



# Environmental Rule of Law and Human Rights in Asia Pacific: Free, prior and informed consent (FPIC)

Summary for Decision-makers

UNITED NATIONS ENVIRONMENT PROGRAMME

July 2023

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# **Environmental Rule of Law and Human Rights in Asia Pacific: Free, prior and informed consent (FPIC)**

## **Summary for Decision-makers**

**July 2023**

## Overview

This Summary for Decision-makers is based on the UNEP Working Paper Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders.<sup>1</sup> It provides an overview of the right to free, prior and informed consent (FPIC), associated duties, and good practices in the application of FPIC across Asia Pacific.

The realization of human rights and the environmental rule of law is recognised in this Summary as being essential to the achievement of the Sustainable Development Goals (SDGs). Realisation of the SDGs depends on governments upholding the rule of law, ensuring access to justice for all, and developing effective, accountable and transparent institutions, ultimately leading to the realization of gender equality and human rights for all.

The valuable role of environmental human rights defenders (EHRDs) advancing the environmental rule of law and contributing to the achievement of the SDGs is recognised in this Summary. This is especially so for SDG 16 and several of its indicators that are specifically applicable to EHRDs, notably: Target 16.3, which seeks to “Promote the rule of law at the national and



international levels and ensure equal access to justice for all”, and Target 16.10, which seeks to “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.

This *Summary for Decision-makers* recognises that environmental human rights defenders (EHRDs) include all “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna”.<sup>2</sup> This includes individuals and groups representing Indigenous Peoples and Local Communities (IPs and LCs).

## Key messages

- **Environmental rule of law is critical for the protection of the environment, the promotion of the right to live in a clean, healthy, and sustainable environment, as well as the achievement of sustainable development.**
- **Environmental human rights defenders (EHRDs) play an important role in upholding, implementing, and advancing environmental rule of law.**
- **EHRDs include Indigenous Peoples and Local Communities (IPs and LCs) seeking to promote and realize their environmental rights in a peaceful manner. These include the rights to public participation, access to justice, access to information, and the right to a healthy environment, and rights over their traditional lands, territories, and natural resources, and the right to free, prior and informed consent (FPIC).**
- **FPIC is an internationally recognised right.**
- **FPIC is particularly applicable to IPs and LCs with respect to the exploitation and conservation of their environment, land, territories, and natural resources.**
- **States have the prime responsibility and duty to protect, promote, and respect all human rights and fundamental freedoms, including EHRDs’ right to free, prior and informed consent.**
- **Meeting these obligations includes ensuring business and other key duty bearers respect these rights, and in turn, provide critical support to States’ achievement of environmental rule of law and realization of sustainable development.**
- **In the Asia Pacific region, measures to uphold free, prior and informed consent have been introduced in some jurisdictions. Good practices such as these could be followed by other states.**
- **Additional strategies and mechanisms, such as environmental impact assessment (EIA), demonstrate other good practices that could also be utilised by states to promote and protect FPIC.**

<sup>1</sup> United Nations Environment Programme (UNEP) (2023). Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders. Working Paper.

<sup>2</sup> UN Special Rapporteur on the situation of human rights defenders (2016), para 7. See also UNEP (2023), 3-5.

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### Summary Outline

- **Section 1** provides a brief background on environmental rights and duties, and the important role of EHRDs.
- **Section 2** provides an overview of Indigenous Peoples' right to FPIC and the corresponding duty of States to ensure the right of FPIC is respected and fully realised. The individual elements of FPIC are also examined.
- **Section 3** explores key legal instruments that recognise and support the right to FPIC and lay down the related responsibilities and duties of States and non-state actors.
- **Section 4** draws specific attention to FPIC good practices that have been implemented in several Asia Pacific states. This includes express recognition of FPIC in national laws. Other good practices, such as environmental impact assessments (EIA), are also considered.
- **Recommendations** for FPIC legal and policy reforms in the Asia Pacific region are set out at the end of this Summary.

## Introduction

The Asia Pacific region has vast and diverse natural resources that encompass highly biodiverse tropical forests, mangrove forest, coral reefs, and other marine, riverine, lacustrine and terrestrial ecosystems. The region also has a rich abundance of other commercially exploitable natural resources, notably mineral ores<sup>3</sup> fossil fuels,<sup>4</sup> tropical hardwoods, palm oil and fisheries. Extensive damming of river systems for hydroelectricity production is also a significant economic activity with environmental impacts. Many of these natural resources are located on or in the traditional, customary lands, territories, and waters of IPs and LCs throughout Asia Pacific.

Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture.”<sup>5</sup> Environmental degradation is increasing in many parts of the world, especially in situations involving extractive industry activities, logging, and infrastructure developments. As the UN has observed: “Indigenous Peoples ... often face grave and even life-threatening risks for defending the traditional lands, resources and territories upon which their communities depend for survival, livelihoods and religious and customary practices.”<sup>6</sup>

Against this backdrop, this *Summary for Decision-makers* presents an overview of IPs and LCs' right to free, prior, informed consent (FPIC), its legal foundations, and States' duties. In addition to paying special attention to the role and protection of environmental human rights defenders (EHRDs), this *Summary* recognises that the right to FPIC is closely linked with other environmental rights, including the

rights to public participation, access to information, access to justice, and the right to a clean, healthy, and sustainable environment (hereafter 'right to a healthy environment').

Protection and fulfilment of the right to FPIC and other environmental rights is also identified as critical to the achievement of environmental rule of law and sustainable development. These additional factors make it even more necessary for governments to uphold the rule of law, ensure access to justice and public participation for all, and to develop effective, accountable and transparent institutions. These important considerations are also discussed in the 2023 UNEP Working Paper: *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders* (UNEP Working Paper).<sup>7</sup>

### Note on Terminology

In the Asia-Pacific Region, a commonality with regard to terminology, is the absence of the use by some States of the term “Indigenous Peoples”. Instead, a range of other descriptors are used, including ethnic groups and sub-groups, ethnic minorities, Indigenous local communities, Indigenous cultural communities, and local communities. For the purposes of this *Summary*, the term “Indigenous Peoples” is generally used to embrace such designations.<sup>8</sup> However, where appropriate, the term “and local communities” is added. Both terms – “Indigenous Peoples” and “local communities” - are abbreviated to IP and LC respectively in this Summary.

<sup>3</sup> These include aluminium, barite, copper, chromium, gold, iron, manganese, nickel, tungsten, tin.

<sup>4</sup> Coal, gas and petroleum.

<sup>5</sup> Töpfer (Executive Director UNEP) (2001).

<sup>6</sup> UNEP, United Nations Human Rights Office of the High Commissioner (UN OHCHR) and United Nations Development Programme (UNDP) (2022).

<sup>7</sup> UNEP (2023), esp. 2-10.

<sup>8</sup> The term “Indigenous” is used with a capital “I” as a mark of respect, in accordance with emerging usage; exceptions are made where a lower case “i” is used in quotations.

# 1. Background

The UNEP *Working Paper*<sup>9</sup> sets out the background to this discussion of FPIC. In addition to the growing recognition of the linkages between human rights and the environment, the Working Paper also provides an overview of environmental rights, especially right to a clean, healthy and sustainable environment, and the important role of EHRDs in exercising their fundamental rights and freedoms to protect the environment.

## 1.1. Environmental Human Rights Defenders

As discussed in UNEP *Working Paper* EHRDs are defined by the UN as:

Individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.<sup>10</sup>

EHRDs can be anyone and everyone including individuals and groups of IPs and LCs. ERHDs can also be international and non-government organisations representing IPs and LCs.

While EHRDs come from a wide variety of backgrounds, they are identified by the nature of what they do, and not necessarily who they are. EHRDs play an important role in assisting States in meeting human rights and environmental obligations, including promoting and protecting environmental rights and rights-holders against abuse.

## 1.2. Environmental Rights

According to the UN, “environmental rights” consist of any proclamation of a human right to environmental conditions of a specified quality.<sup>11</sup> Such rights include the rights to life, health, water, food, a healthy environment, an adequate standard of living, as well as freedom of expression and association, and cultural rights, such as rights to access religious sites and to carry out religious or spiritual practices.<sup>12</sup> Environmental rights also include collective rights affected by environmental degradation, such as the rights held by IPs and LCs to their traditional lands, territories and natural resources, including the rights to self-determination and to FPIC.

Even so, not all environmental rights are fully realised or enjoyed equally. As the UN Human Rights Council observes:

[W]hile the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations.

[T]he specific nature of indigenous peoples and rural and local communities can aggravate their vulnerability, as they can be located in isolated areas without communication access or network support and recognizing also that indigenous peoples are among the first to face the direct consequences of climate change owing to their dependence upon and close relationship with the environment and its resources.<sup>13</sup>

### 1.2.1. Everyone’s right to a clean, healthy and sustainable environment

The UNEP *Working Paper* draws attention to the growing awareness that sustainable environmental governance cannot exist without the establishment of and respect for human rights, and likewise that human rights cannot be enjoyed without the guarantee of a clean, healthy and sustainable environment. In the Asia Pacific context, it is noted that a number of States already include some form of the right to environment in their constitutions and/or their national legislation.<sup>14</sup> Further, at the ASEAN regional level, Article 28(f) of the ASEAN Human Rights Declaration of 2012 expressly recognises the right to a safe, clean, and sustainable environment.<sup>15</sup>

The most recent international manifestation of the inherent relationship between human rights and the environment is set out in the UN General Assembly’s 2022 Resolution 76/300.<sup>16</sup> The operative paragraphs are:

The General Assembly

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;
2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral

<sup>9</sup> UNEP (2023).

<sup>10</sup> UN Special Rapporteur on the situation of human rights defenders (2016), para 7. See also UNEP (2023), 3-5.

<sup>11</sup> UNEP. What are environmental rights?

<sup>12</sup> See e.g., discussion in United Nations General Assembly (UNGA) (2018a).

<sup>13</sup> UN Human Rights Council (UN HRC) (2019), Preamble, rec 14.

<sup>14</sup> In the Asia Pacific context, Article 28(f) of the *ASEAN Human Rights Declaration* 2012 expressly recognises the right to a safe,

clean, and sustainable environment. A number of Asia Pacific states also include recognition of some form of right to environment in their constitutions. See further, B. Boer (2015), 166-174.

<sup>15</sup> Association of Southeast Asian Nations (ASEAN) (2012).

<sup>16</sup> United Nations General Assembly (UNGA) (2022).

environmental agreements under the principles of international environmental law;

4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

Operative paragraphs two, three and four can all be interpreted as relating directly to the concept of FPIC.

### 1.2.2. Indigenous Peoples and Local Communities' environmental rights

IPs and LCs are vested with a range of environmental rights that are specific to them. Examples include the rights to:

- Self-determination;
- Free, prior and informed consent;
- Conservation and protection of their lands;
- Determine and develop priorities and strategies for the development or use of their lands or territories and other resources;
- Lands, territories and resources that they have traditionally owned, occupied or used;
- Manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies;
- Improvement of their social and economic conditions;
- Maintain, protect, and have access to privacy to religious and cultural sites;
- Be secure in the enjoyment of their own means of subsistence;
- Traditional knowledge and practice; and
- Traditional medicines.<sup>17</sup>

A common feature of these rights is the inherent, often existential, linkages between IPs and LCs and their lands, territories and natural resources.

Through their various activities, IPs and LCs who act as EHRDs often make valuable contributions to the achievement of the environmental rule of law, and States' obligations regarding issues such as national climate change policies and the achievement of the Sustainable Development Goals. At the same time, a shared experience of IPs and LCs is the recurrent violation of their environmental rights by extractive mining activities, large-scale infrastructure, and other development projects. They are often subject to illegal land grabbing as well as unauthorized resource extraction and deforestation. Actions of this kind, and the associated violation of environmental rights, seriously undermines the environmental rule of law and threatens States' ability to realise sustainable development.

## 1.3. Environmental Duties of States

Obligations or duties are the corollary of rights. Those who hold obligations or duties are referred to as duty bearers. In general terms, duty bearers are obliged to respect, promote, protect and ensure the full realisation of environmental rights. At an individual level, this obligation can be seen in national constitutions and laws, which impose obligations on persons to conserve and protect the environment, natural resources, biodiversity, cultural heritage, etc.

In addition to the State, key duty bearers for environmental rights include national and local governments, ministers and their ministries, as well as judicial and quasi-judicial institutions. By way of example, the UN Special Rapporteur's *Framework Principles on Human Rights and the Environment* comprises 16 Framework Principles that set down the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.<sup>18</sup> Each of those principles begins "States should...", thus characterising the State as the prime duty bearer. However, the duty of the State includes ensuring that *other* duty bearers also implement the principles, as indicated in Principle 2:

The obligations of States to respect human rights, to protect the enjoyment of human rights from harmful interference, and to fulfil human rights by working towards their full realization, all apply in the environmental context. States should therefore refrain from violating human rights through causing or allowing environmental harm; protect against harmful environmental interference from other sources, including business enterprises, other private actors and natural causes.<sup>19</sup>

## 2. The Right to FPIC

The right to free, prior, and informed consent (FPIC) is an environmental human right that reflects a consultative, consensus-based, decision-making process. In broad terms, FPIC incorporates established human rights of public participation, access to information, and access to justice, as well as the rights of IPs over issues that concern or impact their traditional/customary lands, cultures and livelihoods.

As Asia Indigenous Peoples Pact (AIPP) points out: "Indigenous Peoples have customarily practised FPIC since time immemorial" and view it "as an inherent right" grounded in their right to self-determination.<sup>20</sup> Furthermore, a UN Human Rights Council study has described the right of FPIC as:

[A] manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: *the right to be*

<sup>17</sup>See UNEP. Human Rights and the environment.

<sup>18</sup> UNGA (2018b).

<sup>19</sup> Ibid, *emphasis added*.

<sup>20</sup> Asia Indigenous Peoples Pact (AIPP) (2019). See also: AIPP and International Work Group for Indigenous Affairs (IWIGA) (2014).



*consulted; the right to participate; and the right to their lands, territories and resources...*<sup>21</sup>

Importantly, the study goes on to state: “If one of these is absent, free, prior and informed consent cannot be achieved”.<sup>22</sup>

Moreover, as AIPP note, although there is no definitive, universally applicable FPIC model, “the process of obtaining FPIC should be determined by the community itself and implemented in a manner that respects customary laws and traditional modes of decision making”.<sup>23</sup> Referring to the *UN Declaration on the Rights of Indigenous Peoples*, the UN Human Rights Council study summarises the rationale for FPIC as:

Free, prior and informed consent as provided for in the Declaration has three major rationales. First, it seeks to restore to indigenous peoples control over their lands and resources, as specified in article 28. Some authors argue that “free, prior and informed consent has its origins in the native title principle, according to which native people have their right to lands based on their customary law and sustained connection with the land”, and others that “historical legal doctrine firmly establishes indigenous peoples’ sovereign rights over ancestral lands and resources as a matter of long-standing international law”.

Second, the potential for free, prior and informed consent to restore indigenous peoples’ cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Indigenous peoples’ cultural heritage, including human remains, taken without consent, are still held by others. Third, free, prior and informed consent has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties (see A/HRC/EMRIP/2010/2), as reflected in articles 18 and 19 of the Declaration.<sup>24</sup>

## 2.1. Elements of Consent

FPIC involves three key elements that characterise and define consent: free, prior, and informed. Each of these is discussed below. As illustrated in Figure 1 (below), these elements all form part of the consultation and decision-making processes that States and other actors are required to observe to ensure the full realisation of IPs and LCs right to FPIC.

### 2.1.1. Free

The term “free” means free from “force, intimidation, manipulation, coercion or pressure by any government or company”.<sup>25</sup> “Free” refers to the ability of the environmental right-holders to decide for themselves whether to agree to a particular project or activity, e.g.,

mining projects and related infrastructure, forestry, large-scale construction development, etc. This means that when engaging in public consultations and decision-making procedures relating to proposed activities that will impact their traditional or customary lands, territories and natural resources, IPs’ consent must not be obtained through force, coercion, pressure, intimidation, or manipulation by others, e.g., national or local public authorities, corporations and investors.

“Free” can also be understood as being free from feeling obliged to consent because of cultural norms; free from having to agree to a simple yes to what is being proposed, without the opportunity to stipulate conditions on that consent. More generally, it also encapsulates the right of public participation in the sense of IPs being free from exclusion from participation in decision-making that may or will affect them.

### 2.1.2. Prior

The term “prior” indicates the temporal nature of the right to FPIC. It means, for example, that prior to the “government allocating land for particular land uses and prior to approval of specific projects”, IPs must be “given enough time to consider all the information and make a decision”.<sup>26</sup> In line with the rights of public participation and access to information, the element of “prior” captures the requirement that the relevant government or public authority must inform and engage in consultation with IPs, and seek their consent, before making a decision to allocate lands, territories, and natural resources to a particular entity, whether it is a local business or an international corporation. The same obligation applies to decisions that entail the approval of specific projects or granting of permission to engage in particular activities or uses impacting upon the rights of IPs over their lands, territories, and natural resources. At the core of this element is the inherent requirement that IPs and LCs are given sufficient time to consider all relevant information and make the decision most suitable to them.

### 2.1.3. Informed

In accordance with international laws and norms, effective public participation in and decision-making by IPs and LCs over activities or uses of their lands, territories, and natural resources includes access to all relevant information. This requires IPs to be provided with all the often-detailed information needed to be able to make a decision about whether to agree to, or reject, or demand conditions on, a decision or project that will or may impact their environmental rights. Such information must be in a form and language that is understandable and culturally acceptable to different members of society, e.g., local language, written or oral.

<sup>21</sup> UN HRC (2018), para 14 (*emphasis added*).

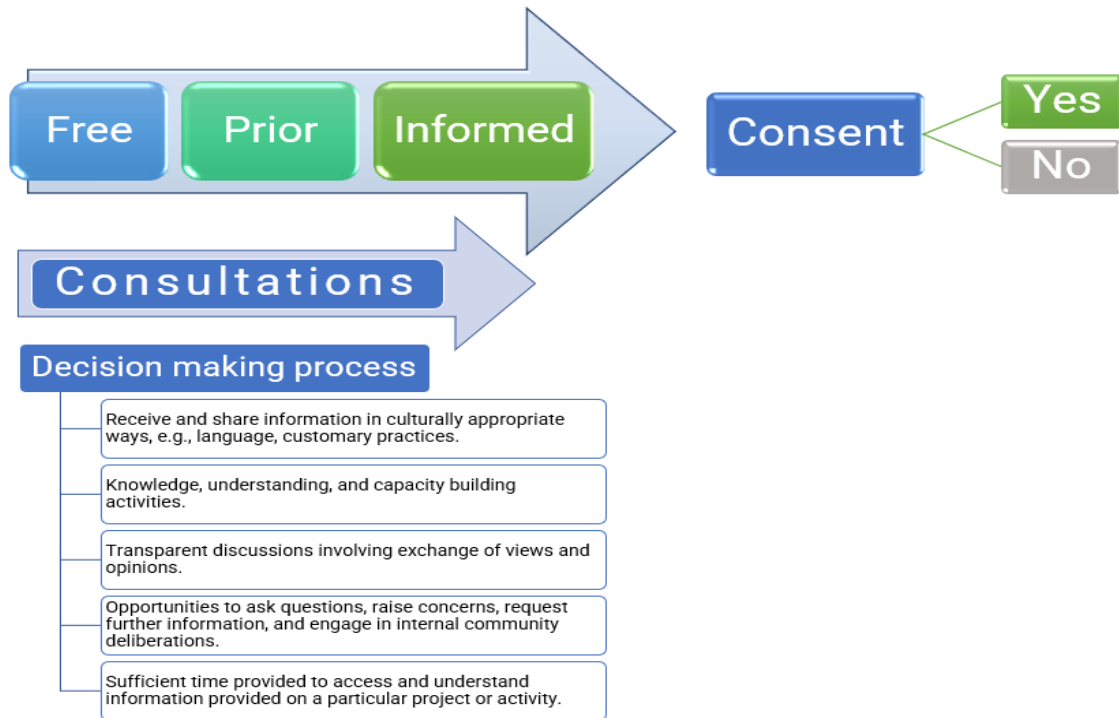
<sup>22</sup> *Ibid.*

<sup>23</sup> Asia Indigenous Peoples Pact (AIPP) (2019).

<sup>24</sup> UN HRC (2018b), para 11 (footnotes excluded).

<sup>25</sup> Hill *et al.* (2014), 10.

<sup>26</sup> *Ibid.*, 11.



**Figure 1 FPIC elements, consultations and decision-making processes**

The information provided must also be sufficiently detailed to enable them to make a knowledgeable decision about any proposal that entails the allocation or use of their lands, territories or natural resources.

In this regard, the information about the proposed activity, use, or development must be provided in a form that is capable of being clearly and easily understood in terms of the proposed activity or project, its positive and negative impacts on the local population and their lands, territories, and natural resources, as well as the consequences of giving or withholding consent. In the context of being “informed”, Indigenous Peoples, including different groups within society such as youth, women and elderly, must also be able to request further information, make changes, add conditions, etc. They must also have “access to independent information, not just information from the project developers, government, or local authorities, and “access to experts on law and technical issues, if requested”.<sup>27</sup>

## 2.2. Other consent-related matters

Further to the above discussion, all of these individual elements of the right to FPIC are interrelated. Participation, consultation, engagement, and provision of information through culturally appropriate means are all essential to ensuring and supporting collective, consensus-based decision making. As

pointed out above, exercising the right to FPIC does not necessarily or automatically result in consent being given. Figure 1 (above) illustrates this distinction, together with various aspects of the decision-making process. Additional consent-related issues involve questions as to who decides to provide or withhold consent. This and other matters are considered next.

### 2.2.1. Who decides?

The decision on whether to accept or reject a proposal for activities, uses or developments concerning traditional or customary lands, territories or natural resources, rests with the relevant Indigenous peoples, as rights-holders. Ultimately, it is for those rights-holders to decide the processes, timelines, decision-making approach and the final outcomes.

### 2.2.2. No Automatic Obligation to Consent: The Right to say No

Satisfying all of the individual FPIC elements does not create an automatic obligation for Indigenous peoples to accept projects or activities affecting their lands, territories and resources. Thus, even where the elements of free, prior and informed consent are met, they do not have to say yes. In other words, the right to FPIC is not just about giving consent, but equally the right to withhold consent.

<sup>27</sup> Ibid at 8.

### 2.2.3. Consultation is not the same as Consent

Exercising the right to FPIC entails a process of decision-making involving consultation that should provide Indigenous peoples with opportunities to engage in discussions, obtain and share relevant information, ask questions, seek clarifications, request further information, express their views, raise their concerns, and overall, gain a fuller understanding of a particular project or activity and its potential or actual impact, and make a collective decision. Engaging in the process of consultation is not the same as providing consent.

## 3. Legal recognition of the right to FPIC

The legal sources recognising the right of Indigenous people to FPIC, and the corresponding obligations of duty-bearers, can be found in a number of international law instruments and associated guidelines or policies. In most cases, the recognised duty bearer is the State. Some international instruments also recognise that “business enterprises, the media and other non-State actors are obliged to respect human rights obligations and refrain from contributing to or committing violations.”<sup>28</sup>

### 3.1. International Conventions

FPIC is not expressly referred to in either of the two principal international human rights covenants - the International Covenant on Civil and Political Rights (ICCPR)<sup>29</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>30</sup> Nevertheless, Common Article 1 of ICCPR and ICESCR sets out the right of self-determination and the foundational rights and duties that underpin Indigenous peoples’ rights. This includes environmental rights concerning their traditional lands, territories and natural resources, and the right to FPIC.

The International Labour Organisation’s 1989 *Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169)*<sup>31</sup> contains references to consent requirements. It is regarded as the first legal recognition of this right by the international community. Although the requirements are not expressed in the exact language of FPIC, namely free, prior and informed consent, FPIC is reflected in several provisions. For example, provisions relating to the removal of Indigenous people from their lands include the requirement that ‘such relocation shall take place only with their free and informed consent’ (Art 16.2). Other

provisions set out obligations for consultation on matters that may or will affect Indigenous peoples and their rights.<sup>32</sup>

### 3.2. UN Declaration on the Rights of Indigenous Peoples 2007

The United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) was adopted by the General Assembly in September 2007.<sup>33</sup> The majority of States in the Asia Pacific region voted in favour of adopting the Declaration.<sup>34</sup>

In the context of environmental rights, IPs rights to self-determination and FPIC mean that they are free to determine the development, priorities for use and strategies concerning their lands, territories or other resources. Six articles in UNDRIP contain explicit reference to FPIC in several of the recognized rights.<sup>35</sup> Through these provisions, the right to FPIC is interwoven with other environmental rights of IPs. For example, pursuant to Article 10, IPs may not be forcibly removed from their lands, but if relocation is to occur, this can only take place once the right to FPIC is fulfilled. In a similar vein, Article 19 obliges States’ authorities to obtain the free, prior and informed consent of IPs before the adoption or implementation of legislative or administrative measures that may affect them.

More specifically, Articles 28, 29 and 32 clearly provide that IPs land, territories and natural resources cannot be dealt with by anyone without their consent. For example, Article 32 stipulates that before approving any project for the development, utilisation, or exploitation of minerals, water, or other resources located on the lands or territories of Indigenous peoples, States are obliged to obtain their free, prior, and informed consent. States are also obliged to consult and cooperate in good faith and provide effective mechanisms for just and fair compensation, where that is required.

### 3.3. Local communities and FPIC

Even though the UNDRIP expressly recognises that the right to FPIC is vested specifically in IPs, the environmental rights of local communities (LCs) are also understood to include the right to FPIC. The primary source of this right can be found in Articles 1 and 2 of the UN Declaration on the Right to Development.<sup>36</sup> Principle 15 of the 2018 Framework Principles on Human Rights and the Environment, provides under paragraph 48 - 51:

Traditional (sometimes called “local”) communities that do not self-identify as indigenous may also

<sup>28</sup> UNGA (2016), para 3.

<sup>29</sup> *International Covenant on Civil and Political Rights* (1966).

<sup>30</sup> *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>31</sup> *Indigenous and Tribal Peoples Convention, C169* (1989).

<sup>32</sup> *Ibid*, arts 6, 7, 15, 17, 22, 27, 28.

<sup>33</sup> UNGA (2007), UNDRIP.

<sup>34</sup> See full voting details: United Nations Digital Library System.

<sup>35</sup> UNGA (2007). UNDRIP, arts 10, 11, 19, 28, 29, 32.

<sup>36</sup> UNGA (1986).

have close relationships to their ancestral territories and depend directly on nature for their material needs and cultural life.... States must ensure the full and effective participation of indigenous peoples and traditional communities in decision-making on the entire spectrum of matters that affect their lives.....The free, prior and informed consent of indigenous peoples or traditional communities is generally necessary before the adoption or implementation of any laws, policies or measures that may affect them, and in particular before the approval of any project affecting their lands, territories or resources, including the extraction or

exploitation of mineral, water or other resources, or the storage or disposal of hazardous materials. Relocation of indigenous peoples or traditional communities may take place only with their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.

National laws can also provide additional support of LC's right to FPIC. A comparison between the legal sources of IPs and LCs right to FPIC is illustrated in Figure 2 below.

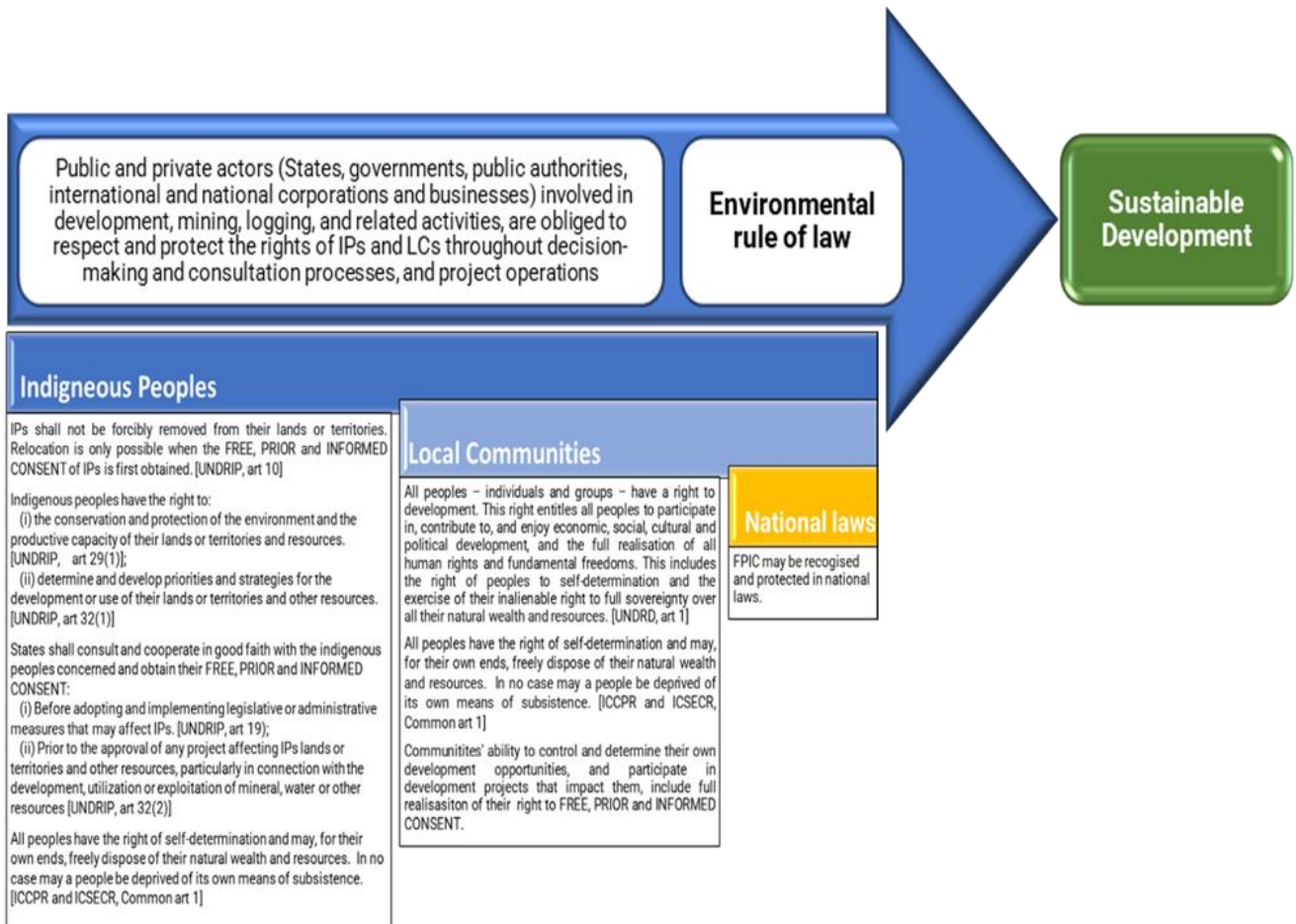


Figure 2 IP and LCs environmental rights, FPIC, environmental rule of law and sustainable development<sup>37</sup>

While not necessarily expressed in the language of FPIC, there is nevertheless legal support for the suggestion that LCs have rights to consultation and engagement in decision-making on matters that affect them, including the right to say no, and an equal right to FPIC. As Oxfam suggests, the principles of FPIC should guide LCs (non-IPs) right to consultation and negotiation in decision-making processes. This means that LCs should only engage in consultation and negotiation when they are “not forced or pressed to

participate”, and “prior to decisions being made”. Also, “consent should only be sought” once the LC is “fully informed of the issues being discussed and negotiated”.<sup>38</sup>

### 3.4. Other Instruments

Several other international treaties and instruments explicitly recognise FPIC as a collective right of Indigenous peoples, with the corresponding duties of

<sup>37</sup> This figure is based in part on the diagram set out in Hill et al. (2014), 12.

<sup>38</sup> C., Hill et al. (2014), 9.

States to obtain Indigenous peoples' FPIC for any proposed projects or activities in or on their lands, territories, and/or natural resources that will impact the enjoyment of their rights. For example, the Committee on Economic, Social and Cultural Rights has commented that "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights" (General Comment 21).<sup>39</sup>

Similarly, while Article 8 - In-situ Conservation, of the UN *Convention on Biological Diversity* (CBD)<sup>40</sup> makes no specific reference to environmental rights and the right to FPIC, the *Mo" otz Kuxtal Guidelines*, made pursuant to Article 8(j), comprise:

Voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge.<sup>41</sup>

Likewise, Articles 52 and 52 of the *Akwé: Kon Voluntary Guidelines*, also established under Article 8(j) of the CBD, expressly recognise Indigenous peoples' right to FPIC.<sup>42</sup> The right to FPIC has now also been included in the *World Heritage Convention's*<sup>43</sup> Operational Guidelines. As Boer explains:

The specific category of Indigenous peoples was added to [the list of stakeholders to be consulted by States] in the 2019 revision of the Guidelines, consistent with the UNESCO Indigenous Peoples Policy of 2018. This amendment to the Guidelines is based on the concepts of the 2007 United Nations Declaration the Rights of Indigenous Peoples and raises the issue of access rights which has become a familiar part of the environmental law and policy discourse since the Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters. Importantly, paragraph 64 now includes the following mandatory obligation: "In the case of sites affecting the lands, territories or resources of indigenous peoples, States Parties shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before including the sites on their Tentative List". [footnotes omitted]<sup>44</sup>

Reference to FPIC in other instruments is less explicit. For instance, the UN Committee on the Elimination of Racial Discrimination (CERD) has observed that State Parties are obligated to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".<sup>45</sup>

### 3.5. Duties of States and FPIC

States primary responsibilities and duties include the obligations to: (i) Respect, protect and fulfil all human rights and fundamental freedoms of all persons";<sup>46</sup> and (ii) Take all measures necessary to ensure the protection of the rights and safety of all persons, including environmental human rights defenders.<sup>47</sup>

The UN Human Rights Committee explains these responsibilities in the context of environmental matters:

States have the obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the rights of all, as recognized in different international instruments and reflected in the framework principles on human rights and the environment, and that additional measures for those who are particularly vulnerable to environmental harm should be taken.<sup>48</sup>

[P]romoting respect, support and protection for the activities of human rights defenders, including women and indigenous human rights defenders, is essential to the overall enjoyment of human rights and for the protection and conservation of the environment, including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, including adequate food and housing, safe drinking water and sanitation, and cultural rights.<sup>49</sup>

In terms of specific responsibilities and duties relating to FPIC vested in States, Figure 1 sets out UNDRIP provisions that impose mandatory duties of States to "consult and cooperate in good faith with the Indigenous peoples concerned" and to "obtain their free, prior and informed consent": (i) Before adopting and implementing legislative or administrative measures that may affect IPs; [art 19]; and (ii) Prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[art 32].

<sup>39</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2009), para 37.

<sup>40</sup> Convention on Biological Diversity (1992).

<sup>41</sup> Secretariat of the Convention on Biological Diversity (2019).

<sup>42</sup> Secretariat of the Convention on Biological Diversity (2004).

See also Secretariat of the Convention on Biological Diversity (2002), arts 14(b), 16(b).

<sup>43</sup> Convention concerning the protection of the world cultural and natural heritage (1972).

<sup>44</sup> B. Boer (2023).

<sup>45</sup> Committee on the Elimination of Racial Discrimination (CERD) (2007), para 4(d).

<sup>46</sup> UNGA (1998), art 2. See also UN HRC (2019), Preamble, rec 8.

<sup>47</sup> UN HRC (2019).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, Preamble, rec 9.

### 3.6. Other responsibilities

As the UN Special Rapporteur on Human Rights Defenders explains, States have “a parallel duty to protect environmental human rights defenders from violations committed by both State and non-State actors”.<sup>50</sup> This aligns with the *UN Guiding Principles on Business and Human Rights*,<sup>51</sup> which seeks to implement the three pillars of the UN’s “Protect, Respect and Remedy” Framework. These Guiding Principles recognise the duties of States, businesses and other non-state actors in respecting, protecting and fulfilling everyone’s human rights.

At the first level of obligation, non-state actors come under the auspices of the State in which they operate, with Foundational Principle 1 providing:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>52</sup>

The commentary on this principle observes that the international human rights law obligations of States “require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes duties of States to “protect against human rights abuse by third parties, including business enterprises”.<sup>53</sup> For example, Foundational Principle 2 requires that States ‘should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’.<sup>54</sup> In operationalising their duties, States are further obligated to “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps”.<sup>55</sup>

### 3.7. Non-State Actors’ FPIC Duties

According to the UN Special Rapporteur, “international human rights law makes it clear that business enterprises, the media and other non-State actors” are themselves “obliged to respect human rights obligations and refrain from contributing to or committing violations”.<sup>56</sup> The *Guiding Principles on Business and Human Rights* also impose duties on businesses to refrain from human rights abuses. For

example, the Guiding Principles set out duties for corporate actors, providing, inter alia, that:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.<sup>57</sup>

The obligation of States to ensure access to remedies – judicial and non-judicial - is also recognised in these *UN Guiding Principles*: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”.<sup>58</sup>

A range of other non-State actors have expressly recognised the right to FPIC and the importance of protecting this and other environmental rights of IPs. For example, the right to FPIC has been recognised by several international banking organisations, including the World Bank<sup>59</sup> and the Asian Development Bank.<sup>60</sup> Several extractive sector organisations have also committed to the principle of FPIC, particularly in light of the important positive contributions of Indigenous peoples to the sustainable, economic viability of their respective sectors. This includes the International Council on Mining and Metals (ICMM),<sup>61</sup> the ASEAN Regional Framework on Extractive Industries,<sup>62</sup> and the Initiative for Responsible Mining Assurance (IRMA).<sup>63</sup> The latter proposes that, as part of the sector’s engagement in planning and managing for positive legacies, “companies engage with stakeholders from the early planning stages and throughout the mine life cycle to ensure that mining projects are planned and managed to deliver positive economic, social and environmental legacies for companies, workers and communities”. Notably, this includes recognition and fulfilment of the right to FPIC, which requires companies to “demonstrate respect for the rights, dignity, aspirations, culture, and livelihoods of indigenous peoples, participate in ongoing dialogue and engagement and collaborate to minimize impacts and create benefits for indigenous peoples, thereby creating conditions that allow for indigenous peoples’ free, prior and informed consent and decision-making regarding mining development”.<sup>64</sup> As explained further, this requires:

Companies [to] collaborate with indigenous peoples to identify indigenous peoples’ rights and interests such

<sup>50</sup> UNGA (2016), para 3.

<sup>51</sup> UN IHCHR (2011).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid. See also Operational Principles 3-10.

<sup>54</sup> Ibid, Foundational Principle 2. See also Operational Principles 3-10.

<sup>55</sup> Ibid, Operational Principle 3.

<sup>56</sup> See UNGA (1998), art 12(2).

<sup>57</sup> UN IHCHR (2011), Foundational Principle 11. See also Foundational Principles 12-15 and Operational Principles 16-24.

<sup>58</sup> Ibid, Foundational Principle 25. See also Operational Principles 26-31.

<sup>59</sup> World Bank (2016); (2018); and (2022).

<sup>60</sup> Asian Development Bank (ADB) (2009), paras 32-33, 62. See also ADB (2012).

<sup>61</sup> International Council on Mining and Minerals (ICMM) (2015). See also ICCM (2023).

<sup>62</sup> Institute for Essential Services Reform (2014).

<sup>63</sup> Initiative for Responsible Mining (IRMA) (2018), esp Chapter 2.2.

<sup>64</sup> Ibid, 8. See further Chapter 2.2.

as lands or resources that may be affected by the mining project; identify studies or assessments needed to determine potential impacts from the mine on these rights and interests; and design and implement plans to address information gaps. Engagement continues throughout the Free, Prior and Informed Consent (FPIC) process, and if consent is given, throughout the life of the mine.<sup>65</sup>

There is also recognition of companies' obligations to "communities", which is expressed in terms of obtaining support and delivering sustainable, tangible and equitable benefits.<sup>66</sup> The generality of this recognition suggests that it extends to consultatively acquiring the support of both IPs and LCs. The Forest Stewardship Council (FSC), a multi-stakeholder forest sector initiative, has also recently developed "new guidelines on securing a participatory and equitable approach to decision making through the implementation of free, prior and informed consent (FPIC)" as part of its "dedicated approach to protect Indigenous peoples and local communities' rights".<sup>67</sup> According to IWIGA, so far, this commendable initiative's practical implementation has been "insufficient".<sup>68</sup>

## 4. Good practices: National FPIC approaches and experiences

The obligations of States to promote, protect and fulfil Indigenous peoples' environmental rights, including the right to FPIC, are well-grounded in international law. Such duties, in theory at least, suggest that States will actively seek to ensure the FPIC of Indigenous peoples is obtained, through its own authorities or by businesses and others whose intended activities will impact the rights of Indigenous peoples. Despite this, only one State in the Asia Pacific – the Philippines - has enacted legislation specifically relating to Indigenous peoples right to FPIC. In other States, the right to FPIC is incorporated, expressly or implicitly, in other measures, e.g., environmental impact assessment, due diligence requirements and National Action Plans. These are briefly discussed in later sections.

### 4.1. FPIC in The Philippines

As indicated in the table at the end of this paper, while the Philippines voted in favour of the adoption of the UNDRIP, the concept of free, prior, and informed consent has long been a feature of decision-making concerning environmental and cultural rights matters in the Philippines. It is embodied in the 1997 *Indigenous*

*Peoples' Rights Act*, preceding its recognition in the United Nations Declaration on the Rights of Indigenous Peoples<sup>69</sup> by some 10 years.

#### 4.1.1. Indigenous Peoples' Rights Act 1997

The *Indigenous Peoples' Rights Act 1997* (IPR Act 1997) was enacted "to recognize, protect and promote the rights of Indigenous Cultural Communities/Indigenous Peoples, creating a National Commission on Indigenous Peoples, establishing implementing mechanisms, appropriating funds therefore, and for other purposes."<sup>70</sup> The IPR Act 1997 is among the most comprehensive set of provisions concerning the rights of Indigenous peoples to have been enacted anywhere in the world. As has been recently observed, the Act was "a major step forward in terms of legal recognition and protection of the rights of Indigenous people. The Philippines is one of the few countries where the tenurial rights of Indigenous people are explicitly protected by law".<sup>71</sup> The IPR Act 1997 "was in fact quite radical, for it 'sought to give effect to the profound philosophical shift from previous conceptions of Indigenous peoples as recipients of State grants who would eventually be assimilated into broader society, to self-determining groups vested with the inherent decision-making rights that the State was bound to respect".<sup>72</sup>

#### Box 1 ICCs/IPs definition

**Indigenous Cultural Communities/ Indigenous Peoples** – refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously **lived as organized community on communally bounded and defined territory**, and who have, under **claims of ownership** since time immemorial, **occupied, possessed and utilized such territories**, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, nonindigenous religions and cultures, became historically differentiated from the majority of Filipinos.

ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of nonindigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains: Ch I, Section 3(h).

<sup>65</sup> Ibid, 23.

<sup>66</sup> Ibid, 8. See further Chapter 2.3.

<sup>67</sup> Forest Stewardship Council (2021).

<sup>68</sup> IWIGA (2022), 655.

<sup>69</sup> UNGA (2007). Articles 10, 19, 23, 28, 29 30 and 32 contain the FPIC provisions that are found to similar effect in The Philippines, *Indigenous Peoples' Rights Act of 1997*.

<sup>70</sup> The Philippines, *Indigenous Peoples' Rights Act of 1997*.

<sup>71</sup> Bello (2020).

<sup>72</sup> Ibid, referring to Doyle (2020).

The Act provides a definition of *Indigenous Cultural Communities/Indigenous Peoples* (ICCs/IPs). This is set out in Box 1 (below). *Ancestral Lands* are also defined as “land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership...”.<sup>73</sup>

A range of Indigenous people’s ownership and possession rights to ancestral lands are recognised in the IPR Act 1997. These include: the “right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds” (sec 7a); the “right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories...” (sec 7b); the “right to stay in the territory and not be removed (sec 7c); and the “right to safe and clean air and water” (sec 7f).<sup>74</sup>

Specific duties of the State under this Act are set out in Chapter I, Section 2 (see Box 2 below). The language used throughout this provision clearly reflects the

State’s international obligations relating to human rights. The IPR Act 1997 defines FPIC as “the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community”.<sup>75</sup> The Act’s provisions require ICCs/IP’s FPIC to be obtained for a variety of activities concerning their ancestral lands, including: the “formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains”(sec 7b); the grant of any concession, license, lease or permit for the exploitation of natural resources, or entering any production-sharing agreement affecting the interests of ICCs/IPs or their ancestral domains (sec 46(a), sec 59); displacement and relocation (sec 7(c); exploration, excavation, or diggings on archaeological sites of the ICCs/IPs (sec 33); and access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources (sec 35).

#### Box 2

##### Chapter I, Section 2 (emphasis added)

##### Declaration of State Policies.

The State shall recognize and promote all the rights of **Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs)** hereunder enumerated within the framework of the Constitution:

- a) The State shall **recognize and promote the rights of ICCs/IPs** within the framework of national unity and development;
- b) The State shall **protect the rights of ICCs/IPs to their ancestral domains** to ensure their economic, social and cultural well-being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;
- c) The State shall **recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions**. It shall consider these rights in the formulation of national laws and policies;
- d) The State shall **guarantee that members of the ICCs/IPs** regardless of sex, shall **equally enjoy the full measure of human rights and freedoms** without distinction or discrimination;
- e) The State shall **take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity**, and to **ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities** which national laws and regulations grant to other members of the population; and
- f) The **State recognizes its obligations** to respond to the strong expression of the ICCs/IPs for cultural integrity by **assuring maximum ICC/IP participation** in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.

**Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights**, taking into consideration their customs, traditions, values, beliefs, interests and institutions, and to adopt and implement measures to protect their rights to their ancestral domains.

In institutional terms, the IPR Act 1997 established the Philippines’ *National Commission on Indigenous Cultural Communities/Indigenous Peoples* (NCIP). This institution has the legislative responsibility for implementing the Act and certifying FPIC (Chapter VII).

In 2012, the NCIP issued *Revised Guidelines on FPIC and related processes*, amending the previous 2006 guidelines.<sup>76</sup> These Revised Guidelines set out a *Declaration of Policy* that strengthens the right to FPIC, stating:

<sup>73</sup> The Philippines, The Indigenous Peoples’ Rights Act of 1997, Ch II, sec 3 (b).

<sup>74</sup> Ibid, Ch III, sec 7.

<sup>75</sup> Ibid, Ch II, sec 3(g).

<sup>76</sup> The Philippines, National Commission on Indigenous Peoples (NCIP).



The FPIC actualizes and strengthens the exercise by ICCs/IPs of their rights to Ancestral Domains, Social

The right of ICCs/IPs to the management, development, use and utilization of their land and resources within their own ancestral domains shall be given utmost regard;

No concession, license, permit or lease, production-sharing agreement, or other undertakings affecting ancestral domains shall be granted or renewed without going through the process laid down by law and this Guidelines.

Furthermore, the Revised Guidelines objectives aim to inter alia:

Ensure genuine exercise by Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) of their right to Free and Prior Informed Consent (FPIC), whenever applicable [sec 2a];

Ensure that when priority right to development and utilization of natural resources is validly exercised by the ICCs/IPs, the same shall be validated in accordance with the spirit and principles of FPIC [sec 2e];

Ensure that any benefit derived after the grant of FPIC or as an exercise of priority rights shall be managed and used properly by, for and with the concerned community not forgetting inter-generational obligations [sec 2f]; and

Guarantee protection of resettled/displaced ICCs/IPs [sec 2g].

In these ways, the IPR Act 1987 and the Revised Guidelines provide ICCs/IPs in the Philippines with the right to approve or veto a wide range of projects and activities. The Supreme Court of the Philippines has upheld the constitutional validity of the IRP Act 1997, noting that it does not violate the Regalian Doctrine – namely, that all public lands and waters are owned by the State – as indigenous peoples' ancestral domains have never been public lands.<sup>77</sup>

Despite the Philippines detailed approach to the right to FPIC, practical experiences do not align with the written laws and guidelines. There has been a range of studies of the effectiveness of the IPR Act 1997's FPIC provisions by international and Philippines-based organizations. For example, an Oxfam study observed in 2013: "Unfortunately, even with strong legislation in place, indigenous peoples in the Philippines have faced considerable challenges in realizing their right to give or withhold FPIC".<sup>78</sup> Recent examples are briefly noted in IWIGA's The Indigenous World 2022 report:

In December 2021, Indigenous peoples in the Cordillera faced yet another railroaded Free, Prior and Informed Consent (FPIC) process in the Gened Dam application of the Pan Pacific Renewable Power

Justice and Human Rights, Self-Governance and Empowerment, and Cultural Integrity;

Philippines Corporation (PPRPPC), where elders opposed to this dam were prevented by local police from participating in the process. In Benguet province, Indigenous Peoples in Mankayan municipality rejected the mineral exploration of Nickel Asia Corporation (NAC) subsidiary Cordillera Exploration Inc. (CEXI) during the consensus-building for the project's FPIC. And, according to announcements from the Metropolitan Waterworks and Sewerage System (MWSS), excavations for the Kaliwa Dam were set to commence in December 2021 with potentially devastating consequences for the Indigenous communities in the area.<sup>79</sup>

The Kaliwa Dam project commenced in June 2022.<sup>80</sup> It is also subject to the provision of free, prior and informed consent to be given by the Dumagat-Remontado Indigenous Peoples, whose ancestral lands will be significantly impacted. The Department of Environment and Natural Resources must also issue a Special Use Agreement in Protected Areas before the project can be further advanced.

## 4.2. Environmental Impact Assessments and Strategic Environmental Assessment

In circumstances where exercise of the right to FPIC is problematic, it is worth noting that a variety of other legal mechanisms may be called on to support and enable participation of IPs and LCs in decision-making processes for project or activities that could or do infringe their rights.

One such possibility is drawing on broader environmental rights, in particular the three key "access rights" of public participation, access to information, and access to justice. A closely related pathway, based on these procedural environmental rights, involves drawing on national laws that include established appraisal tools, including Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs). As UNEP has explained, both tools

are structured approaches for obtaining and evaluating environmental information prior to its use in decision-making in the development process. Even so, they are different: EIA focuses on proposed physical developments such as highways, power stations, water resource projects and large-scale industrial facilities. SEA focuses on proposed actions at a "higher" level such as new or amended laws, policies, programmes and plans.<sup>81</sup>

More recently, the functions of an EIA have been succinctly described in the following terms:

<sup>77</sup> See The Philippines, Isagani Cruz and Cesar Europa v Secretary of Environment and Natural Resources, et al. (6 December 2000).

<sup>78</sup> Oxfam America (2013).

<sup>79</sup> IWIGA (2022), 281-82.

<sup>80</sup> Santos (2022).

<sup>81</sup> UNEP (2004) 6.

The main function of an EIA is to produce information for the decision-making process on a proposed activity. EIA processes are carried out with public participation as an intrinsic component in accordance with international standards as well as national legislation. Public participation is concerned with the public being actively involved in decisions affecting their lives and is consistent with the declared principles of sustainable development. The EIA process and the EIA report in itself does not lead to a decision; it is rather the key informational input, forming the basis for a decision on whether or not to go ahead with the proposed activity. It is typically specified in EIA legislation that the decision-maker is obliged to integrate the results from the EIA process as summarised in the EIA report. Furthermore, the EIA is expected to have an effect through the dialogue it facilitates between proponents, authorities and communities, improving projects through (re)design, site selection, and the development and implementation of mitigation measures and monitoring programmes, etc. The EIA process is considered to be the main arena for the engagement of all stakeholders, including local and indigenous groups. Knowledge exchange during public participation processes is essential for the impacted communities to be able to adapt to and benefit from projects. EIA is therefore also expected to have an effect on work with communities to assist them in coping with change and planning for positive futures. EIA also aims to support democratic processes and equality, and promote the exchange of knowledge, facilitating transparency and ensuring that local knowledge and concerns are taken into consideration in decision-making processes and project development.<sup>82</sup>

The importance of EIAs has given rise to suggestions for FPIC to be widely recognised as a core principle of EIAs, rather than a separate process.<sup>83</sup>

### 4.3. Other good practices in Asia Pacific

Another way in which FPIC can be recognised and operationalized in national settings is through its inclusion and/or recognition in National Action Plans (NAPs). As several commentators suggest, “implementing FPIC makes legal, economic, political and ethical sense”.<sup>84</sup> Not only is this approach consistent with State’s international commitments under the UNDRIP, securing the support of Indigenous peoples for “projects through a FPIC process is a good economic strategy as it limits the risks associated with costly litigation” and “reduce political tensions and potential conflicts” concerning Indigenous people’s rights, and “foster sustainable and locally grounded economic development”.

Indonesia provides an example of good practice relating to FPIC, even though, like many other countries in the region, Indigenous peoples are not formally recognised by the Indonesian Government. Nevertheless, FPIC is recognised in several different ways. For instance, in the context of foreign financial support, FPIC is included in the 2016 Environmental and Social Management Framework (ESMF). This relates to the Indonesian Infrastructure Finance Development Trust Fund, supported by the World Bank, and public-private partnership infrastructure projects. For the purposes of financial support, FPIC is included as part of the environmental assessment and decision-making processes necessary to safeguards the rights of “indigenous groups”. Specifically, FPIC is defined as:

A culturally appropriate and collective decision-making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project with affected indigenous groups.<sup>85</sup>

In several other countries, FPIC – or a similar principle – is recognised in NAPs on Business and Human Rights. For example, although there is no explicit statement on FPIC in Thailand’s *First National Action Plan on Business and Human Rights (2019-2022)*, it does set out the following “FPIC-like” statement:

Minorities and ethnic groups. Consultation processes with minority and ethnic groups should be conducted in order to get involved in the decision-making process in terms of strategy, policies and projects, especially in the formulation of land management and forest conservation policies as well as the development of large projects in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Filing cases against ethnic groups living in the forest, which can later be declared a conservation forest, should be avoided. Measures to protect the ethnic groups should be established to ensure their good livelihoods.<sup>86</sup>

Furthermore, the NAP recommendations include proposed activities by the Ministry of Natural Resources and Environment and Ministry of Interior, including: Reviewing and developing “mechanisms to manage natural resources and the environment by focusing on participation of all sectors, including women and ethnic groups”,<sup>87</sup> requiring the “Environmental Impact Assessment (EIA) and the Environmental Health Impact Assessment (EHIA) to assess public participation in a neutral, independent, and transparent manner: monitor and investigate after passing the environment evaluation to control the business sector not to violate various rights after the project has been approved”,<sup>88</sup> and bolstering “the

<sup>82</sup> Larsen, *et al* (2019), 7-8. See also other discussions on the advantages and shortcomings of EIAs, e.g., CIEL (2010); Hanna, *et al*, (2014).

<sup>83</sup> See eg., discussion in M. Papillon and T. Rodon (2016).

<sup>84</sup> *ibid*.

<sup>85</sup> World Bank (2016). See also World Bank (2022), esp 152-159.

<sup>86</sup> Thailand, *First National Action Plan on Business and Human Rights (2019-2022)*, 70.

<sup>87</sup> *ibid* at 89.

<sup>88</sup> *ibid*, at 78.

current impact assessment process to be stronger, especially in large-scale development projects such as infrastructure and mining and energy projects”.<sup>89</sup> The NAP also recommends that, in respect of the EIA/EHIA: “State enterprises and the business sector should build mutual understanding with the people and communities affected by operations in the surrounding areas and provide opportunities for those persons to participate in the EIA/EHIA process.”<sup>90</sup>

This brief snapshot of laws and other measures demonstrates that while there are reasonable levels of implementation in some Asian Pacific jurisdictions, overall acceptance of the right to FPIC

concerning IPs and LCs is inadequate. Their environmental human rights are breached on a daily basis as a consequence of State and private sector-sponsored development. Extractive industries such as logging, mining and hydro developments result in destruction of ecosystems, threats to livelihood, and temporary or permanent displacement and alienation from their traditional or customary lands. Without adequate implementation of each of the elements of FPIC, Indigenous peoples will continue to be largely powerless to uphold their environmental human rights.

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<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*, at 96.

## 6. RECOMMENDATIONS

### 1. A regional FPIC framework agreement

As part of the duty to recognise, respect and protect the right to FPIC, States in Asia Pacific should be encouraged to develop and adopt a model FPIC Law for uniform application across the region.

Any such instrument should necessarily recognise and support FPIC protocols developed by Indigenous peoples or facilitate and support the development of such protocols in cases where they do not exist.

### 2. Recognise, Respect and Protect the Right to FPIC at National Levels

States should take all steps necessary to satisfy their international obligations to respect and protect the right to Free, Prior and Informed Consent (FPIC) as set out by the UNDRIP and other relevant instruments, together with related rights, including the right to self-determination. This duty includes ensuring that all businesses/companies operating with their jurisdiction also respect Indigenous peoples/local communities right to FPIC.

As part of these States and business should be called on to demonstrate greater transparency in State and corporate engagement in relation to proposed projects through national and international lobby and campaigns, and ensure they act in accordance with their human rights obligations.

### 3. Recognition of the right to self determination

Pursuant to their international obligations, States should be encouraged to give legal recognition to Indigenous peoples' sovereign rights over their lands and resources and preventing dispossession of territories, as part of their right to self-determination.

### 4. Introduce National FPIC Legislative Measures

State should take all steps necessary to review existing approaches to FPIC and, as appropriate, take steps to introduce adequate legislative FPIC frameworks that

expressly recognise, protect and support the fulfillment of this right.

States should also ensure that any such measures oblige business actors to protect and respect the rights to FPIC. This includes the obligation to ensure that all business activities are carried out in such a manner that the right of IPs and LCs to self-determination is protected and respected, including their rights over lands, territories and resources traditionally occupied by them.

### 5. FPIC and EIAs

States should ensure that their national laws concerning environmental impact assessments (EIA) provide IPs and LCs with meaningful opportunities to exercise their right to FPIC. These laws should support their public participation in environmental impact assessment processes and ensure that companies are held accountable for environmental degradation due to mining and extractive industries, ensure that they comply with EIA and environmental protection measures, and provide full compensation for damage and restoration of sites.

### 6. Develop Consultation-based National Action Plans

All states should ensure that National Action Plans (NAPs) are produced, implemented and revised with the participation of and in consultation with Indigenous peoples.

NAPs should include specific provisions to protect Indigenous peoples' rights, in particular the right to self-determination. NAPs should stipulate the enactment of mandatory due diligence legislation for business enterprises, including for their operations abroad.

Further, NAPs of home states and host states should include measures to identify and close any gaps that are preventing Indigenous peoples affected by business operations from accessing effective remedies.

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