
RIGHT TO CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT

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SESSION 1



Derecho a la consulta previa y al consentimiento previo, libre e informado

What is the consultation?

It 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.

Procedural law

Right to participate

¿What is the purpose of the consultation?

Avoid imposing legislative or administrative measures, and promote intercultural dialogue with the responsible bodies;

Obtain free, prior and informed consent and/or reach agreements with communities and indigenous peoples.

How important is consultation for indigenous peoples?

It is a high priority.

Because it involves joining efforts among the actors involved to enable the State to achieve the appropriate results for the benefit of a population in a vulnerable situation as it is the indigenous population



What other rights does the right to consultation relate to?

1. Self-determination: indigenous peoples have the right to determine their political, economic, social and cultural status (legal).

2. Sustainable development: is the satisfaction of the needs of present generations, without compromising the possibilities of the future.

That is, "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: the State has the obligation to 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 therefrom.



What other rights does the right to consultation relate to?

4. Cultural Biodiversity: 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, with the participation of the people and guaranteeing their cultural practices.

5. The right to cultural identity: The State must guarantee the right to right of indigenous peoples to preserve their cultural identity. The affectation of the right to indigenous property transgresses in turn the possibility of exercising their "religion, spirituality or beliefs (...) including the public expression of this right and access to sacred sites.



When and in which cases should consultation be applied?



When there is an affectation of the communities and indigenous peoples due to the implementation of:

- a) Legislative measures**
- b) Administrative measures**
- c) Megaprojects or high impact projects**

In other words:

- When formulating, implementing and evaluating national and regional development plans and programs.
- When exceptional circumstances necessitate the relocation of indigenous peoples, it may only be carried out with their consent. Consent given freely and with full knowledge of the cause (art. 16.2).
- When the conservation and preservation of biodiversity in indigenous territories, such as ecosystems, species and genetic resources, is affected, as well as the use of biotechnology for their exploitation or transformation.

What are the principles governing the right to consultation?

- 1. Good faith:** Implies that the actions undertaken respond to a foundation of honesty and respect in accordance with the traditions and culture of the indigenous peoples.
- 2. Prior:** it must be prior to the adoption and application of the legal measure or the national administration and to the execution of the project or activity.
- 3. Free:** there must be no interference or pressure. That is, it must be free from external interference, and free from "coercion, intimidation and manipulation".
- 4. Informed:** the object of the law, decree or project must be made known to those potentially affected. In other words, the indigenous communities that will be affected must be provided with complete, understandable, truthful and sufficient information to enable them to make a decision that is appropriate to their needs.



What are the principles governing the right to consultation?



5. Culturally appropriate: it must be carried out through assemblies and representative institutions of each indigenous people. The peculiarities of the peoples, forms of government, uses and customs must be taken into account. As well as having an intercultural dialogue with the parties.

Other principles:

a) Self-determination: Ability to govern oneself and decide.

b) Interculturality: This implies taking into account the different visions, perspectives and interests involved in the consultation process.

c) Transversality: special attention should be paid to the totality of the population's rights in order to seek harmony among them without affecting others in the name of one.

d) Cultural relevance: Intercultural dialogue implies observing the principle of equality and non-discrimination, recognizing the specificities of the subjects of consultation and avoiding reproducing patterns of inequality during the process.

Who is obliged to consult?

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:

1. Governmental entity: the three levels of government.

- a) Federal
- b) State
- c) Municipal

➤ The units y entities of the administration the federal public administration, the chambers that make up the Congress of the Union and the autonomous bodies.

➤ The agencies and entities of the local public administration, local legislatures and local autonomous bodies, and in the following cases municipalities.

2. Companies (private sector) (third party).



Who is involved in the consultation process?

In order to carry out the consultation, the participation of at least six figures is required:

- I. Responsible authority**
- II. Guarantor body**
- III. Technical body**
- IV. Technical Advisory Committee**
- V. Academy Advisory Group**
- VI. Civil society organizations and observers**

- 1) Responsible Authority:** is who has the main duty to consult when there are or may be decisions or projects that affect the rights and interests of indigenous peoples.
- 2) Guarantor Body:** acts as a witness to the consultation. In Mexico, several institutions and organizations have participated and have the capacity to intervene in this capacity, such as the CNDH, the National Human Rights Commission and the CDPIM, the Commission for Dialogue with Indigenous Peoples of Mexico.
- 3) Technical body:** who is responsible for preparing the responsible authority during the process, providing technical and methodological advice. In Mexico it may be: the INPI

Who is involved in the consultation process?

4. Technical Advisory Committee: it is made up of various bodies, with the purpose of "contributing knowledge, advice, methodology, substantive information and specialized analysis to the prior consultation process. They can be the three levels of government ministries.

5. Groups of advisors from academia and civil society organizations: these 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. They can be academics, experts, NGOs.

6. Observers: are persons or entities that accompany the consultation process.

- They can be the representative of ILO and OHCHR, UNDP, Permanent Forum on Indigenous Issues and the Special Rapporteur on the Rights of Indigenous Peoples. Rights of Indigenous Peoples.
- The National Institute for Transparency, Access to Information and Protection of Personal Data, the State Organisms for the Protection of Personal Rights, and the State Organisms for the Protection of Personal Data. Human, the Commission National Commission of the Rights Human Rights, as well as civil society organizations, among others.



Who is consulted?



Consultation:

- I. To the **communities or indigenous peoples** whose rights may be affected.
- II. The **Afro-Mexican people** whose rights may be affected.

By means of: Through its representative institutions with capacity to grant such consent:

- a) Indigenous municipal authorities;
- b) Community authorities, which, depending on the federal entity, may be: delegates, agents, commissioners, tenure chiefs, local authorities, assistants, among others;
- c) Indigenous and Afro-Mexican traditional authorities;
- d) Indigenous and Afro-Mexican agrarian authorities (communal and ejido);
- e) Organizations, institutions and citizens belonging to the indigenous and Afro-Mexican peoples, and
- f) Academic and research institutions related to indigenous and Afro-Mexican peoples.

What are the consultation processes?

Stages of the Consultation:

- I. **Preliminary agreements and protocol development stage:** the responsible body, the technical body and the subjects consulted will **draw up by mutual agreement an action protocol** to establish the purpose and scope of the consultation, as well as to give order and structure to the process, clear rules and procedures must be defined, and the stages of the consultation, the ways of proceeding and the obligatory nature of the results must be established.
- II. **Informative Stage:** the Responsible Body must **provide information on the nature and implications of the measure**, in a timely, clear and sufficient manner, to the indigenous and Afro Mexican peoples and communities, using all available means of communication and information.
- III. **Deliberative Stage:** this is the stage in which the subjects consulted **analyze the information** provided by the responsible body, on which they **give their opinion and discuss in order to reach a joint decision** on the implications of the measures submitted for consultation.



What are the consultation processes?



IV. Consultative Stage: the Responsible Body clearly and precisely asks the consulted parties the response they offer to the measure submitted for consultation.

It is at this point that the parties **reach agreements**, i.e. the subjects consulted can give or withhold their consent to the measure for which they were consulted, or accept the measure with modifications to the original proposal.

V. Systematization Stage: this is the stage in charge of the Responsible Body where it gathers the **main points** of the consultation process as well as its results.

At this stage, the technical body must ensure that the agreements are **clearly expressed** and represent the will of the subjects consulted.

VI. Follow-up and verification of agreements. Criteria are designated to observe **compliance with the parties' agreements**.

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

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:

- a) In good faith
- b) Free
- c) Previous
- d) Informed
- e) Intercultural dialogue: Participation of representative organizations and inclusion of traditional authorities.
- f) Self-determination
- g) Intergenerational participation
- h) Gender equality
- i) Culturally appropriate procedure
- j) 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:

1. Technical Unit for Indigenous Consultation (UTCI) in charge of the Ministry of Justice and Peace.
2. Territorial Instances of Indigenous Consultation. shall create one Territorial Instance of Indigenous Consultation per territory.
3. 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 period of time
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

In accordance with the proposed law on free and prior consultation in Honduras.

Principles:

1. In good faith
2. Preliminary nature
3. Mandatory nature
4. Interculturality
5. Multilingual
6. Right of representation
7. Representation
8. Use of languages

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).

The State, through its different institutions, will be responsible for carrying out the Free, Prior and Informed Consultation (FPIC) processes, within the scope of its competencies, which may include lands and territories, natural resources, customary law, employment, professional training, social security, health, education, culture, among others.

Observers:

The role of observers of the Free, Prior and Informed Consultation (FPIC) will be assumed by public or private, national or international institutions or organizations.

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.
Documentation and registration of agreements.
Follow-up of the outcome of the consultation.
Guarantees of the results of the consultation.
Responsibility of the state.
Administrative conflict resolution.

Comparative law Who is obliged to consult and to be consulted?

Belize	<ul style="list-style-type: none"> ➤ A person or authority who consults with another person or authority. (129 consultation numeral 1 and 2 of the Constitution of Belize). 	Guatemala	<ul style="list-style-type: none"> - The Political Constitution of Guatemala recognizes the indigenous communities - "Guatemala is characterized sociologically as a multiethnic, multicultural and multilingual country. (art. 66 CPG). - Protection of lands and territories. - The legislation on indigenous consultation in Guatemala is based on ILO Convention 169.
Costa Rica	<ul style="list-style-type: none"> ➤ The constitutional jurisdiction who will exercise the prior advisory opinion on the legislative projects and the judge who will consult to the Constitutional Court (art. 96 and 102 of the Costa Rican Constitution). ➤ Education and Culture. The state shall see to the maintenance and cultivation of national indigenous languages (art. 76 CPRCR). <p>General Mechanism for Consultation with Indigenous Peoples</p> <ul style="list-style-type: none"> ✓ Obligation of the Executive Branch to consult with indigenous peoples whenever administrative measures, draft laws or bills are envisaged private projects that may affect them (Art. 1). ✓ Binding nature within the consultation process. ✓ The following are involved in the consultation processes: the Technical Unit for Indigenous Consultation (UTCI), the Territorial Indigenous Consultation Instances (UTCI), and the interested party (public institution or private law entity) 	Honduras	<ul style="list-style-type: none"> ➤ Agrarian Reform. It is the duty of the State to dictate measures of protection of the rights and interests of indigenous communities existing in the country, especially of the lands and forests where they are settled (art. 346 CPH). ✓ The Law on Free, Prior and Informed Consultation for Indigenous and Afro-Honduran Peoples is a draft bill spearheaded by the government of Honduras since 2012
El Salvador	<p>Chapter III of the Law of Culture recognizes the indigenous peoples.</p> <p>Art. 32.- The State shall establish the means to ensure the participation of indigenous peoples in decision-making on matters affecting their rights.</p> <p>Article 25, paragraphs a and b of the Environmental Law establishes consultation as a right in which any person, natural or legal, who wishes to issue their observations on an Environmental Impact Study ...</p>	Panama	<ul style="list-style-type: none"> ➤ National Culture. The State recognizes and respects the ethnic identity of the national indigenous communities, it will carry out programs aimed at developing the material, social and spiritual values of each of their cultures and shall create an institution for the study, conservation and dissemination of these cultures and their languages, as well as the promotion of the integral development of these human groups (art. 90 of the CPRP). ✓ Agrarian Regime. The State shall give special attention to the peasant and indigenous communities in order to promote their economic, social and political participation in national life (art.124). ✓ Law establishing consultation and free, prior and informed consent of indigenous peoples (Law No. 37).

What are the results or consequences of the consultation?

- a) Plain and simple acceptance.
- b) Acceptance with conditions.
 - When the communities and indigenous peoples establish the conditions under which such a measure would be carried out in order to guarantee their rights, including measures of reparations, compensation, mitigation y a fair and equitable distribution of benefits.
- c) No acceptance with possibility of submit another option or modifications to the measure.
 - The Respondent leaves open the possibility of exploring other options. for the implementation of a similar measure, which would be again submitted for consultation.
- d) Not plain and simple acceptance.
- e) Opinions on the subject matter of the consultation.



What are the international standards for 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.
0. 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....

What are Mexico's experiences with consultation processes?



1. Constitutional Reform Initiative on the Rights of the Child Indigenous and Afro-Mexican Peoples.
2. Initiative for a General Law on Consultation with Indigenous and Afro-Mexican Peoples and Communities
3. Process consultation process for the construction of the University of Indigenous Languages
4. Affirmative actions in the area of political and electoral representation of indigenous peoples
5. Electoral Redistricting for Indigenous Peoples and Communities
6. Infrastructure projects and Megaprojects.
7. Mayan Train
8. Transisthmian train

