

SEEKING CONSENT? THE LEGAL CHALLENGES IN CONSULTING INDIGENOUS PEOPLES FOR HYDROELECTRIC DAM PROJECTS

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ABSTRACT

The consultation process with indigenous communities in large-scale development projects remains a contested issue, particularly in projects involving the relocation of the communities and compensation. This paper examines the challenges in the consultation process in the context of hydroelectric dam construction, taking the example of the Nenggiri Dam project in Malaysia which is currently under construction. Through a doctrinal legal analysis, this study argues that, with the current Malaysian legal framework recognising the customary land rights of the indigenous communities in the country, it is a legitimate expectation that the consultation process observes the principle of Free, Prior, and Informed Consent (FPIC). This is entailed from the fiduciary duty of the

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state authority in protecting indigenous land rights under the legal framework in Malaysia. The position of FPIC under the international legal standards, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other instruments, and its relevance to the Malaysian legal framework are also discussed. The paper further highlights gaps in the legal framework, which lacks clear mechanisms to enforce FPIC as a binding legal obligation. This paper argues for stronger legal protections and policy reforms to ensure meaningful participation of indigenous communities in decision-making. This could be done through formal integration of FPIC into national legislation, and the establishment of independent oversight bodies. By addressing these legal and procedural shortcomings, Malaysia can move towards a more equitable and sustainable approach in development projects affecting the indigenous peoples.

Keywords: Indigenous Peoples, Social Equity, Free; Prior and Informed Consent (FPIC), Consultation, Hydroelectric Dam.

KE ARAH PERSETUJUAN? CABARAN UNDANG-UNDANG DALAM PERUNDINGAN ORANG ASAL BAGI PROJEK EMPANGAN HIDROELEKTRIK

ABSTRAK

Proses perundingan dengan komuniti orang asal dalam projek pembangunan berskala besar kekal menjadi isu yang dipertikaikan, terutamanya dalam projek yang melibatkan penempatan semula komuniti dan pampasan untuknya. Kertas kerja ini mengkaji cabaran dalam proses perundingan dalam konteks pembinaan empangan hidroelektrik, mengambil contoh projek Empangan Nenggiri di Malaysia yang kini dalam pembinaan. Melalui analisis undang-undang doktrin, kajian ini berhujah bahawa, dengan rangka kerja perundangan Malaysia semasa yang mengiktiraf hak tanah adat masyarakat orang asli di negara ini, adalah jangkaan yang sah bahawa proses perundingan mematuhi prinsip Izin, Maklum Awal, Bebas dan Telus (IMABT). Ini berpunca daripada kewajipan fidusiari pihak berkuasa negeri dalam melindungi hak tanah orang asal di bawah kerangka undang-undang di Malaysia. Kedudukan IMABT di bawah piawaian undang-undang antarabangsa, termasuk Deklarasi Pertubuhan Bangsa-Bangsa Bersatu mengenai Hak Orang Asli dan instrumen lain yang berkenaan, serta perkaitan dengan kerangka perundangan Malaysia juga dibincangkan. Kertas kerja ini menyerlahkan jurang dalam kerangka undang-undang sedia ada, yang tidak mempunyai mekanisme yang jelas untuk menguatkuasakan

IMABT sebagai kewajiban undang-undang yang mengikat. Makalah ini mencadangkan agar perlindungan undang-undang yang lebih kukuh dan pembaharuan dasar perlu dibuat bagi memastikan penyertaan bermakna komuniti orang asal dalam pembuatan keputusan bagi projek pembangunan yang memberi kesan besar kepada mereka. Ini boleh dilakukan melalui penggubalan peruntukan undang-undang yang sesuai dalam perundangan negara, dan penubuhan badan pengawasan bebas. Dengan menangani kelemahan undang-undang dan prosedur ini, Malaysia boleh bergerak ke arah pendekatan yang lebih saksama dan mapan dalam projek pembangunan yang memberi kesan kepada orang asal.

Kata Kunci: Orang Asal, Keadilan Sosial, Prinsip Izin, Maklum Awal; Bebas dan Telus (IMABT), Perundingan, Empangan Hidroelektrik.

INTRODUCTION

The consultation process with indigenous communities in large-scale development projects has long been a contested issue, including in the construction of hydroelectric dam projects. While dams contribute to renewable energy generation, flood mitigation, and water supply, they often result in severe consequences for indigenous communities, including relocation, the loss of the communities' ancestral lands, and disruption of their socio-economic conditions.¹ Last year, in September 2024, the Ipoh High Court ordered Perak Hydro Renewable Energy Corporation Sdn Bhd and Conso Hydro RE Sdn Bhd to immediately cease development and vacate an area designated for a hydroelectric dam project, which affected the Orang Asli communities from six villages in Ulu Geruntum, Gopeng, Perak. The court found that the project, initiated in 2012, infringed upon the ancestral lands of the communities without their consent, and that state and federal authorities, including the Perak government and the Department of

¹Rebecca Minardi, *The Impacts on Livelihoods and Social Capital from Dam-Induced Resettlement: A Global Review* (Michigan State University, 2019); S Robert Aiken and Colin H Leigh, "Dams and indigenous peoples in Malaysia: Development, displacement and resettlement," *Geografiska Annaler: Series B, Human Geography* 97, no. 1 (2015); Fadzilah Majid Cooke et al., "The limits of social protection: the case of hydropower dams and indigenous peoples' land," *Asia & the Pacific Policy Studies* 4, no. 3 (2017)..

Orang Asli Development, had breached their fiduciary duties by allowing the encroachment.²

This raises fundamental concerns about the legal protection of the indigenous peoples, especially the right to self-determination, which relates to the rights to land that they live in, and the right to participation in decision-making relating to development and dam construction.

The protection of the rights of indigenous peoples has been a primary focus not only under the international legal framework but also the law at the national level. In Malaysia, the recognition of the rights of indigenous peoples to their customary land is an established legal principle. The principle also embodies the principle of fiduciary duty of the state to the indigenous peoples to protect their interests. As such, any decision affecting the indigenous peoples' customary land must be on the basis of the legal recognition and protection of the communities' land rights which, among others, requires meaningful consultation with the affected communities before the decisions are made, with adequate compensation upon the taking of the land.

At the international level, legal instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³ and International Labour Organisation (ILO) Conventions concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) 1989 (ILO Convention)⁴ emphasise the importance of Free, Prior, and Informed Consent (FPIC) as a fundamental principle in projects that impact indigenous territories. The FPIC principle requires that affected communities have the autonomy to accept or reject development projects affecting their land and livelihoods. However, many states, including Malaysia, lack a

²Ivan Loh, "High Court rules in favour of Gopeng Orang Asli group in hydro dam project case," *The Star*, 9 September 2024 2024, <https://www.thestar.com.my/news/nation/2024/09/09/high-court-rules-in-favour-of-gopeng-orang-asli-group-in-hydro-dam-project-case>.

³"United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295, adopted 13 September 2007," (2007).

⁴"International Labour Organisation's (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991)."

clear legal framework that enforces FPIC as a binding obligation, leading to inconsistencies in consultation practices.

This paper examines the challenges in the consultation process with indigenous peoples in the context of hydroelectric dam construction, taking the example of the consultation process conducted involving the Orang Asli community affected by the Nenggiri Dam project in the state of Kelantan, Malaysia. The Nenggiri hydropower electric dam is currently under construction, which began in June 2022, by TNB Power Generation Sdn Bhd (TNB Genco), under the approval of the Ministry of Energy and Natural Resources (MENR). The project, which aims to generate hydroelectric power of up to 600GWh of clean energy annually, to increase renewable energy capacity in the country upon its completion in 2027. The hydroelectric power plant seeks to mitigate downstream areas from floods and provide a pure and raw water supply for irrigation.

RESEARCH METHODOLOGY

This paper is based on a qualitative research method that integrates legal doctrinal research and empirical perspectives. Doctrinal legal research is adopted to analyse the position of the relevant law and policy at both national and international levels. This approach is to assess the legal position on consultation of the indigenous peoples and FPIC in such development projects under the Malaysian legal framework and its international legal obligations. It explores key legal issues, including the fiduciary duty of the state in protecting indigenous land rights, and the procedural requirements in consultation to obtain the FPIC. Doctrinal legal research is a traditional approach in legal studies that focuses on analysing legal rules and principles. This method systematically presents the rules governing a specific legal area, examines their interrelationships, clarifies complex legal issues, and may offer insights into potential future developments. It also involves comprehensive background reading to identify primary and secondary legal sources, followed by the synthesis of relevant issues to form a preliminary conclusion on the state of the law.⁵

⁵Terry Hutchinson, *Researching and Writing in Law*, 3rd ed. (Pymont: Thomson Reuters, 2010).

Additionally, the research also conducted two focus group discussions with the representatives of the affected communities to capture the opinions and perspectives of the communities involved on their experience and aspirations in the consultation process. This complements information obtained from published reports and news. The significance of this study lies in its focus on the issues facing indigenous peoples and the impact of development projects on their lives. It also highlights the importance of adhering to the principles of FPIC to mitigate the effects on marginalised indigenous communities.

DAM CONSTRUCTION AND ITS IMPACT ON INDIGENOUS PEOPLES

Dams are undeniably significant in providing clean energy through the generation of hydropower, water supply, flood mitigation mechanisms, and offering recreational opportunities. However, large-scale dam construction projects have historically resulted in adverse effects on indigenous communities who had been living in the areas and had to be relocated to other areas. As they have deep cultural, spiritual, and economic ties to their ancestral lands, the resettlement caused by such projects often leads to social, economic, and cultural disruptions that threaten indigenous ways of life.

Hydroelectric projects typically require large tracts of land, leading to flooding of villages, agricultural fields, and culturally significant sites. This results in the loss of land tenure and forces communities to relocate to government-assigned resettlement areas, which often lack the resources and environmental conditions necessary for sustaining their traditional livelihoods. For example, the Batang Ai Dam in Sarawak displaced thousands of Iban people, while the Murum Dam forced approximately 10,000 Penan and Kenyah people to relocate, severing their connection to hunting, fishing, and traditional subsistence farming.⁶ Similarly, the Temenggor Dam in Perak submerged large parts of the Orang Asli Jahai homeland, resulting in

⁶Aiken and Leigh, "Dams and indigenous peoples in Malaysia: Development, displacement and resettlement."

declining socio-economic conditions, loss of food security, and disruptions to their traditional knowledge systems.⁷

The submersion of sacred sites, burial grounds, and ritual spaces due to dam construction also results in an irreparable loss of cultural heritage. Indigenous cultures are deeply tied to land, rivers, and forests, which serve as sources of spiritual identity, traditional knowledge, and communal heritage. Many indigenous communities believe that their spiritual connection to the land is permanent, making displacement not only a physical loss but also a cultural and identity crisis.⁸ This is also the concern in the case of the Nenggiri Dam which threatens to flood ancestral burial sites and culturally significant sites such as Gua Cha, a site with archaeological and spiritual significance to the Temiar Orang Asli.⁹

Besides, resettlement to a new area often leads to economic and social marginalisation. Many indigenous communities depend on farming, fishing, and forest resources for their livelihoods. However, resettlement areas are often unsuitable for agriculture, lack access to clean water, and are distant from traditional hunting or fishing grounds.¹⁰ Furthermore, governments and project developers often

⁷Ronzi Mohd Yusoff, Sharina Abdul Halim, and Joy Jacqueline Pereira, "Impak Pembinaan Empangan Temenggor Ke Atas Sosioekonomi Komuniti Orang Asli Jahai Di Rancangan Pengumpulan Semula Air Banun, Perak," *Asian People Journal (APJ)* 5, no. 1 (2022).

⁸Andrea Schapper and Frauke Urban, "Large dams, norms and Indigenous Peoples," *Development Policy Review* 39 (2021).

⁹Humaira' Aishah and Asmawi Ibrahim, "Land Acquisition of Indigenous Community Based on Sustainable Strategies for the Construction of the Hydro-Electric Dam Nenggiri Gua Musang Kelantan," *International Journal of Academic Research in Business and Social Sciences* 14, no. 8 (2024), https://kwpublications.com/papers_submitted/11188/landacquisition-of-indigenous-community-based-on-sustainable-strategies-for-the-construction-of-the-hydro-electric-dam-nenggiri-gua-musang-kelantan.pdf; Bernama, "Nenggiri hydroelectric dam: Over 1,000 Orang Asli affected by construction to be relocated in 2026, says TNB," *Malay Mail*, 21 August 2024, <https://www.malaymail.com/news/malaysia/2024/08/21/nenggiri-hydroelectric-dam-over-1000-orang-asli-affected-by-construction-to-be-relocated-in-2026-says-tnb/147700>.

¹⁰See, e.g., Peter Ho, Nor-Hisham Bin Md Saman, and Heng Zhao, "Credibility and the Social Function of Property: A Saga of Mega-Dams,

promise compensation and alternative livelihood programmes, such as rubber plantations and cash-based economies. However, these initiatives frequently fail due to a lack of long-term sustainability, limited land access, and insufficient job opportunities. For example, the resettlement of Orang Asli communities after the Temenggor Dam project resulted in widespread unemployment, school dropouts, and increased dependence on government aid, as their traditional knowledge and skills did not align with the imposed economic system.¹¹

It has also been reported in many studies that when indigenous peoples are relocated under government initiatives due to development projects such as the dam construction or the conversion of land into large-scale plantations, their socioeconomic status is further marginalised, and their cultural integrity is compromised.¹² These communities, once self-sufficient, often become reliant on government assistance for survival. Several issues have been identified in such resettlement schemes, including the absence of formal land ownership recognition for the Orang Asli, inadequate implementation of development plans, limited opportunities for direct participation in plantation schemes managed by appointed corporations, lack of job

Eviction, and Privatization, as Told by Displaced Communities in Malaysia." *Land* 13, no. 8 (2024): 1207., " *Land* 13, no. 8 (2024); Yusoff, Halim, and Pereira, "Impak Pembinaan Empangan Temenggor Ke Atas Sosioekonomi Komuniti Orang Asli Jahai Di Rancangan Pengumpulan Semula Air Banun, Perak."

¹¹Yusoff, Halim, and Pereira, "Impak Pembinaan Empangan Temenggor Ke Atas Sosioekonomi Komuniti Orang Asli Jahai Di Rancangan Pengumpulan Semula Air Banun, Perak."

¹²Ma'rof Redzuan and Zahid Emby, "Orang Asli: Pembangunan dan Ekologi Hutan (Orang Asli: Development and Forest Ecology)," in *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformasi and Challenges)*, ed. Ma'rof Redzuan and Sarjit S. Gill (Serdang: Putra University of Malaysia, 2008); Omar Mustaffa, "Rancangan Pengumpulan Semula (RPS) Masyarakat Orang Asli: Pencapaian dan Cabaran (Resettlement Scheme for the Orang Asli Communities: Achievement and Challenges)," in *Orang Asli: Isu, Transformasi dan Cabaran (Orang Asli: Issues, Transformation and Challenges)*, ed. Ma'rof Redzuan and Sarjit S. Gill (Serdang: Putra University of Malaysia, 2008); Yusoff, Halim, and Pereira, "Impak Pembinaan Empangan Temenggor Ke Atas Sosioekonomi Komuniti Orang Asli Jahai Di Rancangan Pengumpulan Semula Air Banun, Perak."

opportunities within these schemes, and significantly low income in relation to the scale of land involved.¹³ Furthermore, for communities whose lands are surrounded by large-scale plantations or situated near mining activities, access to traditionally used resources is disrupted, soil fertility deteriorates, and water sources become contaminated.¹⁴ For instance, the Nenggiri Dam compensation package includes RM10 million for crop loss, resettlement land allocations, and infrastructure development. However, concerns have been raised regarding delays in land gazettement, lack of secure land tenure, and failure to restore economic self-sufficiency.¹⁵

Additionally, dams also significantly alter natural ecosystems which affects the indigenous communities' access to food, water, and medicinal plants.¹⁶ The flooding of forests also contributes to biodiversity loss, soil degradation, and disruption of local microclimates. These circumstances lead to difficulty for the communities living in the new area to adapt to their new environments. Dam projects may also cause water pollution from sediment accumulation and upstream agricultural activities. In the case of the Nenggiri Dam, the community representatives have raised concerns about pollution from logging and palm oil plantations, which could contaminate drinking water sources and harm aquatic life. Poor water quality can lead to health issues, including waterborne diseases and

¹³Mustaffa, "Rancangan Pengumpulan Semula (RPS) Masyarakat Orang Asli: Pencapaian dan Cabaran (Resettlement Scheme for the Orang Asli Communities: Achievement and Challenges."; Yusoff, Halim, and Pereira, "Impak Pembinaan Empangan Temenggor Ke Atas Sosioekonomi Komuniti Orang Asli Jahai Di Rancangan Pengumpulan Semula Air Banun, Perak."; Aiken and Leigh, "Dams and indigenous peoples in Malaysia: Development, displacement and resettlement."

¹⁴Aiken and Leigh, "Dams and indigenous peoples in Malaysia: Development, displacement and resettlement."

¹⁵Bernama, "Nenggiri hydroelectric dam: Over 1,000 Orang Asli affected by construction to be relocated in 2026, says TNB."; Tan Zhai Yun, "Social: A blind spot in the transition?," *The Edge Malaysia*, 2024, June 17 2024, <https://theedgemalaysia.com/node/715527>.

¹⁶Alla Yousra Mohamed Khir and Lee Liu, "Impacts of dams on the environment: a review," *International Journal of Environment, Agriculture and Biotechnology* 6, no. 1 (2021); Liam J Zarri et al., "The evolutionary consequences of dams and other barriers for riverine fishes," *BioScience* 72, no. 5 (2022).

malnutrition, particularly among vulnerable groups such as children and the elderly.¹⁷

NENGGIRI HYDROELECTRIC DAM PROJECT AND THE CONSULTATION PROCESS

The developers of the Nenggiri Hydroelectric Dam have publicly emphasised their commitment to engaging with and consulting affected communities. The consultation process was led by UKM Pakarunding Sdn Bhd, a consultancy firm appointed to conduct social and environmental impact assessments. As part of this process, the firm conducted a Public Acceptance Survey in 2015 and 2018, which reportedly showed an increase in community approval from 69.5% to 80% among residents of Pos Pulat, Pos Tohoi, and Kampung Kuala Wias, the villages directly affected by the project. In addition to these assessments, UKM Pakarunding facilitated engagement sessions and discussions on socio-cultural concerns related to the dam's construction.¹⁸

The project developer, TNB Power Generation Sdn Bhd (TPGSB), collaborated with federal and state agencies, including the Department of Orang Asli Advancement (Jabatan Kemajuan Orang Asli - JAKOA), to implement resettlement plans and economic compensation programmes. Reports indicate that over thirty engagement sessions were held between 2014 and 2022, involving village heads, community representatives, and NGOs such as SUHAKAM (Malaysian Human Rights Commission). These discussions primarily focused on the anticipated benefits of the dam, including flood mitigation, improved water access, and job opportunities during the construction phase, as well as the compensation package for the relocation. A compensation plan amounting to RM216 million has been allocated for the affected Orang

¹⁷Aishah and Ibrahim, "Land Acquisition of Indigenous Community Based on Sustainable Strategies for the Construction of the Hydro-Electric Dam Nenggiri Gua Musang Kelantan."

¹⁸Business Today, "Govt Ensures Orang Asli Welfare Amid Nenggiri Dam Project," April 1, 2024 2024, <https://www.businesstoday.com.my/2024/04/01/govt-ensures-orang-asli-welfare-amid-nenggiri-dam-project/>.

Asli communities, covering land allocation and infrastructure development. Each family will receive 800 square feet of land, and the new settlements will be equipped with essential amenities, including housing, schools, and healthcare facilities. To support families during the transition period, an allowance of RM683 per household will be provided for five years.¹⁹

Despite these engagements, several points of concern were raised by the Kelantan Network of Orang Asli Villages,²⁰ and other advocacy groups about the lack of transparency and the absence of FPIC. Community leaders argued that the negotiation process was neither comprehensive nor conducted in good faith. They claimed that critical information about the dam's long-term impact was not fully disclosed to the affected communities.²¹ One major concern was the submersion of ancestral burial sites, including Gua Cha, a prehistoric cultural landmark. According to JKOAK, this issue was not properly communicated during early consultations.²²

The scope of the consultation process was also questioned, as it only included Kuala Wias, Pos Pulat and Pos Tohoi, while other affected communities were excluded. Indirectly affected villages, such as Kampung Angkek in Kuala Betis, were not involved in early discussions, despite concerns about potential downstream flooding and pollution from nearby logging and plantation activities. The lack of inclusivity in the consultation process raised doubts about whether all affected Orang Asli had been given a fair opportunity to voice their concerns.

¹⁹Qistina Nadia Dzulqarnain, "Nenggiri Dam: RM216 mil compensation for Orang Asli, says minister," *The Vibes.com* 2022, <https://www.thevibes.com/articles/news/67309/nenggiri-dam-rm216-mil-compensation-for-orang-asli-says-minister>.

²⁰Jaringan Kampung Orang Asli Kelantan (JKOAK).

²¹Yun, "Social: A blind spot in the transition?."

²²Yun, "Social: A blind spot in the transition?."

Another criticism of the consultation process was its narrow focus on economic compensation. While the resettlement package included provisions for rubber plantations and new housing, it did not consider the deep cultural and spiritual connections the Orang Asli had with their ancestral lands. The loss of sacred sites, including ancestral graves and ritual spaces, was not adequately addressed. A study by Aishah & Ibrahim²³ found that the affected communities fear losing their heritage lands, sacred sites, and traditional livelihoods tied to forest resources. Similarly, the Heritage Impact Assessment (HIA) conducted for the project acknowledged the submersion of Gua Cha but framed it as a salvage operation rather than a cultural loss. The assessment focused on recovering artifacts and human remains instead of preserving the site itself.²⁴ This approach ignored the community's spiritual connection to the cave.

Besides, the community representatives also warned of an increase in human-wildlife conflict. Deforestation and habitat loss due to the dam's construction have displaced wildlife, causing animals like elephants and tigers to encroach upon Orang Asli villages. Incidents have been reported where wildlife destroyed crops and, in some cases, caused injuries and fatalities among villagers.²⁵

The Centre for Orang Asli Concerns (COAC), a civil society advocating for the Orang Asli community, also criticised the consultation process for lacking genuine engagement. Referring to an engagement session involving NGOs conducted in 2023, the resettlement agreement was said to be presented only via PowerPoint, making it difficult for participants to follow.²⁶ Additionally, they stated that they were not given physical copies of the agreement for proper review and understanding. The consultation meeting also did not allow

²³Aishah and Ibrahim, "Land Acquisition of Indigenous Community Based on Sustainable Strategies for the Construction of the Hydro-Electric Dam Nenggiri Gua Musang Kelantan."

²⁴New Straits Times, "Over 71,000 Prehistoric Artefacts Discovered, Removed in Nenggiri Valley," August 15, 2024, <https://www.nst.com.my/news/nation/2024/08/1095496/over-71000-prehistoric-artefacts-discovered-removed-nenggiri-valley>.

²⁵Yun, "Social: A blind spot in the transition?."

²⁶Colin Nicholas, *COAC Comments on the Proposed TNB-Nenggiri Dam Resettlement and Compensation Plans*, Center for Orang Asli Concerns (2023).

for a thorough discussion of the legal and financial implications of the resettlement. Another concern raised was the lack of community-wide participation, as discussions were mainly held with selected representatives rather than the entire community.²⁷ COAC emphasised that meaningful consultation should respect the Orang Asli's right to self-determination and should be conducted through culturally appropriate mechanisms.

To be effective, consultation processes must engage Indigenous communities in ways that acknowledge their traditional governance structures and spiritual connections to land. Structural barriers to meaningful engagement must also be addressed. Given the weak legal protections for Indigenous land rights in Malaysia, the power imbalance in negotiations does not favour the Orang Asli.

Another concern raised on the consultation process was land ownership and tenure security over the resettlement land. The affected communities repeatedly brought up this issue, both during consultations and in discussions with researchers. However, it was not addressed properly, possibly because corporate negotiators lacked the authority to make commitments regarding land ownership. Furthermore, delays in gazetting the resettled lands as Orang Asli reserves in past projects created distrust.

THE POSITION OF INDIGENOUS PEOPLES' LAND IN MALAYSIA

The Concept of Indigenous Peoples in Malaysia

The Federal Constitution accords a special status to indigenous communities in Malaysia. They are the Malays, whom are defined broadly as individuals who profess Islam, habitually speak the Malay language, and adhere to Malay customs; the Natives of Sabah and Sarawak, referring to members of ethnic communities in these states as specified under Article 161A (6); and the Aboriginal Peoples, also known as the Orang Asli, referring to the aboriginal communities of Peninsular Malaysia. The term Orang Asli has been widely used in

²⁷Nicholas, Colin. *COAC Comments on the Proposed TNB-Nenggiri Dam Resettlement and Compensation Plans*.

policy statements since the 1980s and has gained general acceptance among these communities.

The term 'indigenous peoples' is commonly used in international legal instruments to describe distinct groups originating from a specific territory, who are generally marginalised compared to the majority population. Although there is no universally accepted legal definition, four key criteria are widely recognised in identifying indigenous peoples: historical priority in the occupation and use of a specific territory; cultural distinctiveness, which is voluntarily maintained; self-identification as a distinct group, along with recognition by other groups or state authorities; and a history of marginalisation, subjugation, dispossession, exclusion, or discrimination, whether past or ongoing.²⁸

The UNDRIP, which is an important international instrument endorsed by the majority of nations, including Malaysia, establishes self-identification as a fundamental criterion, allowing indigenous groups to define their identity or membership based on their customs and traditions. UNDRIP also emphasises shared historical experiences of marginalisation. The use of the term peoples (plural) signifies recognition of organised societies with distinct identities rather than mere groupings with shared racial or cultural traits.

Based on these characteristics, the indigenous peoples of Malaysia are generally recognised as the Orang Asli in Peninsular Malaysia and the natives of Sabah and Sarawak, who are numerical minorities and fulfil the above criteria. Collectively, these communities are often referred to as Orang Asal, a term reflecting their status as the indigenous peoples of Malaysia. As seen in the context of Peninsular Malaysia, indigenous communities that form a majority and hold significant political and economic influence may not necessarily be classified as indigenous peoples under international law. However, this does not negate the fact that the majority of indigenous communities

²⁸Erica-Irene A. Daes, *Final Report of the Special Rapporteur on the Rights of Indigenous Peoples, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty over Natural Resources*, 56th sess Agenda Item 5(b) (provisional agenda), UN Doc E/CN.4/Sub .2/2004/30 (13 July 2004). "http://www1.umn.edu/humanrts/demo/IndigenousSovereigntyNaturalResources_Daes.pdf.

are indigenous to the land within the framework of national law and policy.

The Malaysian Law and the Land of the Indigenous Peoples

The law in Malaysia, mainly through court decisions, recognises the land rights of the Orang Asli and natives of Sabah and Sarawak who have occupied certain lands for an extended period. This recognition is a well-established and binding principle of common law, based on the doctrine of *stare decisis*.

In many cases such as *Adong bin Kuwau v Government of the State of Johor* [1997] 1 MLJ 418 and *Sagong Tasi v Government of the State of Selangor* [2002] 2 MLJ 591, *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 and *Director of Forest, Sarawak & Anor v TR Sandah Tabau & Ors and other appeals* [2017] 3 CLJ which were among the earliest cases involving Orang Asli and natives land claims, the customary land rights of the indigenous communities have been judicially recognised. In the cases involving the Orang Asli, the communities sought court declarations that their customary lands acquired by state authorities were their customary lands and applied for compensation orders. The courts, in all these cases, ruled that the Orang Asli communities in the disputed areas held customary rights over the land, and ordered compensation for their acquisition.

These judicial decisions were found upon consideration of the relevant constitutional provisions, certain statutory laws such as the National Land Code, the relevant state land legislation, as well as specific statutes concerning the Orang Asli, particularly the Aboriginal Peoples Act 1954 (Act 134).

The nature and scope of land rights recognised by the courts include lands occupied by the communities over an extended period, not only for residential purposes or subsistence farming, such as growing fruit trees, but also for commercial cash-based cultivation, including rubber and oil palm plantations. This is based on the practice of the community, integral to their custom and traditions. In *Sangka bin Chuka & Anor v District Land Administrator Mersing, Johor* [2016] 8 MLJ 289, the court held that the customary land rights of the affected Orang Asli community extend beyond lands occupied for settlement and rubber cultivation. These rights also encompassed areas used for

forest produce collection and hunting. The reasoning behind this decision was that such activities had been continuously practiced and were integral to the customs and traditions of the community. They also formed the primary source and essence of their very existence and would continue to be essential to their future livelihood. The failure to protect these rights was deemed a threat to their customs, traditions, and overall survival.

In the case of *Eddy bin Salim v Iskandar Regional Development Authority* [2017] 1 LNS 822, the court not only recognised rights over land occupied for a significant period but also acknowledged non-exclusive customary rights over areas used for traditional activities. This included:

"The surrounding waters in which their customary activities are being carried out. Hence, a claim for native customary rights over lands covering rivers, streams within the boundaries of the land used by them for fishing and gathering of produce of such waters should be claimable but subject to proof."

As such, the High Court in *Eddy Salim* distinguished between land rights based on exclusive ownership and non-exclusive customary rights over water areas commonly used for livelihood purposes.

These cases align with other judicial decisions. For instance, in *Government of the State of Selangor v Sagong Tasi* [2005] 6 MLJ 289, the Court of Appeal held that Orang Asli customary land rights, as recognised under common law, extended to lands they occupied and had direct control over, including areas used for settlement and agricultural activities. Similarly, in *Mesara Long Chik v Director of Land and Mines, Pahang* [2018] 1 LNS 1009, the High Court recognised the plaintiff's customary land rights over a piece of land cultivated with fruit trees, the produce of which was sold for cash income. In this case, the plaintiffs, a Semoq Beri subgroup of the Sen'oi, sought a declaration of ownership and interest over approximately 12 acres of land in Maran, in the state of Pahang, Malaysia. They also requested the return of the land or, alternatively, compensation for its loss.

Although they had moved away from the area, they frequently returned, particularly during the fruit season, to harvest and sell the produce. In fact, they had applied for land grants from the state authorities in 1985 and 1989 but received no response. Subsequently,

in 2005, a temporary license was issued by the state authorities to an individual who proceeded to clear the land.

In addition, in *Mohamad bin Nohing v State Land and Mines Office, Pahang* [2013] 5 MLJ 268, the Semelai community in Pahang filed a judicial review application based on the principle of common law recognition of customary land rights. The High Court found that their exclusive occupation and continuous use of the land established their legal rights over it. The court also recognised that the Semelai had transitioned from mere subsistence activities to cash-based endeavours such as rubber and oil palm cultivation, as well as small-scale trading. This shift did not affect the status of their customary land rights. Therefore, based on the discussed court decisions, the actual practices of the community are crucial in determining the nature and scope of Orang Asli land rights.

Besides, the Orang Asli land recognised as customary land by the courts is not limited to land gazetted under the Aboriginal Peoples Act 1954 and the National Land Code (Section 62). In the cases of *Sangka bin Chuka & Anor v District Land Administrator Mersing, Johor* [2016] 8 MLJ 289; *Government of the State of Selangor v Sagong Tasi* [2005] 6 MLJ 289; and *Director General of the Department of Orang Asli Affairs v Mohamad bin Nohing* [2015] 6 MLJ 527, the courts recognised that Orang Asli land ownership is not confined to land gazetted under Act 134 but also extends to other areas not officially gazetted. The courts affirmed that the customary land of the Orang Asli communities involved constitutes ownership with full and beneficial interest, which can be inherited and passed down from generation to generation.

Furthermore, if customary land rights have been established and proven, gazettment under other statutes, such as the Forestry Act/Enactments or Malay Reserve Land Enactments, does not automatically extinguish Orang Asli customary land rights, unless the reservation is inconsistent with their continued occupation and use of the land. However, any extinguishment of Orang Asli customary land must be carried out in accordance with legal provisions or by executive authority permitted under the law, and compensation must be paid (*Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677). Similarly, in *Mohamad bin Nohing v State Land and Mines Office, Pahang* [2013] 5 MLJ 268, the gazettment of Malay Reserve Land and the establishment of a plantation project by Felcra

on Semelai customary land were deemed unlawful, as they constituted encroachment on Orang Asli land. The court ordered the degazettement of the Malay Reserve Land and the removal of Felcra from the disputed land. This decision was upheld by the Court of Appeal in *Director General of the Department of Orang Asli Affairs v Mohamad bin Nohing* [2015] 6 MLJ 527. This is also reflected in the Act 134, in which regardless of conflicting provisions, Orang Asli retain the right to reside in reserved areas such as forest reserves and lands declared as Malay Reserve Land (Sections 6 & 7).

The Fiduciary Duty to the Indigenous Peoples

Established under the common law discussed in the foregoing, also includes the principle of fiduciary duty of the government towards the indigenous peoples which is fundamental in the recognition of the indigenous peoples' land rights. The fiduciary duty principle establishes that the government has a special obligation to act in the best interests of the indigenous peoples, particularly in matters affecting their land ownership, access, and usage (*Sagong bin Tasi v Government of the State of Selangor* [2002] 2 MLJ 59; *Bato' Bagi v Government of the State of Sarawak* (2011) 6 MLJ 297). This principle is fundamental and must be carefully considered in any policy decisions affecting Orang Asli land rights.

In *Khalip Bachik & Another v Director of Land and Mines, Johor & Others* [2013] 5 CLJ 639, the court held that the first defendant's delay of over ten years in gazetting the land, without justification, constituted a breach of fiduciary duty toward the plaintiffs. The defendant failed to provide any explanation for the delay despite an earlier commitment to gazette the land. The court emphasised that once such a commitment is made, it must be fulfilled, particularly since the plaintiffs had been displaced from their settlement since 1993.

A similar ruling was made in *Sangka bin Chuka & Anor v District Land Administrator Mersing, Johor* [2016] 8 MLJ 289, where the court found that the respondents had breached their fiduciary duty by failing to ensure that the entire customary land was gazetted as an Orang Asli Reserve or, at a minimum, not incorporated into the Endau Rompin National Park despite long-standing awareness of the Orang Asli community's presence in the area.

In addition, in *Eddy bin Salim v Iskandar Regional Development Authority* [2017] 1 LNS 822, the High Court in Johor Bahru reaffirmed the government's fiduciary duty to protect the welfare and interests of indigenous communities, particularly their land rights. The court rejected the argument that the term 'welfare' in the Federal Constitution should be narrowly interpreted to exclude land rights or gazettment obligations. Justice Teo Say Eng stated:

I agree with the Plaintiffs that it is clear that our Malaysian Courts have recognised that Government stands in a fiduciary position to protect the interest of the natives (See Bato Bagi case - Federal Court). The content of the fiduciary duties has been described in many ways. But in essence, the duty to protect the welfare of the aborigines includes their land rights, and not to act in a manner inconsistent with those rights and further to provide remedies where an infringement occurs: See Sagong Tasi case.

On this basis, the court ruled that both the Director General of JAKOA (Fifth Defendant) and the Federal Government (Sixth Defendant) had breached their fiduciary duty toward the plaintiffs.

The Federal Court, in the case of *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677, outlined key fiduciary responsibilities, including the protection of the community's welfare, particularly their land rights. The fiduciary relationship arises from constitutional and legal provisions granting special status to the indigenous communities, which impose a duty on the government to safeguard their interests. This duty is further reinforced by the establishment of government agencies such as JAKOA to protect Orang Asli welfare; as well as policies and legal frameworks governing Orang Asli affairs.

A fiduciary relationship exists when one party, i.e., in this context, the government, has discretionary authority over matters significantly affecting another party's interests, i.e., the indigenous peoples. This relationship can arise through laws, agreements, or even by necessity, without requiring explicit consent from the affected party. A fiduciary must act in the best interest of the beneficiaries. The decisions affecting Orang Asli land must align with fiduciary obligations. Even where the state has legislative authority, any law that diminishes or disregards the indigenous community's land rights may be deemed a breach of fiduciary duty.

As part of its fiduciary duty, the government must consult the affected communities before making decisions that impact their rights. In *Sagong Tasi*, the High Court cited Justice Toohey in the Australian case *Mabo v Queensland (No 2)* (1992) 175 CLR 1, which held that indigenous consent is essential when actions threaten or extinguish land rights. The US Supreme Court, in *Worcester v State of Georgia* 31 U.S. (6 Pet.) 515 (1832), affirmed that indigenous land rights include exclusive rights to negotiate land sales with the state. In *Mabo*, Justices Dean and Gaudron rejected the idea that state authorities could unilaterally extinguish indigenous land rights or redefine them in a way that disregards original ownership. A similar approach is seen in Canada, where consultation is a key factor in determining whether a fiduciary breach is justified. In certain cases, indigenous interests must be upheld even when land rights have not been fully proven but are supported by strong evidence.

Arguing for procedural fairness, Chief Justice Richard Malanjum of the Federal Court in *Bato' Bagi v Government of the State of Sarawak* (2011) 6 MLJ 297 emphasised:

Essential justice and procedural fairness require that a public decision-maker ensures such rights are protected before making any decision affecting indigenous communities.

This principle highlights that the indigenous communities must have a voice in decisions concerning their land, in line with fundamental principles of justice and fairness. Any decision affecting the communities' land must ensure the recognition and legal protection of the communities' land rights; and consultation with affected communities before any decisions are made.

THE PROTECTION OF INDIGENOUS PEOPLES AND DAM CONSTRUCTION UNDER INTERNATIONAL LAW

The rights of the indigenous peoples have been given central emphasis, especially in international law, particularly in development projects such as dam construction. With the increasing impact of international legal principles on Malaysian legal and policy frameworks, the guidelines and standards for protecting the rights and interests of indigenous communities under the international instruments are relevant.

In the context of dam constructions, the international law emphasises the rights of indigenous peoples to FPIC before such a project is carried out. For instance, the UNDRIP, the main document regarding the rights of indigenous peoples, prohibits the removal of indigenous peoples from their lands or territories without their free, prior, and informed consent (FPIC) (Article 10). States are also required to consult and cooperate in good faith with indigenous peoples to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them; before the approval of any project affecting indigenous lands, territories, or resources (Article 19); and in projects involving development, utilisation, or exploitation of resources in areas occupied by the indigenous peoples (Article 32).

Similar requirement of FPIC is also required under the International Labour Organisation (ILO) Conventions concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) 1989. The treaty which specifically focuses on the rights of indigenous and tribal people requires governments to consult with indigenous peoples. The consultation process must be made upon decision making involving legislative or administrative measures that may affect the indigenous peoples directly, through appropriate procedures with their representative institutions (Article 6). It is also affirmed under the ILO Convention that the indigenous peoples have the right to decide their own priorities for the development project due to the effect that the project entails on their lives, beliefs, institutions, and spiritual well-being, as well as the lands they occupy or use (Article 7). Recognising the right of the indigenous peoples to the land that they live in, the ILO Convention also requires participation of the indigenous peoples in the management of the natural resources found on their land (Article 15).

Furthermore, the FPIC is specifically required in situations which the indigenous peoples are to be removed from their customary land. The places to which they are moved must be of at least similar quality and legal status to their places of origin. The government must also negotiate with the indigenous peoples and seek their participation regarding the development of natural resources and soil with good faith (Article 2, 15, 16 ILO Convention No 169).

Although Malaysia is not a party to the ILO Convention No 169, the convention is significant to be considered as it shapes legal discourse, influences indigenous rights advocacy, and sets a global

standard that Malaysia is often compared against. Besides, although the soft law instrument such as the UNDRIP is merely persuasive in nature, and thereby carries no legal force, it has been argued that the principles declared in the UNDRIP is a legal concept and, as such, is a source of international law that, according to Article 38 of the Statute of the International Court of Justice should be implemented by the Court.²⁹

Apart from the international law instruments which specifically elaborate on the rights of the indigenous peoples as discussed above, the World Commission on Dams (WCD) 2000 Report provides a comprehensive assessment of the impacts of dam projects worldwide. The report recognises that, while dams have significantly contributed to human development by supplying water, irrigation, flood control, and electricity, these benefits often come at a high cost. Many large-scale dam projects have led to severe social and environmental consequences, including the displacement of communities, loss of livelihoods, and ecological degradation.³⁰ Specifically, the report stated that,

The WCD Knowledge Base indicates that the poor, other vulnerable groups and future generations are likely to bear a disproportionate share of the social and environmental costs of large dam projects without gaining a commensurate share of the economic benefits. Specific cases include: ... Indigenous and tribal peoples and vulnerable ethnic minorities have suffered disproportionate levels of displacement and negative impacts on livelihood, culture and spiritual existence;³¹

Recognising these challenges, the WCD report introduces a set of core values, including equity, sustainability, efficiency, participatory decision-making, and accountability, to guide future dam planning and implementation. The report outlines seven strategic priorities to ensure

²⁹ Muhamad Sayuti Hassan et al., "Free, Prior, and Informed Consent (FPIC) and the Right to Self-Determination: A Case Study of Indigenous Peoples in ASEAN Member States, pp. . , 2025," in *Routledge Handbook of the UN Sustainable Development Goals Research and Policy*, ed. Ranjula Bali Swain and Peter Dobers (Routledge, 2025).

³⁰ World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (London: Earthscan, 2000), https://awsassets.panda.org/downloads/wcd_dams_final_report.pdf.

³¹ World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, p 130.

that decisions regarding dams are equitable and sustainable.³² Among the priorities most relevant to the indigenous peoples are the emphasis on the importance of meaningful participation and the FPIC to ensure that indigenous voices are genuinely considered in dam planning and decision-making; and recognising entitlements, that is, affirming indigenous peoples' customary land rights and access to fair compensation and benefit-sharing. Another priority outlined is sustaining rivers to acknowledge the deep cultural, spiritual, and economic ties that indigenous communities have with river ecosystems, calling for the protection of their traditional livelihoods and environmental heritage.³³

In sum, the WCD report advocates for a rights and risks approach in assessing the impacts of dam projects. Moving beyond traditional cost-benefit analyses, the framework recognises all legitimate stakeholders, including indigenous communities affected by dam construction, and emphasises the need to respect and protect their rights. To support this approach, the report outlines criteria and guidelines for good practices in planning, design, construction, operation, and decommissioning of dams. These guidelines aim to enhance decision-making, improve project outcomes, and mitigate negative consequences for affected communities and the environment.³⁴

A key recommendation of the WCD report is stakeholders participation throughout the project lifecycle. It stresses the importance of inclusive and participatory decision-making, ensuring that all stakeholders, particularly marginalised and affected communities, have a meaningful voice in the process. Transparency and public access to information are highlighted as essential for building trust and accountability. The report also emphasises the need for comprehensive environmental and social impact assessments to identify potential risks and implement effective mitigation measures. It calls for stronger

³²World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

³³World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, p 214.

³⁴World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

protections for ecosystems and cultural heritage sites that may be impacted by dam construction.³⁵

The WCD report further recommends benefit-sharing and compensation mechanisms to ensure that local communities receive fair and adequate compensation for any negative impacts while also gaining access to benefits generated by the projects. The report underscores the importance of addressing historical injustices and providing reparations where necessary. Among others, the report calls for the formal acknowledgement of past harms and the establishment of mechanisms to provide reparations, which may include financial compensation, restoration of livelihoods, land restitution, or social development programmes.³⁶

Additionally, the WCD report encourages exploring alternatives to large dams, such as demand-side management, upgrading existing infrastructure, and considering smaller-scale or non-structural solutions.³⁷ To ensure compliance, the report calls for robust monitoring mechanisms to uphold agreed-upon standards and commitments throughout the lifespan of dam projects. These include independent and transparent monitoring bodies involving representatives from affected communities, civil society, government, and technical experts to provide oversight. Besides, public access to information is also crucial to ensure that monitoring results, compliance reports, and performance evaluations are accessible and understandable to all stakeholders, especially affected communities.³⁸ By implementing these principles, the WCD report aims to transform the approach to dam development, promoting sustainable and equitable solutions while minimising negative social and environmental impacts.

Besides, in the context of climate change, the United Nations Framework Convention on Climate Change (UNFCCC)³⁹ and the Paris

³⁵World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

³⁶World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

³⁷World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

³⁸World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

³⁹United Nations Framework Convention on Climate Change, (1992).

Agreement (2015),⁴⁰ both of which Malaysia is a party to, promote hydropower as a low-carbon energy source to reduce reliance on fossil fuels. However, large-scale dam projects must align with indigenous rights and sustainability principles. Article 7.5 of the Paris Agreement emphasises the importance of traditional knowledge and indigenous participation in climate adaptation efforts.⁴¹ This recognition emphasises the need for inclusive decision-making when implementing climate solutions that impact indigenous communities.

The UNFCCC also requires that, to ensure accountability, climate finance mechanisms, such as the Green Climate Fund (GCF), must comply with FPIC standards and adhere to environmental safeguards before financing hydropower projects.⁴² The UNFCCC also encourages the exploration of alternative renewable energy sources, including solar, wind, and micro-hydropower, which provide cleaner energy solutions without the social and ecological costs associated with large dams.⁴³ To this, balancing clean energy development with indigenous rights is essential for achieving sustainable and just climate action. Policies must integrate climate resilience, environmental protection, and human rights, ensuring that renewable energy transitions do not come at the expense of indigenous communities and their livelihoods.⁴⁴ For instance, the First Nations Major Projects Coalition (FNMPC) in Canada supports Indigenous communities in securing ownership stakes in large-scale energy projects, including solar farms and mineral developments. By promoting Indigenous equity participation, the coalition ensures that First Nations are not only economically empowered but also have a meaningful voice in decisions that impact their lands and resources. This approach fosters a model of inclusive and equitable development, aligning economic

⁴⁰United Nations, *Paris Agreement (United Nations Framework Convention on Climate Change)* (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

⁴¹United Nations, *Paris Agreement*.

⁴²United Nations, *United Nations Framework Convention on Climate Change*.

⁴³United Nations, *United Nations Framework Convention on Climate*.

⁴⁴Melanie Zurba and Anastasia Papadopoulos, "Indigenous participation and the incorporation of indigenous knowledge and perspectives in global environmental governance forums: a systematic review," *Environmental Management* 72, no. 1 (2023).

progress with the protection of Indigenous rights and self-determination.⁴⁵

Summarily, ensuring the protection of indigenous peoples' rights in dam construction and climate policies requires strong adherence to international legal principles, particularly the FPIC framework. While hydropower development plays a role in climate mitigation, it must be balanced with sustainability principles, social equity, and environmental protection to prevent displacement and ecological harm.

The FPIC of Indigenous Peoples in Decision Making

The principle of FPIC and other participation rights are derived from the right to self-determination, which is the founding principle of indigenous peoples' rights. In the context of large-scale development projects such as dam construction, which often result in the acquisition of ancestral land and forced relocation, this right is critical. The right of indigenous peoples to self-determination refers to the inherent right to freely determine their political status and pursue their economic, social, and cultural development.⁴⁶ This right, considered as fundamental to protecting their identity, culture, and autonomy in the face of external pressures, allows indigenous communities to make decisions about their lands, resources, governance, and way of life according to their traditions and aspirations.⁴⁷ In other words, FPIC is one of the manifestations of the right to self-determination of indigenous people through participation in the decision-making process.

⁴⁵Bryan Walsh, "Want More Clean Energy Projects? Give Communities a Stake," *Time*, June 27, 2024, <https://time.com/6992183/clean-energy-canada-community-ownership/>.

⁴⁶Hassan et al., "Free, Prior, and Informed Consent (FPIC) and the Right to Self-Determination: A Case Study of Indigenous Peoples in ASEAN Member States, pp. . , 2025."

⁴⁷Terry Mitchell et al., "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)," *International Indigenous Policy Journal* 10, no. 4 (2019), <https://www.jstor.org/stable/48767144>; Tara Ward, "The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law," *Northwestern Journal of International Human Rights* 10, no. 2 (2011).

Within international human rights jurisprudence, the FPIC is legally based on property rights, cultural rights, and the right to non-discrimination. These legal foundations are particularly important in cases where dam projects threaten to displace indigenous communities, disrupt their cultural landscapes, and impair access to traditional resources. Dams such as the Nenggiri project in Malaysia illustrate how such developments can profoundly affect indigenous rights if the FPIC is not effectively implemented.

This principle requires that the indigenous peoples are fully involved in every process of decision making transparently and independently. The FPIC ensures that indigenous communities have the authority to grant or withhold consent for projects proposed on their ancestral territories, thereby safeguarding their cultural integrity, livelihoods, and traditional knowledge. This principle mandates that consent must be given freely, without coercion; prior to the initiation of any activities; and based on full disclosure of information regarding the nature, scope, and potential impacts of the proposed projects.⁴⁸ The effective implementation of FPIC is crucial in promoting equitable and respectful partnerships between indigenous populations, governments, and developers, ensuring that development initiatives do not compromise the rights and well-being of indigenous communities.⁴⁹

Reviewing definitions and descriptions of the FPIC by various organisations, Mitchell elaborates that

FPIC is characterised as a set of rights that enable decision making, which is realized free from coercion, within a community's own cultural framework, and with adequate time to review and assess all information necessary to make an informed judgement on the long-term risks and benefits of proposals. The information and processes supporting collective community decision making as described would enable communities to provide or withhold consent, to say

⁴⁸Rohaida Nordin and Mohd Syahril Ibrahim, "Exercising the principle of free, prior and informed consent (FPIC) in land development: An appraisal with special reference to the Orang Asli in peninsular Malaysia," Article, *Pertanika Journal of Social Science and Humanities* 22, no. January (2014).

⁴⁹Nordin and Ibrahim, "Exercising the principle of free, prior and informed consent (FPIC) in land development: An appraisal with special reference to the Orang Asli in peninsular Malaysia."

“yes” or “no” or “yes with conditions,” and to pursue further discussion and action regarding proposed developments.⁵⁰

The process of obtaining FPIC from indigenous communities is guided by fundamental principles that are especially critical when dealing with high-impact projects like dam construction, which may permanently alter indigenous territories. Good faith negotiation is not just a procedural ideal, but a legal and moral necessity in situations where communities are asked to relinquish land and resettle. The FPIC cannot be reduced to administrative formality, it must result from sincere and inclusive dialogue, where indigenous concerns and perspectives are fully considered and integrated into project plans.⁵¹

Another essential principle is the recognition of indigenous protocols, which acknowledges the importance of customary laws, traditional governance structures, and community-based decision-making. Indigenous peoples have their own methods of deliberation and consensus-building, which may differ from standard legal procedures.⁵² A local example of recognising Indigenous protocols for FPIC is the Melangkap Community Protocol developed by the Dusun community in Sabah. This protocol outlines the community's customary laws, decision-making processes, and expectations for external parties seeking to engage with them.

By formalising their traditional governance structures, the Melangkap community ensures that any development or research activities on their lands require prior consultation and consent, respecting their cultural norms and autonomy. This approach not only safeguards their rights but also serves as a model for integrating Indigenous protocols into broader legal and environmental frameworks.⁵³ Respecting these governance mechanisms ensures that

⁵⁰Mitchell et al., "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)."

⁵¹Mitchell et al., "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)."

⁵²Françoise Montambeault and Martin Papillon, "Repolicising indigenous participation: FPIC protocols in Canada and Brazil," *The International Journal of Human Rights* 27, no. 2 (2023).

⁵³"Protokol Komuniti Melangkap," 2019, <https://sabc.sabah.gov.my/sites/default/files/uploads/attachments/2019-11/Protokol-Komuniti-Melangkap.pdf>.

indigenous communities have the cultural space and autonomy to make informed decisions in accordance with their traditions.

Informed consultation and participation are another critical principle, ensuring that indigenous communities are actively involved throughout the entire process, rather than being passive recipients of information. Effective FPIC requires clear, comprehensive, and culturally appropriate communication about the project's objectives, potential risks, and long-term impacts. This information must be provided in languages and formats accessible to indigenous peoples, enabling them to make fully informed choices about whether to accept or reject a proposed project.⁵⁴

A key cornerstone of FPIC is the prohibition of forced relocation,⁵⁵ which directly applies to dam-related displacements. Large dams often require the flooding of villages and agricultural lands, making relocation unavoidable in some cases. In such scenarios, FPIC requires that indigenous peoples voluntarily agree to resettle, only after fair negotiations, culturally appropriate planning, and compensation mechanisms that restore, not diminish, their quality of life.

To maintain the integrity of the FPIC process, an independent verification mechanism must be established to confirm that consent was given freely, without coercion, manipulation, or misinformation. This includes independent oversight, documentation of consultations, and grievance redress mechanisms that allow indigenous communities to raise concerns, challenge decisions, and seek remedies if they believe FPIC principles were violated.⁵⁶ By adhering to these principles, the FPIC serves as a meaningful safeguard for indigenous rights, ensuring that development projects respect indigenous

⁵⁴Nordin and Ibrahim, "Exercising the principle of free, prior and informed consent (FPIC) in land development: An appraisal with special reference to the Orang Asli in peninsular Malaysia."

⁵⁵Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

⁵⁶Dwight Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?" (2012).

sovereignty, promote social justice, and uphold ethical and legal responsibilities.⁵⁷

For consultation to be meaningful, all parties must act in good faith and ensure that Indigenous communities have access to clear and relevant information. Without full disclosure, consultation efforts risk being superficial and failing to address real concerns.⁵⁸ Sufficient time must also be allocated for Indigenous communities to review, discuss, and provide feedback on any proposed project. When needed, the state or corporate project proponents, particularly in complex infrastructure projects like hydropower dams, should assist Indigenous communities in developing their capacity to process technical and legal information so that they are not disadvantaged by a lack of resources or expertise.⁵⁹ FPIC is a tool to achieve equity and an important step for local communities to take on co-management roles in large development projects.⁶⁰

Moreover, in dam construction contexts where environmental, social, and economic stakes are high, the institution responsible for the consultation must have the authority and willingness to alter decisions based on community concerns. If a consultation process only gathers opinions without the ability to change the outcome, it is not meaningful. Decision-makers must show that they are open to modifying plans when valid concerns are raised. The goal of consultation should not be to impose changes upon Indigenous communities but to respect their autonomy and ensure their rights are

⁵⁷Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?."

⁵⁸Nordin and Ibrahim, "Exercising the Principle of Free, Prior and Informed Consent (FPIC) in Land Development: An Appraisal with Special Reference to the Orang Asli in Peninsular Malaysia."

⁵⁹Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?."; Mara Tignino and Diego Jara, "Human rights law in the development of hydropower projects in transboundary context," *Frontiers in Climate* 6 (2024).; International Hydropower Association, *How-to Guide: Hydropower and Indigenous Peoples*, International Hydropower Association (London, 2021).

⁶⁰Nordin and Ibrahim, "Exercising the Principle of Free, Prior and Informed Consent (FPIC) in Land Development: An Appraisal with Special Reference to the Orang Asli in Peninsular Malaysia."

upheld. Forced changes undermine the very purpose of consultation and weaken Indigenous governance structures. This is also highlighted in the WCD report that for community participation to be effective, there must be systems in place to include their input in actual decisions.⁶¹ It stresses that consultation is not meaningful if it cannot lead to changes in project plans based on community concerns. Likewise, the International Hydropower Association's How-to Guide on Hydropower and Indigenous Peoples supports consultation processes that allow indigenous feedback to shape project outcomes. It stresses that for engagement to be meaningful, it must be able to influence decisions, and those in charge must have the authority to make changes.⁶²

In some cases, state involvement is necessary, especially when issues raised during consultations require government intervention.⁶³ Matters related to land rights, environmental regulations, and legal protections often go beyond the authority of corporate stakeholders. When the state plays a role, it must ensure that its actions are transparent, fair, and prioritise Indigenous rights over economic or political interests.⁶⁴

⁶¹World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*.

⁶²International Hydropower Association, *How-to Guide: Hydropower and Indigenous Peoples*.

⁶³Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?."

⁶⁴Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?."; Elisa Morgera, "Under the radar: the role of fair and equitable benefit-sharing in protecting and realising human rights connected to natural resources," *The International Journal of Human Rights* 23 (2019).

CONCLUSION

In conclusion, the principle of FPIC is not merely a theoretical concept but serves as vital protection, especially when development projects like dam construction may seriously affect the lives and lands of indigenous peoples. These principles give practical effect to the right of self-determination by ensuring that indigenous communities are not only consulted but are given the authority to decide whether and how they wish to be involved in such projects. Adhering to FPIC in the context of dam development is a measure of responsible governance and legal integrity, consistent with the recognition of the customary land rights of the indigenous peoples under the law in Malaysia, as well as the protection of the indigenous peoples' rights under the international law which to certain extent has an impact in Malaysia.

To achieve fair, just, and sustainable outcomes for Indigenous communities, meaningful consultation must ultimately be a cooperative process in which all parties act in good faith, respect Indigenous autonomy, and maintain an openness to genuine dialogue and change. While hydroelectric dams contribute to economic growth and energy security, they also have severe and often irreversible consequences for indigenous communities. The impacts extend beyond physical displacement to cultural, economic, and environmental disruption, often exacerbated by weak consultation processes and inadequate legal protections.

The case of the Nenggiri Dam reflects broader concerns about the treatment of indigenous land rights and the implementation of FPIC in Malaysia. Findings indicate that, despite relentless efforts to engage with the affected indigenous communities, the consultation process revealed significant shortcomings, notably the unequal footing of the parties involved. These issues were largely a lack of formal legal recognition of the community's land rights and the absence of binding regulations to enforce FPIC, which undermines the fairness of the engagement process.

Ultimately, this paper argues for stronger legal protections and policy reforms to ensure that the consultation process with indigenous communities is substantive rather than procedural, by ensuring meaningful participation of indigenous communities in decision-making processes. Formal integration of FPIC into the national

legislation, the establishment of independent oversight mechanisms, and the adoption of best practices from international legal frameworks are crucial towards a more equitable and sustainable approach to indigenous consultation in development projects.

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