Unit 22

Free, Prior and Informed Consent

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lesson plan

Duration:

2 hours

Objective(s):

This unit builds participants’ knowledge and skills to apply the principles of free, prior and informed consent in the context of inventorying intangible cultural heritage and also understand its importance more broadly as a requirement for safeguarding under the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.[[1]](#footnote-1)

Description:

The unit introduces the concept of free, prior and informed consent, which is mandatory under the Convention when submitting nominations to the Convention’s Lists and required in a community-based inventorying approach. Participants learn about free, prior and informed consent as an ethical practice for inventorying and develop tools to apply these principles in their work. They furthermore acquire knowledge on the legal side of free, prior and informed consent, especially as applied in the field of traditional knowledge and indigenous peoples’ rights.

Proposed sequence:

* General introduction to the concept of free, prior and informed consent and why and how it is used
* Free, prior and informed consent in the Convention
* Discussing each of the principles more closely
* Case study: Free, prior and informed consent for an inventorying workshop, Sikri, Nepal
* Exercise 1: on developing a format to apply free, prior and informed consent in a concrete situation of either a field practicum on inventorying or a pilot inventorying activity

Supporting documents:

* Unit 22 PowerPoint presentation
* Hand-out 1: Free, prior and informed consent
* Hand-out 2: ‘Who’ and ‘whose’ questions
* *Information Note by the Secretariat of the World Intellectual Property Organization (WIPO)*. International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples January 17 to 19, 2005. January 10, 2005. Available at: http://www.un.org/esa/socdev/unpfii/documents/workshop\_FPIC\_WIPO\_en.pdf

Unit 22

Free, prior and informed consent

Facilitator’s narrative

## Introduction

This unit introduces the concept of free, prior and informed consent, which has grown in importance and achieved legislative status in many countries. It is also enshrined in the UN Declaration on the Rights of Indigenous Peoples. Under the Convention, free, prior and informed consent is mandatory for safeguarding and for submitting nominations. The use of free, prior and informed consent in relation to inventorying relates to a number of ethical concerns, and reinforces the role of the community and practitioners in the inventorying process in accordance with the Convention. Free, prior and informed consent is not only for the use of outside agencies and State Parties when working with communities; community members working within their own community should also respect the principles of free, prior and informed consent. Being a member of a community does not automatically attribute the legitimacy to represent it. Free, prior and informed consent is also not an automatic exercise; it should involve discussion and consensus.

Principles such as free, prior and informed consent are not meant to be restrictive and discourage access. They can help to build the trust and protection required to share practices and information about specific intangible cultural heritage.

Hand-out 1 (optional) provides a brief history on the concept of free, prior and informed consent and how it evolved and could be circulated for reading at home rather than during the workshop

###### SLIDE 1.

Free, prior and informed consent

###### Slide 2.

In this presentation …

SLIDE 3.

Why free, prior and informed consent?

Some background about why this principle is needed and the role it plays according to the Convention. It also provides a space to discuss the wider use of this principle in the development arena and the links with other parts of UNESCO and the United Nations, and more particularly the World Intellectual Property Organization (WIPO), who are working on various legislations regarding free, prior and informed consent with various forms of traditional and indigenous ownership of traditional cultural expressions, traditional knowledge and, perhaps most importantly, natural resources.

For more information, see: WIPO’s Information Note from the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples: http://www.un.org/esa/socdev/unpfii/documents/workshop\_FPIC\_WIPO\_en.pdf

###### SLIDE 4.

An emerging standard for the rights of indigenous people

As noted previously, free, prior and informed consent is being used increasingly by international agencies in various countries and largely in the development arena. Its use covers rights to forests, produce and so on, but also culture and traditional knowledge.

One international standard-setting instrument that gives prominence to free, prior and informed consent as a core provision, is the UN Declaration on the Rights of Indigenous Peoples. Although there are many references to free, prior and informed consent in this Declaration, especially related to land rights, the following articles are the most relevant for discussion here:

**Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

**Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

**Article 19**

States 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 adopt- ing and implementing legislative or administrative measures that may affect them.

The World Intellectual Property Organization (WIPO) focuses on intellectual property rights issues, including their relation to traditional knowledge and traditional cultural expressions. In that context, the application of the principles of free, prior and informed consent principle could entail that traditional knowledge and traditional cultural expressions held by an indigenous people or traditional community, and derivatives of such knowledge and expressions, should not be accessed, recorded, adapted, used or commercialized without the prior informed consent of the people or community concerned. It could, as suggested by some, provide a legal and practical mechanism for negotiation of ‘mutually agreed terms’ as a basis for benefit-sharing arrangements at the point of access to traditional knowledge and traditional cultural expressions. Compliance with free, prior and informed consent is also under active consideration in WIPO’s work concerning the intellectual property aspects of access to and benefit-sharing in genetic resources.

###### SLIDE 5.

Free, prior and informed consent

The concept of free, prior and informed consentwas initially more a matter of ethics for use by researchers working on communities for ethnographies. It grew out of a concern that people who were being studied and recorded were often not aware of what was intended from the research, and that materials would be distributed freely without permission of the person and community. This was especially the case with rituals and ceremonies, which may be considered secret or inappropriate for public release. This issue is now a major driver for the rights of indigenous people and is becoming a legal instrument. However, it of course also always remains an ethical matter.

###### SLIDE 6.

Free, prior and informed consent and the Convention (1)

Free, prior and informed consent is required and compulsory for nomination to the Lists of the Convention, but also required when ensuring the participation of communities, groups and, in some cases, individuals in safeguarding. Safeguarding plans are to be made involving the community, with their consent and agreement. In the form to be filled when submitting nominations, one question requires that the process of acquiring community consent has to be described, but there is no reference to any standard way of doing it as long as the process demonstrates the effective application of the principles.

###### SLIDE 7.

Free, prior and informed consent and the Convention (2)

These quotations are taken from the text of the Convention ODs where free, prior and informed consent is mentioned. If the facilitator uses this slide it is important to explain the content in a language that is adapted to workshop participants, as the language uses id quite dense, due to its legal nature.

###### SLIDE 8.

Free, prior and informed consent and the Convention (3)

This slide presents the relevant text from the Convention regarding free, prior and informed consent.

###### SLIDE 9.

Why ‘free’?

The next four slides present various wordings and definitions of the terms involved in the phrase free, prior and informed consentfrom a variety of sources. ‘Free’ refers to freedom of choice, and lack of pressure (not to lack of remuneration). No form of incentive or disincentive should be used to obtain this permission, from anybody inside or outside the community.

###### SLIDE 10.

Why ‘prior’?

Prior refers to the need to obtain consent at the planning stage when the project or inventorying is proposed. This is important as, too often, people are asked to give consent after an intervention at which point it becomes a mere formality.

###### SLIDE 11.

Why ‘informed’?

To be informed of what one is agreeing to is central to this discussion. Agreeing means more than simply being informed. Ideally, it also means participation in formulating the agreement. This agreement can take the form of a form, which should be drafted in the language that the signatory knows and/or translated accordingly. The text should be discussed so that all aspects are understood and the signatory feels encouraged to propose text and/or ask questions. This is the point at which issues concerning the use of data, what a project will entail and decision-making, enter the picture.

Often people sign such documents with a verbal explanation that is inadequate. If a group is signing it can be read out to all, leaving scope for discussion.

###### SLIDE 12.

Why ‘consent’?

Consent involves being able to withhold or to refuse permission. This can be done not only by refusing to sign such a document, but also by affirming in writing that permission is not given. Non-participation is an important statement, which often has implications for the internal dynamics of a community that need to be understood and dealt with.

###### SLIDE 13.

Who can provide the consent?

This slide lists possible parties who could provide consent by signing such a document. This list can provide an opening for discussion among community representatives and others, as to who else may be involved in the issue of free, prior and informed consent.

Note to facilitator:

Depending on the time available, facilitators may wish to use Hand-out 2 on ‘who’ and ‘whose’ questions to engage participants in a brief discussion.

###### SLIDE 14.

Protection

This is an attempt to unpack and open the implications of consent so that free, prior and informed consent is not viewed as a restrictive instrument, but one that empowers a community to be able to share without fear of exploitation. This slide lists some ways in which free, prior and informed consent can provide protection.

###### SLIDE 15.

Positive enabling features

This slide deals with the positive enabling features of free, prior and informed consent. There is a worrying trend of such instruments inhibiting creativity, creating barriers to collaboration and contact, and introducing ownership into issues where none existed. These points can also be used to frame an agreement so that kinds of use can be stipulated.

###### SLIDE 16.

Creating agreements

Although various formats may exist, free, prior and informed consent for inventorying does not have a fixed format and one can be created, ideally with community participation. This is once again a space to bring in the issue of community participation.

###### SLIDE 17.

Key points to consider

This slide summarizes key points to consider that are linked to free, prior and informed consent and inventorying. It is not implied that issues of transparency, trust and so on are achieved through free, prior and informed consent, but it is an instrument that helps in this regard. Once again, it is necessary to emphasize that free, prior and informed consent is not only for ‘outsiders’, but should also be used by community members working on their own traditions.

###### SLIDE 18.

Case study: Sikri, Nepal (1)

This example presented on the next three slides shows how free, prior and informed consent was acquired for the two-day field practicum during a workshop on identification and inventorying of intangible cultural heritage in Sikri, Nepal. The workshop was held in the relatively remote location of Jiri, a small town inhabited largely by the Jirel community. Of the twenty-four participants, eleven were from the Jirel community of Jiri and the village of Sikri. The Kathmandu office of UNESCO and the Department of Heritage of the Government of Nepal made an advance trip to the region and identified a schoolteacher with an interest in ICH, who spoke English, and was willing to serve as a translator and resource person for the Jirel community. Some participants were educated and worked in local departments, some were literate and others could communicate only in Jirel. The practitioners included a shaman a monk and women who were health workers.

The other participants came from Kathmandu and other places in Nepal and spoke Nepali and Newari. The practice of pairing a community member with each Nepali participant proved very successful and remained one of the strengths throughout the workshop. The sessions were interactive: all community members were involved in spite of language difficulties and were encouraged to lead group exercises. A lot of theoretical sessions were ‘sacrificed’ to create space for group work and roleplays. The level of participation changed rapidly throughout the workshop.

###### SLIDE 19.

Case study: Sikri, Nepal (2)

This slide describes the preparation for the two-day fieldwork practicum. A large number of Sikri residents were eager to participate and gave their free, prior and informed consent. When designing a draft form to express the consent of community members, workshop participants suggested the development of a common form for all community members, rather than individual forms. According to the participants, seeing other names ahead of their own would give people more confidence.

The work with the community proved successful at different levels. free, prior and informed consent was obtained and community members, notably women, came forward to express their wish to participate in the inventorying exercises, even handling recorders and cameras. All those involved were welcome to have lunch with the workshop participants, which created a space for further dialogue and a sense of community over the two days. It has to be noted that the workshop participants were at ease in working with the community. The village held a welcome ceremony for the workshop participants at the start of the fieldwork practicum.

Unit 22

Exercise 1: creating a Free, prior and informed consent form

Imagine you are going to undertake a field practicum for the inventorying workshop or a pilot inventorying activity as a follow-up to the workshop.

Create a form for free, prior and informed consent that briefly explains the purpose of the practicum or pilot activity with reference to the Convention (explain it briefly). Explain also the possible uses to which the data and recordings of the visit could be put.

Community representatives in the workshop should provide inputs and guide the participants in terms of expectations the community may have.

*This form could be finalized and used during the fieldwork practicum or pilot activity respectively.*

1. . Frequently referred to as the ‘Intangible Heritage Convention’, the ‘2003 Convention’ and, for the purpose of this unit, simply the ‘Convention’. [↑](#footnote-ref-1)