly have to contend with business interests wanting to tap into the last reserves of the world's natural resources and biological diversity, which indigenous peoples have protected and nurtured for many generations. Through their traditional and sustainable development practices, indigenous peoples were able to maintain their ancestral domains for their own survival and for the sake of future generations. However, corporations have come in the name of "development", to extract and exploit these resources on a large scale, and in the process displacing and desecrating indigenous communities, violating indigenous peoples' rights and depriving them of their means of survival.

It is a stark reality that indigenous peoples in Asia are constantly and increasingly exposed to threats of land grabbing and destruction of their resources without their Free, Prior and Informed Consent (FPIC). Indigenous communities have many experiences wherein proponents of mining, plantations, dams, national parks, hunting reserves and other development projects have simply remained indifferent to undertaking consultations with the affected communities, much less obtaining their consent before proceeding with the project. These bad practices have led to conflicts and sometimes even killing of indigenous leaders, forced displacement and relocation without proper compensation, loss of traditional livelihoods, devaluation and loss of indigenous cultural and spiritual values related to ancestral land, and ultimately posing an imminent danger to indigenous peoples' identities as a whole. This has resulted in widespread resistance by indigenous peoples against encroachments into their communities and the assertion of their rights to land, resources and self-determination, including the right to FPIC.

The right to FPIC has long been recognized by a number of international conventions and legal instruments as a collective right of indigenous peoples. It was further upheld by the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and is gaining wider acceptance as an international standard that should be respected by external entities wishing to engage with indigenous peoples and enter into their traditional lands. A growing number of corporations, financial institutions, intergovernmental bodies, UN agencies and other organizations have also incorporated indigenous peoples' rights and FPIC into their policies in an effort to comply with international human rights standards and obligations. However, the recognition and implementation of FPIC is still far from ideal as seen in the experience of indigenous communities all over Asia. Various stakeholders, including indigenous peoples, are still grappling with how best to implement and operationalize FPIC in a manner that is respectful of indigenous peoples rights.

This Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC) is meant to equip indigenous peoples' organizations, leaders, trainers and community members with the information and knowledge necessary to ensure that the right to FPIC is respected. It tackles the concept, framework, elements and principles of FPIC from the perspective of indigenous peoples. It enumerates key provisions of major international legal instruments recognizing indigenous peoples' right to FPIC. It mentions safeguard policies of several international financial institutions that have committed to respect FPIC. It presents the national legal framework in the Philippines on indigenous peoples and FPIC as an example for other countries, and case studies on how the policy has been implemented in indigenous communities. It includes case stories from different indigenous communities in Asia that illustrate the actual experience of indigenous peoples with projects funded by international financial institutions. It identifies gaps and challenges in implementing FPIC and draws lessons from these experiences, offering pointers for capability-building and more effective advocacy on indigenous peoples' rights.

The Manual targets indigenous leaders, members of indigenous organizations and communities, activists, advocates and UN agencies and civil society organizations in general. It is particularly intended for indigenous educators, trainers and facilitators working with indigenous organizations and communities, especially those affected by development projects. It is designed for trainers and facilitators to use as a guide when conducting training for indigenous communities on FPIC. It consists of eight (8) modules. Each module can be given in sessions of between 1 to 3 hours, for an estimated total time of 16 hours or two days to finish the entire course. This can however be adjusted according to the type of audience and other considerations such as level of literacy and experience of target participants, time limitation, among others.

This Training Manual is a working guide and shall be updated and or revised accordingly.

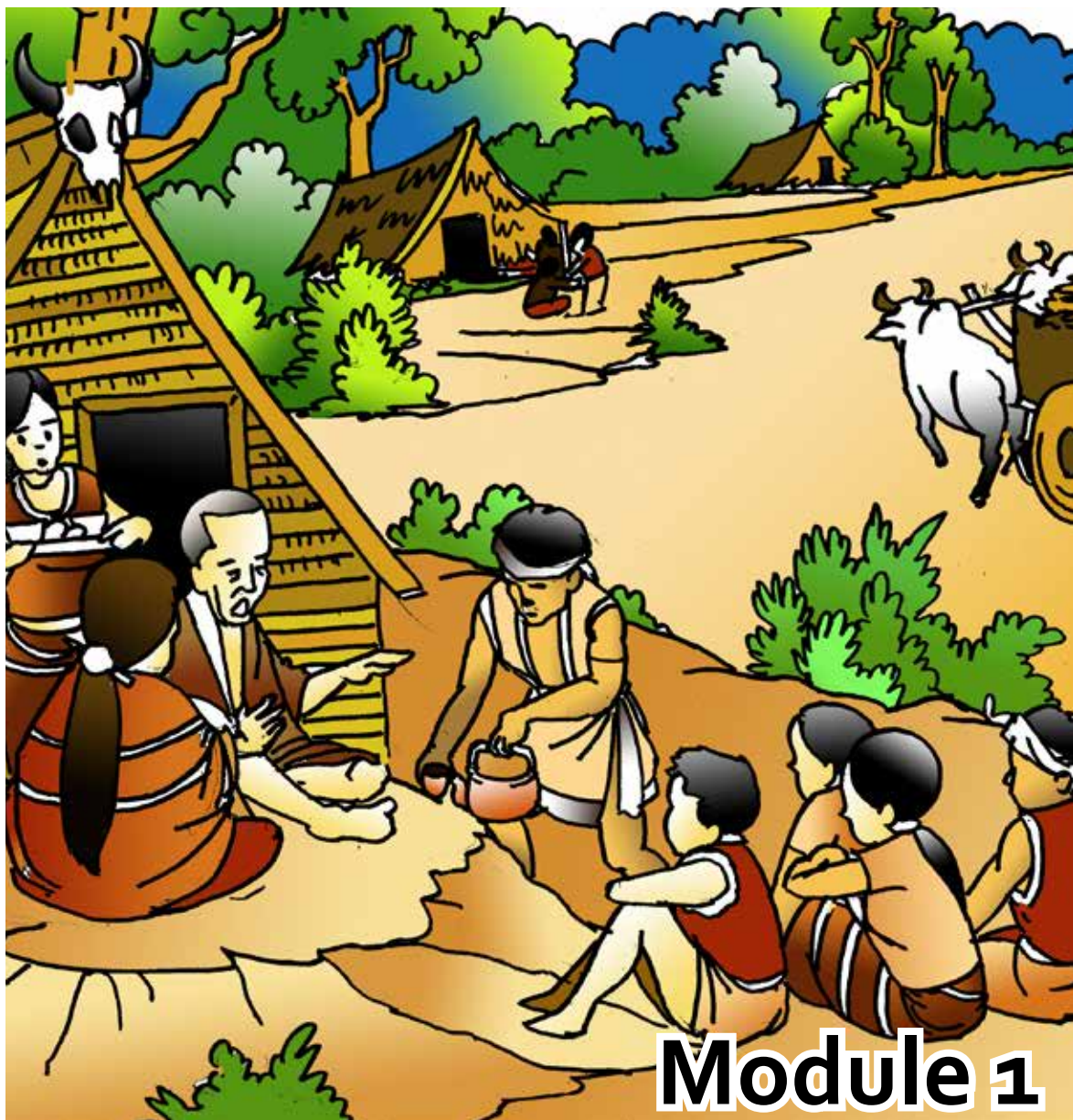
The overall training design follows:

Module	Specific Objectives	Methods to be Used	Estimated Time	Needed Materials
1: Concept, Framework and Principles of FPIC	<ol style="list-style-type: none"> 1. Understand the overall context and background of indigenous peoples in relation to FPIC. 2. Understand why indigenous peoples are entitled to FPIC. 3. Understand the concept of FPIC. 4. Make the linkages between consultation and consent. 5. Define the features of FPIC. 6. Grasp the key principles of FPIC. 	Group discussion/ poster making, group exercise, lecture, open forum, discussion	3.5 hours	Cards, craft paper, computer, projector
2: Recognition of the Principle of FPIC In International Human Rights Instruments	<ol style="list-style-type: none"> 1. Become familiar with key provisions of international instruments recognizing FPIC 	Small group discussion, plenary session, lecture, open forum	1.5 hours	Hand-out, craft paper, pens, computer, projector
3: Process to reach FPIC	<ol style="list-style-type: none"> 1. Understand the key steps and processes in conducting FPIC 	Role-playing, lecture, open forum, small group discussion, plenary session	2 hours	Hand-out, craft paper, pens, computer, projector

Module	Specific Objectives	Methods to be Used	Estimated Time	Needed Materials
4: National Policies and Experiences In FPIC Implementation	<ol style="list-style-type: none"> 1. Know about the national policies on indigenous peoples and FPIC in different States in Asia. 2. Share experiences of different indigenous communities in the implementation of FPIC. 3. Identify gaps, challenges, good practice and lessons learned from the experience of FPIC in the different communities 	Panel presentation, open forum, group sharing and discussion, plenary session	2.5 hours	Hand-out, craft paper, pens, computer, projector
5: Policies of International Financial Institutions (IFI) and other Development Actors on Indigenous Peoples and FPIC	<ol style="list-style-type: none"> 1. Know the particular safeguard policies of international financial institutions and multilateral banks in relation to indigenous peoples and FPIC. 2. Appreciate the relevance for indigenous peoples of the safeguard policies of international financial institutions in relation to indigenous peoples and FPIC. 	Lecture, small group discussion, plenary session	1.5 hours	Hand-out, craft paper, computer, projector
6: Experience of Asian Indigenous Peoples with Policies of International IFI	<ol style="list-style-type: none"> 1. Learn different experiences of indigenous peoples with projects funded by international financial institutions in Asia. 	Panel presentation, open forum, small group discussions, sharing of experiences, plenary session	2.5 hours	Hand-out, craft paper, pens, computer, projector

	2. Identify challenges and lessons learned from the sharing of experiences.			
7: Recommendations for Implementation of FPIC of Indigenous Peoples	<p>1. Identify the challenges their communities face in the implementation of FPIC.</p> <p>2. Come up with recommendations addressed to indigenous peoples for their effective participation in FPIC processes.</p> <p>3. Come up with recommendations addressed to States, corporation and financial institutions for their effective implementation of FPIC.</p>	Small group discussion, plenary session, lecture	1.5 hours	Hand-out, craft paper, computer, projector
8: Capability-Building For Indigenous Peoples' Effective Participation In FPIC	<p>1. Identify their capability-building needs for them to be able to effectively participate in FPIC processes.</p> <p>2. Understand the importance of well-organized communities and responsible leaders in conducting FPIC.</p> <p>3. Learn what are some basic skills necessary for the effective participation of indigenous peoples in FPIC processes.</p>	Group exercise, plenary discussion, lecture, role-playing or practicum	2 hours	Cards, pens, computer, projector

It is hoped that with this Training Manual, indigenous communities may be better equipped to engage more effectively with corporations, governments, financial institutions and other development actors in the assertion of their right to FPIC. In this way, indigenous peoples could be further empowered to defend their rights to land, territories and resources in the exercise of their right to self-determination.



Module 1

CONCEPT, FRAMEWORK AND PRINCIPLES OF FPIC

SPECIFIC OBJECTIVES

To enable the participants to:

1. Understand the overall context and background of indigenous peoples in relation to FPIC.
2. Understand why indigenous peoples are entitled to FPIC.
3. Understand the concept of FPIC.
4. Make the linkages between consultation and consent.
5. Define the features of FPIC.
6. Grasp the key principles of FPIC.

METHODS: Group discussion/poster making, group exercise, lecture, open forum and discussion

ESTIMATED TIME REQUIRED: 3 to 3.5 hours

ACTIVITY:

1. Group discussion/poster making:
 - a. Divide the participants into small groups. Ask each group to discuss and then draw or write down on craft paper: a general overview of their situation, key issues and concerns they face in their communities, especially in relation to self-governance and decision-making.
 - b. Paste the results on the board/wall and let each group report briefly.
 - c. The trainer summarizes the reports, linking this with the exercise and violation of their collective rights and shows how indigenous peoples have their own decision making processes as part of their self-governance.
2. Group exercise:
 - a. Distribute meta-cards to the participants and ask them to write down their answers to the question: How do you make decisions on matters affecting the community based on your traditional institutions or customary law? Collect the cards and/or write down and cluster common answers on the board.

b. An alternate activity is to ask 2-3 participants to verbally share or present their traditional decision-making process. Then the facilitator summarizes the key elements of the decision-making process.

3. Lecture:

a. Based on the participants' answers, the trainer gives additional inputs and explanation following the input provided below.

b. Present insights and examples to explain why indigenous peoples are entitled to FPIC by emphasizing the collective rights of indigenous peoples over their lands, territories, resources and self-determination as "peoples," and not as individuals.

c. Present the key principles and elements of FPIC using key messages and relevant examples.

4. After the input, there should be an open forum for questions, clarifications and plenary discussion by the participants.

1.1 Brief Context of Indigenous Peoples and the Exercise of their Collective Rights

Indigenous peoples across the world have been historically subjected to colonization, subjugation, assimilation and other forms of oppression which they have resisted in various ways. Most nation-states have refused to recognize the demand of indigenous peoples to remain rooted in their lands and territories, which define their social systems, culture and identity. As a result of continuing state denial of the collective rights of indigenous peoples, indigenous peoples have been asserting and exercising their right to self-determination in various ways.¹

The essence of the right to self-determination is consent and control.²

- **Consent**

This is the freedom of a people to say yes or no, to accept or reject any proposal, project, program or policy, any activity or action that has any sort of implication on their individual lives and their life as a community, and on their lands territory, and resources

¹ Joan Carling, 2010. "Overview of the United Nations Declaration on the Rights of Indigenous Peoples." Training Manual on the United Nations Declaration on the Rights of Indigenous Peoples. AIPP

² Raja Devasish Roy, 2010. "Self-Determination And Self-Government". Training Manual on the United Nations Declaration on the Rights of Indigenous Peoples. AIPP

- **Control**

Beyond just reacting positively or negatively to the initiatives of others, indigenous people should be able to decide for themselves on their own development. They must be able to pro-actively set their own priorities, guidelines and rules. They should be able to exercise full sovereignty over their life as a community, their territory, the lands it encompasses and the other resources it holds. In this way, indigenous peoples can fully exercise self-governance and enjoy the collective right of self-determination through their own decision-making processes.



1.2 What is Free, Prior and Informed Consent (FPIC)?

FPIC is a mechanism whereby indigenous peoples and indigenous communities are able to conduct their own independent collective decision-making on matters affecting them. This collective decision-making process is undertaken in relation to the plan, programs, projects and activities that impact on their lands, territories and resources; health and well-being; territorial integrity, collective identity, culture, livelihoods, social cohesion and future well-being.

The FPIC process requires that indigenous peoples:

- Are provided with accurate and complete information regarding the proposed policy, program or project that may affect them, in a language and manner they understand;
- Are consulted in accordance with their customary decision-making processes;

- Are given the freedom, time and space to conduct their internal and collective decision-making process without interference; and that
- Indigenous peoples' collective decision to give or withhold consent including setting conditions for consent is recognized and respected with proper and accurate documentation of the decision.

1.3 Why are Indigenous Peoples Entitled to FPIC?

FPIC is a set of principles that defines the process and mechanisms that applies specifically to indigenous peoples in relation to the exercise of their collective rights as indigenous peoples especially their right to self-determination, rights to lands, territories and resources, and to cultural identity and heritage. This is to ensure that they are treated as peoples with their own decision-making power to protect their collective rights. Other communities have also democratic rights to participation and consultations as group of individuals and citizens.

- **FPIC is a collective right of indigenous peoples that has been violated throughout history**

Throughout history, indigenous peoples have been self-governing in their own territories even before the creation of nation-states. With colonization, forced assimilation and subjugation, indigenous peoples were dis-empowered and subjected to serious social injustice as their distinct identities, territories, lands and resources as well as their cultures were and continue to be systematically violated. In order to rectify this, FPIC as set of operation principles is a requirement for external actors to ensure the respect and protection of their collective rights to determine their own future and path for development as distinct peoples from the rest of the population. This is in line with achieving equality, non-discrimination, inclusive democracy and justice for all citizens.

- **Indigenous peoples have the right to decide on the development of their own land, territories and resources.**

The application of FPIC requires that necessary measures be taken to ensure respect for the collective right of indigenous peoples to consent on matters affecting them. All activities, projects, programs and policies that may have serious implications on their land, territories, resources, cultural heritage,

identity, survival and collective wellbeing require the consent of the indigenous peoples prior to implementation. Indigenous peoples have the right to decide on the utilization, management, conservation and development of their lands, territories and resources based on their collective ownership and perspectives, interest and welfare as distinct peoples - and not merely as individuals. Thus, FPIC is essential and integral to the exercise of the collective rights of indigenous peoples.

- **Indigenous peoples have their own traditional practices of decision-making and consensus- building as an exercise of self-determination and self-governance**

In indigenous societies, traditional decision-making systems are often in the form of seeking consensus among community members. In such process, community members actively participate in both formal and informal ways of collective decision-making. Issues and concerns of members of indigenous communities are handled in various ways including continuous deliberations to reach consensus. Likewise, consensus does not mean the absence of dissenting views, but rather allowing the views of the majority to prevail as the collective decision. This collective decision-making process is essential to the exercise of the right to self-determination and self-governance of indigenous peoples

- **Indigenous peoples need to protect and promote their collective interest**

Indigenous peoples exist as collectives and therefore rely on each other for their collective survival and development. FPIC is an undertaking to protect and promote the collective interest of indigenous peoples. The FPIC process should thus involve all the members of an affected community or communities through collective decision-making processes. (UN-REDD, 2009)

1.4 Understanding the Linkages between Consultation and Consent

It is important for indigenous peoples to understand the Linkages between consent and consultation in order to ensure that their right to FPIC is respected.

The decision-making process leading to consent requires a series of consultations in order for the affected indigenous peoples to gain sufficient information, knowledge and understanding about the issue at hand. Consultations allow indigenous peoples to seek clarification and express their views and concerns that need to be taken into account in the crafting of policies, strategies, plans and activities prior to arriving at a collective decision.

Consultation, is a mechanism for information sharing, discussions and for expressing and exchanging views and opinions on a certain issue, proposal or action to be taken into account by the external party or parties. The external parties will share information about their project/ activity and seek the views of affected or concerned indigenous peoples through their customary system or through mass-gathering or transparent consultations with the community leaders. Consultation is also undertaken to gauge if the proposed project or activity is well understood by the indigenous leaders and community members, to know their concerns and views towards reaching a consent. Thus, consultations is not a one off event but a series of meetings and discussions taking into account the concerns and views of the concerned indigenous peoples.

Consent is the result of an independent and collective decision-making process regarding a certain proposal or action. Indigenous peoples' consent is arrived at through a process involving access to relevant information, consultations, internal deliberations, and independent decision-making processes resulting in a collective decision of either giving or withholding their consent.

Arriving at consent is an iterative process that goes through a series of consultations and deliberations, which allow flexibility and adjustments in consideration of the views and concerns of the affected indigenous peoples. If their concerns are not properly addressed especially in relation to the protection of their rights, interest and welfare, indigenous peoples may decide to withhold their consent. A no consent decision as an outcome of their decision-making process must be respected. The decision of giving or withholding consent by concerned indigenous peoples should be made without force, pressure or intimidation from any party.

All concerned indigenous peoples, including women and youth, should be given opportunities and channels to be consulted, and to fully participate and engage in the decision-making process towards reaching a final decision or consent.

1.5 What are the Features of FPIC?

a. Respect for indigenous peoples' cultural integrity and control over their lands, territories and resources

FPIC allows indigenous peoples to exercise control and management over their land and territories and to command respect for their cultural integrity and self-determination, especially on their development as distinct peoples. External entities such as governments, corporations, institutions, organizations or project proponents need to obtain the consent, agreement and authorization of indigenous communities as rights-holders, before implementing any project or activity that may have impacts on the concerned indigenous communities. FPIC defines the relationship and level of engagement of indigenous peoples with outside entities intending to implement activities, projects and programs that may have impacts on indigenous peoples and their territories.

b. Exercise of the right to self-determination

Indigenous peoples continue to practice traditional governance systems including socio-political systems, customary laws and practices, resource management systems, and traditional knowledge and cultural practices, which make them distinct from the dominant and mainstream society. However, indigenous peoples' self-governance has been seriously eroded and undermined by colonization, subjugation and forced assimilation. In spite of this, indigenous peoples continue to assert, practice and defend their collective identity, lifestyles and traditional systems of governance as part of their collective right to self-determination. This right also includes their right to determine their own path of development that takes into account their cultural and social systems as distinct peoples. (IAITPTF and IPF, 2011)

FPIC provides the mechanism for indigenous peoples to undertake their own collective decision-making on matters affecting them in the exercise of the right to self-determination. FPIC thus becomes a preventive measure against impositions that may further undermine their self-governance and control of their own development.

c. FPIC as a safeguard against adverse impacts

FPIC serves as a safeguard to ensure that the potential social and environmental impacts on indigenous peoples will be considered in the decision-making process regarding any project affecting them. The FPIC process also allows indigenous peoples to voice out their concerns on potential adverse impacts of projects, which should be taken into account. In this process, indigenous peoples can demand full information disclosure from the project proponents, including results of feasibility studies and comparative studies relating to the project. Information disclosure could help guide the affected indigenous peoples in arriving at their collective decision. It is therefore critical that the FPIC process allows indigenous peoples to be well informed in all aspects of the project that will affect them. They should also be assured of sufficient time to deliberate on the implications of the project on their collective welfare. Respect for and compliance with the collective decision of the indigenous peoples in the FPIC process means to uphold and protect their rights, interest and wellbeing.

Thus, FPIC is not merely a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' right to take decisions, especially in relation to the use, management and development of their lands, territories and resources. FPIC must be adhered to and is essential for ensuring the full and effective participation of indigenous peoples in policy making and decision-making processes. FPIC provides the condition for indigenous peoples to negotiate and define the terms for the implementation of externally imposed policies, programs and activities that may have serious implications on them.



d. FPIC as a collective decision-making process

FPIC is a collective undertaking of the members of the community or communities involved. Indigenous peoples exist as collectives and therefore rely on each other for their collective survival and development. In this context, the collective decision-making of indigenous peoples ensures that their collective interests are fully considered and become the basis of their decision. The views and concerns of individual members of indigenous communities should also be taken into account. However, the collective interest of the whole community, and not the individual interests, should prevail in the process of collective decision-making. The collective decision is not simply an aggregation of individual decisions but rather an outcome of collective deliberations and consensus building to uphold the common good and welfare of the indigenous peoples over individual interests and benefits.

e. FPIC as an iterative process

FPIC is an iterative process that should be undertaken in good faith to ensure mutual respect and meaningful participation of indigenous peoples in decision-making on matters affecting them. As an iterative process, it requires the conduct of a series of consultations, dialogues, exchanges, and interactions between indigenous peoples and those requiring their consent and agreement. It also requires continuous engagement of indigenous peoples in the whole project cycle, not only before project implementation, but also in the planning, implementation and monitoring of the project. Thus, FPIC should ensure the full and effective participation of indigenous peoples in all project-related processes.

f. FPIC as a process of engagement of indigenous peoples with governments and other external entities

As FPIC is a set of principles in relation to the respect and exercise of the rights of indigenous peoples in relation to their lands, territories and resources, to self determination and cultural integrity, external entities shall thereby abide by these principles when they undertake projects and activities that will impact the collective rights of indigenous peoples. The engagement of other entities with indigenous peoples is not simply to provide information and conduct consultation but also to respect the independent collective decision of indigenous peoples.



1.6 What are the Key Elements of FPIC?

The principles and substance of each element of FPIC are interrelated and should not be taken or treated as separate elements (Anderson, 2011). In particular, the first three elements (Free, Prior and Informed) qualify and set the conditions of CONSENT as a decision-making process. Thus, CONSENT should be sought before any project, plan or action takes place (PRIOR), should be independently decided (FREE) and based on accurate and sufficient information (INFORMED) for it to be considered a valid result or outcome of a collective decision making process.

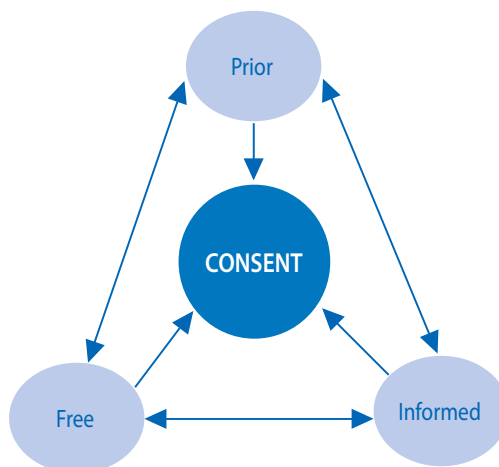


Figure 1: 'Free, Prior and Informed' qualify and set the conditions for CONSENT

- **Free:** Independent process of decision-making
- **Prior:** Right to undertake their own decision-making process regarding any project that concerns them before its implementation.

- **Informed:** Right to be provided and to have sufficient information on matters for decision-making.
- **Consent:** Collective and independent decision of impacted communities after undergoing their own process of decision-making.

NOTE TO THE FACILITATOR:

Figure 1 showing the key elements of FPIC and their interrelation may be written on craft paper and posted on the wall or board for better visualization by the participants.

1.7 What are the Key Principles of FPIC in Terms of Substance and Process?

a. What is Free?

Free implies the absence of any manipulation, coercion or intimidation from any other groups, bodies and entities in the decision-making process of indigenous peoples. Any external influence that hinders self-determination in the process of decision-making and the outcome of their decision is a clear violation of this principle. Consent cannot be valid if it is taken from an authority or the group that is not recognized by the indigenous communities or not accountable to them. Further, the independence of their decision-making process and the outcome must be verifiable with the members of the indigenous communities.

TAKE NOTE: Free - independent process of decision-making.

b. What is Prior?

The informed consent must be sought first as a precondition before implementing any activity and project. It is an advanced authorization from affected indigenous peoples' communities before the commencement of any

activities or project. It shall respect the time requirements of indigenous peoples' consultation and consensus processes defined by them. The prior consent requires a comprehensive procedure to ensure that indigenous peoples have sufficient time to understand, analyze and discuss the information they receive collectively. The element of prior also denotes respecting the duration of time for indigenous peoples to undertake their decision-making process according to their pace and circumstances. All parties requiring the consent of indigenous peoples must thereby engage them in good faith discussions to reach a mutual agreement on the timeline of the decision-making process.

While national legislations may contain provisions and timeline for the notice of information and the conduct of consultations, this should not preempt the self-defined process of decision-making of indigenous peoples, including the time they need to deliberate on the information provided to them. The parties and proponents must be respectful of the time requirements of indigenous peoples in undertaking their own decision-making process based on their own circumstances and requirements.

Indigenous people in Asia have been experiencing the marginalization of their effective participation in the decision making relating to the laws, policy and programmes that impact their livelihoods. For example, granting of licenses and economic land concessions, among others. Therefore it is vital that indigenous peoples are informed and genuinely consulted to prior to making any decisions on matters that may directly or indirectly impact indigneous communities

TAKE NOTE: Prior - right to understand concerns and impacts of any legislation, policies and project activities and undertake their own decision-making process.



c. What is Informed?

This is a core element of the FPIC decision-making process to reach or achieve a well-informed decision. It is important for indigenous peoples not only to have access to information, but also to clearly understand the information provided to them. If necessary, information should be translated into the local language and put in a form and manner that is understood by the indigenous communities to facilitate better understanding. Further, indigenous community members must have a level of satisfaction on the level of information provided to them. This includes information to clarify or answer their questions as well as information that provides them with a comprehensive understanding especially on the implications of the activity, project or matter for their collective decision. Information provided to indigenous communities is critical in their own deliberations and decision-making process.

TAKE NOTE: Informed - right to be provided and to have sufficient information on matters for decision-making.

d. What is Consent?

Consent is a collective decision-making process of indigenous peoples that entails several steps. This may include series of consultations as needed and it should allow enough time for indigenous communities to undertake their own internal deliberations prior to making their collective decision. The consultations should allow community members, including women and youth, to express their views, raise their concerns, seek additional information, if needed, and seek clarifications on their questions and/or concerns.

Consent should be transparent, inclusive and well-informed with meaningful and accountable participation of the indigenous leaders in the consultation processes and the collective decision-making process. The consultation processes should be documented properly. The project proponents should provide for more information, if requested, and respond to the clarifications and conditions set by indigenous communities. In addition, consultations require an effective system of communication and understanding information among indigenous peoples.

TAKE NOTE: Consent - collective and independent decision of impacted communities after undergoing their own process of decision-making.





Module 2

RECOGNITION OF THE PRINCIPLE OF FPIC IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

SPECIFIC OBJECTIVES

For the participants to:

1. Become familiar with key provisions of international instruments and mechanisms recognizing FPIC including:
 - UN Declaration on the Rights of Indigenous Peoples
 - ILO Convention No.169
 - Convention on Biological Diversity
 - The Committee on Economic, Social and Cultural Rights (CESCR)
 - The Committee on the Elimination of Racial Discrimination (CERD)
 - Inter-American Human Rights System

METHODS: Small group discussion, plenary session, lecture, open forum

ESTIMATED TIME REQUIRED: 1.5 hours

ACTIVITY:

1. Divide the participants into smaller groups. Each group will be assigned to discuss 1 or 2 international instruments (UNDRIP, ILO 169, CBD, CESCR, CERD and Inter-American Human Rights System). Identify a facilitator, documenter and reporter for each group.
2. Each group will read and discuss the particular instrument assigned to them, focusing on the provisions relating to FPIC, by saying what they understand and elaborating based on their insights and experiences. Allocate 30 minutes for reading, analyzing and discussion among themselves.
3. Plenary Discussion: Each group will be given 10 minutes to report back the result of their discussion to the whole group. Encourage the other participants to ask questions and clarifications.
4. As an alternative activity, a resource person or trainer may discuss the input below using a powerpoint presentation or visual aid. An open forum for questions, clarifications and discussions will follow the presentation.

The international community is increasingly recognizing the rights of indigenous peoples after several decades of advocacy and negotiation by indigenous peoples in international decision-making processes. Several international instruments address the plight of indigenous communities in terms of their socio-cultural and economic marginalization, exclusion from benefit sharing of economic growth, and impacts of development and climate change on their cultures, identities and resources. The role and contribution of indigenous peoples in sustainable resource management and social and economic development are also gaining recognition and appreciation around the world. (AIPP, 2010)

FPIC is for the respect of indigenous peoples' rights. Intergovernmental bodies, UN agencies, international organizations, international conventions and human rights law have increasingly, but at varying degrees, recognized indigenous peoples' right to FPIC. Some international laws and instruments have incorporated FPIC as a right and a principle, making FPIC an obligation for those countries that have

TAKE NOTE: The International Labour Organization Convention No. 169 (ILO 169), the Convention on Biological Diversity (CBD) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are the major international instruments that clearly address indigenous peoples' right to FPIC, stating that governments shall recognize the Free, Prior & Informed Consent of indigenous peoples for development activities within their boundaries and territories.



ratified these international instruments.

2.1 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The UNDRIP clearly defines FPIC as a right of indigenous peoples in the following articles (UN, 2008; AIPP, 2010):³

- 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 indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- Article 11 (Point 2): States shall provide redress through their 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.
- Article 19: States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measures that may affect them.
- Article 26 (Point 1): Indigenous peoples have the full rights to the lands, territories and resources, which they have traditionally owned, occupied or otherwise used or acquired.
- Article 26 (Point 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 http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf

- Article 28 (Point 1): Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, 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.
- Article 29 (Point 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.
- Article 32 (Point 2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions in order to obtain their free, prior and informed consent to any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

2.2 International Labour Organization Convention on Indigenous & Tribal Peoples No. 169 (ILO Convention 169)

ILO Convention No.169 requires that indigenous peoples should not be removed from their land and territories arbitrarily. The convention stresses no relocation without consent; informed participation in the context of development, national institutions and programmes, lands and resources. The following with five articles of the convention directly deal with FPIC⁴ :

Article 6: Point1. In applying the provisions of this Convention, Government shall:

a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, wherever consideration is being given to

⁴ <http://www.ilo.org>

legislative or administrative measures which may affect them directly;

b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Point 2: The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7:

Point 1: The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.

Point 2: The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

Point 3: Government shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Point 4: Government shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 14 (Point 1): The rights to land ownership and land possession of the peoples that they traditionally occupy should be recognized. In addition, measures shall be taken in appropriate cases to safeguard the rights of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Article 15 (Point 1): The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Article 16 (Point 2): Relocation of these peoples is considered, if necessary, as an exceptional measure, which shall take place only with their Free, Prior and Informed Consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries, where appropriate, which provide the opportunity for effective representation of the peoples concerned in the processes and procedures.

2.3 Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD) recognizes the rights of indigenous and local communities to prior informed consent in its text, programmes of work and decisions regarding Traditional Knowledge (TK), Access and Benefit Sharing (ABS) and Protected Areas. Prior informed consent is also required in relation to the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on sacred sites, lands and waters of indigenous and local communities.

In Article 8 (j), the CBD mentions that the traditional knowledge of indigenous and local communities may be used only with their approval. This has subsequently

been interpreted to mean that it can be used only with their prior and informed consent. In addition, the CBD requires governments (subject to national legislation) to respect, preserve and maintain the knowledge and innovations of indigenous peoples, relating to biodiversity conservation and management. Article 8 (j) requires “States to respect & preserve indigenous knowledge, innovation and practices and (its)...application with the approval & involvement of indigenous and local communities.”⁵

The Fifth Conference of the Parties (COP) CBD Decision V/16 requires States to obtain prior informed approval and to ensure the effective involvement of indigenous and local communities in decisions relating to the conservation and sustainable use of biological resources. It also expresses a firm commitment to the implementation of prior informed consent in its general principles: “access to traditional knowledge, innovation and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.” Decision V/16 further calls upon: “Parties to take measures to enhance and strengthen the capacity of indigenous and local communities to be effectively involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity subject to their prior informed approval and effective involvement.”⁶



5 Convention on Biological Diversity 1992

6 <http://www.cbd.int/decisions/cop/?m=cop-5>

2.4 The Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights highlighted the need to obtain indigenous peoples' consent in relation to resource exploitation. In 2004, for instance, the Committee stated that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities" (E/C.12/1/Add.100, para. 12). A few years earlier it observed "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem" (E/C.12/1/Add.74, para. 12) ⁷

2.5 The Committee on the Elimination of Racial Discrimination (CERD)

In its general recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination calls 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" (para. 4 (d)). The Committee makes repeated reference to the right to consent and general recommendation XXIII in its concluding observations.⁸

2.6 The Inter-American Human Rights System

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have affirmed indigenous peoples' rights to their traditional lands and resources in a series of opinions issued from 2001-2003. The Court and the Commission have also called upon the states of the Americas to uphold their obligations to protect those rights in domestic law and practice. They have found that indigenous peoples have the right to give or withhold their free, prior informed consent to activities affecting their lands and territories. This

⁷ <http://www2.ohchr.org/english/bodies/cescr/index.htm>

⁸ <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c>

right holds whether or not domestic or national law protects property or self-determination rights of indigenous peoples.

In so doing, the Court and Commission have acknowledged the interrelationship between indigenous land tenure, culture, and self-determination. In the jurisprudence of the Inter-American Human Rights system, the basis for indigenous peoples' right to free prior informed consent (FPIC) lies in their right to property, on one hand, and rights to self-determination and culture, on the other. This understanding of the two distinct bases for FPIC is shared by other international experts and adjudicatory bodies outside of the hemisphere.⁹

9 Alex Page, 2004. Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System. Sustainable Development Law & Policy Volume 4 Issue 2 Summer 2004: Prior Informed Consent



PROCESS TO REACH FREE, PRIOR AND INFORMED CONSENT

SPECIFIC OBJECTIVE

For the participants to:

1. Understand the key steps and processes in conducting FPIC.

METHODS: Role-playing, lecture, open forum, small group discussion, plenary session

ESTIMATED TIME REQUIRED: 2 hours

ACTIVITY:

1. Selected participants are asked to prepare and perform a short skit representing the role of the community, the government and the corporation in the FPIC process.
2. After the role-play, the trainer or facilitator gives the input below using a powerpoint presentation or a visual aid, going through the necessary steps in conducting FPIC.
3. An open forum follows for questions and clarifications from the participants.
4. The participants then divide into smaller groups to discuss the following:
 - What should be the role of the community, the government and the corporation in the FPIC process?
 - Recalling the lessons learned from the different experiences with FPIC, what tips or guidelines should we remember when conducting FPIC in our own communities?
5. A plenary session is held for the small groups to report back to the whole group on the results of their group discussion.

3.1 Key Steps in the FPIC Process

At the outset, it should be emphasized that there is no standard process or common template for the conduct of FPIC. There is no one-size-fits-all process for FPIC since there are as many ways of decision-making as there are indigenous peoples. The concerned indigenous community should be consulted and should be allowed to define and agree on the process of FPIC in accordance with their own indigenous culture. The form and process of FPIC will very much depend on the customary practices of collective decision-making of the concerned indigenous peoples to be affected by a proposed policy, program or project.

Generally, the conduct of FPIC should pass through a series of necessary steps and processes before the community can finally arrive at a collective decision of consent or no consent. The key steps that need to be undertaken in the FPIC

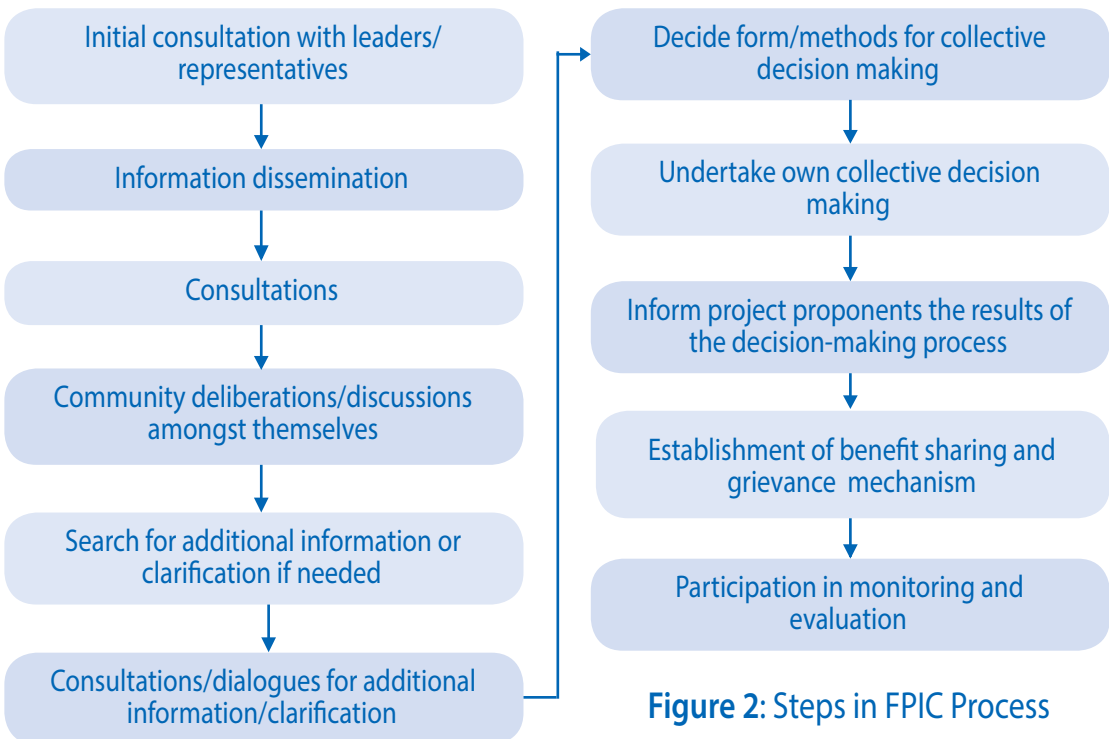


Figure 2: Steps in FPIC Process

NOTE TO THE FACILITATOR:

Figure 2 above may be drawn on a piece of craft paper and posted on the wall or board as a guide for discussion and for better visualization by the participants.

process are the following:

3.2 Processes of FPIC

a. Initial consultation with leaders and representatives

Initial consultation by concerned governments, corporations, project proponents or external entity is necessary to inform the community through their leaders and representatives of the plan to consult them and to formally request their FPIC in relation to a proposed policy, program or project. At this point, the proponent should provide all available and basic information about their proposal to the community and request for a process of FPIC to ensue, the manner of which will be defined by the community. They should also ensure that the people they are talking to are the real leaders and representatives of the indigenous community, not designated by outsiders but selected by the people themselves.

The duty to consult indigenous peoples is the primary task of the government. In this context, it is also the task of the government that private proponents of projects are undertaking necessary consultations transparently and that the government should be part of such consultations. This is in line with the duty of states to respect and protect the rights of indigenous peoples.

b. Information Dissemination

The community leaders and representatives disseminate the initial information about the request for FPIC to all members of the community and other concerned groups. They then call for the conduct of community consultations, which are to be scheduled at a time that is convenient for the whole community.

c. Consultations

Consultations with the community are conducted at an opportune time, involving all those concerned, including all community members, the external entity proposing the project, policy or program, and other groups that the

community would want to involve as their advisers or supporters. Consultations could be done several times or in different locations to be sure to reach all the people concerned, in accordance with the customary practices of the people.

During the consultations, all available information about the proposed project should be presented to the community including basic information about the project, the company, the purpose, the timeframe for implementation, all potential positive and negative impacts, among others.

d. Information disclosure

Information disclosure for the FPIC process should include full and accurate data pertaining to any activity or proposed developments or projects. This should include studies on environment and social impacts, project design, implementation plan, budget and sources of funds, terms of contracts or agreements, among others. The project proponent is responsible for the full disclosure of the information to indigenous communities, including providing the information in forms understood to them. In this context, there should be considerations for the level of literacy and language understood by indigenous peoples.

Information that the project proponent should provide:

- Nature, size and scope of the proposed project or activity
- General and specific objectives, implementation plans, budget, outcomes and impacts of the project and/or activity, and also source of funding in some cases
- Duration, locality and scale of the project
- Assessment with the effective participation of indigenous peoples of possible economic, social, cultural, and environmental impacts, including potential risks and fair and equitable benefit sharing mechanisms
- Full and clear disclosure of the information based on levels of indigenous peoples' understanding
- Involvement of personnel in the execution of the proposed project, e.g. indigenous peoples, private sector staff, research institutions, government

employees and others.

e. Search for additional information or clarification if needed

If the information provided is seen as inadequate, indigenous communities have the right to request additional information or clarification from the proponent. They may also find it necessary to seek additional information from other sources, besides the project proponent. They have full rights to find ways to verify the accuracy of information provided to them and also to seek external advice. It is often the case that indigenous communities are provided with information that highlights only the positive aspects of the projects, while potential adverse impacts are not fully disclosed or provided. They may thus wish to seek additional information and advice from their trusted partners or other parties. In case indigenous peoples feel the need to work with an external adviser, provision for resources to support this shall be provided by the project proponent and or the government..

f. Community deliberations and discussions among themselves

Prerequisite to the process of collective decision-making is the undertaking of independent and thorough deliberation by members of indigenous communities after disclosure of the information. After the community consultations involving the proponent and other groups, the community members should be given the time and space to deliberate and discuss among themselves. This will allow them to raise questions that are unanswered and to bring out unresolved issues or particular concerns arising from the consultations. This process of deliberation should be free from the influence of the proponent or other external entities, the military or government representatives.



Key questions and considerations must be thoroughly discussed and all the views, opinions, and recommendations of the community members must be addressed. Thus, adequate time for community deliberations must be provided until members have gained enough confidence to undertake their collective decision. Their collective and independent deliberations will create a common understanding and process their concerns, issues, views, and opinions prior to taking their collective decisions.

The active participation of all members and groups in the community should be ensured. It is important that women and youth are able to participate in these deliberations to express their specific concerns and views, as well as to seek clarification. Indigenous women and youth groups can deliberate on their own, if they so wish, and/or as part of the wider process of community deliberations. Community discussions and deliberations should take into account views and opinions expressed by the community members, including women and youth, within the framework of upholding the rights, common interest and welfare of the community - as opposed to individual interest or agenda.

Community deliberations must be free from intimidation and conditions that undermine their free expression and collective discussions of their issues and concerns. If community members require more information to guide their collective deliberations, the required information must be provided promptly and in a manner that satisfies their level of understanding. Likewise, if community members feel the need to have more consultations in order to seek clarification to their concerns, this should also be conducted prior to their collective decision-making.

g. Consultations and dialogues for additional information and clarification

Additional consultations and dialogues may be called for to ensure the accuracy of information provided about the project, upon which the indigenous communities will base their decision. Indigenous communities have the right to change and/or review their decision after additional information shall have been acquired. The collective decision for consent by indigenous peoples may be revoked if this was reached based on false or inaccurate information.

h. Decide on the form and method for collective decision-making

Indigenous communities should have the freedom to define their own mechanisms and processes of decision-making. The community will decide on the manner of consensus building and collective decision-making that they will follow in arriving at a decision of either consent or no consent. The consensus process should be in accordance with the customary practices of discussion and deliberation among community members and allow them to define the process of decision-making. If necessary, the capacity of the indigenous peoples should be enhanced for them to effectively participate in the decision-making process, before finally taking a decision.

i. Undertake collective decision-making

Community members should be allowed the time and space to decide collectively based on the implications of the project/activity from their own perspectives, interest, welfare, and aspirations. The decision-making process should not be rushed or boxed into a pre-set time frame. The time should be enough for them to thoroughly discuss and deliberate among themselves before taking a decision. The conduct of the collective decision-making should allow all members of the community to express their views and positions in a manner or form agreed by the community. Further, community decision-making should be conducted in a manner defined by the community and should ensure the active participation of women and youth, in order to take into account their views, specific concerns and rights.

For indigenous communities or groups with strong or functioning systems of self-governance, they can use their traditional system of decision-making (for example consensus decision-making). Other forms of collective decision-making could include the casting individual votes through a referendum, such as through ballots or open vote of raising hands during a community gathering (Hill et. al, 2010). However, indigenous peoples could be unfamiliar with these forms of decision-making and which could be subject to manipulation.

Indigenous communities may include terms and conditions for consent as part of their collective decision. These terms and conditions must be

clear, measurable or quantifiable and provide measures on how they will be implemented or achieved including the allocation of resources as needed. This is to prevent misinterpretation or confusion on how the terms will be implemented. These conditions may be in relation to material support for the livelihoods of affected indigenous peoples, provision for community funds for emergency needs, college scholarship support, regular reporting of proponents, effective participation of indigenous representatives in project monitoring, among others.

In addition, decision-making must be conducted in an atmosphere and environment that is suitable to all members of the indigenous communities. If communities feel that their collective decision-making process is being undermined or manipulated, they should immediately stop and file a complaint. Alternatively, they can deny the project immediately.

j. Giving or withholding consent

The final decision of the community, as an outcome of the collective decision-making process, includes the option of giving or withholding consent and making their own proposals and suggestions, including for amending the proponents suggestions,. As part of their decision, the community should set the terms and conditions for consent based on their own considerations and decision-making processes. Indigenous communities have the right to withdraw consent if these conditions are not met.

Strong division within indigenous communities with opposing views signifies the absence of consent. On the other hand, consent does not mean unanimity of opinion. Based on the traditional systems of indigenous peoples' decision-making, consensus is the desired outcome of a collective decision-making process upholding the common good and the collective interest and welfare of the community. Even if there are views or positions that run counter to those of the majority, as long as those with opposing views agree to abide by or respect the position of the majority, then this is considered as a consensus and a collective decision. The consensus building process shall attempt to accommodate the diverse views of the community while at the same time upholding the common good for the community members.

k. Inform project proponents of the result of the decision-making process

The final decision of the community, whether consent or no consent, including the accompanying terms and conditions should be made known to the proponent by the appropriate or designated community representatives. The decision may be written and/or formally or officially relayed to the proponent through an appropriate means of communication. The proponent must respect the decision of the community, including a NO CONSENT decision.

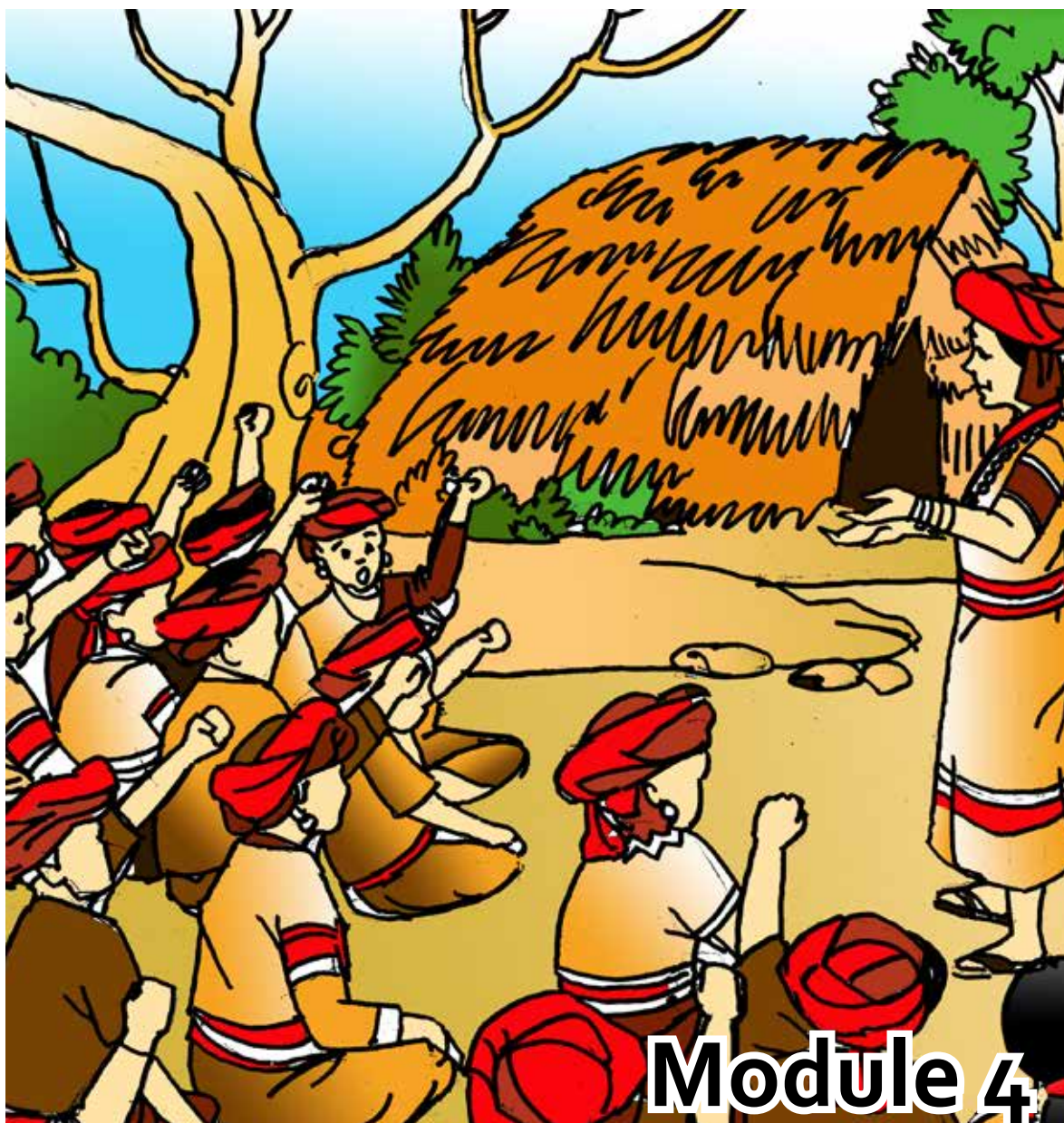
l. Agreement and establishment of grievance mechanism

A decision giving consent will likely result in the signing of an agreement between the indigenous community and the proponent regarding the proposed project or activity. Any agreement reached should be written in a form fully understood by the community members. Part of this agreement should be the terms and conditions for consent defined by the community, including a grievance mechanism to which complaints regarding violations of the agreed terms can be brought for appropriate action. Grievance mechanisms may take various forms – whether judicial, institutional, extrajudicial – and/or these may be based on existing traditional justice systems and structures. What is important is that both parties agree to the mechanism and it is seen as fair, impartial, transparent and accessible, and with enough powers to act on complaints brought before it.

m. Participation in monitoring and evaluation

Indigenous peoples have the right to participate in every step of the development process, including planning, implementation, reporting, monitoring and evaluation. The participation of indigenous peoples in the monitoring, reporting and evaluation of a project within their territories should be guaranteed and provided in the terms and conditions of the agreement arrived at between the indigenous community and the external entity implementing the project.

TAKE NOTE: There is no standard process or common template for the conduct of FPIC. The form and process of FPIC will very much depend on the customary practices of collective decision-making of the concerned indigenous peoples to be affected by a proposed policy, program or project.



Module 4

NATIONAL POLICY AND EXPERIENCES IN FPIC IMPLEMENTATION

SPECIFIC OBJECTIVES

For the participants to:

1. Know about the national policies on indigenous peoples and FPIC in different States in Asia.
2. Share experiences of different indigenous communities in the implementation of FPIC.
3. Identify gaps, challenges, good practice and lessons learned from the experience of FPIC in the different communities.

METHODS: Panel presentation, open forum, group sharing and discussion, plenary session

ESTIMATED TIME REQUIRED: 2.5 hours

ACTIVITY:

1. Selected participants or resource persons are asked to form a panel of speakers to present the particular national policies on FPIC and to share case studies on the implementation of FPIC in their respective countries or communities.
2. An open forum will follow for questions and clarifications from the participants.
3. The participants are then divided into smaller groups to share their own experiences and to identify gaps, challenges, good practices and lessons learned from the presentation by the panel of speakers and from the discussions in their own group.
4. Each group reports back by listing the identified gaps, challenges, good practices and lessons learned in the implementation of FPIC.
5. The case studies below may also be read and used as reference material for the sharing of experiences from different countries.

4.1 Case Studies from the Philippines

The Philippine legal framework for FPIC is defined by the Indigenous Peoples Rights Act (IPRA), which was enacted in 1997. The IPRA recognizes the right of indigenous cultural communities/indigenous peoples (ICC/IPs) to FPIC for all activities affecting their lands and territories. Such activities requiring FPIC include exploration, development and use of natural resources, research, bio-prospecting, any displacement and relocation of ICC/IPs, policies affecting indigenous peoples, archeological exploration, including entry of the military or establishment of temporary or permanent military facilities within indigenous communities.¹⁰

In Chapter 2, section 3 of the IPRA, FPIC is defined as “the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference, coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.”¹¹

The IPRA also mentions FPIC as a requirement before the National Commission on Indigenous Peoples (NCIP) can issue any certification precondition or a certification that an area to be affected by a project does not overlap with any ancestral domain. All governmental departments and agencies are strictly enjoined not to issue, renew, or grant any concession, license or lease, or enter into any production-sharing agreement, without such prior certification from the NCIP.

As stated in Chapter VIII, Section 59 of the IPRA:

“No certificate shall be issued by the National Commission on Indigenous Peoples (NCIP) without the free and prior informed and written consent of the ICCs/IPs concerned. Further, Government department or agency or government-owned or -controlled corporation may not issue new concession, license, lease, or production sharing agreement while there is pending application. Finally, the ICCs/IPs shall have the right to stop or suspend any project that has not satisfied the requirement of this consultation process in accordance with this Act.”¹²

10 Philippine Indigenous Peoples Rights Act (IPRA). Part III Section 7. 1997

11 Philippine Indigenous Peoples Rights Act. 1997

12 Ibid.

The required process for obtaining FPIC is defined and detailed in the NCIP Revised Guidelines on FPIC and Related Processes of 2012, which amended and replaced the FPIC guidelines of 2006. According to the guidelines, the implementation of FPIC by the NCIP is supposed to follow a prescribed process, involving a series of steps from field based investigation and community consultations leading to the issuance of a certificate of precondition by the NCIP signifying consent by the community.¹³

However, the experience of indigenous peoples with FPIC processes in the Philippines has been deeply problematic. Despite legal provisions for FPIC recognizing that customary law should have primacy in the process, customary laws and collective decision-making processes of indigenous peoples are often disregarded or misrepresented in the FPIC process. Numerous negative experiences of indigenous peoples with FPIC in the Philippines have been documented and reported on several occasions including the Philippine Indigenous Peoples Shadow Report submitted to the ICERD in 2009¹⁴, Philippine case studies on FPIC included in the report of International Alliance of Indigenous and Tribal Peoples in the Tropical Forests (IAITPTF)¹⁵, the Philippine Task Force for Indigenous Peoples Rights 2013 research report on customary law and FPIC, among various other documents.



13 NCIP Administrative Order No. 3 Series of 2012. The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012

14 Discrimination against Indigenous Peoples of the Philippines. Philippine indigenous Peoples ICERD Shadow Report. Submission to the Committee on the Elimination of All Forms of Racial Discrimination 27th Session. August 2009

15 IAITPTF and Indigenous Peoples Foundation for Education and Environment (IPF) 2011.

A common complaint raised is the manipulation of the FPIC process by the NCIP, resulting in the fabrication of indigenous peoples' consent. The result has been that FPIC is reduced into a checklist that is used to facilitate the entry of development projects into indigenous lands regardless of the wishes of indigenous communities. In addition, the NCIP regularly deviates from its own FPIC rules when it becomes clear that the outcome of the process is likely to involve the community withholding consent. Thus many indigenous communities in the Philippines see the FPIC process as an imposition by the NCIP whereby indigenous peoples are forced to consent, without the option of rejection, in order to get priority projects implemented rather than an expression of their own autonomy.¹⁶

The following brief case studies illustrate the experience of some Philippine indigenous peoples with the implementation of FPIC. The first case of the Iraya Mangyan of Mindoro shows the negative experience of the people with the FPIC process facilitated by the government agency NCIP. The second case involving indigenous migrants in Yabbi, Nueva Vizcaya shows the conflicts created among the people by the entry of a mining company and the subsequent FPIC process. The third case of the Binongan people in Abra shows the power of people's collective action in stopping an anomalous FPIC process. The fourth case in Zamboanga, Mindanao gives a positive experience of assertion by the Subanen indigenous people of their customary concept and practice of FPIC as contained in the Subanen Manifesto.

Case Study 1: FPIC Anomalies among the Iraya Mangyan of Abra de Ilog, Mindoro Occidental¹⁷

The Iraya indigenous peoples inhabit the inner mountains and low lying areas of the provinces Mindoro Occidental and Mindoro Oriental. Their ancestors were former coastal dwellers who were displaced due to historical invasions of Moro pirates, encroachment of pasture ranchers, landlords, logging activities, mining and population mobility of landless peasant settlers. The indigenous Iraya have since established nomadic semi-communal communities.

¹⁶ Philippine Task Force for Indigenous Peoples Rights (TFIP). 2013. Customary Laws and FPIC.

¹⁷ UCCP-IDPIP-ST. 2013. Customary Laws and FPIC. Philippine Task Force for Indigenous Peoples Rights (TFIP).

The Iraya traditional governance system is collective and kinship-based. Scattered tribal communities are collectively governed by elders representing families and clans, who exercise leadership through a council. The oldest leader of the council usually governs and addresses concerns among tribal communities and acts as prime adviser of the elders and the council. Historically, leaders are dominantly men, but Iraya women, who are generally shy in character, have the right to speak and to be heard. Cases affecting the majority require permission from the community, which is done by asking elders to facilitate community consultation within their jurisdiction. Consensus is the clear unity of the community arrived at through a collective decision-making process. Although community consensus means the united decision of the whole, the facilitation of the council of elders is a prerequisite.

Conflict came into Iraya communities during the 1950s, when the government ordered scattered and nomadic Iraya settlements to settle into “barrios”. The dynamics and interactions of the tribal communities were disrupted as they were forced to settle into sitios and sub-sitios under the political jurisdiction of the local barangay units.

Meanwhile, some elders expressed dismay that despite having Iraya officials to represent them in the municipal meetings, their communities and elders were no longer consulted. Their customary laws and decision-making processes were undermined and leadership values changed as the dynamism of the tribes was eclipsed by hierarchal structures and bureaucratic relationships. Some community leaders became susceptible to the dictates and influence of local government units (LGU), the National Commission on Indigenous Peoples (NCIP) and corporate interests, instead of serving the wellbeing of the Iraya.

Since the late 1990s, the Iraya community of Abra de Ilog had been included as a mining prospect of Agusan Petroleum and Mineral Corporation (APMC), which is owned by San Miguel Corporation. In 2008, APMC was able to secure one of largest exploration permits for gold, silver, copper and zinc, covering 53,952 hectares. The mining exploration encompassed indigenous peoples’ areas in 8 barangays within Abra de Ilog. Majority of these barangays are Iraya settlements, kaingin sites, sacred groves, burial sites and watersheds.

Starting in 2008, a series of actions were undertaken by the NCIP and the APMC to obtain the FPIC of the Iraya people to allow APMC to mine their area. These

consisted of community assemblies and meetings to convince the people to agree to the mining project. These meetings were marked by deception, threats, bribery, scare tactics, use of signatures in attendance sheets to show consent, and promises of money for projects and CADT processing. The MOA signing between APMC and the Iraya elders of Abra de Ilog was held in a place far from the Iraya territory, in Batangas, where a few Iraya elders were transported on a ship and forced to sign so that they could go back home. This resulted in disunity among the Iraya communities. Many of those who signed the MOA later revoked their signatures, exposed the anomalies of the FPIC process and expressed disappointment over the elders who accommodated the mining agreement.

Despite FPIC anomalies and dissent among the Iraya, the NCIP office released on July 23, 2008 a Compliance Certificate of FPIC to Abra de Ilog Mayor's office. The NCIP then approved the Certificate Precondition subject to the terms and conditions in the Memorandum of Agreement entered into and executed between APMC and Iraya communities of Abra de Ilog.

Currently, APMC is renewing its FTAA application, and another FPIC process may follow. Pro-mining leaders and organizations who benefited from the mining money are reportedly aggressive in persuading Iraya communities to give their consent. Many challenges still lie ahead for the Iraya to further educate and unify their people in defense of their land and rights.



Case Study 2: Creating Divisions between the indigenous Ibaloi migrants and original Bugkalot settlers of Yabbi, Dupax del Norte, Nueva Vizcaya ¹⁸

Yabbi is a remote barangay of Dupax del Norte, Nueva Vizcaya, made up of mountains, virgin forests and watersheds. The indigenous Bugkalot people are the original settlers in the area. They are primarily hunters and they also practice swidden farming or kaingin. Through time, indigenous Ifugao, Isinay, Kankana-ey and Ibaloi peoples, including some non-indigenous Ilokano, came and resettled in the upland area. Today, the Ibaloi make up the biggest number with an estimate of 96% of the 118 households in Yabbi.

The migration of indigenous peoples from the Cordillera into Nueva Vizcaya started in the 1950s and 1960s, when many Ibaloi people in Benguet were displaced from their ancestral lands by the Ambuklao and Binga dams, without being provided a resettlement site by the government. Likewise, the Ifugaos arrived in the Nueva Vizcaya looking for resettlement. These groups approached the Bugkalot elders, asking if they could settle in the area. The Bugkalot, as the original settlers, were scattered in the wide mountains of Nueva Vizcaya, Quirino, Aurora and Nueva Ecija. They accepted and welcomed the indigenous migrants and entered into various agreements with them. The Ibaloi and Kankanaey migrants were able to acquire land through barter, trading products in exchange for pieces of land. The indigenous migrants started gardening in the mountain slopes. Through time, the Bugkalots gradually abandoned their hunting activities, settled and improved their farming, tilling their lands to plant vegetables and rice.

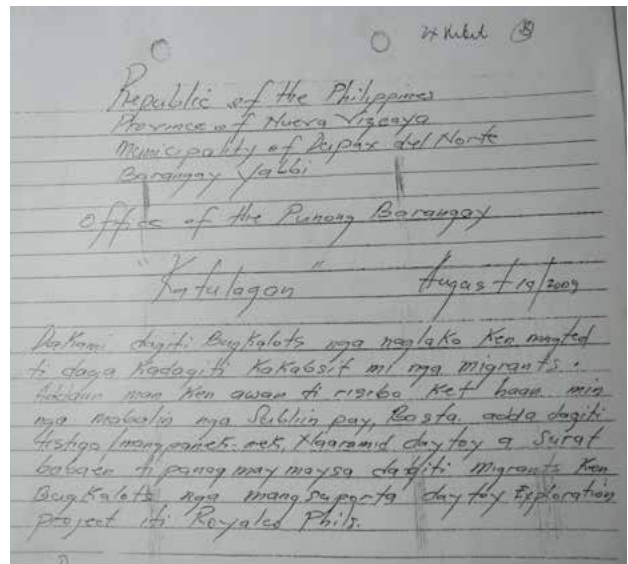
A good relationship was established among the original Bugkalot settlers and the indigenous migrants, through agreements containing some conditions. Among these conditions was that the Ibaloi and the Bugkalot had to respect each other. If an Ibaloi wronged any Bugkalot, he or she would be sent away from the community. The Ibaloi would only farm the lands that were granted by the Bugkalot elders for them and will not occupy any place in the territory unless the owner of the land decided to sell it. All tribes must be informed about an entry of any visitor or migrant for protection. Anyone who disobeys the agreement would be punished according to the decision of the elders of both indigenous groups. At present, the Ibaloi and Bugkalot tribes have intermarried and interact as one community.

¹⁸ TFIP. 2013. Customary Laws and FPIC. Philippine Task Force for Indigenous Peoples Rights (TFIP).

The entry of the Buena Suerte Mining Company (BSMC) in 2009 caused disunity among the indigenous peoples in Yabbi on the issue of mining. The Ibaloi and the other migrants in Yabbi are all affected by the BSMC mining exploration project and should thus be consulted in a genuine FPIC process. However, the NCIP excluded the migrants in the decision-making process for FPIC. Barangay Yabbi is covered by the Certification of Ancestral Domain Title awarded by the NCIP to the Bugkalot tribe. On this basis, the NCIP only considered the Bugkalot votes in the FPIC process.

Manipulations during the FPIC consultations were observed, such as highlighting the benefits for the barangay but not the adverse impacts of mining. Signatures in attendance sheets passed during a consensus-building meeting were used as signatories in the Memorandum of Agreement in favor of the mining exploration project. Most of the signatories are Bugkalot who reside outside Yabbi, in other barangays not affected by the mining exploration.

The NCIP did not recognize the historical agreements forged between the Bugkalot and indigenous migrants when they were accepted into the community. Though the indigenous customary laws of the Ibaloi migrants in Yabbi have weakened because of their displacement from their ancestral land, they are now reviving their traditional panglakayen system and have appointed an elder as their tribal chieftain to represent them in different venues. The NCIP did not recognize this customary selection by the Ibaloi migrants of their traditional elder.



Division in the community is evident. Residents have signed many petitions opposing the mining activity. The company paid some Bugkalot to act as security guards and harassed anti-mining residents and their supporters from the church. Bugkalot who are in favor of mining threatened to reclaim their lands back from the migrants if they would not agree to the exploration.

The residents of Yabbi are now calling for the revocation of the mining company's exploration permit. They have made use of state institutions, such as the barangay, and formed indigenous peoples' organizations to strengthen their struggle to fight for their rights over their land and for genuine FPIC.



Case Study 3: Assertion of FPIC by the Binongan people of Abra ¹⁹

The municipality of Baay-Licuan in the province of Abra in the Cordillera is composed of 11 barangays encompassing the ancestral domain of the Binongan tribe. In 1998 the government granted 2 Mineral Production Sharing Agreements (MPSA) to local companies Abra Mining Corporation and Jabel Resources Company within the Binongan ancestral domain without their FPIC. These MPSA were illegally granted based on certifications issued by the NCIP that there were no pending applications or issued certificates for ancestral domain in the areas covered by the mining applications. In 2006, these 2 local companies signed a memorandum of understanding with the Canadian mining company Olympus Pacific Minerals. This paved the way for Olympus to commence exploration activities in February 2007 in the ancestral lands of the Binongan tribe without securing the communities' FPIC.

¹⁹ Abigail Anongos, Cordillera Peoples Alliance, 2012. Pitfalls and Pipelines. Indigenous Peoples and Extractive Industries.

In response, the Binongan indigenous communities filed petitions against Olympus, asserting their right to FPIC. Sustained opposition temporarily suspended the exploration and drilling, and prompted the NCIP to call the attention of Olympus to comply with the legal requisite of acquiring the FPIC. Following an intensive four-month campaign, the Binongan people of Baay-Licuan managed to force the NCIP to temporarily halt Olympus's exploration operations to allow the conduct of an FPIC process. This led to a series of community consultations that took place in all the 11 barangays. In these consultative assemblies the Binongan people reiterated their collective opposition against Olympus, except for the two barangays of Nalbuan and Bunglo, who voted to accept the project, believing the company's promises of employment and roads.

A ritual performed by Binongan elders on April 22 in Mt. Capcapo supported the community opposition. A pig was butchered and its blood spilled on specific parts of the mountain, to ward off evil elements such as Olympus and symbolizing the Binongan's collective ownership of the land. Also, a 3,000-strong gathering organized by the Cordillera Peoples Alliance (CPA) in Baay-Licuan for Cordillera Day on April 24 signed a declaration supporting the local communities' earlier petitions against Olympus. Binongan elders and leaders also came out with a Unity Pact written in the Binongan language opposing Olympus and other large mines.

In the FPIC process that followed, the Binongan elders felt that they had been marginalized by the failure to respect their customary decision making processes. According to the customary practice of the Binongan, a general assembly should be held with all people from the entire ancestral domain present in order to reach a consensus. However, the NCIP encouraged the formation of a 'governing council' to facilitate the conduct of the FPIC process. The 'governing council' has no precedence in customary law or practice and was perceived as being controlled by the mayor and local government officials. The affected barangays were consulted on an individual basis and the NCIP and 'governing council' proposed to hold a secret ballot in each barangay to determine the outcome of FPIC, which is incompatible with the customary decision making processes. Furthermore, the threatening presence of the military increased in the area prior to the commencement of the FPIC process sowing fear and division in the community.

In spite of all this pressure, the communities' resolve to protect their ancestral domain was successful in stopping Olympus' attempts to continue its operations in Mt. Capcapo in Baay-Licuan. This was done through the collective decision-making processes and traditional methods of democratic consensus building of the Binongan people.

This case shows that it is wrong for the NCIP to assume that there is no ancestral domain in the area based on the pretext that no claim for ancestral domain had been filed in their office. Also, using culturally inappropriate processes in obtaining FPIC is incompatible with the IPRA and goes against the mandate of the NCIP to uphold indigenous peoples rights.

Case Study 4: FPIC Community Protocol - The Subanen Manifesto ²⁰

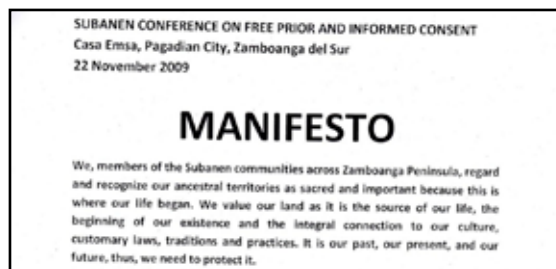
The Zamboanga peninsula is a priority mining area in the Philippines under the government's policy to revitalize the mining industry. The peninsula, which was traditionally Subanen territory, is home to some 300,000 Subanen who now represent a minority of the population and whose ancestral domains are scattered throughout the peninsula. The area has been host to several mining applications over time by international and national companies including Rio Tinto, TVI Resources Development Inc. (TVIRD), Ferrum 168, Geotechniques and Mines Inc (GAMI) and Frank Real Inc.

Numerous violations of customary laws and FPIC were documented in relation to the selection of community representatives and decision-making processes to obtain consent for mining activities in Zamboanga. The Subanen indigenous peoples have had negative experiences in engaging in flawed FPIC processes facilitated by the NCIP, including the creation of fake tribal council of elders to give consent. Thus, they have asserted their own conceptions of FPIC to ensure that future processes comply with, and protect, their rights, including their right to self-determination. To do this they have asserted their customary laws and formulated their own guidelines for a culturally appropriate FPIC process as contained in the "Subanen Manifesto".

²⁰ Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013) [www.piplinks.org/makingfpicareality]

The Subanen “Manifesto” on FPIC came about after a group of Subanen traditional leaders from different parts of Zamboanga Peninsula gathered in 2007 to protest against the NCIP 2006 FPIC Guidelines for facilitating the entry of extractive projects into their ancestral domains. This was followed in 2009 by a series of community consultations and a conference of Subanen traditional leaders to consolidate the views of the different communities and to formulate FPIC guidelines that they considered to be culturally appropriate, consistent with their customary law and sensitive to their indigenous worldview and beliefs. The Subanen leaders involved in the consultation process represented different communities and provinces from all over the Zamboanga peninsula including Zamboanga del Sur, Sibugay, Zamboanga del Norte, Misamis Occidental, Subanen women leaders and Timuoy Noval Lambo representing the Gukom Sog Pito Kodolungan. The result of this broad-based community consultation process was a manifesto expressing the aspirations of the Subanen people for an acceptable consent process before the introduction of development projects in the ancestral domains.²¹

The Manifesto declared their views on the importance of their land and natural resources. It called for respect for indigenous values through asking permission and acquiring consent before doing anything involving the people, their property and the unseen spirits. The document called for the adoption of guidelines to regulate the entry of large-scale development programs in the Zamboanga peninsula. Among the conditions for the conduct of FPIC were: the submission of a list of names of indigenous leaders duly recognized by their respective communities; participation of all affected communities in the FPIC process; respect for traditional territories and boundaries; respect for traditional leadership and decision-making processes; performance of traditional sacred rituals; written agreements with terms and conditions; respect for decisions to reject projects and the absence of military and police forces in the community.²²



21 LRC-KSK. Subanen Manifesto: The Free Prior and Informed Consent Process of the Subanen in Zamboanga Peninsula. 2013

22 Manifesto. Subanen Conference on Free Prior and Informed Consent. Nov. 22, 2009

4.2 Gaps, Challenges and Lessons Learned

Needs, capacities and strategies obviously vary, from country to country, from one indigenous people to another, and from situation to situation. In general, however, we can mention some major challenges faced by indigenous peoples in relation to FPIC in most Asian countries:

- a. **The paramount need for indigenous peoples is to have strong indigenous institutions and organizations for self governance or effective collective decision- making.**

It is imperative that affected indigenous peoples have :

- Full understanding and grasp of their collective rights and how to exercise and protect these rights in the conduct of FPIC
- Strong institutions and organizations for independent collective decision making that is transparent and inclusive
- Strong leaders that are accountable to members or constituents
- Vigilant community members and constituents

These are the necessary conditions to ensure that the conduct and implementation of FPIC serve the interest and welfare of affected indigenous communities.



- b. In most countries in Asia, it is important to lobby for national legislation recognizing indigenous peoples and providing for their right to free, prior, informed consent on all matters pertaining to or affecting them, their territories, lands and resources.**²³

In this case, the major concerns are: what strategy should indigenous peoples employ to achieve such legislation, and whether indigenous peoples have the capacity to implement such a strategy.

- c. The capacity to handle technical information and assess their implications is, in many cases, lacking among communities.**

This challenge needs to be seriously addressed if efforts to secure FPIC implementation are to be effective. The need for organization and networking is also a significant challenge.

- d. In some Asian countries, the challenge is not the absence of favorable laws or policies but rather the violation or non-implementation of these.**

As in the case of the Philippines where there is a national law, the Indigenous Peoples Rights Act, the challenges indigenous peoples face are:

- To be vigilant and keep track of all policies, programs and projects, actions and activities planned for them or their territories. For each and every policy, program and project, action and activity affecting them, indigenous peoples should demand that they go through the FPIC process:
 - prior to the implementation of the policy, program or project, action or activity,
 - all information about it and its implications be divulged to their communities;

²³ Lulu A. Gimenez, 2010. Module 2, Free, Prior, Informed Consent. Rights! Training Manual on the United Nations Declaration on the Rights of Indigenous Peoples. Asia Indigenous Peoples Pact. Chiangmai.

- their communities are afforded time to deliberate the matter according to customary processes;
 - their communities are given freedom to say yes or no, and their answer will be respected.
-
- If communities consent to a policy, program or project, action or activity, they need to deliberate among themselves, using their own decision-making processes, on what terms or conditions they should ask for, negotiate for these assertively and lay these down clearly in a memorandum of agreement with the entity concerned.
 - If an agreement is finally reached, indigenous peoples should be able to vigilantly monitor the implementation of the agreement.

TAKE NOTE: The paramount need in most countries in Asia for indigenous peoples is to have strong indigenous institutions and organizations for self-governance or effective collective decision-making. It is important to lobby for national legislation recognizing indigenous peoples and providing for their right to free, prior, informed consent on all matters pertaining to or affecting them, their territories, lands and resources.



Module 5

POLICIES OF INTERNATIONAL FINANCIAL INSTITUTIONS (IFI) AND OTHER DEVELOPMENT ACTORS ON INDIGENOUS PEOPLES AND FPIC

SPECIFIC OBJECTIVES

For the participants to:

1. Know the particular safeguard policies of international financial institutions and multilateral banks in relation indigenous peoples and FPIC.
2. Appreciate the relevance for indigenous peoples of the safeguard policies of international financial institutions in relation to indigenous peoples and FPIC.

METHODS: Lecture, small group discussion, plenary session

ESTIMATED TIME REQUIRED: 1.5 hours

ACTIVITY:

1. The trainer or facilitator discusses the input below for the whole group in the form of a powerpoint presentation or lecture, and by providing a hand-out for the participants.
2. An open forum follows for questions and clarifications from the participants.
3. The participants are then divided into small groups to discuss what they understood from the presentation and to reflect on the relevance of these policies based their own experience in dealing with financial institutions.
4. Each group reports back to the whole group on the result of their group discussion on the relevance of IFI policies for indigenous peoples in their day-to-day lives.

It is important for indigenous peoples to be familiar with the policies of financial institutions supporting or funding projects that impact on their land, territories and resources. This is because the incorporation of FPIC into the safeguard policies of these financial institutions implies a commitment by funders to ensure that all projects they fund proceed in a manner consistent with the respect of indigenous peoples' rights. These policies represent a major commitment and undertaking by the financial sector to reform their practices, which until now have condoned and facilitated the imposition of projects that deny or violate the rights of indigenous peoples.²⁴

Knowing the safeguard policies of IFIs, and particularly their policies on indigenous peoples, will enable indigenous peoples to hold such financial institutions to task for their commitments. It will also allow indigenous peoples to raise their grievances and complaints against corporations in cases where these policies are violated, even in countries where indigenous peoples and their right to FPIC are not recognized by the government.



24 Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013) [www.piplinks.org/makingfpicareality]

5.1 European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD) issued in May 2008 its Environmental and Social Policy, which recognizes that for the rights of indigenous peoples to be upheld enabling them to engage in partnerships where they so chose, their FPIC must be obtained. The policy states:

“Need for Free, Prior and Informed Consent. This Performance Requirement recognises the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required for the project-related activities identified in paragraphs 31–37, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.”

Where clients propose to commercially develop natural resources in indigenous peoples lands the client is required to:

“enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation.” (Doyle, 2008)

FPIC is therefore seen as the necessary framework for any negotiations with indigenous peoples to ensure “fair and equitable sharing of benefits.”²⁵

5.2 Inter American Bank

The Inter American Bank’s current policy on indigenous peoples was issued in 2006, prior to the adoption of UNDRIP. It mirrors ILO Convention 169’s requirement that consultations and “good faith negotiation” have the objective of achieving agreement or consent. FPIC is required under this policy as it identifies “applicable legal norms” including “international jurisprudence of the Inter-American Court of Human Rights.”²⁶

²⁵ Doyle, Cathal, 2008. Free Prior Informed Consent (FPIC) - A universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector, Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights, Moscow

²⁶ Ibid.

5.3 Asian Development Bank

The Asian Development Bank (ADB) undertook a review of its environmental and social safeguard operational policies in 2008-2009 and issued a revised Safeguard Policy Statement that includes a more progressive Indigenous Peoples (IP) Policy. The ADB IP Policy now requires the application of the free, prior and informed consent of indigenous peoples on projects and programme interventions that affect their land, territories and resources, their cultural heritage and on their potential displacement.²⁷

The objective of the ADB Indigenous Peoples Safeguards is to design and implement projects in a way that fosters full respect for indigenous peoples' identity, dignity, human rights, livelihood systems, and cultural uniqueness as defined by the indigenous peoples themselves. This is to ensure that affected indigenous peoples:

- i. receive culturally appropriate social and economic benefits,
- ii. do not suffer adverse impacts as a result of projects, and
- iii. can participate actively in projects that affect them.

The ADB Indigenous Peoples Safeguards are triggered if a project directly or indirectly affects the dignity, human rights, livelihood systems, or culture of indigenous peoples or affects the territories or natural or cultural resources that indigenous peoples own, use, occupy, or claim as an ancestral domain or asset. Under this safeguard, the borrower/client must fulfill certain requirements to protect the rights of affected indigenous peoples.

The Indigenous Peoples Safeguard Requirements (Safeguard Requirements 3) outlines the requirements that borrowers/clients need to meet in projects supported by ADB. These requirements include:

- i. undertaking the social impact assessment and planning process;
- ii. preparing social impact assessment reports and planning documents;

²⁷ AIPP in FPP E-newsletter, 2013. <http://www.forestpeoples.org/topics/african-development-bank-afdb/news/2013/04/experience-asian-indigenous-peoples-finance-lend-0>

- iii. disclosing information and undertaking consultation, including ascertaining consent of affected Indigenous Peoples community to selected project activities;
- iv. establishing a grievance mechanism; and
- v. monitoring and reporting.²⁸

However, the operational policy remains weak in respecting the collective decision-making process of indigenous peoples. It is also weak in its definition of consent as “broad community support.” Furthermore, the commitment of the ADB Management and the responsible counterpart agencies in borrower governments to implement the IP Policy still remains to be tested.²⁹

5.4 The World Bank Group

The World Bank (WB) continues to apply an outdated policy on indigenous peoples, Operational Policy 4.10, which is currently undergoing a review process to be completed in 2014. This policy is the only policy of the multilateral development banks that does not recognise the right of indigenous peoples to free, prior and informed consent (FPIC). The World Bank’s Operational Policy on Indigenous Peoples 4.10 (OP4.10) provides for “free prior informed consultation (FPICon)”, which is inconsistent with and falls below the international human rights standard on Free Prior and Informed Consent.³⁰

The failure of the OP4.10 to effectively address indigenous peoples’ concerns with World Bank financed projects is attributed to the absence of a human rights based approach in the policy as exemplified in its inconsistency with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the ILO Convention 169. Also to blame is the persistent lack of political will within the Bank’s Senior Management to effectively enforce the requirements under the existing operational policy framework and ensure that the policy meets the existing international standards on indigenous peoples.³¹

²⁸ ADB (2009), Safeguard Policy Statement 2009, Asian Development Bank, Manila, Philippines.

²⁹ AIPP in FPP E-newsletter, 2013. <http://www.forestpeoples.org/topics/african-development-bank-afdb/news/2013/04/experience-asian-indigenous-peoples-finance-lend-0>

³⁰ AIPP in FPP E-newsletter, 2013. <http://www.forestpeoples.org/topics/african-development-bank-afdb/news/2013/04/experience-asian-indigenous-peoples-finance-lend-0>

³¹ AIPP, 2012. Indigenous Peoples Inputs to the World Bank Operational Policy 4.10

Various indigenous organizations, including AIPP, have been strongly lobbying and raising the issue to the World Bank for the replacement of the phrase “Free Prior Informed Consultation” in its Policy on Indigenous Peoples (OP4.10) with Free, Prior and Informed Consent (FPIC).

On a positive note, in January 2012, the International Finance Corporation (IFC) of the World Bank Group updated its Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy, including its safeguard policy on indigenous peoples. The IFC is the entity in the World Bank that deals with the private sector, particularly corporations, while the World Bank deals with the public sector, i.e. governments or States.

IFC’s Performance Standard No. 7 on Indigenous Peoples has been revised to require that Free, Prior and Informed Consent (FPIC) be obtained in certain circumstances affecting indigenous peoples. The policy applies to all new investments. Under the policy, IFC clients are required to obtain FPIC for project design, implementation and expected outcomes stages for those projects impacting on land or natural resources subject to traditional ownership or under customary use, requiring relocation of communities and significantly impacting on critical cultural heritage of indigenous peoples.³²

5.5 The Equator Principle Banks

The IFC’s performance standards form the basis of policies of the 75 Equator Principle financial institutions, which between them finance a major portion of projects in emerging markets.³³

The Equator Principle Banks adopted a new set of Equator Principles in July 1, 2006 that has been subscribed to by 40 of the commercial banks that are responsible for global private sector finance. There is no specific statement on indigenous peoples in the 2006 Equator Principles but a footnote specifies that, “Consultation with indigenous peoples must conform to specific and detailed requirements as found in Performance Standard 7. Furthermore, the special rights of indigenous peoples as recognized by host-country legislation will need to be addressed.”³⁴

32 International Finance Corporation, 2011. Update of IFC’s Policies and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy.

33 Cathal Doyle & Jill Cariño “Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector” (2013) [www.piplinks.org/makingfpicareality]

34 Forest Peoples Programme, 2006. Briefing on Indigenous Peoples and Private Sector Project Financing. http://www.wrm.org.uy/peoples/private_sector/project_financing_aug06.pdf.

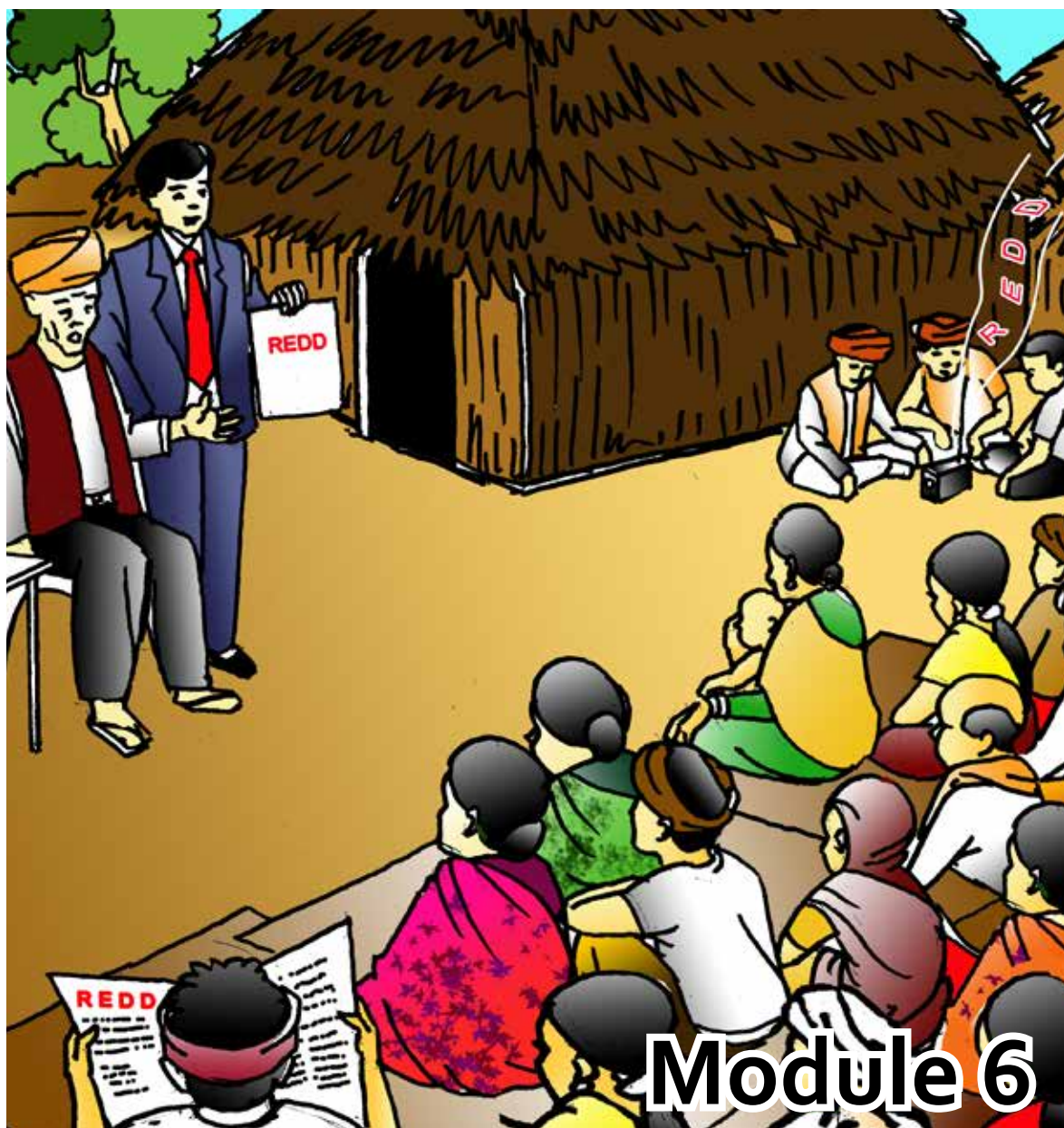
5.6 European Union Policy on Indigenous Peoples

The European Union (which includes both the European Community and its 28 Member States) provides some 50 per cent of the total international Official Development Assistance.³⁵ The EU seeks to integrate indigenous issues into all aspects of its external policies (political dialogues, multilateral fora, financial support). The European Consensus on Development – a December 2005 Joint statement by the Council, Member States, the European Parliament and the European Commission - drives activities in the field of development cooperation. The Consensus commits the EU 'to apply a strengthened approach to mainstreaming' specific cross-cutting issues, including 'indigenous peoples,' to integrate their concerns at all levels of cooperation, ensuring their full participation and free, prior and informed consent.

The EU is funding projects through the European Instrument for Democracy and Human Rights (EIDHR) under which the rights of indigenous peoples are a priority. The goals of the EIDHR are to increase indigenous peoples' rights and capacity to control their own social, economic and cultural development, while enhancing territorial rights and capacity for sustainable management of biological resources.³⁶

TAKE NOTE: IFIs and Multilateral Development Banks (MDBs) providing funds for projects are bound to abide by their policies relating to indigenous peoples. Indigenous peoples should be fully aware of these policies, including the gaps, lessons learned and challenges, to be able to demand for the implementation of these policies where appropriate. At the same time, indigenous peoples should insist on their right to FPIC. This is not fully provided by the Policies and Guidelines of IFI (for example the World Bank).

35 The European Union: Human Rights And The Fight Against Discrimination
36 EU policy on indigenous peoples. http://eeas.europa.eu/human_rights/ip/index_en.htm



Module 6

EXPERIENCE OF ASIAN INDIGENOUS PEOPLES WITH POLICIES OF INTERNATIONAL FINANCIAL INSTITUTIONS (IFI)

SPECIFIC OBJECTIVES

For the participants to:

1. Learn different experiences of indigenous peoples with projects funded by international financial institutions in Asia.
2. Identify challenges and lessons learned from the sharing of experiences.

METHODS: Panel presentation, open forum, small group discussions, sharing of experiences and plenary session

ESTIMATED TIME REQUIRED: 2.5 hours

ACTIVITY:

1. Selected participants or resource persons are asked to share their particular experience regarding the implementation of IFI-funded projects or activities in their community, mentioning how the project has affected the community and if or how FPIC was implemented. The case studies below may be used as reference for the presentation.
2. An open forum follows for the participants to ask questions and clarifications.
3. The participants are divided into smaller groups to discuss the following questions:
 - What problems do you see or experience in relation to FPIC in IFI-funded projects in indigenous communities?
 - Can you identify some lessons learned from the cases presented or from your own experience with IFI-funded project?
4. The small groups report back to the whole group on the results of their discussions.
5. The facilitator synthesizes the group reports by clustering common ideas and summarizing the challenges and lessons learned.

NOTE: The source for this section is the AIPP article *The Experience of Asian Indigenous Peoples with the Finance Lending Policies of International Financial Institutions: A Select Overview*, contributed to and first published by the Forest Peoples Programme E-newsletter, April 28, 2013.

<http://www.forestpeoples.org/topics/african-development-bank-afdb/news/2013/04/experience-asian-indigenous-peoples-finance-lend-0>

Projects and programme interventions of multilateral development banks have a record of systematic and widespread human rights violations for indigenous peoples in Asia. In many countries, indigenous peoples have been subjected to widespread displacement and irreversible loss of traditional livelihoods. Behind these human rights violations is the denial of indigenous peoples' rights to their lands, territories and resources and to their right to give their FPIC to projects and programme interventions, including those in the name of sustainable development and human development. Among them, the large infrastructure (dams and highway construction) and environmental "conservation" projects have had the most detrimental adverse impacts on indigenous peoples. There are a good number of examples of such projects that have negatively impacted indigenous peoples' communities in Asian countries, some of which follow below.

While both the World Bank and the Asian Development Bank (ADB) have their own mandatory environmental as well as social safeguard operational policies, the requirements for respecting the human rights and collective rights of indigenous peoples are weak and implementation has proved problematic. While there are projects today that are better designed from the perspective of indigenous peoples, compared to those implemented in the 1960s and 70s, the desired positive impacts of the implementation of these safeguards in ensuring environmental protection and in avoiding adverse social consequences have not been achieved.

The following cases exemplify the experiences of indigenous peoples impacted by projects and programme interventions financed by international financial institutions.

6.1 Case Studies from Asia

Laos: *Khammouane Province, Vientiane and Xieng Khouang Provinces*

The government of Laos PDR (GoL) considers hydro energy to be the main thrust of growth and economic development. It aims to transform the country into “the battery of Southeast Asia” by harnessing the power of rivers. To achieve this goal, GoL is receiving financing from major International Finance Institutions (IFIs) including the World Bank and the Asian Development Bank. In its power sector development plan, GoL includes 72 new large dams, 12 of which are under construction and nearly 25 more are at advanced stages of planning.[2] In the case of large dams such as Nam Theun 2 (NT2) and Nam Ngum 3 (NN3), indigenous peoples in the affected communities have suffered serious economic and social dislocations in addition to loss of biodiversity.

The NT2 dam in Khammouane Province directly affected more than 120,000 people downstream by destroying livelihood options and fisheries, flooding riverbank gardens and affecting water quality. 6,300 Indigenous persons in the Nakai Plateau were resettled to make way for the reservoir. The numerically small Vietic people, the most vulnerable of the indigenous peoples in Laos, were forcibly relocated to resettlement villages in violation of both the WB and ADB operational policies on indigenous peoples. It has been reported that many of them have died as a result of living in a resettled village, for both psychological and physical reasons. As of today, affected indigenous peoples in the resettlement villages have not been provided with land and have not received compensations for the loss of their properties.

The commitments for land and compensation described in detail in the project’s planning documents remain partly unfulfilled. Due to loss of land and natural resources, food security has remained a concern of the affected indigenous peoples. Although the material needs for housing, electricity, roads, schools, and health centres, are provided at the resettlement villages, there is serious doubt that indigenous peoples’ livelihoods will be restored to the pre-resettlement level, will be culturally appropriate and will be sustainable in the future. The poor quality of the land in the resettlement villages continues to pose severe problems for villagers, who are unable to grow sufficient food to feed their families, and to pay for the electric bills. The long-term production of the reservoir fisheries is also in doubt, and, as opposed to arrangements agreed in the project’s Indigenous

Peoples Development Plan, outsiders are encroaching on the villagers' community forest areas.[3] In the meantime, the Nam Ngum 3 dam (also proposed to be funded by ADB) in Vientiane and Xieng Khouang Provinces, which is expected to be completed by 2016, will submerge an area of 3,769 km² affecting Lao-Tai (42%), Khmu (33%), Hmong (25%) and Yao indigenous peoples.



North-East India: Meghalaya, Manipur, Nagaland

In North-East India, major IFIs including the WB, ADB and Japan Bank for International Cooperation (JBIC) are most active in providing support in the sectors of transportation, power and energy, trade and private sector participation, urban development, agribusiness and tourism. In most projects in North-East India, indigenous peoples have not been properly consulted before mega development projects are undertaken. One such example is the Lafarge Surma Cement (LSC) plant, the first project of the South Asia Subregional Economic Cooperation (SASEC), an initiative for borderless Asia being financed by ADB. The LSC plant, which is actually in Bangladesh but sources its raw materials from Meghalaya, India, has affected the indigenous Khasi people in Meghalaya. As of today, the affected families have been struggling to get compensation for loss of lands and livelihoods due to the LSC. As well as IFI projects, large transport and energy projects have been undertaken or are being initiated by private companies and government agencies in North-East India. For example, the Tipaimukh Multipurpose Hydroelectric Project (TMHEP) in Manipur, and Mapithel dam in Nagaland pose serious threats to Hmar, Naga and Kuki indigenous peoples. The TMHEP will flood around 311 sq. km. of land, permanently displacing 90 villages mostly of the indigenous Hmar and Zeliangrong peoples, and 7.8 million trees and 27,000 bamboo groves will be felled in the 25,822 ha forested area.

Nepal

In Nepal, apart from financing health and education projects, the WB and ADB are financing transport systems and hydropower dams. Current examples include two hydropower projects – ‘Kabeli A Hydropower’ and ‘Tanahu Hydropower Project’ - which are in the pipeline. The detailed impacts of these hydropower projects on indigenous peoples have not yet been ascertained. At the same time, the “do no harm” projects financed by the IFIs, e.g., agriculture development projects, do not necessarily bring good results to indigenous peoples either due to lack of adequate participation or wrongful assessments of the projects by the IFIs. A case study on a commercial agriculture development project financed by ADB, concluded that the high value crop provided by the project, despite the increase in income in the short-term, affected the traditional seeds, soil fertility and pest management systems of indigenous peoples.



Malaysia: Sarawak Province

The Batang Ai Hydro Electric Power (HEP) project in Sarawak was constructed between 1980 and 1985 in the heartland of the Iban traditional territory. It displaced about 3,000 Iban people from 21 longhouses and they were forcibly resettled in the Lemanak-Batang Ai area on land that was managed by the Sarawak Land Consolidation and Rehabilitation Authority. Funded partly by the ADB, this largest HEP in Malaysia occupies some 40,000 acres of land, 21,000 of which have now

been flooded, destroying large areas of forests and lands held under customary tenure, including swidden farms, crops and ancestral lands. The resettled Iban people face numerous problems and feel that they have been treated unfairly. The following is a long list of socio-economic woes that the 18,000 indigenous peoples in the Batang Ai state constituency still have today, even though the Batang Ai hydro electric dam has been operating for 25 years[4]:

1. Instead of the eleven acres of cleared land that they had been promised, each family received only one acre.
2. They did not receive any support for re-building as promised.
3. Many families were unprepared for this new way of living; so many could not cope.
4. Land certificates were only issued one per family and were issued to men; women were deprived from land ownership.
5. In 2009, not only the displaced families but the whole of the constituency of Batang Ai had no access to public transport, limited telecommunication, poor electricity supply, frequent water-supply interruptions, poor health and medical facilities, as well as limited job opportunities.

The ADB, on the other hand, has described the resettlement of 2,800 Iban by the dam as an example of a “culturally sensitive and economically sound programme” because “the policies and plans...were carefully investigated and prepared.”[5] Others, however, are more sanguine. A review paper commissioned by the World Commission on Dams as part of its assessment of the impact of dams on indigenous peoples states: “The Iban were persuaded to move in exchange for promises of free housing, free water, free electricity and 11 acres of land per family. The reality has proved a bitter experience. Not only were they resettled on a government land scheme, but they were also forced to change their way of life radically. Rice cultivation proved impossible on the terraces prepared for them and they were obliged to set up as small-holders on a plantation scheme. Incomes fell to the point that, according to one study, 60% of households were below the State poverty line, with the majority of respondents reporting that lack of land was their main problem.”[6] The State-owned Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) ran the plantation on which the Iban were resettled. Women suffered disproportionately from the resettlement procedures. For example, compensation, which should have been paid to both men and women as co-owners of the land, was only paid to male “heads of household”.

Indonesia: PT WEDA Bay Nickel, Halmahera island, North Maluku

The Forest Tobelo (Tugutil) are the nomadic people inhabiting the inland forests of Halmahera island whose subsistence is based on hunting, gathering, and foraging for sago in lower areas. The Tobelo Forest Community are broadly categorised into two groups. The first group are those who have been resettled in the villages, but may still return regularly to old use sites in the forest. The second group remain fully nomadic and identify themselves as O hongana ma nywa or 'forest people'. Although total numbers are difficult to estimate, the latter group is composed of roughly 100 individuals[7].

In 2004, the government of Indonesia declared 167,300 hectares of this territory as the Aketajawe Nature Reserve and the Lalobata Protected Forest to protect at least 23 bird species; it was claimed that these bird species are found nowhere else in the world. However, PT Weda Bay Nickel (WBN) has been allowed to undertake exploration and other mining development activities inside these national parks. The WBN Project's Contract of Work covers 54,874 hectares which are part of the proposed buffer zone for the parks. This area contains mangrove and fresh water swamp forest, various lowland forest habitat types, and lower montane forest. Less than half of the total area is designated Protected Forest by the Ministry of Forestry.

In this phase of WBN's mining operations, it has asked the Multilateral Investment Guarantee Agency (MIGA), a specialised arm of the World Bank Group, to guarantee the project with respect to political risks. The MIGA board approved the insurance for the feasibility phase of the project on 13 July 2010 in the amount of USD207 million for three years.[8] This guarantee covers war, civil disturbance expropriation, non-transfer and breach of contract. However, in the Environmental and Social Review undertaken by the MIGA on due diligence conducted in mid-2010, key significant potential impacts of the project were identified that will occur during the construction and operations phases. These impacts include potential erosion of biodiversity, solid residues disposal and population influx. With respect to the forest dwellers, it states: "It is possible that Project activities may hamper their movements and cause changes to livelihood patterns and distress.... It may also be possible to discover heritage sites belonging to the local indigenous groups." [9] The planned mining area is still part of the proposed buffer zone for the parks. The forests are also the lands of the Forest Tobelo indigenous peoples, and represent important habitats for a number of endemic and protected species.

Concerns have been expressed that the project will have numerous adverse impacts on biodiversity, such as the destruction of at least 4,000 - 11,000 ha of moist tropical forest, as well as the destruction of at least 2,000 - 6,000 ha (30%) of the Protected Forest in the mine project area[10]. Most importantly, the sociocultural survival of the Forest Tobelo people is threatened due to the severe impact of this mining project in their territory.

6.2 Gaps and Lessons Learned

To overcome this legacy of failed or damaging projects in indigenous peoples' lands and territories, financial institutions working in Asia need to pay more than just lip-service to the safeguard standards they have set themselves. Financing institutions need to address the significant barriers to better implementation of their safeguard policies, including weak political will on the side of some Asian governments. Furthermore, the standards themselves need to be improved and brought into line with the international obligations of governments, including the obligation to implement the UN Declaration on the Rights of Indigenous Peoples.



Some lessons learned in relation to dealing with financial institutions that have come out in the case studies of indigenous peoples are the following:

1. Although most projects did identify benefits for indigenous peoples, in many projects they did not address potentially negative impacts on indigenous peoples, especially the long-term or indirect ones;
2. There has been significant disregard of the protection or promotion of indigenous peoples rights to lands and resources;
3. There is a lack of appropriate grievance mechanisms established by projects;
4. Where resource rights are not recognised, projects that affect land and water rights often did not consider measures to address the land and resource rights which are essential for the long-term wellbeing and sustainability of indigenous peoples' societies and cultures;
5. Project information and documentation of project processes is substantially lacking.³⁷

TAKE NOTE: To overcome the legacy of failed or damaging projects in indigenous peoples' lands and territories, financial institutions working in Asia need to comply with the safeguard standards they have set themselves. Furthermore, the standards themselves need to be improved and brought into line with the international obligations of governments, including the obligation to implement the UN Declaration on the Rights of Indigenous Peoples.

³⁷ World Bank, Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008), August 2011 cited in FPP E-newsletter April 2013.



Module 7

RECOMMENDATIONS FOR EFFECTIVE IMPLEMENTATION OF FPIC

SPECIFIC OBJECTIVES

For the participants to:

1. Identify the challenges their communities face in the implementation of FPIC.
2. Come up with recommendations addressed to indigenous peoples for their effective participation in FPIC processes.
3. Come up with recommendations addressed to States, corporations and financial institutions for their effective implementation of FPIC.

METHODS: Small group discussion, plenary session, lecture

ESTIMATED TIME REQUIRED: 1.5 hours

ACTIVITY:

1. Break up the participants into smaller groups to discuss the following questions:
 - What are the challenges that indigenous communities face in the implementation of FPIC?
 - What recommendations can you make for indigenous peoples, corporations, States and financial institutions to be able to implement FPIC in a manner that is respectful of indigenous peoples' rights? The small groups gather and report back the results of their discussion to the whole group.
2. The facilitator synthesizes the different reports by clustering common ideas and listing together the major recommendations addressed to the different actors.
3. The input below may be discussed by the facilitator or used as a reference or guide for the synthesis.

NOTE: The challenges and recommendations enumerated below are the result of a research on Making FPIC a Reality: Indigenous Peoples and the Extractive Sector, which is part of a project being conducted by the Ecumenical Council for Corporate Responsibility (ECCR), Indigenous Peoples Links (PIPLinks), the Missionary Society of St Columban and Middlesex University School of Law, jointly with indigenous organizations. The project aims to promote the human rights of indigenous peoples by persuading leading multinational mining companies to abide by their obligations under international human rights standards. Specifically, the project aims to achieve sector-wide adoption of FPIC as the global mining industry standard, in order to safeguard the rights, including the collective rights to self-determination, lands, territories and resources and culture, of indigenous peoples currently or potentially faced with mining operations in their territories.

The advocacy paper that came out as a result of the research contains several recommendations addressed to different actors aimed at making FPIC a reality in the mining industry. These recommendations, included below, are relevant not only for the mining industry but for other extractive industries as well requiring FPIC of indigenous peoples. Indigenous peoples are encouraged to take on board these recommendations for their own capability-building and for submission to various groups. The full research report entitled “Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector” by Cathal Doyle & Jill Cariño (2013) may be accessed here:

www.piplinks.org/makingfpicareality

7.1 Challenges faced by indigenous peoples ³⁸

Indigenous representatives from around the world have identified several challenges they face in the operationalization of FPIC. The major challenges identified are the following:

1. Lack of access to adequate and correct information about a project and its impacts. In most cases, only biased and misleading information or details of positive impacts of a project are provided. Indigenous peoples also experience communication problems when dealing with companies or government because of cultural barriers such as language and different ways of thinking and perspectives.

³⁸ Cathal Doyle & Jill Cariño “Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector” (2013) [www.piplinks.org/makingfpicareality] pages 24-25

2. Indigenous peoples have difficulties mustering the financial and logistical requirements necessary for the community to gather and hold their consultations, especially if the communities are far apart or the affected area involves different indigenous peoples and communities.
3. The current strength of indigenous peoples and their traditional authorities to be able to assert their right to FPIC is a challenge. Having experienced colonization and marginalization, often for many centuries, indigenous authorities and institutions in some communities have been rendered very weak. When projects encroach on their territories there is a push for the indigenous community to strengthen their traditional authorities. If they do not have the space in which to do this and access to the resources which it requires, the context becomes one which is conducive to undue influence on leaders or the establishment of unrepresentative structures. This renders good faith consultation and consent seeking impossible.
4. Indigenous peoples argue that customary law should have predominance within their territories. However, asserting which law should prevail – whether formal law or customary law – is a challenge. In a system of legal plurality formal laws should be on a par with and empower, and not re-engineer or undermine, customary law. This is the proper relationship between these two bodies of law.



5. It is a challenge for indigenous peoples to determine what strategies to use in pressuring the State to implement FPIC. They need to monitor and hold the concerned government agencies to account, to ensure that they act in an independent manner, in accordance with their human rights obligations. Full transparency around all State and corporate engagement in relation to proposed projects is fundamental to achieving this.
6. A major obstacle in FPIC is the lack of recognition by the State of indigenous peoples' sovereign rights over their lands and resources. Natural resources are most often considered public domain, and extraction of resources leads to dispossession of the lands and territories of the indigenous peoples. Thus the recognition of the people's sovereignty is important.
7. A challenge in operationalizing FPIC is that the laws of the government favour developers. Rights of corporations often supersede, or are given precedence over, the rights of indigenous peoples. There is also inequality in negotiations, in which the company always has the advantage and enjoys the support of the State. When indigenous peoples want their rights to be respected, they always have to bargain for it, and inevitably have to do so from a position of disempowerment.

7.2 Recommendations for indigenous peoples³⁹

Based on the challenges identified, recommendations were made for indigenous peoples to build their capabilities to be able to effectively engage with external entities in FPIC processes. It would be favorable for indigenous communities to take on board the following recommendations:

1. Indigenous peoples and communities need to take steps to prepare and strengthen their structures in order to be better equipped to deal with external agents, such as corporations.

³⁹ Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013) [www.piplinks.org/makingfpicareality] pages 76-77

2. Indigenous peoples are advised to be proactive in asserting their rights in relation to extractive and other projects. This should ensure, where possible, defining, agreeing and codifying the decision-making processes of the community with regard to any FPIC process. They should consider their position with regard to community development alternatives. This may involve demanding the time and resources which communities deem necessary in order to establish enabling conditions for FPIC such as: adequate capacity building, institution strengthening, elaboration of indigenous defined FPIC processes, formal recognition of land and autonomy rights, and the formulation of self-determined development plans.
3. Indigenous peoples collectively have a range of experiences in resisting, cooperating or negotiating with, mining companies. They also had the empowering experiences of defining their own protocols, conducting their own impact assessments and developing their own social, cultural, environmental and economic baseline data. Indigenous groups who have had less exposure should learn from these and other experiences.
4. In order to strengthen community capacity to consider and evaluate project proposals, to conduct effective negotiations, and to assert their decision-making rights, indigenous peoples should insist on improved education on their rights. This should include education on relevant national processes and structures and possible avenues of complaint and redress at local, national and international levels. Indigenous peoples should also seek to better understand corporations, addressing issues such as their processes of decision-making, relationships with other companies, financial resources and investment sources, policies, and track record, particularly in relation to FPIC and benefit-sharing agreements.
5. Communities need to develop their own analytical skills, or have guaranteed access to independent experts with such skills, so that they are in a position to understand the legal and technical documentation provided by companies. In the spirit of FPIC the absence of the capacity to engage with the information provided could be viewed by communities as sufficient grounds to reject any proposal until these conditions are in place.
6. Indigenous communities should insist that they decide where and under what conditions negotiations will be held. If this choice of location is denied, or

access is denied to some concerned parties, or consultations and negotiations are tainted by military or police threat or duress this would constitute sufficient grounds to reject any proposal until the appropriate conditions are in place.

7. Participation in or the building of alliances between indigenous peoples or with broader networks may provide communities with better access to support in the context of ensuring that FPIC processes are conducted under the appropriate conditions.
8. In all consent-seeking consultations the indigenous organisers should ensure that all appropriate bodies and groups are invited, including representatives of the directly or indirectly affected peoples and any advisers or observers chosen by them.
9. When defining their position, strategies and demands in the course of negotiating and engaging in FPIC processes, indigenous organizations should familiarise themselves with their internationally recognised rights and align their demands with recognised international standards and instruments.



7.3 Recommendations for Corporations, States and Financial Institutions ⁴⁰

The following recommendations could be the basis for the demands and conditions that indigenous peoples set, propose or submit to external entities when engaging with them in the process of FPIC:

a. For Corporations

1. Corporations should commit to respect international standards on indigenous peoples, especially the UN Declaration, ILO Convention 169 and the General Recommendation number 23 on indigenous peoples of the UN Committee on the Elimination of Racial Discrimination. These international standards should be mainstreamed within corporate policy and practice, integrated into their conduct of human rights due diligence, and promoted through the training and career development of their staff.
2. Corporations need to adopt policies which clarify their human rights obligations under international standards, irrespective of national legislation. They also need to commit to those obligations flowing from the legislation and policies of home and host States.
3. Corporations should acknowledge and respect the fact that FPIC is viewed by indigenous peoples as a principle which provides for their control over the future development of their territories, and as a manifestation of that control. They should accept that FPIC is a process which is to be defined and managed by the indigenous authorities and communities whose territories and futures are impacted by proposed projects.
4. The appropriate bodies for companies to dialogue, and or negotiate, with should primarily be defined by local indigenous authorities. Affected peoples and communities need to be identified in a manner that respects local processes, customs and perspectives.

⁴⁰ Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013) [www.piplinks.org/makingfpicareality] pages 75-78

5. Corporations must adapt their existing internal decision-making processes to take account of the need to engage with indigenous peoples' processes of local dialogue and decision making.
6. FPIC should be viewed as an indigenous governance process. Corporations, and all third parties involved, need to guard against engagements that might be viewed as seeking to exert pressure on community members or key office holders, or which unduly influence or corrupt outcomes through offering incentives and rewards prior to local decision-making.
7. FPIC process must be broad based and include all indigenous peoples and communities whose rights and environment are impacted. Impact areas have to be based on the social, cultural and spiritual links to territories as well as the direct physical impact area.

b. For States

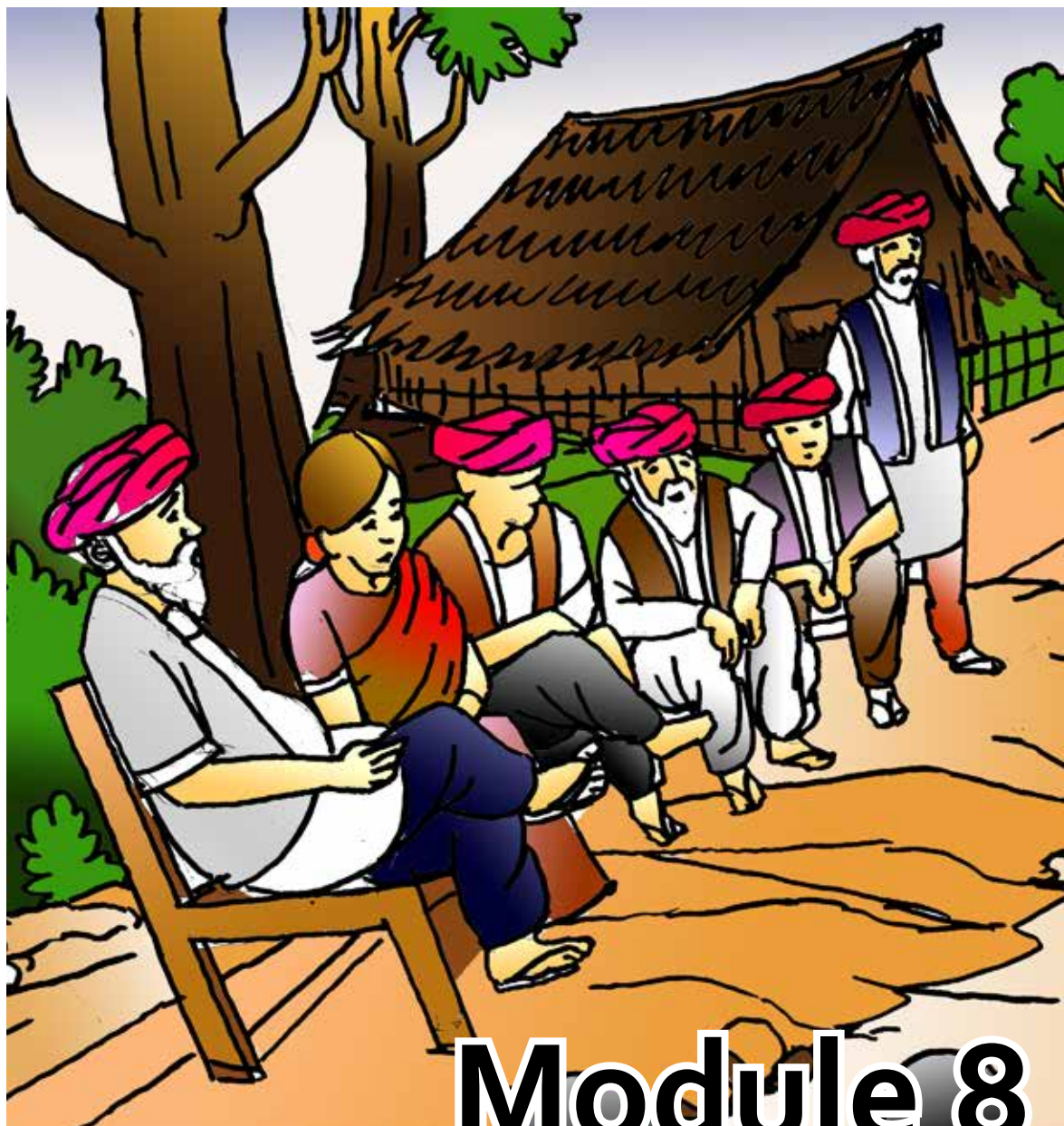
1. Ratify International Labour Organization Convention 169 and ensure the genuine implementation of the UN Declaration and other relevant human rights obligations as members of the international community.
2. States must enact legislation and take appropriate administrative measures to:
 - i. recognize the existence of indigenous peoples in accordance with international criteria;
 - ii. recognize their territorial, property, cultural, religious and self-determination and governance rights, including their right to practice their customary laws and maintain and develop their traditional authorities;
 - iii. require indigenous peoples' FPIC when developments in or near their territories potentially impact on their enjoyment of these rights.

3. Ensure that adequate and culturally appropriate grievance mechanisms are available to indigenous peoples, through which they can address allegations of State and corporate violations of their rights, including their decision-making rights over developmental activities in their territories.
4. Guarantee that where indigenous peoples wish to do so they are accorded the necessary time and space to formulate their own FPIC protocols or policies.

c. For financial institutions

1. Engage in a comprehensive dialogue with indigenous peoples to better understand the issues they face and in order to understand how indigenous peoples seek to operationalize FPIC.
2. Ensure that their clients have policies in place which adhere to the principles of the UN Declaration, including the requirement for FPIC.
3. Require rigorous due diligence regarding the potential impact of projects on the rights of indigenous peoples and support efforts to provide credible independent monitoring.
4. Ensure that clients indicate whether indigenous peoples will be impacted by proposed projects and, if this is the case, have obtained or commit to obtaining their FPIC prior to concession issuance and project commencement. Failure to obtain an impacted indigenous community's FPIC should constitute grounds for disinvestment.

TAKE NOTE: In order to strengthen community capacity to consider and evaluate project proposals, to conduct effective negotiations, and to assert their decision-making rights, indigenous peoples should insist on improved education on their rights. This should include education on relevant national processes and structures and possible avenues of complaint and redress at local, national and international levels.



Module 8

**CAPABILITY-BUILDING FOR
INDIGENOUS PEOPLES'
EFFECTIVE PARTICIPATION IN
FPIC**

SPECIFIC OBJECTIVES

For the participants to:

1. Identify their capability-building needs for them to be able to effectively participate in FPIC processes.
2. Understand the importance of well-organized communities and responsible leaders in conducting FPIC.
3. Learn what are some basic skills necessary for the effective participation of indigenous peoples in FPIC processes.

METHODS: Group exercise, plenary discussion, lecture, role-playing or practicum

ESTIMATED TIME REQUIRED: 2 hours

ACTIVITY:

1. The facilitator distributes cards to the participants and asks them to write down key words on what they think are their particular needs for capability building to be able to effectively participate in FPIC processes.
2. The participants read aloud what they wrote down then paste their cards on the board by clustering them under the following headings: Information, education, organizing, networking, advocacy, negotiation, others.
3. The facilitator summarizes the responses and then proceeds to give a lecture to address the particular needs expressed by the participants. The input below may be discussed and other sources may be used as references for the lecture
4. Practicum or role-playing may be conducted for the participants to practice some skills they have learned.

8.1 The need for well-organized communities and responsible leaders

The capacities of indigenous peoples at the local level are critical and essential in ensuring their effective engagement in FPIC. Experiences have demonstrated that indigenous communities that have weak capacities are vulnerable to misinformation, manipulation and bribery, among others. They also become easy targets for divide and rule, undermining their unity and cohesion to collectively take action and effectively address their concerns and issues (IWGIA and AIPP, 2011).

Thus, there are necessary preconditions and required capacities of indigenous communities for their full and effective participation in the implementation of FPIC.

a. Communities have to be well organized

Indigenous peoples have their own systems of self-governance that are important for ensuring the cohesion and cooperation of indigenous peoples as a collective. However, these forms of self-governance have been seriously undermined, eroded and weakened in many indigenous communities. It is essential that indigenous communities revive and strengthen their self-governance systems and keep this attuned to present-day realities. They can form or strengthen their organizations and institutions to work for the respect of their rights and promote their collective interests, welfare and aspirations.

Features of well-organized communities:

- Strong unity and cooperation in working together to address the common issues, needs, welfare, interests and aspirations.
- Well-oriented on the particular situation of the community and related issues and concerns.
- Support and practice collective actions and decision-making processes.

- Democratic in the process of consultation and selection of indigenous leaders, with the active participation of women and youth.
- Have developed programs of action and plans for collective activities.
- Collective leadership and good interpersonal relations among leaders.
- Mutual understanding and respect among the members of the community.
- Self-reliant on the strengths and capabilities of the community.

b. Communities must have responsible leaders who are accountable to the community

In addition, communities must have indigenous leaders who are responsible and accountable to their community by taking full responsibility for the consequences and implications of their actions. Indigenous leaders should uphold the collective interest and welfare of their constituents above individual or personal interest and benefit. Indigenous leaders should be able to articulate, assert and uphold the collective interests and welfare of the communities over their personal interest or interest of other groups or parties.

Requirements for leaders to be accountable:

- A leader should be committed, determined, industrious and farsighted to fulfill the collective wellbeing of his/her constituency.
- A leader should always execute his/her responsibilities based on the mandate agreed by his/her constituency.
- Leaders should be willing to accept criticisms from others and be serious in rectifying errors.
- A leader should uphold the welfare and interest of his/her constituents at all times. Any decision undertaken by the leader shall be based on and/or subject to the views, position and concerns of his/her constituents in relation to their overall or common interest, welfare and aspirations.
- Leaders should be able to facilitate building broader unity and conflict resolution in relation to the concerns and issues of his/her constituents.

- Leaders should establish effective communication mechanisms with their constituents for consultations and exchange of information and views for collective decision-making.
- Leaders should always promote and respect the collective decisions based on the consensus of the community members. They should listen to the concerns raised by women, youth and elders and facilitate meaningful consultation by encouraging them to participate actively in the process.
- Leaders should always be mindful of possible conflicts or misunderstanding that may arise within the community. They should be wary of attempts by project proponents to fast-track the decision making process or to create divisions within the community. Leaders should be alert, knowledgeable and sensitive to intervene at the appropriate time using appropriate methods to resolve such possibilities.
- Leaders should never coerce or force community members into making decisions. Instead they should consult, explain and accept the collective decision of the community. Therefore his/her actions should always generate trust from among the community members.

TAKE NOTE: It is essential that indigenous communities revive and strengthen their self-governance systems and form or strengthen their organizations and institutions to work for the respect of their rights and promote their collective interests, welfare and aspirations.



8.2 Necessary skills for effective participation of indigenous peoples in FPIC processes

a. Documentation

Indigenous communities must be able to properly document and record their collective decision-making process as part of the FPIC process. They also need to validate the records or documents of FPIC before these are submitted to any party or made public. It is important that members of the community be assigned to do the documentation and recording of the decision-making process as well as the outcomes. The community should ensure proper safekeeping of the records of their collective decisions. If the record is in the local language, trusted translators of the community should be tasked with translating it accurately to the national language and/or English and the translation should be subjected to validation in for accuracy.



b. Information dissemination

Information dissemination and awareness raising are essential in the FPIC process. It is the first important step that has strategic implications on the collective decision of indigenous communities. Giving wrong or unclear information to indigenous communities will affect their deliberations and considerations as well as their collective decisions. Not being able to communicate the information well could lead to misunderstanding. So, clear and easily understandable information for indigenous peoples is mandatory. In this context, indigenous communities should demand complete, accurate information to be delivered to them in a manner and form they can clearly understand.

Information dissemination and awareness-raising activities should take into consideration the level of literacy and language that indigenous communities use and understand. Audio-visual and printed media in a language familiar to them can be used for better understanding of the concept and implications to their rights, ownerships and livelihoods. This also needs to take into consideration the appropriate time to conduct these activities in relation to the activities and priorities of communities.



c. Facilitation

Indigenous leaders must develop their skills in facilitation of meetings and consultations. Facilitation is a method of giving direction to a discussion, workshop and/or meeting. It is one way of managing the flow of the discussion such that decisions are collectively made. Facilitation should also ensure equal and democratic participation of each individual within the group. Facilitation helps simplify things and makes sure that any meeting or discussion will not become confusing or chaotic. The objective of facilitation is to encourage participants to think productively and ultimately to articulate key ideas, to ask vital questions, to uncover variables, to find solutions, and to identify productive actions.⁴¹

41 For more pointers in facilitation, refer to the Leadership Training For Indigenous Peoples published by the Indigenous Learning Institute for Community Empowerment (ILI), Cordillera Peoples Alliance (CPA) and Asia Indigenous Peoples Pact (AIPP). 2011 Baguio City

d. Organizing and Networking

Organizing and networking mean uniting the people to empower them to achieve an agreed objective. The principal objective of networking is to unite the broadest number of people in order to achieve certain goals and objectives and to have stronger coordinated actions and programs. It is crucial to strengthen indigenous peoples organizations and networks if we want to succeed in our objectives of promoting and defending the individual and collective rights of indigenous peoples, as well as their welfare and wellbeing.⁴² An indigenous community can more effectively engage with external entities and participate meaningfully in the FPIC process if they are well organized and have the support of a wider network of indigenous communities, advocates and technical advisers.



e. Advocacy and Lobbying

Advocacy means generating public support for a particular cause or policy. This is usually done through awareness raising and mobilization of members of organizations and communities, using various forms and methods. Advocacy work aims to generate greater public awareness, interest, attention and concern, and generating the broadest possible support for a particular cause, objective of goal. For indigenous peoples, advocacy work means using these various forms of

⁴² For general considerations, principles and requirements in networking and alliance work, refer to the Leadership Training For Indigenous Peoples (2011) pp. 115-118 and the Education Manual on Indigenous Elders and Engagement with Government (2013) pp. 141-144. Both manuals are published by the Indigenous Learning Institute for Community Empowerment (ILI), Cordillera Peoples Alliance (CPA) and Asia Indigenous Peoples Pact (AIPP).

action for the advancement of indigenous peoples' rights. The central objective of our political advocacy is the full recognition and realization of indigenous peoples' rights.⁴³

Lobbying on the other hand, aims to persuade or influence the government, policymakers or private corporations to either enact or modify legislation, policies and programs. To lobby means to influence policymakers to either oppose or support a specific issue or a specific policy or program to the benefit or interest of the groups that are doing the lobbying.

It is often necessary for indigenous peoples to conduct advocacy and lobbying to push for the implementation of FPIC in a manner that is respectful of indigenous peoples rights. When the FPIC process goes against the interests of indigenous peoples, or when FPIC is not implemented properly, it is necessary for indigenous peoples to advocate, lobby and raise public awareness on the issue in order to pressure the concerned parties to respect their right to FPIC.



43 For more pointers on advocacy and lobby work, refer to Rights! Training Manual on the UNDRIP (2010) pp. 197-202, Leadership Training For Indigenous Peoples (2011) pp. 106-115, and Education Manual on Indigenous Elders and Engagement with Government (2013) pp. 144-146, published by the Indigenous Learning Institute for Community Empowerment (ILI), Cordillera Peoples Alliance (CPA) and Asia Indigenous Peoples Pact (AIPP).

f. Negotiation

Indigenous peoples should be prepared to negotiate with external entities such as corporations, government, financial institutions or other actors when engaging in FPIC. Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached. In any disagreement, negotiators understandably aim to achieve the best possible outcome for their position, community or the organisation they represent. However, the principles of fairness, seeking mutual benefit and maintaining a relationship are the keys to a successful outcome.⁴⁴

Specific forms of negotiation are used in many situations, i.e., international affairs, the legal system, relating with government, disputes with corporations or conflicts among or within indigenous communities. Through study and practice, indigenous leaders can learn general negotiation skills that can be applied in a wide range of activities. Negotiation skills can help in resolving differences that may arise between the indigenous community and other parties in the process of FPIC.

NOTE TO THE FACILITATOR:

For more pointers on advocacy and lobby work, refer to the following materials:

AIPP and IWGIA, 2010. Rights! Training Manual on the UNDRIP pp. 197-202,
AIPP, ILI, CPA, 2011. Leadership Training For Indigenous Peoples pp. 106-115
AIPP, ILI, CPA, 2013. Education Manual on Indigenous Elders and Engagement with
Government pp. 144-146

Andy Whitmore, ed. 2012. PITFALLS & PIPELINES Indigenous Peoples and Extractive
Industries. Tebtebba, IWGIA and PIPLinks pp 101-115

⁴⁴ <http://www.skillsyouneed.com/ips/negotiation.html#ixzz2S76QND6w>

AIPP Publication Feedback Form

Dear Friends,

As we endeavor to publish more useful and relevant materials relating to indigenous peoples, we would greatly appreciate if you could spend some of your valuable time to provide your constructive comments and suggestions on this publication. Your comments and suggestions will help us to improve our publications and enhance our outreach to wider audiences.

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Thank you very much for your feedback.

AIPP Secretariat

AIPP at a glance

The Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by indigenous peoples' movements as a platform for solidarity and cooperation. AIPP is actively promoting and defending indigenous peoples' rights and human rights; sustainable development and management of resources and environment protection. Through the years, AIPP has developed its expertise on grassroots capacity building, advocacy and networking from local to global levels and strengthening partnerships with indigenous organizations, support NGOs, UN agencies and other institutions. At present, AIPP has 47 members from 14 countries in Asia with 7 indigenous peoples' national alliances/networks and 35 local and sub-national organizations including 16 are ethnic-based organizations, five (5) indigenous women and four (4) are indigenous youth organizations.

Through our Indigenous Women (IW) programme, AIPP aims to empower indigenous women through networking, education and capacity building activities with the overall goal for indigenous women to assert, promote and protect their rights as women and as indigenous peoples.

Our Vision

Indigenous peoples in Asia are living with dignity and fully exercising their rights, distinct cultures and identity, and enhancing their sustainable management systems on lands, territories and resources for their own future and development in an environment of peace, justice and equality.

Our Mission

AIPP strengthen the solidarity, cooperation and capacities of indigenous peoples in Asia to promote and protect their rights, cultures and identities, and their sustainable resource management system for their development and self-determination.

Our Programmes

Our main areas of work among the different programmes are information dissemination, awareness raising, capacity building, advocacy and networking from local to global. Our programmes are:

- Human Rights Campaign and Policy Advocacy
- Regional Capacity Building
- Environment
- Indigenous Women
- Research and Communication Development
- (Indigenous Youth.)

AIPP is accredited as an NGO in special consultative status with the UN Economic and Social Council (ECOSOC) and as observer organization with the United Nations Framework Convention on Climate Change (UNFCCC), Convention on Biological Diversity (CBD), Green Climate Fund (GCF), Global Environment Facility (GEF) and the World Intellectual Property Organization (WIPO). AIPP is a member of the International Land Coalition (ILC).

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2014**