Appendix IV

FPIC – Frequently Asked Questions

In this Appendix:

What makes a relationship to landscape profound?

Understanding what makes a relationship to landscape profound requires a process of listening, learning and appreciating the IPLC's worldview. Some indicators of a profound relationship include:

- Places that feel highly significant to the members of the community
- Places where the relationship is multi-dimensional, that is, the land provides a place to live, farm or hunt and is also linked to the community's ancestral experience, culture, spiritual life, and integrity as a people.

In the Saramaka case, communities initially founded by enslaved people who had escaped enslavers in coastal cities and fled "to the interior regions of the country [Suriname] where they established autonomous communities." The IACHR heard extensive testimony about how the people lived on the land and what it meant to them. It recognized that "the identity of the members of the Saramaka people with the land is inextricably linked to their historical fight for freedom from slavery, called the sacred 'first time.'"

Is there an authoritative source on what is required for FPIC?

No one source details the entirety of FPIC. Instead, there are core underlying principles, such as free, prior, informed, consent and consultation. Treaties add specificity, as do judicial decisions that consider whether FPIC was achieved in a particular case, and guides like this one try to piece it all together.

Where did FPIC come from?

FPIC has developed from a process called customary international law. Like the common law in the U.S. and England, it is not just a matter of statutes and codes, but evolves over time from the actual conduct of states, judicial decisions, and other authoritative statements. This includes policies adopted by key institutions like the World Bank and even civil society actors like TNC. As these sources evolve, FPIC evolves too. TNC, therefore, is bound by the customary law of FPIC and also may contribute to FPIC's evolution.

1. The UN Declaration on the Rights of Indigenous Peoples is non-binding but considered to be a forceful part of normative or soft international law, especially since the only four countries who initially opposed it have reversed course and now support it.
2. The International Labor Organization's Convention No. 169 on Indigenous and Tribal Peoples, a legally binding treaty that has been ratified by 22 states, has served as a source in many judicial decisions.

The Inter-American Court of Human Rights has been active in the area of indigenous rights and FPIC, as have the courts of a handful of countries, like Canada and Colombia, who have come to be considered experts.

Is FPIC really the law—or just a good idea?

The distinction between hard law (you must do something or there are consequences) and soft law (you really should do something) is fuzzy at the international level.

Some argue that all international law has a soft character. In any event, the widespread adoption of FPIC by such a wide range of actors makes FPIC relatively strong soft law, even if it's not legally binding in all cases. Governments, corporations and NGOs today recognize that violations of strong soft law like FPIC will often result in greater adverse consequences in terms of public trust and institutional capability. TNC is a founding member of the Conservation Initiative on Human Rights and has joined other environmental NGOs committed to upholding FPIC.

Are indigenous peoples and local communities treated the same?

FPIC was developed with indigenous peoples in mind, meaning peoples who have lived in a place since time immemorial, survived colonialism and imperialism, and maintained their cultural integrity.

Most indigenous peoples suffered catastrophic traumas during the colonial and post-colonial eras, including:

- Forcible relocation
- Populations decimated by violence or disease
- Children stolen away to boarding schools
- Prohibitions on speaking their languages and practicing cultural and spiritual tradition
- Severe restrictions on the use of land they inhabit

TNC extends the benefits of any protection the law requires for indigenous peoples to a wider range of potentially affected local communities. Because of the nature of the work we do, TNC focuses on the experience of having a profound relationship with the natural landscape.

As one Saramaka chief, Wazen Edwards, testified: "When our ancestors fled into the forest they did not carry anything with them. They learned how to live, what plants to eat, how to deal with subsistence needs once they got to the forest." From this experience, the Saramaka perceived that the land had not just received them, but also sustained them and liberated them. It taught them how to be free. Thus, even though the Saramaka communities were not classically "indigenous," even to the continent of South America, the IACHR applied and developed indigenous rights law concerning their claims.

Consultation "versus" consent?

The first three elements of FPIC—free, prior, informed—have been added and developed over time to protect the element at the core of the standard: consent.

This reflects that FPIC necessitates meaningful, active consent. Yet some sources have removed consent from the equation by recasting the standard as "free, prior and informed consultation."[1]

This version of FPIC, known as Consultation-FPIC, draws on the protective strength of the free, prior and informed elements of FPIC, but ultimate authority in decision-making rests with the party conducting the consultation rather than the one being consulted.

Consultation-FPIC has critics. But it's too easy to call it a watered-down version of FPIC. Consultation can build on the consent of indigenous participants, and when appreciated in its many dimensions and genuinely implemented, it can be a powerful source of protection.

It can also avoid some of the controversies of a consent requirement, which is sometimes characterized in national politics as

an indigenous veto over sensitive land use and natural resource decision-making.

The Canadian legal system is largely based on Consultation-FPIC but has proven in recent years capable of protecting indigenous self-determination claims in the face of powerful opposition from the oil, gas, and pipeline industries. Leading indigenous activists have supported the notion of a complex interplay between consent and consultation.[2] Professor James Anaya, a pioneer of international indigenous rights law who served two terms as the UN Special Rapporteur on the Rights of Indigenous Peoples, has described the indigenous right to self-determination as "entail[ing] more than a mere right to be informed and heard but not an absolute right of veto."[3]

One of the reasons why it is not easy to separate consent and consultation is that indigenous peoples do not all speak with one voice, so a strict interpretation of a consent requirement in the form of a veto could be wielded by one indigenous people against the wishes of a neighboring people. And the indigenous right to self-determination is in constant tension with the prerogative of sovereignty exercised by contemporary nation-states. In light of this, courts, policy-makers and practitioners, including those strongly supportive of indigenous peoples, have devised a number of approaches to balance competing interests, ensure the legitimacy of consultation, and protect the essence of consent.

How these approaches apply to a non-state actor like TNC is not entirely clear, but the question is less important in light of TNC's commitment to obtaining full consent from impacted IPLCs before proceeding with any initiative.

It may be that TNC's commitment to a consent-based approach won't resolve every conflict between impacted communities. But such scenarios, uncommon as they are, can be addressed on a case-by-case basis. TNC recognizes the legitimacy of both FPIC and Consultation-FPIC processes, so long as the core underlying principles and good faith are maintained, but we have chosen to hold ourselves to a consent-based model.

Notes

[1] For example, this standard was used by the IFC's 2006 Performance Standard on indigenous peoples and the World Bank's Operational Policy 4.10 referenced this standard. See, e.g., https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf. Ecuador's historic 2008 Constitution, which also protected the rights of nature, provided for Consultation-FPIC at a constitutional level in article 57, section 7. As discussed herein, Canada's elaborate constitutional and common law framework for protecting indigenous land and self-determination rights requires Consultation-FPIC.

[2] World Bank Operational Policy 4.10 is also a good example of this complex interplay. While the policy itself requires "free, prior and informed consultation," the policy further provides that "[t]he Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples' communities have provided their broad support to the project" and that "[t]he Bank does not proceed further with project processing if it is unable to ascertain that such support exists."

[3] S James Anaya and Sergio Puig, Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples, 67 U. Toronto L.J. 435 (2017).