

- **Free prior informed consent**
- **Business & Biodiversity**
- **Múch'tambal Summit on Indigenous Experience**

Who's Afraid of Free?

Preston Hardison, Tebtebba Foundation

Free, prior and informed consent (FPIC) should be accorded to everyone! No person should be intimidated or coerced into giving their consent in any area that significantly affects their livelihoods, territorial security or ways of life. The *International Indigenous Forum on Biodiversity* (IIFB) has been surprised at the resistance of some parties to accepting FPIC in the adoption of the draft voluntary guidelines for accessing traditional knowledge, innovations and practices. This change in terminology does not introduce new concepts or legal obligations into the Convention or international legal system that do not currently exist, but reflects current best practices and international standards in related to consent.

Consent is often divided into implied and informed (or knowing). Informed consent is an equitable principle in law that adequate relevant information must be provided before consent can be obtained. "Prior" is embodied in the concept of informed consent, but has purposely been made visible to emphasize the concept.

This applies to "free." This was adopted in ILO Convention Regarding Indigenous and Tribal Peoples in Independent Countries (ILO169) in 1989. The phrase "free and informed consent" (FPIC) was used to emphasize non-coercion in the context of land dispossession for large-scale development projects. Various instruments have since adopted the phrase "free, prior and informed consent" and extended the concepts from indigenous peoples to local communities. It has also been used to refer to major projects and to traditional knowledge, including the United Nations Declaration on Indigenous Peoples, the FAO, the UN REDD Program, and others.

In the definitions of which we are aware, "free" clearly

refers to placing an emphasis on the principle of non-coercion in negotiations and decision making or taking actions. The Office of the High Commissioner of Human Rights (2013) describes the phrase as:

- "Free implies that there is no coercion, intimidation or manipulation.
- Prior implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- Informed implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a consent process."

Nothing in the phrase contradicts existing obligations under the Convention on Biological Diversity. It does not in itself create any legal obligations, but is the primary standard by which existing legal obligations in national and the international system are carried out. It reduces legal conflicts by making explicit what should be addressed in designing decision making processes to avoid subtle as well as overt coercion. It does not add confusion to legal meaning, any more than COP decisions that applied "prior informed consent" to access to traditional knowledge, out-

side of its original context of referring to the consent of national competent authorities.

These are voluntary guidelines. There is nothing in the use of FPIC that prevents parties from using the terms of the CBD in their national contexts.

FPIC is highly significant to indigenous peoples and local communities. Its adoption would signal that governments are ready to recognize and respect a full range of safe-

guards for our rights and interests. The proposed Guidelines present elements that help guide governments in the adoption of international standards for consent without coercion. Failure to supply guidance using the highest standards of the international system used to meet multiple international and national obligations will undermine efforts by those states that may want to incorporate the use of FPIC into national laws in a way consistent with obligations under the CBD and the Nagoya Protocol.

"We leave the environment in a better state than we found it"

An example from the Business and Biodiversity Forum

Antje Lorch, Ecoropa

"We leave the environment in a better state than we found it" - this was the bold statement of the CEO of Cemex Mexico, Juan Romero, during the Business & Biodiversity Forum.

Cemex is one of the world's largest cement producers, operating more than 60 cement plants and 400 quarries as well as marine terminals, distribution centres and other facilities - and its CEO gave a rousing speech about how companies had to go beyond being responsible, and how, if they wanted to make more money, they needed to be leaders in biodiversity and environment.

The CEO stated that he was not only talking about restoration of a site - but that after "taking something from nature" CEMEX would also "leave something behind and contribute to nature"



His examples were a site in Valencia, Spain, where after extracting the rock they needed, Cemex established a vineyard, and a quarry in the UK that now has a lake where people go fishing.

A lake may be better than a quarry - but what was there before? What about the biodiversity that was lost to the quarry in the first place? And what about the time in between? The simple before-and-after equation might work for accounting, but it leaves out all those years in which the site or quarry is operational. It leaves out the time in which there is neither the original environment, nor a restored site.

What about people, their health and their livelihoods in all of those years that a site is operational?

Here's how some local residents in the UK describe the Cemex plant in their immediate neighbourhood.

"CEMEX's cement plant in Rugby, UK spews out 200 cubic metres of waste gases per second including from burning household waste and old tyres, which they are paid to incinerate: among other particulates, damaging nanoparticles from high temperature combustion pollute the air. It is a serious health hazard for the town but protests are dismissed. The legality of its planning permission and its operating permit are contested but, by ignoring huge conflicts of interest and the lack of any due diligence checks, and the fact that 'where there is muck there is money', they've managed, somehow, to get around the regulatory system and monitoring controls."

No promise of a lake on which to go fishing some time in the future can compensate for that.

Múuch'tambal Summit on Indigenous Experience

Traditional Knowledge, biological and cultural diversity

Cancun, 9-11 December 2016

The Summit was attended by 280 participants from Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific Regions. Part of the programme was a visit to a Mayan indigenous community; participants had the opportunity to visit a Mayan archaeological site. This was followed by a two day panel and round tables discussions on 1) Traditional Knowledge, innovations and practices (in sectors) 2) Use, management and conservation of biodiversity 3) Community Governance and biodiversity.

The outcome of the Summit was a declaration:

We, the participants of the *Múuch'tambal* Summit held in Cancun, Mexico, territory of Indigenous Peoples since millennia and rich in biological and cultural diversity:

1. *Welcome* this opportunity to share experiences from indigenous peoples and local communities, Parties and International Organizations on the contributions of traditional knowledge and cultural diversity across the Agriculture, Fisheries, Forestry and Tourism sectors for the conservation and sustainable use of biodiversity;
2. *Recognize* that many countries with the highest levels of biological diversity also rank amongst the most culturally diverse. Cultural diversity and its corresponding traditional knowledge are eroding fast in many parts of the world, and these losses are closely linked to the loss of biological diversity. There is an urgent need to reverse this trend to ensure critical pathways towards future sustainability on Earth;
3. *Fully Endorse* the recommended actions at various levels as presented in the Annex of this Declaration with the aim of contributing to all of the Aichi Targets of the CBD, in particular enhancing protection, conservation and customary sustainable use of biodiversity for local and traditional livelihoods and the equal sharing of the benefits arising from the use of traditional knowledge and biodiversity;
4. *Acknowledge* the ownership of indigenous peoples' lands and territories and the inseparable linkages between indigenous and communal land tenure systems and customary use of biological and cultural diversity. We underline the importance of this to the well-being of indigenous peoples;
5. *Recognize* the contribution and values of traditional knowledge and biological and cultural diversity to healthy ecosystems, human well-being and resilient and sustainable societies, particularly in the agriculture, fisheries, forestry, and tourism sectors;
6. *Acknowledge* the important role indigenous peoples and local communities play in the governance, management and conservation of biodiversity, and the importance of protecting traditional knowledge and its continued transmission to future generations through their own institutions;
7. *Encourage* the full and effective exercise of the rights of indigenous peoples and local communities enshrined in the various international instruments related to the protection of Mother Earth, without suffering the violation of their rights;
8. *Encourage* the balanced, fair, and effective intellectual property protections of genetic resources, traditional knowledge, and traditional cultural expressions;
9. *Acknowledge* the role of indigenous women and youth in caring for biodiversity and cultural diversity as women represent fertility like that of Mother Earth and the youth as our next generation,
10. *Recognize* the critical role that traditional knowledge and biocultural diversity plays in achieving sustainable development and in advancing the 2030 Agenda for Sustainable Development and its Sustainable Development Goals;
11. *Acknowledge* the importance of the UNESCO-

SCBD Joint Programme on the Links between Biological and Cultural Diversity in advancing our understanding of and attention to the biocultural diversity as the complex interplay between biodiversity and cultural diversity, and its vital impacts on economic, political, environmental, social and cultural sustainability;

12. *Recognize* the importance of enhancing mechanisms for the incorporation of approaches that build on traditional knowledge, innovations and practices and biocultural diversity with full and effective participation of indigenous peoples and local communities in the National Biodiversity Strategy and Action Plans of the CBD;

13. *Commit* to disseminate locally, nationally and globally the outcomes of the Summit, including at the Thirteenth Meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD COP 13), while ensuring the financial support of the proposed actions;

14. *Encourage* further elaboration and dissemination of case studies, policies and concepts presented at the Summit through mutual learning platforms such as the Joint Programme of Work between the CBD and UNESCO on the Links between Biological and Cultural Diversity;

15. *Welcome* the Local Biodiversity Outlooks Indigenous Peoples' and Local Communities' contributions to the implementation of the Strategic Plan for Biodiversity 2011-2020" as a complement to the fourth edition of the Global Biodiversity Outlook;

16. *Encourage* the continued exchange and distribution of best practices through diverse platforms such as the Local Biodiversity Outlooks webpage, and the further exploration of how to best care for the synergies between the protection of traditional knowledge and biocultural diversity with the implementation of the Convention, the Strategic Plan for Biodiversity 2011-2020 and its Aichi targets, as well as the Agenda 2030 and the Sustainable Development Goals, in particular Goal 1, indicator 5, regarding the percentage of women, men, indigenous peoples and local communities with secure rights to land;

17. *Invite* the United Nations Member States, in partnership with the Secretariats of the CBD, UNESCO, FAO and WIPO to consider and support the spirit and initiatives of this Declaration and its Annex;

18. *Welcome* the commitments made in the Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity For Well-Being, which will be made possible through the implementation and compliance of the actions proposed in this Declaration and its Annex

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Submissions

are welcome from all civil society groups.

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