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STANDARD-SETTING

Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation

Summary

At its twenty-first session, the Working Group on Indigenous Populations decided to continue at its next session its standard-setting activities by starting to elaborate a legal commentary on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources. In its resolution 2003/29, the Sub-Commission asked Antoanella-Iulia Motoc to prepare a preliminary working paper that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. The Working Group has also taken the initiative to build research partnerships with indigenous organizations for the preparation of the working papers on standard-setting for its twenty-second session. This paper is a collaborative effort between Mrs. Motoc and the Tebtebba Foundation, an organization of indigenous peoples from the Philippines.

Introduction

1. The purpose of the present working paper is to provide some preliminary ideas on the following topics: first, the importance of free, prior and informed consent in international and domestic legal instruments will be outlined; second, there will be an attempt to explain what the terms “free”, “prior” and “informed” mean in this context. In the conclusions, recommendations are presented to assist the Working Group in drafting a legal commentary on this concept.

Free, prior and informed consent in international and domestic legal instruments

2. The principle of free, prior informed consent is acknowledged in several documents in the field of international human rights law. The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) refers to the principle of free and informed consent in the context of relocation of indigenous peoples from their land in its article 6. In articles 6, 7 and 15, the Convention aims at ensuring that every effort is made by States to fully consult with indigenous peoples in the context of development, land and resources (see annex).

3. The draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex) is an important emerging instrument that explicitly recognizes the principle of free, prior and informed consent in its articles 10, 12, 20, 27 and 30.¹

4. At present, the draft American declaration on the rights of indigenous people of the Organization of American States (OAS) provides that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

5. Several United Nations committees have made reference to the principle of free, prior and informed consent in their concluding observations and general recommendations. 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)).

6. In its concluding observations on the report of Colombia in 2001, the Committee on Economic, Social and Cultural Rights noted “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). It subsequently recommended that the State party ensure the participation of indigenous peoples in decisions affecting their lives and particularly urged it “to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169” (ibid., para. 33).

7. The Inter-American Commission on Human Rights frames inter-American human rights law to include the taking of “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation”.² A similar conclusion was reached by the African Commission on Human and Peoples’ Rights in the 2002 Ogoni case. The Commission held that Nigeria had violated the right of the Ogoni people to freely dispose of its natural wealth and resources by issuing oil concessions on Ogoni lands.

8. The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights also recognizes the principle of free, prior and informed consent in the context of indigenous peoples by stating: “Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects” (E/CN.4/Sub.2/2003/38/Rev.2, para. 10 (c)).

9. The principle of free, prior and informed consent is central to indigenous peoples’ exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources. The substantive and procedural norms underlying free, prior and informed consent empower indigenous peoples to meaningfully exercise choices about their economic, social and cultural development, particularly in relation to development proposals by States and other external bodies in their ancestral lands and territories.

10. In this context, important measures were taken by United Nations specialized agencies in terms of the operationalization of the human rights of indigenous peoples in the general framework of international law. The Conference of the Parties to the Convention on Biological Diversity has established a working group specifically to address the implementation and related provisions of the Convention. This working group is open to all Parties, and indigenous and local community representatives play a full and active role in its work. Traditional knowledge is considered a “cross-cutting” issue that affects many aspects of biological diversity, so it will continue to be addressed by the Conference of the Parties and by other working groups as well.

11. The Inter-American Developmental Bank Strategies and Procedures on Socio-Cultural Development provides that IDB will not support projects affecting tribal lands and territories. The United Nations Development Programme also states that it promotes and supports the rights of indigenous people in its policies.

12. Representatives of non-governmental organizations have also contributed to the question of free consent. Participants in the United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5 to 7 December 2001, discussed the principle of free, prior and informed consent, recognizing the need to have a universally agreed upon definition of the principle. The participants reached a basic common understanding of the meaning of the principle, as the right

of indigenous peoples, as land and resource owners, to say “no” to proposed development projects at any point during negotiations with Governments and/or extractive industries (see E/CN.4/Sub.2/AC.4/2002/3, para. 52).

13. Substantively, the principle of free, prior and informed consent recognizes indigenous peoples’ inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by indigenous peoples about their development path.

14. In relation to development projects affecting indigenous peoples’ lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:

(a) Indigenous peoples are not coerced, pressured or intimidated in their choices of development;

(b) That their consent is sought and freely given prior to the start of development activities;

(c) That indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;

(d) That their choice to give or withhold consent over developments affecting them is respected and upheld.

15. The World Commission on Dams commissioned a thematic review of dams, indigenous peoples and ethnic minorities which examines the experience of indigenous peoples and ethnic minorities within the context of large-scale dam constructions. Upon documenting the negative impact of large dam projects on indigenous and minority communities, the thematic report identifies a set of principles to guide future energy and water resource development projects with a view to minimizing conflict and protecting the rights of indigenous peoples and ethnic minorities. Among the guiding principles that the thematic report elaborates are that indigenous peoples and ethnic minorities should be involved from the beginning in planning and decision-making processes and that the principle of free, prior and informed consent should guide the building of dams that may affect indigenous peoples and ethnic minorities.³

16. Several domestic legal instruments underline the importance of free, prior and informed consent. In five states of Australia, consent has been obtained through statutory indigenous-controlled Land Councils in the mining area for more than 30 years.

17. The Philippine Indigenous Peoples Rights Act recognizes the right of free, prior and informed consent of indigenous peoples for all activities affecting their lands and territories including:

(a) Exploration, development and use of natural resources;

(b) Research-bioprospecting;

- (c) Displacement and relocation (the former is transfer of community due to natural calamities, while the latter is due to man-made activities);
- (d) Archaeological explorations;
- (e) Policies affecting indigenous peoples such as Executive Order 263 (Community-based Forest Management);
- (f) Entry of military.

18. Human rights, coupled with emerging best practices in human development, provide a comprehensive framework for participatory development approaches which empower the poorest and most marginalized sections of society to have a meaningful voice in development. Moreover, the realization of human rights requires recognition of conflicts between competing rights and the designing of mechanisms for negotiation and conflict resolution.

19. More specifically, human rights principles require the development of norms and decision-making processes that:

- (a) Are democratic and accountable and enjoy public confidence;
- (b) Are predicated on the willingness of interested parties to negotiate in good faith, and in an open and transparent manner;
- (c) Are committed to addressing imbalances in the political process in order to safeguard the rights and entitlements of vulnerable groups;
- (d) Promote women's participation and gender equity;
- (e) Are guided by the prior, informed consent of those whose rights are affected by the implementation of specific projects;
- (f) Result in negotiated agreements among the interested parties;
- (g) Have clear, implementable institutional arrangements for monitoring compliance and redress of grievances.

The terms “free”, “prior” and “informed” in relation to development affecting indigenous peoples' lands and natural resources

20. The principle of free, prior and informed consent contains the elemental terms “free”, “prior”, “informed” and “consent” which need to be interpreted in order to operationalize the concept:⁴

Free: It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.

Prior: To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.

Informed: A procedure based on the principle of free, prior and informed consent must involve consultation and participation by indigenous peoples, which includes the full and legally accurate disclosure of information concerning the proposed development in a form which is both accessible and understandable to the affected indigenous people(s)/communities regarding, inter alia:

- The nature, size and scope of the proposed development or activity;
- The duration of the development (including the construction phase) or the activity;
- The locality of areas that will be affected;
- A preliminary assessment of the likely impact of the development;
- The reasons/purpose for the development;
- Personnel likely to be involved in both construction and operational phases (including local people, research institutes, sponsors, commercial interests and partners - as possible third parties and beneficiaries) of the development process;
- Specific procedures the development or activity would entail;
- Potential risks involved (e.g. entry into sacred areas, environmental pollution, partial destruction of a significant site, disturbance of a breeding ground);
- The full implications that can realistically be foreseen (e.g. commercial, economic, environmental, cultural);
- Conditions for third-party involvement;
- Provision of misleading or false information should result in a penalty or denial of consent for the proposed development to proceed.

Consent: This involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are fundamental components of a consent process. There may also be negotiation involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the operationalization of the principle of free, prior and informed consent. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisers, including legal counsel of their choice.

21. Indigenous peoples need to specify which entity will express consent on behalf of the affected people(s)/communities. This may vary depending on the activity in question. For example, the traditional authorities of a particular community may, under the relevant customary law, be the entity to give or withhold consent. In other cases, it may be the indigenous people(s) as a whole or a combination of entities.

22. The consent process should also be time bound so as to ensure that the affected people(s)/communities have enough time to understand information received, to request additional information or clarification, to seek advice, and to determine or negotiate conditions, as well as to ensure that the process does not serve as an undue impediment for the proponent seeking consent. The appropriate amount of time needed may vary depending on the number of affected persons, communities or peoples, the complexity of the proposed activity, the amount of information provided or requested, etc. Whatever the amount of time needed, a pre-determined and clearly understood deadline is critical.

23. Prior informed consent must be based on specific activities for which consent has been granted. While prior informed consent may initially be granted for one set of activities, any intended change of activities will require a new appeal for prior informed consent.

24. Finally, the successful operationlization of the principle of free, prior and informed consent is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, the principle will not provide the protection it is designed to provide.

25. Given indigenous peoples' historic interdependence and multifaceted relationship with their lands and resources, the scope of potential benefits, costs and impacts of the development activity will best be understood by ensuring their full and effective participation in impact assessment processes. Participation and collaboration in impact assessment processes provide the conditions for jointly determining the full economic, environmental, social, cultural and spiritual impacts, in order to be able to propose measures that can avoid, minimize and mitigate these impacts.

Elements for the elaboration of a legal commentary

26. The objective of a legal commentary should be to provide an interpretation of the principle of free, prior and informed consent within the context of international and human rights law, as well as establishing guidelines on how the principle should be respected in practice. The guidelines to be included in the legal commentary should be practical and concise, so that they can be used in negotiations between indigenous peoples and the private sector and/or Governments.

27. There is no single prescriptive implementation of the principle of free, prior and informed consent, as this necessarily requires respect for history, cultures and institutions of the peoples concerned. Nevertheless, it is possible to elaborate some core elements central to the exercise of this principle which were outlined in this paper. Indigenous peoples' right to withhold consent or to say "no" to inappropriate development must be one of these elements.

28. An effective way to establish the principle of free, prior and informed consent is to recognize it legally in national legislation, with the corresponding implementing rules and regulations. Furthermore, negotiated agreements reached following the principle of free, prior and informed consent processes should also be legally enforceable through the courts.
29. The meaningful application of free, prior and informed consent places substantive and procedural requirements on the part of Governments and developers which they must carry out with due diligence in the development process.
30. It is, therefore, recommended to the Working Group that the legal commentary it will elaborate should provide a comprehensive overview of the recognition of the principle of free, prior and informed consent in international and human rights law, jurisprudence and national legislation and practice, so as to serve as a useful reference on this theme. The Sub-Commission might want to ask Governments for examples of how this principle has been implemented at the national level. It should also address frequently asked questions and also the common misinterpretations about this principle in order to move the discussion forward. Furthermore, it should encourage Governments to respect and uphold this principle as part of their commitments and obligations to promote human rights.
31. The interpretation of the principle of free, prior and informed consent should be embedded in international human rights instruments and in the Draft United Nations declaration on the rights of indigenous peoples, which provides a comprehensive set of indigenous peoples rights.
32. The Working Group should harmonize efforts to interpret and promote the implementation of the principle of free, prior and consent and seek guidance from other United Nations mechanisms on indigenous peoples such as the Permanent Forum and the Special Rapporteur.

Notes

¹ “The UN Draft Declaration identifies and includes provisions addressing many further crucial issues in such relationships, but does not connect these expressly to self-determination in the way advocated here. The dynamic of the UN process has been rather the opposite, treating self-determination as an end-state issue and separating the debate on self-determination from the structuring of relationships. The Draft Declaration provides much of the material from which the concept of self-determination may be reconstructed in relational terms, but does not always develop the relational aspects sufficiently ... Indigenous institutions and juridical practices may be maintained and promoted, subject to internationally recognized human rights standards, but the relation of these institutions and practices to state institutions, particularly the judicial system, is not addressed explicitly. The Draft would require states to include the rights recognized in the Declaration in national legislation ‘in such a manner that indigenous peoples can avail themselves of such rights in practice’, but the role of state institutions, especially courts and administrative agencies, is not addressed systematically. The Draft alludes to the capacities and powers of states throughout. States are required, for instance, to ‘take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and

territories of indigenous peoples', a formulation that deliberately did not provide for indigenous consent to receipt of such materials." B. Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law, *New York University Journal of International Law and Policies*, vol. 34 (2001), 22. 225-226.

² *Mary and Carrie Dann v. United States*, case 11.140, Report No. 75/02, Inter-Am. C.H.R., 2002, para. 131.

³ Marcus Colchester, Forest Peoples Programme, *Dams, Indigenous Peoples and Ethnic Minorities*, (Cape Town, South Africa: Secretariat of the World Commission on Dams), November 2002. The World Commission on Dams subsequently commissioned the Institute of Development Studies at the University of Sussex to undertake a study that would elaborate a framework by which indigenous peoples are ensured equal status with other members of the community in the planning, negotiations and decision-making leading to the implementation of water and energy projects. The study entitled *Consent and participation in planning and decision-making processes in water and energy* outlines, inter alia, how public acceptability and the free, prior and informed consent of indigenous peoples can be ensured throughout all phases of project planning. The study notes that the necessity of obtaining free, prior and informed consent from communities affected by development projects is based on the norms of human rights law which guarantee all peoples the right to continuing participation and consent in the decision-making processes as well as the right to freely determine their own development. The principle of free prior and informed consent should not be considered as a concession by Governments that grants special treatment to vulnerable communities; rather, it applies to all cases in which outsiders propose specific development projects that impact indigenous communities.

⁴ The following are examples that Fergus Mackay of the Forest Peoples Programme provides of what may be required under each component in his "Notes on Content and Operationalization of Indigenous Peoples' Right to Free, Prior and Informed Consent" provided to the secretariat of the Working Group by the Tebtebba Foundation.

Annex

**ARTICLES OF THE ILO CONVENTION NO. 169 THAT REFER TO
THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT
IN RELATION TO INDIGENOUS PEOPLES**

Article 6

“1. In applying the provisions of this Convention, Governments shall:

“(a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

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

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

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

Article 7

“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.

“...

“3. Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation 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.

“4. Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”

Article 15

“...

“2. In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

Article 16

“1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

“2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free 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.

“...”

ARTICLES OF THE DRAFT UNITED NATIONS DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES RECOGNIZING THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT

Article 10

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

Article 12

“Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.”

Article 20

“Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

“ ... ”

Article 27

“Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.”

Article 30

“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”
