

INDIAN LAW RESOURCE CENTER

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SUBMISSION TO THE EXPERT MECHANISM'S STUDY ON FREE, PRIOR, AND INFORMED CONSENT

The Indian Law Resource Center (Center) welcomes the opportunity to provide the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) with the following submission to inform EMRIP's study on the concept of free, prior, and informed consent.

The Center is a non-profit law and advocacy organization established and directed by American Indians. The Center seeks to overcome the grave problems that threaten indigenous peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by challenging the governments of the world to accord justice and equality before the law to indigenous peoples of the Americas and the world. Since its foundation in 1978, the Center has engaged in the development of policies and legal standards relating to indigenous peoples in major intergovernmental organizations, including the United Nations, the Organization of American States and the World Bank Group.

Free, prior, and informed consent is an important concept and can be an important tool to advance indigenous peoples' rights. However, attention to this principle should not distract from efforts to strengthen and protect indigenous peoples' legal and human rights. Free, prior, informed consent is an expression of agreement or willingness that an act take place that would otherwise be a violation of a right. It is not a substantive right like the right to land or the right of self-determination. It is not a legal rule creating legal duties or legal interests. It is, generally, a procedural right (the right to give or withhold consent) that is incidental to or a part of some substantive right.

When free, prior, informed consent refers to relinquishing or compromising fundamental rights – human rights -- it is likely to be a bad thing, even dangerous in the extreme. We should be on high alert for a multitude of possible harms. Free, prior, informed consent has become the formula for getting around and overcoming the rights of indigenous peoples. It is the password that can open the gates for mining companies, oil companies, timber companies, and countries to get hold of indigenous peoples' lands and resources.

We ought to ask whether it is sensible to give primary attention to consenting, to giving away, evading, waiving, by-passing and overcoming indigenous peoples' rights rather than to safeguarding, clarifying and promoting indigenous peoples' rights. In many cases, legal rights, even human rights, can be given up or compromised with the free, prior, and informed consent of the rights-holder. For example, in general, a land owner can consent to the logging of timber on her land—that is, she can waive her right to deny entry or exploitation of resources she owns. This is simply a formal part of the structure of a right, although in certain cases, such as non-derogable or inalienable human rights, this possibility is legally foreclosed. However, when rights other than indigenous peoples' rights are analyzed, the focus is, rightly, on the content of the right and on how best to enforce it, not on the process of giving up the right. The ability to give up or waive a right is generally assumed, but that is not what is important. What is important is the content and enforceability of the right itself. It should be no different when we talk of indigenous rights.

The text of the Declaration makes clear that, among other rights, indigenous peoples have the right to own, use, control, benefit from, and dispose of lands and natural resources, the right of self-determination, and the right to control or govern activities that seriously and directly affect indigenous peoples, communities, and resources. The concept of free, prior, and informed consent arises most clearly out of these underlying, substantive rights to land and self-determination. However, although the Declaration uses the term six times, nowhere does it establish a separate right to free, prior, and informed consent in any meaningful sense.¹

This is not to say that there is no place for free, prior, informed consent. It is not a concept that is bad in itself. It has at least two proper uses and meanings. First, it refers to an incidental right (the right to grant or withhold consent) to rights to lands, resources, and self-determination, and to some other rights. Second, it can sometimes be justifiably used as an argument in situations where no formal legal right exists yet justice demands some level of control or a right to be heard for the community or people affected by some plan or activity.

Indigenous peoples and human rights advocates can and should insist on free, prior, and informed consent as a condition to approval of actions that would affect their rights or interests. The Expert Mechanism can and should assist in sharing good practices and lessons learned in this regard. However, the Indian Law Resource Center believes that indigenous peoples, human rights advocates, and the Expert Mechanism should focus on establishing genuine, substantive legal rights both in international and domestic law. We should seek to define those rights in straight-forward legal terms. We should seek to guarantee and strengthen the rule of law. And we should seek effective remedies when those rights are violated. Our objective must be to protect, respect and fulfill indigenous peoples' rights, not to establish better procedures to waive them.

¹ In Article 10, forbidding forced relocation, the term is redundant and adds nothing to the article. In Article 11, on takings of cultural, religious and other property, the term merely helps to define a wrong for which redress must be provided. In Article 19, calling for consultation “in order to obtain” their free, prior, informed consent, it is clearly not a right—merely a desired objective. Article 28 refers to redress for lands taken without free, prior, informed, consent. In this article the term merely helps define the wrong for which redress must be provided. Article 29 prohibits hazardous waste storage except where there is free, prior and informed consent. Such consent creates an exception to a general prohibition. Article 32 requires consultation “in order to obtain” free, prior, informed consent. Free, prior, informed consent is not required but must be sought.