



RIGHT TO CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT

This material was made possible through support provided by the Office of Inclusive Development Hub, Bureau for Inclusive Growth, Partnerships, and Innovation, U.S. Agency for International Development, under the terms of Contract No.7200AA20CA00013. The opinions expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Agency for International Development.

Session 1:

Q:What is prior consultation, what is its importance for Indigenous Peoples, what is its scope, when and in what cases should it be applied, who is responsible for its application, who is involved in the process, what standards must be met to carry out a consultation that allows reaching the free, prior and informed consent (FPIC) of the communities and Indigenous Peoples, what is FPIC, in what cases is it applied.

What is the consultation?

This is the procedure by which indigenous peoples and communities are presented with initiatives, proposals for plans and programs, public policy models and institutional reforms that directly affect them, with the purpose of obtaining their consent or agreement.

The right to consultation implies obtaining free, prior and informed consent with respect to the implementation of programs, projects, legislative reforms or modifications, State actions, and actions affecting lands and territories that impact the social, cultural, religious and spiritual values and practices of the peoples.

The right to free, prior and informed consultation, in addition to being a general principle of international law, is a collective human right of indigenous peoples and communities.

According to James Anaya, consultation should be a mechanism through which indigenous peoples can reach agreements favorable to their own priorities and development strategies, provide them with tangible benefits and, on the other hand, promote the enjoyment of their human rights.

What should be understood by the right to free, prior and informed consultation and consent?

In the review procedure for proposals or projects affecting indigenous peoples, consent is understood to be the right of indigenous peoples to authorize or permit proposals or projects in accordance with the impacts they consider to affect their cultures and communities.

Free, prior and informed consent does not mean that the result of the consultation must be full authorization for the development of the programs and projects proposed to the people; nor does it necessarily imply a refusal to the same.

Prior consent is said to refer to an authorization prior to the implementation of any action; free, in the understanding that it must be a full and autonomous decision of the communities and their members, and informed, because for

decision-making it is essential to have the necessary information, culturally appropriate and in accordance with the circumstances, so that the resolution is relevant to the interests of the communities.

How important is consultation with indigenous peoples?

It is a high priority. It implies joining efforts among the actors involved to enable the Mexican State to achieve the appropriate results for the benefit of a population in a situation of vulnerability, such as the indigenous population. The right to prior consultation is of paramount importance as it is interconnected with the protection of other collective rights. In this sense, the guarantee of this right is necessary for the preservation of the right to self-determination, sustainable development, ancestral property, cultural biodiversity, cultural identity, and so on.

In this regard, in 1997, the Committee on the Elimination of Racial Discrimination, concerning the rights of indigenous peoples, issued General Recommendation No. 23, in which it urges States Parties to "ensure that members of indigenous peoples enjoy equal rights with respect to their effective participation in public life and that no decisions directly relating to their rights or interests are taken without their informed consent.

On the other hand, the United Nations Declaration on the Rights of Indigenous Peoples, a document that mainly integrates and protects their collective rights, establishes in Articles 19 and 32, the duty of the State to consult with the peoples concerned "*before adopting and implementing legislative or administrative measures affecting them*."

As for the inter-American system for the protection of human rights, it is undeniable that the judgments issued by the Inter-American Court of Human Rights (IACHR) 27 , as well as the pronouncements issued by the Inter-American Commission on Human Rights (IACHR) 28 , have been of great importance for the understanding, comprehension and development of this right.

What other rights does the right to consultation relate to?

Indigenous consultation is interrelated with other human rights, which may be violated by actions or omissions of the State. Some of them are listed below:

1. **Self-determination:** Articles 2° of the Political Constitution of the United Mexican States, 3° and 4° of the United Nations Declaration on the Rights of Indigenous Peoples; establish that indigenous peoples have the right to determine their political, economic, social and cultural status.
2. **Sustainable development:** is the satisfaction of the needs of present generations, without compromising the possibilities of the future. This right is indispensable for the preservation of indigenous peoples, it implies "the right to determine their own pace of change, according to their own vision of development, and that this right must be respected, especially their right to say no".

3. **Right to property:** Articles XXIII of the American Declaration of the Rights and Duties of Man, and 21 of the American Convention on Human Rights, which protect the close ties that indigenous peoples have with their lands, as well as with the natural resources of their ancestral territories and the incorporeal elements derived therefrom⁵⁰. However, the IACHR Court has ruled that this right is subject to limitations by the State, restrictions that must meet the criteria of necessity and proportionality in relation to a legitimate objective in a democratic society.
4. **Cultural biodiversity:** with the signing of the Convention on Biological Diversity (CBD), whose purpose is to establish measures for a sustainable future through the conservation of biological diversity by regulating natural resources, ecosystems, species and the genes contained in those species. Other important international instruments in this area are the Rio Declaration on Environment and Development and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity⁵². These international standards are relevant for indigenous consultation, since they contemplate participation and enshrine the duty to respect and guarantee traditional cultural practices.
5. **Right to cultural identity:** The State must guarantee the right of indigenous peoples to preserve their cultural identity. The affectation of the right to indigenous property, in turn, transgresses the possibility of exercising their "religion, spirituality or beliefs (...) including the public expression of this right and access to sacred sites".

What is the purpose of the consultation?

The Ombudsman's Office of Ecuador considered that the minimum content of the right is configured by: the purpose of the consultation (consent), subjects and subject matter, and the characteristics of free, prior and informed consent.

On the other hand, the Peruvian Constitutional Court established that the constitutionally protected content of this right is: "i) access to consultation, ii) respect for the essential characteristics of the consultation process, and iii) the guarantee of compliance with the agreements reached in the consultation. The content of this right does not include the veto of the legislative or administrative measure, or the refusal of the indigenous peoples to carry out the consultation.

From the academic perspective, two central components have been identified:

- The negative obligation of the State to refrain from violating the human rights of indigenous peoples.
- That the dialogue between the State and the indigenous peoples and nationalities allows for the incorporation of the opinions and visions of these groups in the adoption of State decisions.

What is the purpose of the consultation?

The purpose of consultation is to avoid the imposition of legislative or administrative measures, and to promote intercultural dialogue with the responsible bodies in order to obtain their free, prior and informed consent and/or reach agreements, under the terms of this law.

The purpose of indigenous consultation is the effective protection of the human and fundamental rights of indigenous and Afro-Mexican peoples and communities, which must be prior, free, informed, culturally appropriate, in good faith and carried out through appropriate procedures, through their authorities, and in accordance with their internal normative systems, whenever legislative or administrative measures are envisaged that could affect them.

What are the characteristics of the consultation?

Prior: In relation to this principle the Mexican SCJN, has held that all authorities within the scope of their competence, have the obligation to consult with indigenous peoples: "before adopting any action or measure likely to affect their rights and interests", taking into account that this exercise must be prior, culturally appropriate, informed, through the representatives and in good faith; stressing that *"the duty of the State to consult does not depend on the demonstration of a real affectation to their rights, but on the susceptibility that they could be harmed, since precisely one of the objects of the procedure is to determine whether the interests of the indigenous peoples would be harmed"*.

Free: This means that the consultation process must be free from external interference, and free from "coercion, intimidation and manipulation", such as "conditioning basic social services", "posing the dilemma of whether to develop or continue in poverty and marginalization", seeking to divide the subjects of consultation and criminalization, to mention a few.

Rodolfo Stavenhagen, former UN Rapporteur, recognizes that, in the context of protest activities for the vindication of indigenous rights, States proceed to mitigate them by using the law, the administration of justice or even the use of force. On this point, the IACHR warns that: "in too many cases, consultations with indigenous peoples are carried out in a climate of harassment and even violence perpetrated by private security guards hired by the companies responsible for the projects and, sometimes, by public security forces.

Informed: This consists of providing the communities that will be affected with complete, understandable, truthful and sufficient information to enable them to make a decision that is appropriate to their needs. In this sense, they must be provided with all the necessary documentation "to know, issue, intervene and be in a position to offer elements that demonstrate, in their opinion, that the work subject to evaluation will affect their rights and/or subsistence.

The Inter-American Court of Human Rights has stated that the State, before and during the consultation, must maintain constant communication, provide precise information that allows the community to know "the nature and consequences of the project"⁷⁰, the benefits and compensation to which they could be entitled, as well as the risks to health and the environment, which obliges it to carry out studies of "social and environmental impact."

Good faith: Good faith consultation requires the absence of any type of coercion by the State or agents acting with its authorization or acquiescence.

In the "Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador", the IACHR Court established that: "consultation should not be exhausted in a mere formal procedure, but should be conceived as "a true instrument of participation", which should respond to the ultimate objective of establishing a dialogue between the parties based on principles of mutual trust and respect, and with a view to reaching a consensus between them."

For a consultation process to be in good faith, all actions aimed at intimidating, harassing, threatening or creating a climate of tension and social disintegration among the subjects of the consultation, through "the corruption of community leaders or the establishment of parallel leaderships, must be avoided."

The State shall consult on the premise of generating a favorable environment of trust, freedom and respect, in order to reach agreements or free, prior and informed consent. Regarding the latter, James Anaya, former United Nations Rapporteur, stated that consultations must be held in good faith and for the purpose of achieving consent.

Culturally appropriate procedures: these should take into account the peculiarities of the peoples, forms of government, uses and customs, among others, "guaranteeing a gender balance and taking into account the opinions of children and young people, as appropriate"⁷⁹. These processes "must include, according to systematic and pre-established criteria, different forms of indigenous organization, provided that they respond to the internal processes of these peoples."

With respect to the appropriate nature of the consultation, the then UN Special Rapporteur, James Anaya, citing the ILO, recalled that in this procedure the decision-making processes of the indigenous people involved must be respected: "the necessary time must be provided so that the indigenous peoples of the country can carry out their decision-making processes and participate effectively in the decisions taken in a manner that is adapted to their cultural and social models".

Cultural relevance: Intercultural dialogue implies observance of the principle of equality and non discrimination, recognizing the specificities of the subjects of consultation and avoiding reproducing patterns of inequality during the process; for example, the State may not exert pressure on the people involved by imposing temporary restrictions.

Some elements conducive to guaranteeing this dialogue are: integrating the indigenous peoples' conception of development into the project, conducting oneself in good faith, respecting their culture, language, identity and oral tradition, respecting their conditions, demands, ways of deciding and presenting their arguments.

Other principles

Equitable Principle: It must benefit equally all members of indigenous and Afro-Mexican peoples and communities, without discrimination and contribute to reducing inequalities.

Democratic Principle. In the consultation process, the corresponding mechanisms must be established so that the greatest number of members of the community can participate; that the majority criterion is applied in the adoption of resolutions and that human rights are respected at all times.

Principle of Equality between women and men: The participation of women and men belonging to indigenous and Afro-Mexican peoples and communities must be on equal terms, in order to know their opinions and points of view about the different topics of the consultation, without pressure and always seeking the appropriate and respectful way for them to be involved throughout the process.

Principle of Interculturality: Implies taking into account the different visions, perspectives and interests involved in the consultation process, in order to generate the necessary conditions that make it possible for projects or laws with diverse cultural expressions and interests to become shared and beneficial for the parties.

Principle of Self-Determination: Guarantees that in the relationship of indigenous and Afro Mexican peoples and communities, the municipalities, the federal entities and the federation adapt their areas of competence to maximize the exercise of self-determination as a right of such peoples and communities, so that, under conditions of freedom and equality, the subjects of consultation may make a decision regarding the measure consulted and thus determine their political status, as well as their economic, social and cultural development.

Social Responsibility Principle: It must respond to the needs identified by the indigenous and Afro-Mexican peoples and communities themselves, and strengthen their own development initiatives; it must also promote the empowerment of indigenous peoples, especially indigenous women.

Principle of transversality: special attention should be paid to the totality of the population's rights in order to seek harmony among them without affecting another in the name of one.

Who are the subjects of the consultation?

These are the indigenous peoples or communities whose rights may be affected, being societies prior to the State, which have historical continuity and maintain their institutions.

In accordance with the provisions of international human rights law, governments should consult them through representative institutions with the capacity to grant such consent.

In the Mexican context, the country's indigenous and Afro-Mexican peoples and communities, through their representative authorities and institutions, will be of strategic importance.

to the participation of women. By way of example, the representative authorities and institutions of these peoples and communities are:

1. Indigenous municipal authorities;
2. Community authorities, which, depending on the federal entity, may be: delegates, agents, commissioners, tenure chiefs, local authorities, assistants, among others;
3. Indigenous and Afro-Mexican traditional authorities;
4. Indigenous and Afro-Mexican agrarian authorities (communal and ejido);
5. The organizations, institutions and citizens belonging to the indigenous and Afro Mexican peoples;
6. Academic and research institutions related to indigenous and Afro-

Mexican peoples. **Who participates in the consultation?**

In the Mexican context, in order to carry out the consultation, the participation of six figures is required: i) responsible authority, ii) guarantor body, iii) technical body, iv) technical committee, v) academia advisory group, and vi) civil society organizations and observers.

The **responsible authority** "is the one who has the primary duty to consult when there are or may be decisions or projects that affect the rights and interests of indigenous peoples.

In the Mexican context, it may be the government entity belonging to any of the three levels of government, of any sector, or "an autonomous or decentralized public entity, which has the power to authorize the implementation of such measures or actions". On this point, the following are mentioned: a) at the federal level: the agencies and entities of the federal public administration, the chambers that make up the Congress of the Union and the autonomous bodies; b) at the state level: the agencies and entities of the public administration, the local legislatures and the local autonomous bodies, and in the municipalities: the municipal public administration. The foregoing implies that even in cases where there are public contracts and/or concessions to private parties, it does not exempt the authority from guaranteeing the right to prior consultation.

The **technical consultation body** is responsible for preparing the responsible authority during the process, providing technical and methodological advice; such is the case of the National Commission for the Development of Indigenous Peoples.

The **guarantor body** acts as a witness to the consultation. In our country, various institutions and organizations have participated and have the capacity to intervene in this capacity, such as the National Human Rights Commission, the Undersecretary of Human Rights and the Commission for Dialogue with the Indigenous Peoples of Mexico, both of the Ministry of the Interior.

The **Technical Advisory Committee** is made up of various bodies, with the purpose of "contributing knowledge, advice, methodology, substantive information and specialized analysis to the prior consultation process", which can be integrated by the Federal Government Secretariats, State Secretariats, Municipalities, to mention a few.

The **advisory groups of academia and civil society organizations** are instances that contribute to the "construction of an intercultural methodology", their intervention is aimed at accompanying and advising the subjects of consultation when required.

Observers may include: the representative of the ILO and the Office of the United Nations High Commissioner for Human Rights in Mexico; members of the United Nations Development Program, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Rights of Indigenous Peoples, all from the UN; the National Institute for Transparency, Access to Information and Protection of Personal Data; State Human Rights Protection Bodies; the National Human Rights Commission; as well as civil society organizations, among others.

What is the subject matter of the consultation?

ILO Convention 169 establishes that States must consult on all administrative and legislative measures affecting indigenous and tribal peoples (Articles 6 and 7), as well as on projects for the exploration and exploitation of natural resources on their lands.

Legislative or administrative measures that may affect Indigenous Peoples and Communities are subject to consultation.

Likewise, the United Nations Declaration on the Rights of Indigenous Peoples generally provides for the obligation to consult on any administrative or legislative measure and in particular:

1. In cases where they are displaced from their lands (art.10);
2. When their cultural, intellectual, religious or spiritual property may be affected (art11);

3. In the adoption of measures to combat prejudice and eliminate discrimination (art. 15); 4. In the definition of policies aimed at protecting indigenous children from economic exploitation (art. 17);
4. In cases where their lands are affected in any way (art. 28);
5. In cases of storage or disposal of hazardous materials on indigenous peoples' lands or territories (art. 29);
6. In cases where it is necessary to use their lands and territories for military activities (art30);
7. In the approval of projects that may affect their lands and resources, such as the exploitation of mineral, water or other resources (art. 32);
8. Before the adoption of measures to facilitate relations and cooperation, including activities of a spiritual, cultural, political, economic and social nature, with its own members, as well as with other peoples, across borders (art.36).

The **administrative measures** to be consulted are the plans, programs, formulation, approval and follow-up of public policies from the public administration, The rights of the subjects of consultation, such as infrastructure works and mega-projects or investment projects, are susceptible to be impacted.

The Ecuadorian Ombudsman's Office maintains that in the case of "investment or development projects, exploration and extraction of resources, consultation must also take place during all phases of execution of these projects.

The **legislative measures** to be consulted have been further elaborated by the United Nations Human Rights Committee in the *Apirana Mahuika et al. v. New Zealand* case (2000). In this case, members of the Maori people sent a communication to the Committee regarding a fisheries law adopted by the government, in which several consultations were held with the affected peoples. This law violated their territorial rights and endangered their cultural survival.

Also, in 2000, the Committee on the Elimination of Racial Discrimination (CERD) and the United Nations Human Rights Committee recommended that Australia ensure the effective participation of indigenous communities, particularly with respect to amendments to land title laws that could undermine their rights to the land they inhabit.

What are the stages of the consultation?

Preliminary Acts and Agreements Stage: In this stage, the Responsible Authorities will adopt the corresponding procedural agreements to carry out the consultation process.

In the event that any community wishes to submit its proposals, suggestions or regulatory content, specific participation mechanisms may be agreed upon.

Informative Stage: In this phase, the subjects consulted will be provided with all the information available regarding the topics to be consulted, the document of principles and criteria prepared in accordance with the progress of indigenous rights at the international level, jurisprudential criteria and the needs of the organizational processes of the various peoples and communities will be explained, in order to encourage reflection, debate and consensus on the proposals.

In order to provide indigenous and Afro-Mexican peoples and communities with the necessary time for analysis, reflection and construction of their proposals, INPI will carry out a wide dissemination of the thematic axes of Constitutional and Legal Reform, among others.

Deliberative Stage: For the development of this stage, in each of the Forums, working tables will be organized where all participants will be able to present their proposals, reflections and observations, dialogue with representatives and authorities of other indigenous peoples to develop their proposals, which will be made known to all participants and will be incorporated into the general proposals.

Consultative stage: this stage will receive the proposals, suggestions, observations and specific regulatory content generated at the working groups or that the participants may wish to formulate separately.

It is important to emphasize that it is the duty of the Responsible Authority to attend to the proposals, suggestions, observations and normative contents or, if applicable, to explain the reasons why they were not considered, complying with the duty of accommodation and reasonableness.

Agreement Follow-up Stage: Criteria are designated to observe compliance with the parties' agreements.

Failure to comply with the agreements by any of the parties involved nullifies the entire process, and will merit sanctions in accordance with the Law on the matter.

What are the results or consequences of the consultation?

1. Plain and simple acceptance.
2. Acceptance with conditions. In this case, the consulted peoples and communities establish the conditions under which such a measure would be carried out in order to guarantee their rights, including measures of reparation, compensation, mitigation and a fair and equitable distribution of benefits.
3. Non-acceptance with the possibility of presenting another option or modifications to the measure. In this case, notwithstanding the non-acceptance, the Subject under Consultation leaves open the possibility

- of exploring other options for the implementation of a similar measure, which would again be submitted for consultation;
4. Not plain and simple acceptance;
 5. Opinions on the object of consultation.

What are the International Standards on Consultation and Consent?

1. The rule of the principle of good faith during the proceedings.
2. The consultation must be systematic and transparent, in order to provide legal certainty to the process and its results.
3. The prior nature of the consultation.
4. The free exercise of consultation.
5. Sufficient and sufficient information.
6. Respect for the culture and identity of indigenous peoples.
7. Recognition of indigenous peoples who, in the consultation processes, can set their own conditions and requirements and demand that the project be in line with their conception of development.
 8. Respect their own ways of generating consensus, their ways of developing their arguments and the importance of symbols and images that reflect their positions.
 9. Respect the times and rhythms that mark their own decision-making processes.
 10. Obtaining free, prior and informed consent, according to their customs and traditions, in their own languages, according to their oral traditions, in their own times....

Consultation experiences in other countries

Consultation processes for indigenous peoples in Costa Rica

Consultation with indigenous peoples. It is the obligation of the Government of Costa Rica to consult, in good faith, the indigenous peoples in a free, prior and informed manner, by means of culturally appropriate procedures and through their representative institutions, every time administrative measures, bills promoted by the Executive Branch, as well as private projects that may affect them are foreseen.

Principles:

1. In good faith
2. Free
3. Previous
4. Informed
5. Intercultural dialogue: Participation of representative organizations and inclusion of traditional authorities.
6. Self-determination
7. Intergenerational participation

8. Gender equality
9. Culturally appropriate procedure
10. Others

Binding nature of the consultation process

Purpose: to reach an agreement or obtain consent on the proposed measures. **Levels of consultation:** Geographic, National, Regional, Territorial and Community. **Level of impact:** positive and negative

Parties subject to consultation: the Government of the Republic.

This obligation cannot be delegated to third parties or subjects of private law of any kind and, under no circumstances, represents the possibility of resorting to coercive measures to carry out the consultation.

Parts of the consultation process:

Technical Unit for Indigenous Consultation (UTCI) under the Ministry of Justice and Peace. Territorial Instances of Indigenous Consultation. shall create one Territorial Instance of Indigenous Consultation per territory. Interested Party: Public Institution or subject of Private Law.

Consultation processes:

- a) Request for consultation;
- b) Admissibility of the request for consultation;
- c) Preparatory agreements for the consultation;
- d) Exchange of information;
- e) Internal evaluation of the indigenous people;
- f) Dialogue, negotiation and agreements;
- g) Completion of the consultation process;
- h) Compliance and monitoring of agreements.

Consultation processes of Panama's indigenous peoples

Indigenous consultation: is the process to be carried out every time legislative and administrative measures affecting their collective rights are foreseen, understanding as these their lands, territories, resources, ways of life and culture.

Principles:

Timely
In good faith Interculturality
Appropriate procedures
Flexibility
Reasonable time
frame Timely
information
Absence of coercion or conditioning Free, prior and
informed consent

Mandatory consultation

Purpose: to reach consent agreements between the State and the indigenous peoples regarding the legislative or administrative measure when it involves their collective rights.

Obligated subject: will be the state entities. These State Entities are those that will issue legislative or administrative measures directly related to the rights of indigenous peoples.

Consultation processes of indigenous peoples in Honduras

Obligor: the State through the General Directorate of Indigenous and Afro-Honduran Peoples (DINAFROH), attached to the Secretariat of Development and Social Inclusion (SEDIS); as the governing body of the institutional public policy of the Indigenous and Afro-Honduran Peoples (PIA).

Stages of the consultation:

- a) Stage of preparation and approval of the consultation plan.
- b) Information stage of the measure.
- c) Evaluation stage and internal dialogue
- d) Dialogue stage
- e) Stage of adoption of agreements

Purpose: to reach an agreement or consent.

Right to free, prior and **informed** **consultation** and **consent**

