

Consultation Protocols:

Instrument for the Defense of Territories and Rights



Supplementary material to accompany the video



The Right to Free, Prior and Informed Consultation “is a right to be asked to be allowed to enter our home. It also means, in the case of informing us well, listening to us and accepting our opinion. If we agree that they enter our house, they enter our river, our forest. ”

- Ireomar Ferreira
Instituto Madeira Vivo (Rondônia)

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Introduction

The Consultation Protocols: Instrument for the Defense of Territories and Rights video aims to contribute to the exchange of experiences and knowledge between indigenous peoples and other traditional communities in Brazil on the origins, processes of elaboration and implementation of Consultation and Free Consent Protocols, Prior and Informed, a new instrument for the defense of territories and rights, developed by the movements themselves.

This video is based on testimonies from leaders of indigenous, riverside and quilombola peoples, talking about their experiences with the creation and implementation of consultation protocols as a tool for fighting. It also includes testimonials from experts, advisers and representatives of civil society organizations and the Public Prosecutor's Office who have supported the development of consultation protocols and the defense of territories.

Thus, the video seeks to show how the right to free, prior and informed consultation and consent are part of the fundamental rights of indigenous peoples and other traditional communities, have guaranteed by the Brazilian Federal Constitution and in international agreements such as ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples of which they include territorial rights, the right to self-determination and respect for cultural diversity.



Introduction cont.

For this, the video is divided into four parts:

- 1) The Right to Free, Prior, and Informed Consultation and Consent
- 2) The Emergence of Consultation Protocols
- 3) Elaboration of Consultation Protocols
- 4) Implementation of Consultation Protocols

The material presented here seeks to highlight important points from each of the four parts of the video, bringing complementary information that delves into important issues, together with questions for discussion in workshops, meetings and other training activities and exchange of movements, in order to stimulate discussions and deepening on key points.





“This right to participate, to be consulted, actually safeguards an earlier right which is the right to self-determination, the right to self-government. They have the right to be themselves, in their own way, to organize themselves according to their customs, according to their social organization.”

***- Bruno Caporrino
Caporrino, Indigenist, independent
consultant specialized in
Consultation Protocols***



Right to Free, Prior and Informed Consultation and Consent (FPIC)

The first part of the video deals with the right of indigenous and traditional peoples and communities to be consulted, in a free and informed manner, in good faith, before taking decisions that may affect their territories and rights.

What is the consultation?

The consultation is a process in which the government asks people what they think about a project, program or measure that affects them. It must be done in good faith and be initiated by the Government according to the procedure indicated by the peoples and communities. At the end of this process, peoples and communities can issue their consent, propose an agreement or say NO to the object of the consultation.

It is “free”, once peoples and communities must have absolute freedom to make the decision, “informed”, once peoples and communities must have information and full knowledge before making the decision, including risks and possibilities, “prior”, since it must occur before the decision and occur in “good faith”, with good intentions, a legal condition for reaching an agreement.

As noted, the consultation must be carried out by the government. Thus, it cannot be guided by a private entity or public company, nor should it be conducted by a consultancy paid by the entrepreneur, although they may provide information to clarify projects.

The consultation applies to decisions at all levels of government: municipal, state and federal, in relation to all administrative and legislative measures, such as plans, programs, and projects such as hydroelectric, railways, roads, as well as to bills that may affect the rights of indigenous peoples, quilombolas or other traditional peoples.

It is also a process because it does not happen all at once, but rather, before each government decision is made on administrative or legislative projects, and as many times as necessary for the culture of peoples and communities to be respected and all necessary information presented for proper decision-making. The consultation is also autonomous and not to be confused with other procedures or forms of public participation foreseen in national legislations.

What about consent?

At the end of the consultation, the goal is to reach an agreement and obtain consent. Consent is the possibility for people to agree or even veto a project or measure. There must be consent when there is a risk to the fundamental rights of peoples, such as integrity and ways of life and development.



"It is a document that helps enforce the understanding of consultation that these groups have, that is, what they understand by free, prior and informed, by participation, by decision ... by environment"

*- Rodrigo Oliveira
Advisor to the Federal Public
Ministry in Santarém (Pará)*



FPIC in the Law

The right to Free, Prior and Informed Consultation and Consent were initially established, at the international level, in 1989, when the International Labor Organization (ILO) adopted its Convention 169, and now it is also foreseen in the United Nations Declaration on Indigenous Peoples (UNDRIP), of 2006, and the American Declaration on the Rights of Indigenous Peoples, of the Organization of American States (OAS), of 2016.

The right to consultation and consent stem from the fundamental right to self-determination, the right for people to determine their own destiny, which is embodied in several treaties of international law, including the United Nations Charter, and affirmed by the Brazilian Constitution of 1988. The Constitution established the right to cultural protection and the rights of indigenous peoples to their own culture and original rights to land, as well as the rights of territories to quilombola peoples, the descendants of former enslaved peoples.





Emergence of Autonomous Consultation and Consent Protocols

Although ILO Convention 169 has been adopted as a law in Brazil, the right to prior, free and informed consultation and consent is often not respected or implemented correctly by the government. For example, several project proponents have sought to characterize 'public hearings', which are part of environmental licensing, as if they were a prior consultation process, but are quite different. Public hearings are open to the whole of society and often take place when political decisions about the project have already been made, and the consultation process is autonomous.

In addition, the Convention says that the method of consultation itself must respect the ways of life and cultures of indigenous and traditional peoples. If the government developed its own policies for consultation, it could establish rules that violate the decision-making of indigenous and traditional peoples, who are plural and each community has its own culture. Therefore, the need arose for these communities to take the process into their own hands.

As the rights were not being respected, consultation protocols were created. The first protocol in Brazil was created by the Wajãpi, in Amapá, after they studied the Constitution and Convention 169. The Wajãpi Protocol established how they wanted to be consulted, indicating all stages of the process. Soon after, several other indigenous and quilombola, ribeirinhos and other traditional peoples began to create their protocols, such as the Munduruku people and the Ribeirinhos of Montanha and Mangabal on the Tapajós River.

The protocols explain each step that must be taken before the government makes any decisions about policies, projects and laws that may affect its territories and livelihoods. They also indicate the language and expressions that should be used in the consultation, so that they can actually understand the information presented. It should also show how the consultation should take place in order to respect its culture and its own internal and decision-making organization, as well as its relationship with the territory, with its worldviews and with nature. For this reason, the protocols are also called "autonomous or community protocols for consultation and consent" since they come from each people or community and respect their own autonomy.



"The consultation protocols are absolutely necessary and important instruments "

*- Andreia Fanzeres
Operation Native Amazon - OPAN*

Elaboration of Autonomous Consultation and Consent Protocols

The consultation and consent protocols must be developed by the traditional peoples and communities themselves, so that the autonomy of the people or community is guaranteed. Thus, each group can define and explain how an appropriate prior consultation process by the State should be, respecting their culture and the traditional way of decision making. The protocol usually indicates a consultation plan, guiding how the consultation should take place, how many meetings they want to have, on what dates and which partners are desired to participate in the consultation offering technical support.

As we were told in the video, the peoples and communities that have already drafted their protocols did so through workshops with the participation of young people, women, warriors, chiefs, shamans, pullers, and then a large assembly. The construction of the protocol also has to respect the way of decision making and the culture of the people, and have the participation of the entire community, so that it really has legitimacy.

Each protocol elaboration process is different, it depends on how the internal organization and culture of each group works, but it has things in common. There are always initial discussions, meetings, workshops and the final approval of the document at a general meeting. An important part is to keep minutes of the meetings to serve as proof that the process was adequate and a specialized mediation or facilitation that supports the elaboration of the protocol.

The technical support of trusted partner organizations, such as the Public Prosecutor's Office, the Public Defender's Office or third sector entities both in the preparation of the protocols and in the consultation process is also essential. However, organizations that support the process cannot have an interest in the purpose of subsequent peoples' decisions, such as companies involved in the projects that will be subject to consultation. In addition, partners should not be present at the time of decision-making, even regarding the content of the protocol, so that the community has privacy and decision is entirely free and autonomous.



Implementation of Autonomous Consultation and Consent Protocols

After the protocol is drawn up, as noted in the video, it must be published and disseminated widely. Taking these protocols to Ministries, Congress and other decision-makers and putting them in the media and the press further strengthens them. Thus, the government and entrepreneurs cannot claim that they were unaware of its existence.

Another issue and potential obstacle in the implementation of the protocols are companies wanting to carry out the consultation, when this must be done by the government through the “process” indicated in the protocol.

Some protocols have already been very successful in preventing undertakings that would be harmful, including by judiciary decisions. For example, the consultation protocol of the Juruna people was fundamental to suspend the environmental licensing of Belo Sun, a huge gold exploration project controlled by a Canadian mining company, which would be located in Volta Grande do Xingu, a few kilometers from the Juruna territory, impacting their ways of life.

It is essential that, as already mentioned, the construction of the protocol is carried out by indigenous or traditional peoples and by the government, with possible technical support from specialists and exempt partners, who have no interest in the enterprise or policy. This can also occur in the implementation of the Protocol, during the consultation and consent process. There is a serious risk of attempts at co-optation at the time of consultation, so that it meets other interests, which everyone involved should be aware of, to ensure that the Protocol is respected.

Finally, the protocol is a map of how the free, prior and informed consultation and consent process should occur, being an important tool to implement their rights of self-determination of indigenous and traditional peoples and other rights enshrined in the Federal Constitution and in international and national legislation. Thus, consultation protocols can contribute to a safer and happier future for current and future generations of indigenous peoples and other traditional communities.





"We managed to build this protocol. We did a workshop, there were several workshops in the villages and there were young people, women, warriors, chiefs, shamans, right? So, there was all this participation of our people, during and when we finished doing workshops we had a great assembly"

*- Maria Leusa Ipereg Ayu Movement,
Munduruku Wakoborun Women's
Association (Tapajós)*

Questions for discussion for workshops

Part 1: The Right to Free, Prior and Informed Consultation and Consent

What is the right to Free, Prior and Informed Consultation and Consent?

What right is it rooted in?

What are the main international agreements that acknowledge or establish the right to free, prior and informed consultation and consent?

According to the international agreements the Brazilian legislation, what groups have been consulted?
Who is responsible for conducting the consultation?



Questions for discussion for workshops cont.

Part 2: The Emergence of Autonomous Consultation and Consent Protocols

Why were consultation and consent protocols created?

How can a protocol help ensure the right to free, prior and informed consultation and consent?

Do you see parallels in Brazil with your country, are protocols also used in your context?

If your community or people are interested in developing a consultation protocol, do you think it would be important as an instrument to defend your territory and rights in your country?



Questions for discussion for workshops cont.

Part 3: The Elaboration of Autonomous Consultation and Consent Protocols

In the video, Maria Leusa Kabá talked about the process of preparing the protocol for the Mundurucu indigenous people. What did you think was most important about what she and other people talked about in the video about the process of preparing a consultation protocol?

How do you imagine a protocol elaboration process in your community, respecting your culture?

What precautions should be taken (including regarding the participation of outsiders)?

Thinking about how your community makes decisions, what do you think should be included in the protocol?

How can a consultation protocol guarantee good community participation in decision-making, respecting the culture of the people?

If your people already have a protocol, how was your process?

What should be included in a consultation protocol?



Questions for discussion for workshops cont.

Part 4: The Implementation of Autonomous Consultation and Consent Protocols

After elaborating a consultation protocol, what is an important next step, remembering the statements of the interviewees (Maria Leuza, Antônio Oliveira and Eva Canoé)?

Why is the disclosure of a protocol important?

What other paths can be used to implement the protocols?

What are the main challenges to ensure the implementation of a protocol?

What is the best way to face these challenges?

What other instruments do you use to protect the territory and how can the Protocol strengthen them?

In what ways do you think that having a Protocol can help your people in an advocacy strategy?





"Within the protocol it is very important when we point out the specificities of the territories, of the community. Because our time is not the time of the government, of capital. This needs to be respected."

***- Vanuza Cardoso
Abacatal Quilombola Community,
Ananindeua, Pará***

Guidance on questions

Part 1: The Right to Free, Prior and Informed Consultation and Consent

The Right to Consultation and Free, Prior and Informed Consent are the rights of indigenous and traditional peoples to be consulted on projects and policies that affect their cultures and territories, including bills, and to say whether or not they agree with the proposal. It must occur without coercion, with enough information for understanding and before making a decision.

The Law stems from the right to self-determination, the right to cultural plurality and the rights guaranteed to indigenous peoples to their cultures, traditions, languages and others, in addition to the original right to their territories and the quilombolas to their lands.

The Right to Free, Prior and Informed Consultation and Consent are foreseen in the United Nations Declaration on Indigenous Peoples (UNDRIP) and in the American Declaration on the Rights of Indigenous Peoples, of the Organization of American States (OAS) and in ILO Convention 169.

The Consultation should take place before decisions are made during political and legislative processes, and whenever necessary for information, according to the procedure determined in the protocols.

Consultation is the right of indigenous and traditional peoples, which include quilombola peoples and other peoples who follow their traditional ways of life.

Part 2: The Emergence of Autonomous Consultation and Consent Protocols

The protocols emerged since the State was not respecting the right to free, prior and informed consent and consultation, or were conducting the consultation in a way that did not respect the traditions and ways of life of indigenous peoples and traditional communities.

The protocol will ensure that the consultation occurs in the way that the peoples themselves understand to be the most correct, according to their customs and traditions, and will ensure that the language is accessible, that their internal decision-making processes are respected, and even their decision-making time.

Guidance on questions

Part 3: Development of autonomous consultation and consent protocols

The consultation protocol should include the steps in the consultation process appropriate for each community or community, including who should be consulted within the community, in what language, and at what time.

To ensure protocol compliance, it is important to have a recorded or written record of the protocol, meeting minutes, and technical support.

Care must be taken to ensure that no outside influence affects decision-making, including the partners that support its design and implementation.

Part 4: Implementation of two Autonomous Consultation and Consent Protocols

A dissemination of the next step for the protocol to be concluded, raising the relevant government bodies for the media. It is important for media, government and other relevant stakeholders to have knowledge about the protocol and that it is respected.

The peoples and communities can also demand that protocols be respected through litigation and by direct action, such as demonstrations. The judiciary has already upheld the right to have protocols respected, as in the case the Juruna people mentioned in the video.

The greatest challenges to ensure the effectiveness of the protocols are the conflicting interests of the government, companies and individuals. These can be manifested by means of co-optation attempts in the elaboration of protocols or the consultation process, or by disrespect of the consultation or an adequate consultation process by the government.

The protocol establishes that the consultation must follow the process indicated in it, which is culturally appropriate, and can be used to question incorrect, hasty or undue interference consultation processes.

Video Evaluation

We hope that this material will be useful and informative, to support capacity-building and resistance. Please rate below so that we can contribute in an even better way!

What did you think of the video?
What was most interesting?

Did the video give you good ideas for working with your community and movement?

Was there anything important in the video?

Do you find it interesting to spread the video to other communities?

What other information do you need to work on this issue with your community or movement?

Send your feedback to: brent@internationalrivers.org



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Special Thanks

Nayra Paye
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Additional music

Audioblocks,
Daniel M. Ring,
Christina Nemo

Financial support

Fundação Mott
Fundação Moore

Supporting documents

Text

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Other relevant materials (in Portuguese)

Protocolos de Consulta Prévia e o Direito à Livre Determinação, Fundação Rosa Luxemburgo:
<https://rosalux.org.br/livro-sobre-protocolos-de-consulta-reforca-direito-de-povos-tradicionais/>

Guia de Protocolos, RCA: <https://rca.org.br/wp-content/uploads/2019/06/2019-Guia-de-Protocolos-RCA-vers%C3%A3o-web.pdf>

Protocolos de Consulta e Consentimento Prévio, Fase: <https://fase.org.br/wp-content/uploads/2019/08/PC-e-Consentimento-Pr%C3%A9vio-FASE-vers%C3%A3o-2.pdf>

Protocolos (Página com os protocolos de consulta do próprio site)

