



Forest Peoples Programme

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Key Elements to the Initiation, Performance and Maintenance of Good Faith Consultations and Negotiations with Indigenous and Tribal Peoples and Communities

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Governments, private and public lending institutions, domestic and multilateral companies and NGOs, and international organizations are increasingly understanding the legal, economic, and social necessity of engaging with indigenous and tribal peoples and communities (Affected Peoples) to carry out good faith consultation, negotiation and consent processes regarding initiatives that will affect their lands, territories and resources. There is a heightened understanding that responsible, culturally appropriate engagement with Affected Peoples can minimize reputational, operational, and fiduciary risks for governments, companies, international financial institutions and other entities interested in carrying out activities that will affect the lands, resources and rights of indigenous and tribal peoples and communities.

There are certainly minimum standards that must be met to guarantee effective good faith consultation, negotiation and consent processes. There are several ways in which these processes can be realized appropriately between two or more parties. The following Key Elements are offered merely as one model for engagement between the parties. It is not offered as a “one solution fits all” approach. It is simply offered to inspire discussion and perhaps to be used by communities or project proponents in the future that wish to internally prepare their community or staff, or better yet work together to design a mechanism for engagement that will meet their distinct needs, the requirements of law, and their sense of equity and social justice. Forest Peoples Programme welcomes comments and observations regarding the contents of these key elements.

I. Foundational Principles Agreed to by the Parties before any Start of Negotiation

In accordance with international law and human rights instruments, including the 2007 UN Declaration on the Rights of Indigenous Peoples, the indigenous and tribal peoples and communities that may be affected by the proposed development, research, investment project or activity (Proposed Project) are the legitimate owners of the lands, territories and natural resources traditionally owned or otherwise occupied and used in accordance with their customary laws regardless of whether they possess a title that is issued and registered by the state in question.

The area that may be affected by the Proposed Project is part of the traditional territory of the indigenous and tribal peoples in question on which they depend for their cultural, spiritual and physical sustenance, well-being and survival, and for which they have the right to own, control, manage and participate in and consent to any Proposed Project that may affect the lands and resources of that area. This includes a right of the Affected Peoples to grant or withhold their free, prior and informed consent to the Proposed Project as well as to decide whether they wish to engage in negotiations or end negotiations at any time. Indigenous and Tribal Peoples living in voluntary isolation are considered to have exercised this right and as a result of their condition decided to withhold their consent and choose not to enter into consultations. They shall not be contacted and engaged by Project Proponents.

While the objective of consultation processes shall be to reach an agreement between the Parties, this does not mean that all negotiation processes will lead to the consent and approval by the Affected Peoples of a Proposed Project in whole, in part, or with modification. Agreements can be reached to pursue a project based on community consent as well as agreements to abandon Proposed Projects. At the core of the right of the Affected Peoples to choose to engage, negotiate and decide to grant or withhold their free, prior and informed consent is the acknowledgement that under certain circumstances, the Project Proponents must accept that the Proposed Projects will not proceed and/or that they will be required to cease engagement if the Affected Peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent to the Proposed Project. In this event, the Proponent has no right to continue to pursue the Affected Peoples.

The negotiation process is an iterative process. The process does not simply begin when permission to consult is granted by the Affected Peoples or end with their decision to consent to the initiation of the Proposed Project. It is a process where consultation, meaningful participation, and consent must be sustained throughout the life of the Proposed Project including but not limited to all aspects of the initial development, the assessment, planning, implementation, oversight, monitoring and closure of the Proposed Project. The mechanisms by which this ongoing involvement is to be achieved shall be agreed as part of the initial consent process. Additionally, material changes that occur subsequent to project initiation will require additional discussion and consent.

While Project Proponents should seek consent from all local populations affected by the Proposed Project, only the Affected Peoples have the right to withhold or grant their consent to the project. Other stakeholders, such as local non-governmental organizations do not have this power when it comes to projects that affect the lands, territories and resources of indigenous peoples. This distinction is based upon the emergence of national and international jurisprudence grounded in the concept that native communities have right to property based on their traditional use and occupation and other stakeholders do not. This does not discount the role of NGOs or local government bodies, for instance, but acknowledges that indigenous and tribal peoples are rights-holders rather than stakeholders or interested parties.

Pursuant to these negotiations, all agreements entered into between the Affected Peoples and Project Proponent shall, at a minimum, be enforceable under the laws of the State within which the Affected Peoples reside. This guarantee of enforceability does not preclude redress to other available and viable forums (i.e arbitration, international courts). Indigenous and tribal peoples and communities have the right to juridical personality under international law and therefore possess the legal capacity to enter into enforceable agreements. In countries where that right has not been recognized under the laws of that State, it shall be done as a condition to commencing negotiations and appropriate legislative, administrative or other mechanisms shall be put in place to ensure the enforceability of the agreements reached therein.

II. Permission to Consult and Seek Consent

All Project Proponents wishing to engage in projects and activities that may affect the lands, natural resources and rights of indigenous and tribal peoples and communities must seek permission from the Affected Peoples to consult with them. Project Proponents need to request permission to consult in the early stages of conceiving a Proposed Project, not only when the need arises to obtain approval from the Affected Peoples. The Affected Peoples shall decide if this permission is to be granted orally or in writing.

Affected Peoples may also choose to have Project Proponents complete an “*Application for permission to consult*” which must be approved by the Affected Peoples in advance. At a minimum, the *Application* shall require, in the language designated by the Affected Peoples: (i) an identification of the Project Proponent and all other interested parties (i.e. investors, partners, third party beneficiaries); (ii) proof

of their status as a legal entity; (iii) a full description of the Proposed Project including its intended scope, duration, the preliminary assessment of social and environmental impacts, expected benefits and risks to the Affected Peoples and other communities, (iv) a full description with supporting documentation of how the project will fully comply with national and international law and best practices, and (v) a point of contact for the Project Proponents. The Affected People will also provide the Project Proponent with a point of contact.

Upon receiving a request for permission to consult, the Affected Peoples will inform the Project Proponent of the time period within which a decision shall be made. Such time period shall be reasonable, but also fully respect the traditional decision-making methods of the Affected Peoples. At such time the Affected Peoples may require a processing fee commensurate with the costs of informing their respective members and arriving at a decision.

The Affected People may request that the Project Proponents make an oral presentation to the communities in question and be available to answer questions and provide additional information. The Affected Peoples will take responsibility for the logistics of such presentations in terms of organizing the communities and members with reasonable costs being offset by the Application fee or additional financial support provided by the Project Proponent after discussion with the Affected People.

There shall be a preference to have the Permission to Consult documented in writing by the Affected Peoples and provided to the Project Proponent. However, if the grant or refusal to grant permission is done orally by the Affected Peoples, it shall be made in the presence of a neutral third party in order to protect the integrity of the decision and the Parties' respective interests.

III. Elements of Good Faith Consultations if Permission is Granted

If Permission to Consult has been provided, the following are to be considered the minimum, fundamental elements of an acceptable and effective consultation process (additional and more specific elements may be required depending on the needs of the Parties and the nature of the Proposed Project).

Identification of Parties to the Negotiation and Decision-makers

All Affected Peoples (including each constituent community) will be identified and all Project Proponents will be disclosed as well as other interested or third party beneficiaries such as project sponsors, commercial and financial investors and partners.

Both the Project Proponent and Affected Peoples (the Parties) have the right to participate in the negotiations through their own freely chosen representatives. At the onset of the negotiations, each Party will identify themselves, their representatives and specifically the individuals or entities with the authority to negotiate as well as those individuals or entities with the authority to make decisions on behalf of the Party. Those with the authority to negotiate may not always be the same individuals or entities with the power to decide. For instance, indigenous and tribal peoples and communities shall identify its traditional authorities, clan leaders, elders, community technicians, advisors, or others who are authorized by the community through their own processes (such as in accordance with their own customary laws and traditions) to enter into negotiations and to convey final decisions and grant or withhold the Affected Peoples' consent. Project Proponents shall do the same.

Identification of Decision-making Processes

Each Party will clearly outline how its decision-making processes functions. This includes, at a minimum, an identification of all individuals and entities that need to take part in the process for each Party (e.g. a Board of Directors, a project manager, a Council of Elders), those with ultimate decision-making power as opposed to simply the power to participate in negotiations, the timing typically required by each Party to arrive at decisions, and information relevant to the duration of the terms of each Party's authorized decision makers (i.e. if elections of a new company board or community council are pending, such disclosures shall be made).

Outside Counsel and Expertise

Each Party has the right to secure advisors and legal counsel of their choice to accompany them in the consultation and negotiation process. The other Party shall respect the role that those advisors play at all times observing the scope and limitations of their respective contributions. The Affected Peoples may seek, as a condition of engagement and permission to consult, that the Project Proponent finance the reasonable costs related to securing independent legal counsel and technical advice to assist them in contributing to and evaluating legal, social and environmental assessments related to the Proposed Project and addressing all other matters necessary for them to participate in the consultations in a fully informed and effective manner.

Agreement on Timing

The Parties should agree on reasonable timelines and deadlines for the various phases of the consultation and negotiation processes. In doing so, the length of the negotiation and agreed time for decision making should ensure that the Affected Peoples have enough time to understand the information received, to request additional information or clarification, to seek advice from other technical and legal advisors, to determine or negotiate conditions, and most importantly, to accommodate their respective decision-making processes.

The Affected Peoples should not be required to make a decision at the end of a meeting, unless they so decide. Cultural characteristics and differences must be accounted for; indigenous and tribal peoples' decision-making processes are usually diffused and consensus based. Extended discussions at the community, extended family and household levels often take place before consensus can be reached and this process must be respected when agreements on timing and deadlines are discussed.

That said, reasonable time periods should be agreed upon to also ensure that the consultation and negotiation process does not serve as an undue impediment for the Project Proponent seeking consent and good faith dialogue with Affected Peoples. The appropriate amount of time may vary depending on, among other things, the number of affected persons, communities or peoples, the complexity of the proposed activity, the amount of information requested, and the decision-making mechanisms of the people in question.

Additional Community Protocols

The Affected Peoples shall disclose to the Project Proponents any policies, rules and regulations regarding how outsiders must behave or engage its communities and members in accordance with their internal practices, protocols, and social organization. Such policies, rules and regulations shall be respected by the Project Proponents and their agents. The Affected Peoples shall agree not to arbitrarily alter or amend any policies, rules and regulations previously disclosed. If changes are later required to

adjust to new factors and to guarantee and protect the rights and interests of the Affected Peoples, reasonable notice shall be given to the Project Proponent before the change takes affect. If the proposed change will materially affect the interests of the Project Proponent, the Affected Peoples shall first consult with the Project Proponent with a view to securing their agreement to the change. Consent of the Project Proponent is not required.

In detailing their policies, rules and regulations, the Affected Peoples may also identify those persons, communities or entities that may require special measures in relation to the consultation and negotiation (i.e. women, elderly, disabled, illiterate, youth etc) and particular mechanisms to ensure their effective participation.

Third Party Mediator/Negotiator

To ensure that any decisions reached by the Affected Peoples is freely given and not the product of coercion or the absence of equal bargaining power, the Affected Peoples [and the Project Proponent] may request at any stage of the process that an impartial third party act as an impartial mediator or observer. This third party can be a national or international entity and should be chosen with the consent of all Parties.

Environment without Duress: Cessation of Adverse Activities

To ensure that the negotiations are fair and indigenous and tribal peoples and communities do not make decisions under any form of duress or coercion, until and if such time that the Affected Peoples grant their consent to the initiation of the Proposed Project, the Project Proponent will be expected to abstain from any and all acts which might lead any of its agents or third parties under its control and acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Affected Peoples are entitled.

Environment without Coercion: Unauthorized Contact and Inducements

To ensure that the negotiations are fair and indigenous and tribal peoples and communities' decision-making is free from coercion, the Project Proponent as well as any of its agents or third parties under its control and acting with its acquiescence or its tolerance shall be prohibited from engaging in any acts of violence or intimidation and providing bribes, gifts, and unregulated and questionable patronage to individuals within the community during the consultation and negotiation period.

The consultation and negotiation process is an iterative one and will last until the conclusion of the project in the event of consent by the Affected Peoples. As such, the Parties will agree to a framework in which benefit sharing arrangements are properly excluded from any prohibited acts such as bribes, gifts, and other unregulated and questionable patronage. Other funds or services in kind provided by the Project Proponent during the consultations and negotiations can also be excluded from these prohibited acts if they are transparently provided to the Affected Peoples and done with the express and written consent of each of the Parties' authorized decision-makers. All such funds or services in kind will be documented in writing, acknowledged by all Parties, and a record of their disbursements shall be kept by all Parties as part of the formal written record of the engagement process.

To ensure an environment free of coercion, the Parties will also avoid contact with representatives of the other Party that are not authorized to engage in the consultation and negotiation processes outside of the framework of the meetings, presentations and exchanges organized by and agreed to by the Parties.

Security agents, private or otherwise, shall not be present at consultations and negotiations unless specific arrangements and conditions for their presence are agreed to by all Parties. The presence of private or government security forces within the Affected Peoples lands and territories during the period of consultations and negotiations shall also be prohibited unless specific arrangements and conditions for their presence are agreed to by all Parties.

Prior Social and Environmental Assessments

As a safeguard to preserve, protect and guarantee the special relationship that the members of the Affected People have with their territory, which in turn ensures their very survival of the people, before any decision is made by the Affected Peoples to consent, in whole or part to the initiation of a Proposed Project, a detailed, transparent and participatory cultural, social and environmental assessment shall be conducted by independent and technically capable entities, with the supervision of the Parties. This assessment shall be prepared in close consultation and with the full and effective participation of the Affected Peoples.

It shall be conducted in a manner consistent with the “Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities” (<http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>). As such, the assessment shall be carried out in a manner such that its results, impacts and assessed project risks and benefits shall consider the Affected Peoples’ cultural, environmental and social concerns; their customary laws, traditional knowledge, innovations and practices; their traditional use and occupancy of their lands and natural resources, as well as the interrelationships among cultural, environmental and social elements within those lands. The conclusion of the social and environmental assessment shall be marked by an agreement of the Parties that the assessment is sufficiently comprehensive to represent a baseline with respect to their understandings of the manner in which the Affected Peoples specifically use and depend on their lands, territories, and natural resources and the Proposed Project’s possible impact on that relationship.

Information Sharing

To be meaningful, informed consent must be sought sufficiently in advance of any authorization received by the Project Proponent to commence activities that may affect the rights, lands and natural resources of the Affected Peoples. Good faith consultations mean a constant exchange of information between the Parties such that any agreement reached is done knowingly by all Parties and the Parties have the opportunity to be heard and to have their questions and requests for clarifications addressed.

All information provided by the Project Proponent and its designated advisors should be provided in a culturally appropriate manner in terms of nature and quality of information (adjusting for language, illiteracy and other particulars). Material should be presented in non-technical, simple language. The use of graphics, maps, posters, and video is recommended rather than sole reliance with the written word. Where illiteracy is significant within the Affected Peoples, the Permission to Consult shall be accompanied by an agreement between the Parties as to the specific methods for the exchange of information to ensure community comprehension of all relevant materials.

Information provided to the community should, at a minimum, include:

- the nature, size and scope of the Proposed Project;
- the duration of the Proposed Project (including construction phase if applicable);
- the locality of areas and resources that will be affected;
- the rights, duties and obligations of all parties under national and international law and other voluntary obligations ascribed to by the Project Proponent (e.g. relevant company policies, Equator Principles, the United Nations Global Pact);

- a preliminary assessment of the likely impacts of the Proposed Project;
- the reasons/purpose for the Proposed Project;
- the national consultation processes, if any, used to determine the necessity or desirability of the Proposed Project;
- the personnel likely to be involved in all phases of the Proposed Project (including local people, research institutes, sponsors, contractors, etc.);
- the specific procedures the Proposed Project would require (e.g. measures to mitigate harms and adverse impacts, to resolve disputes, to oversee implementation, to decommission the project upon completion);
- the potential risks and adverse impacts presented by the Proposed Project, including but not limited to the social, environmental, cultural and health risks and impacts such as interferences with sacred areas, environmental pollution, disturbance of breeding, hunting or gathering grounds;
- the full implications that can realistically be foreseen including *benefits* to the community (e.g. commercial, economic, environmental, cultural). To properly assess whether benefits are reasonable, the Affected People may request copies of the Project Proponent's financial projections or business plans pertaining to the project, and these documents shall be provided where requested;
- drafts for discussion of the participatory social and environmental assessment when completed, as well as the final versions prior to and after completion;
- adequate and complete responses to questions, clarifications and concerns asked by the Affected Peoples (including prompt feedback on issues raised during meetings of the Parties); and
- all measures taken by the Project Proponent to educate its agents, partners, financiers, and associates on the rights of the Affected Peoples and the measures and processes in place to work with them and protect their interests.

All information required for scheduled meetings shall be provided sufficiently in advance to allow for an informed exchange. The Parties shall agree to a reasonable time period (e.g. four (4) weeks before any scheduled meeting). The Project Proponent will be responsible for providing sufficient copies of the information for proper distribution to the members and communities that make up the Affected Peoples.

To avoid miscommunications, the perpetuation of faulty assumptions and misunderstandings, and to ensure the proper documentation of the consultation and negotiation processes, the Parties shall agree on mechanisms to summarize Party exchanges and any mutual understandings reached at meetings (e.g. the drafting of Meeting Minutes). The documentation of these exchanges will be acknowledged by the delegations attending the respective meetings and copies will be maintained by all Parties.

Conditions of Agreement

Before any decision is made by the Affected Peoples to consent, in whole or part to the initiation of a Proposed Project, open, transparent discussions must take place and written agreements reached, at a minimum, on the following: (i) intellectual property (in the event that research projects or other activities consented to will result in the documentation and/or appropriation of intellectual property of the Affected Peoples), (ii) benefit sharing, (iii) demarcation and titling of indigenous and tribal lands where applicable, (iv) provision of certain funds or services to the community outside of the benefit sharing plan and during the consultation process; (v) land restitution, compensation and/or recovery in the event of interference; (vi) environmental mitigation and recuperation measure; (vii) dispute resolution; (viii) joint monitoring and implementation modalities involving all Parties; (ix) the role of independent, impartial entities to audit and conduct oversight of the project; (x) mechanisms for continued negotiations and consensus processes between the Parties until the completion of the project;

and (xi) safeguards to promote and protect the rights and interests of the Affected Peoples and other Parties, including compliance with the Affected Peoples' internal legislation and customs.

Benefit Sharing

Before any decision is made by the Affected Peoples to consent, in whole or part to the initiation of a Proposed Project and certainly before any grant of a state concession to carry out the Proposed Project, the Parties must reach a reasonable benefit sharing arrangement including a schedule of disbursements, and if necessary, linking project phases with benefit sharing milestones and commitments (i.e. *“until title of indigenous lands is registered, phase I of the Proposed Project shall not commence”* or *“disbursement of monetary benefits to the Affected People shall take place quarterly according to the procedures laid out in Annex X; if disbursements do not occur and is not rectified within 15 days; project activities shall be suspended until rectified.”*). Any benefit sharing must include detailed mechanisms for the transparent distribution and administration of the funds or services received by the community as a result of their participation in and consent to the Proposed Project. Such mechanisms shall also include provisions to account for adjustments to the benefit sharing agreement should there be a fundamental change in the value of the benefits originally negotiated and/or the resources and services coming from the Affected Peoples lands and resources (i.e due to market changes or other factors).

If the Project Proponent is also to receive certain contributions or benefits from the community (whether it be in the form of employees, regional expertise, traditional knowledge etc.), such benefits will also be well-documented in writing.

Mechanisms for Continued Negotiations and Consensus Processes between the Parties

The process of engaging affected indigenous and tribal peoples and obtaining and sustaining their meaningful participation and consent should be an iterative one and should not simply begin when Permission to Consult is granted or end with a decision by the Affected Peoples to grant their consent to the initiation of the Proposed Project. Mechanisms for ongoing dialogue, participation, decision-making and consent of the Affected Peoples in the various phases of the Proposed Project should be established and identified clearly between the parties, including how those processes will be maintained throughout, for example, the development, assessment, planning, implementation, oversight, monitoring, dispute resolution, and closure stages of the project. Structures with joint participation of the Parties need to be in place to assign responsibility and roles to ensure that the Proposed Project, once approved, maintains consent for all the respective phases of the Proposed Project. These mechanisms should be articulated and considered part of the binding agreement which articulates the initial consensus of the Parties.

Participatory and Independent Oversight

Before any decision is made by the Affected Peoples to consent, in whole or part to the initiation of a Proposed Project, the Parties shall establish mechanisms for monitoring, evaluating and assessing project implementation in accordance with the agreements of the Parties and the agreed upon work plans for the Proposed Project. The Parties shall establish joint monitoring, evaluation and implementation bodies to ensure that their agreements and their agreed work plans of the Proposed Project are implemented in good faith.

It is suggested that the Parties also designate a role for an impartial and independent body or entity to monitor compliance with their agreements and agreed upon work plans. This impartial entity can serve either as a member of a joint implementation committee integrated by the Parties themselves or as a

wholly independent regulatory oversight and monitoring entity which can audit the agreement at regular, agreed upon intervals, make recommendations for improvements, and encourage the Parties to rectify non-compliance. The Parties can also empower this entity to refer matters to arbitration or to any other dispute resolution mechanisms previously agreed upon by the Parties.

Resolution of Disputes and Complaint Mechanisms

Before any decision is made by the Affected Peoples to consent, in whole or part to the initiation of a Proposed Project, the Parties shall agree on mechanisms to settle all disputes related to interpretations or alleged violations of their agreements and agreed work plans for the Proposed Project. The Parties can jointly consent to settle designated matters through binding arbitration and designate a particular arbitration entity for such proceedings. Ultimately, however, final agreements should reserve the right of all Parties to seek enforceability of the agreement by a court of law.

Proof of Agreements and their Binding Nature

The initial agreement between the Parties, if any, including an agreement that no consent was given and that the Proposed Project should be relocated, modified, or cancelled and all other agreements related to issues such as benefit sharing, intellectual property, land titling, dispute resolution mechanisms, etc. shall be documented in writing and acknowledged by both Parties through the signature of their authorized decision-makers. These agreements will clearly state that they are binding and enforceable agreements. These agreements shall be filed with the appropriate authorities and be enforceable in courts of law and if stipulated by the Parties, subject to arbitration mechanisms.

Agreements documenting the Affected Peoples decision to withhold consent to the initiation of a Proposed Project shall be respected by the Project Proponent. Persistent attempts at engagement with the intention of securing a different decision shall be considered a violation of the agreements as well as a violation of any other declaration, resolution, council decree or other final decision taken by the Community to document its decision to withhold consent.