

Permanent Forum on Indigenous Issues

Tenth session

New York, 16-27 May 2011

Agenda Item 3(c): Free, prior and informed consent

Joint Statement of: Assembly of First Nations, Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), First Nations Summit, Haudenosaunee of Kanehsata:ke, Innu Council of Nitassinan, Indigenous World Association, International Organization of Indigenous Resource Development (IOIRD), Louis Bull Cree Nation, Montana Cree Nation, Samson Cree Nation, Union of BC Indian Chiefs, Amnesty International, First Peoples Human Rights Coalition, Canadian Friends Service Committee (Quakers), Amnistie Internationale

Speaker: Kenneth Deer**FPIC: The 'C' stands for 'Consent'**

Free, prior and informed consent (FPIC) is clearly established as an international human rights norm. The right of Indigenous peoples to grant or withhold approval for actions affecting their rights is an integral element of the right of self-determination. Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) reflects the right of self-determination in common article 1 of the two human rights Covenants.

Free, prior and informed consent is also an indispensable safeguard for other rights of Indigenous peoples. Such rights are routinely violated when Indigenous peoples are excluded from or marginalized in the decision making process.

The right of FPIC has been repeatedly applied by United Nations treaty bodies and by regional human rights commissions and courts, so as to fulfill state obligations under international law. In its March 2011 report, the Human Rights Committee urged Togo to take measures so as to "ensure that Indigenous peoples could effectively exercise their right to free, prior and informed consent" [unofficial translation].

General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (CERD) calls on state parties to ensure that, in regard to members of Indigenous peoples, "no decisions directly relating to their rights and interests are taken without their informed consent".

FPIC is included in four articles of the *UN Declaration*, (arts. 11.2, 19, 28, 32.2). The *Declaration* also affirms that violation of the right of free, prior and consent requires effective redress (arts. 11.2, 28.1 and 32.3).

The right of FPIC has far-ranging significance for Indigenous peoples, especially in the context of human rights and climate change. These issues are generally key considerations, particularly where large-scale developments are concerned.

Need to safeguard FPIC

Our organizations are deeply concerned by the continued opposition to FPIC by some states. There appear to be increasing efforts to undermine or roll back this vital human rights standard.

At the time of its endorsement of the *UN Declaration* in December 2010, the United States indicated that FPIC calls for “a process of meaningful consultation with tribal leaders, but not necessarily ... agreement ..., before the actions addressed in those consultations are taken.” In May 2011, at the Commission on Sustainable Development’s Working Group on Mining, Canada, Australia, New Zealand and the United States asked for deletion of “free, prior and informed consent” regarding indigenous and local communities.

In Canada, where many of our organizations are from, a number of large banks have recently trumpeted their adoption of FPIC, when what they really mean is free, prior and informed consultation. This raises serious concerns that momentum toward implementation of free, prior and informed consent may be lost or diverted by the misleading use of the inadequate standard of free, prior and informed *consultation*.

Replacing the established standard of consent with the lesser standard of consultation would mean that at the conclusion of such a process taking place, governments or corporations would continue to be free to act in their own interests and the interests of other powerful sectors of society – while unilaterally and arbitrarily ignoring the decision taken by Indigenous peoples. This is contrary to the very purpose of FPIC.

Positive steps towards FPIC

The International Finance Corporation (IFC) - part of the World Bank Group – has approved a revised version of the Sustainability Framework that it uses to guide investment decisions. These decisions, which often concern large-scale projects, have the potential for profoundly detrimental impacts on the identities, cultures and well-being of Indigenous peoples.

In the past, the IFC claimed that it did not need to bring its policies into line with the standard of free, prior and informed consent, because free, prior and informed consultation was “functionally equivalent” to this human rights norm. Such an approach still exists in the latest version, with some changes – and is now being called “Informed Consultation and Participation”.

On May 12, 2011, IFC announced: “For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of ‘Free, Prior, and Informed Consent’ informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples.” While improvements in IFC’s Sustainability Framework are still required, the positive steps taken on FPIC should be acknowledged and built upon.

In the development context, FPIC should not apply to a fixed list of “special circumstances” – even if such lists may be broadly stated. While such IFC lists may serve to provide useful examples, there could still be substantial impacts on Indigenous peoples in other situations that require their consent.

In *Haida Nation*, Canada's highest court ruled in 2004 that the nature and scope of the Crown's duty to consult would require the "full consent of [the] aboriginal nation ... on very serious issues". To date, the government of Canada has evaded addressing this criterion of "consent" and focused on those potential consequences that are less serious.

In March 2011, the government of Canada issued its "Updated Guidelines for Federal Officials to Fulfill the Duty to Consult". These Guidelines fail to consider the right of Indigenous peoples to FPIC, except to indicate Canada's concern when such consent is "interpreted as a veto".

It is deeply troubling that the Canadian government would selectively ignore serious situations that require Indigenous consent under Canada's Constitution. The UN General Assembly has repeatedly emphasized the "importance of non-selectivity, impartiality and objectivity", when addressing human rights.

Canada's Guidelines also declare that the *UN Declaration* "does not alter the legal duty to consult" in Canada. This ignores the rule of law. The Supreme Court of Canada has repeatedly ruled that declarations and other international instruments are "relevant and persuasive sources for interpretation" of human rights in the domestic context.

In the *Nagoya Protocol* on access and benefit sharing of genetic resources, only "established" rights – and not other rights based on customary use – appear to receive some protection. As CERD has concluded, such kinds of distinctions are discriminatory. They serve to dispossess Indigenous peoples of their rights relating to genetic resources, including FPIC.

We recommend the following measures to the Permanent Forum on Indigenous Issues (PFII), in relation to "free, prior and informed consent" of Indigenous peoples. These recommendations include that the PFII:

1. Urge states and specialized agencies to adopt a standardized interpretation of FPIC, consistent with international human rights standards.
2. Highlight the need to address the unequal bargaining power generally existing between state/third party developers and Indigenous peoples, by ensuring that the peoples concerned have the necessary financial, technical and other assistance to fully and effectively participate at all stages. States have a role and responsibility to ensure just and democratic processes, consistent with the principle of sustainable and equitable development.
3. Urge states that are undermining FPIC to uphold their international obligations, so as to ensure full respect and implementation of all Indigenous peoples' rights, including those in Treaties with such peoples. In this context, the *UN Declaration on the Rights of Indigenous Peoples* is inseparable from states' obligations under diverse treaties.
4. Urge states to fully respect FPIC, in regard to *all* customary rights of Indigenous peoples to genetic resources without discrimination. Provisions in the *Nagoya Protocol* that could serve to dispossess Indigenous peoples of such resources lack validity and require urgent redress.
5. Urge states, in conjunction with Indigenous peoples, to adopt interim measures so that FPIC and other Indigenous rights are safeguarded. Too often, such rights are violated while

Indigenous peoples are engaging in their own decision-making process and in negotiations on the development project being proposed.