

## BRIEFING NOTE #11: 14<sup>th</sup> NOVEMBER 2017

### FREE, PRIOR AND INFORMED CONSENT WITHIN THE UN HUMAN RIGHTS TREATY SYSTEM



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The United Nations has a number of fora to examine and protect the rights of indigenous peoples. Amongst these are the human rights treaty committees that each monitor a distinct human rights treaty. These treaties are accepted by States as binding legal instruments and the experts on the treaty committees periodically assess their performance to see if they are meeting their legal obligations.

Since the adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly in 2007, the treaty committees have paid increasing attention to the requirements of free, prior and informed consent (FPIC) whenever extractive industries interfere with the traditional land and resources of indigenous peoples. However, they do not all approach the issue in quite the same manner and many questions still remain.

The treaties most relevant to FPIC and the committees that monitor them are shown in the following table.

Treaty	UN Human Rights Treaty Committee
International Covenant on Civil and Political Rights, 1966	Human Rights Committee
International Covenant on Economic, Social and Cultural Rights, 1966	Committee on Economic, Social and Cultural Rights
Convention for the Elimination of All Forms of Racial Discrimination, 1969	Committee on Elimination of Racial Discrimination
Convention for the Elimination of All Forms of Discrimination Against Women, 1979	Committee on the Elimination of Discrimination Against Women
Convention on the Rights of the Child, 1989	Committee on the Rights of the Child
Convention on the Rights of Persons with Disabilities, 2006	Committee on the Rights of Persons with Disabilities

The other treaties do not have a clear mandate on issues of FPIC.

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights both consider land and resource rights as part of the right to culture for indigenous communities. For example, in the *Poma Poma* case,<sup>1</sup> the Human Rights Committee held that raising llamas was fundamental to Aymaran culture and held that developments that “substantially compromise or interfere with the cultural significant economic activities of an indigenous community” would only be lawful with the “free, prior and informed consent” of that community. However, in the same committee’s dialogue with participating States, it has indicated that FPIC is more of a *process* rather than an *outcome*. In other words, it may be enough that States engage in extensive consultation with a good faith effort to obtain consent on a free, prior and informed basis.

The Committee on Economic, Social and Cultural Rights also upholds FPIC but gives mixed messages as to whether FPIC requires only a good faith process or also requires consent as an outcome.

Meanwhile, the Committee on the Elimination of Racial Discrimination upholds FPIC but usually as a process, rather than a substantive outcome.

The Committee on Elimination of Discrimination Against Women has focused on the rights of indigenous women to take part in decision-making processes and upheld their right to FPIC. Like the Committee on the Elimination of Racial Discrimination, this has mostly been seek as a process, e.g. States must “systematically consult and seek free, prior and informed consent,” indicating that developments might still be lawful without consent as long as the State makes good faith efforts.<sup>2</sup>

The Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities have not explored FPIC in the context of the resource management decision-making. The former committee might pay more attention to, for example, the challenges of transmitting information in a suitable manner to children and youths and giving them an opportunity to express their concerns. Likewise, the Committee on the Rights of Persons with Disabilities could look at the inclusion of indigenous persons with disabilities, examining issues such as formatting of information, accessibility of meeting places, and opportunities to influence the decision-making process.

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<sup>1</sup> *Poma Poma v Peru*, Communication No. 1457/2006 (27 March 2009)

<sup>2</sup> Committee on the Elimination of Discrimination Against Women, concluding observations on the state report of Ecuador, CEDAW/C/ECU/CO/8-9, 11 March 2015.