

11th Session of Expert Mechanism on the Rights of Indigenous Peoples (EMRIP11)
9 – 13 July 2018

Agenda item no. 4: Study and advice on free, prior and informed consent
Statement of Asia Indigenous Peoples Pact and Asia Indigenous Peoples Caucus
Presented by: C. Lalremruata of Zo Indigenous Forum (ZIF)

On behalf of the Asia Caucus, I would like to thank the members of the EMRIP for their efforts already poured into the draft Study and welcoming further inputs through this session. We hope all interventions in this session as well as other existing materials on FPIC will still be seriously reviewed and taken into consideration before the Study is finalised.

Free, prior and informed consent (FPIC) has been gaining recognition and support from States, businesses and other development actors through development and/or adoption of FPIC guidelines. However, its operationalisation remains elusive. Capturing its foundations rooted in indigenous peoples' legal recognition as peoples and recognition of their collective rights to self-determination and lands, territories and natural resources (LTR) has been challenging for many institutions hoping to implement FPIC even with those of sincerest intentions. It has been established that FPIC is deemed among the necessary processes should any development initiative is to provide a sustainable and meaningful positive impacts to indigenous peoples. Further, it is recognised that without proper implementation of FPIC means violation of indigenous peoples rights that often leads to detrimental, irreparable damage to their lives.

In Asia Indigenous Peoples Pact's (AIPP) submission to the study,¹ it highlighted some of the prevailing major misconceptions on FPIC, which are related to particular challenges. Among them are:

- *FPIC is understood and promoted in isolation and separate from the general recognition of collective rights of indigenous peoples, particularly on their right to self-determination.*
- *FPIC is interchanged with the general idea of the need for consultation or right to participation.*
- *FPIC is taken literally from what the letters stand for.*
- *FPIC is understood to have a universal method applicable to all indigenous peoples.*
- *FPIC is most often considered, interrogated and raised in the context of development aggression (i.e. mining, agribusiness, hydropower). But less so in the context of other social development programmes, e.g. health, education, poverty alleviation scheme, etc.*

Paragraph 2 of the Draft Study mentions that the Study is neither definitive nor exhaustive but aims to contribute to the body of existing guidelines. However, we believe the EMRIP Study will have strong influence as reference to FPIC implementation by States and beyond. As such, we would like to draw the attention of Members of the EMRIP and request them to review the misconceptions elaborated in our submission. We strongly recommend for them to provide any needed clarifications on these misconceptions in their final version of the Study. In paragraph 29 and 30 of the Draft Study re operationalisation of FPIC, it is likely that the points will reiterate the focus of FPIC mostly in the context of development aggression.

Social development programmes are often designed and implemented without consideration of FPIC, thereby missing the distinct and specific conditions of indigenous peoples. These programmes often

¹ See link: <http://iphndefenders.net/submission-of-aipp-for-the-11th-session-of-emrip/>

have impact on their customary laws, traditions and customs, including cultural, intellectual, religious and spiritual property to which FPIC should be obtained (UNDRIP, Article 11, para 2). Further, this falls under obtaining FPIC before adopting and implementing legislative or administrative measures that may affect them (UNDRIP, Article 19). Blanket approach of these social development programmes fails to respond to the specific situation of indigenous peoples² and provide them positive and effective impact.³ As a result, they remain to be furthest behind and trapped in the cycle of poverty and marginalisation. Although we do recognise that 1st bullet point of Annex no. 11 covers the foundation of this concern but we do hope that that can be elaborated in the Draft Study, particularly in the section of “Operationalisation of FPIC” (no. 3 Chapter III of the Draft Study).

Also, the 6th bullet point of Annex no. 11 mentions “States should ensure that consent is always the objective of consultations...” We request the Members of EMRIP to explain this point further as we believe this should not refer to disregard the collective decision of indigenous peoples to withhold their consent and put a particular development initiative to an end.

Furthermore, with regards to the 8th bullet point, we hope for the Members of EMRIP to consider reviewing the case studies of community protocols of indigenous peoples in Malaysia when finalising the Draft provided through the link footnoted in this Statement.⁴

Further, we recommend the members of the EMRIP to support us in our recommendations as far as their mandate permits to the following institutions:

We urge the States the following recommendations:

- States must implement its international human rights obligation and legislate national law on FPIC in cognizance of the its obligation to protect and promote the rights of indigenous peoples through legal recognition.
- Support constructive multi-stakeholder forums among States, indigenous organisations, CSOs and corporations to enhance awareness of FPIC and sharpen the understanding of its objectives and foundations and build capacity for its implementation. Institute enabling support to ensure effective participation of indigenous women, PwDs and other marginalised groups.
- States should develop, in sincere consultation with indigenous peoples, assistance programmes and effective mechanism, including budget allocation, for the effective implementation of FPIC.
- States should review and address the conflicts emerging from development aggression, including social development programmes that have caused damage to their culture, tradition and customs. It should provide restitution and redress to indigenous peoples affected without proper implementation of FPIC.

² Mohna Ansari, Commissioner of National Human Rights Commission of Nepal, raised this problem of blanket approach to social development programmes in AIPP’s side-event in EMRIP10 on “Exploring the roles of businesses and access to financial services for the rights of indigenous peoples in Asia.” (See EMRIP10 notes here: <https://drive.google.com/file/d/17gjMh6tdtihGui1YioQuBxz6S5lcQck7/view?usp=sharing>)

³See the participatory review of the Philippines’ flagship poverty alleviation programme, Pantawid Pamilyang Pilipino Programme – Conditional Cash Transfer (4Ps – CCT) regarding its (in)effectiveness to provide positive and sustainable impact to indigenous peoples. See review: https://drive.google.com/file/d/1F_ok9NB5XmKXOQiojiRzM_VWyNKvpljr/view?usp=sharing

⁴ See community protocols case studies in Malaysia thru this link: https://drive.google.com/drive/folders/1kOJh9h-WPFFmHFu4_9xhGKcJRep2eSW?usp=sharing

We urge the private sectors the following recommendations.

- IFIs and businesses should ensure that their safeguards and policies are in accordance with international human rights standards relating to FPIC and incorporate FPIC principles into rightsholders and stakeholders' engagement management plans and risk management approach.
- Conduct due diligence and map national and international laws and regulations related to FPIC and leverage States to legislate FPIC laws in pursuit of a commercially stable investment environment.
- IFIs and businesses should ensure that due process regarding FPIC is followed in the implementation of any projects in indigenous lands and territories, including other projects that would have detrimental effects to their cultural, intellectual, religious and spiritual property.
- Corporations should respect the FPIC process to be defined and managed by the indigenous peoples authorities and communities whose territories and futures are impacted by proposed projects. FPIC protocols or policies defined by indigenous peoples should be respected.
- FPIC process must be broad based and include all indigenous peoples and communities whose rights and environment are impacted. Impact areas have to be based on the social, cultural and spiritual links to territories as well as the direct physical impact area.

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