Free, Prior and Informed Consent: Basic Principles and Implementation

Presentation of Scoping Paper by Marcus Colchester, Director Forest Peoples Programme The Forests Dialogue Yale, New Haven, 13th – 14th April 2010
Forests for Peoples : Peoples for Forests
FPIC: a new concept?
What is self-determination?

Ted Moses, former Grand Chief of the Grand Council of the Crees who negotiated the Hydro Quebec agreements explains that:

When I think of self-determination, I think also of hunting, fishing and trapping. I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land. ... The end result is too often identical: we indigenous peoples are being denied our own means of subsistence. ... We cannot give up our right to our own means of subsistence or to the necessities of life itself.... In particular, our right to self-determination contains the essentials of life – the resources of the earth and the freedom to continue to develop and interact as societies and peoples.

UN Declaration on the Rights of Indigenous Peoples

- IPs are no less peoples than other human societies

- **Article 3:** Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

- **Article 4:** Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
Key rights in the UN Declaration

- Rights to the land, territories and natural resources customarily owned, occupied or otherwise used by them
- Control what happens on their lands
- Represent themselves through their own institutions
- Exercise their customary law
- All of above within framework of State, international human rights and respecting rights of individuals.
FPIC in International Law:

International Human Rights Laws:
- FPIC is recognised explicitly in international laws
- UN Declaration on the Rights of Indigenous Peoples
- ILO : 6(2) y 7(1) (aim of securing consent)
- CBD : 8j (indigenous knowledge)

Jurisprudence:
- FPIC is explicit in legal interpretations
- Committee of Human Rights
- CERD Committee
- InterAmerican Commission and Court of Human Rights
- African Commission of Human and Peoples’ Rights
UN Declaration on Rights of Indigenous Peoples: Article 32

1. **Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.**

2. **States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...**

(Adopted by UN GA Sept. 2007)
What does FPIC consist of?

- Right to say 'yes' or 'no' to proposed developments on peoples’ lands
- **Consent** which is determined in conformity with or with respect for peoples’ cultures, customary systems and practices
- According to people’s own representative organisations/ institutions
- Without coercion or duress (‘Free’)
- Before the initiation of activities (‘Prior’)
- After the complete sharing of available information on the proposed activities and their implications, according to an agreed process and with adequate time (‘Informed’)
FPIC in international norms:

- UN Development Group Guidelines
- UNDP Policy on Indigenous Peoples
- European Union: IPs policy
- IBD: IPs and re resettlement
- IFAD: IP policy
- World Bank Indigenous Peoples Policy

**FPICCon and Broad Community Support**

- FAO Voluntary Guidelines for Planted Forests: no resettlement without FPIC
FPIC in voluntary ‘best practice’ standards:

- Protected Areas: WCPA, WPC, WCC, CBD
- Forestry: Forest Stewardship Council
- Dams: World Commission on Dams
- Mines: World Bank’s Extractive Industries Review
- Environmental Impact Assessments: Akwe:kon Guidelines
- Crops: Roundtable on Sustainable Palm Oil, RTRS, RSB....
- Now REDD: UNREDD, CCBA, CCBA/CARE.
Conflict: costly for companies
Repression: costly for people
CSR and FPIC: Why companies seek consent: reducing risk

‘... early attention to FPIC issues can avoid significant costs during implementation...’

‘Even as we refine what this principle means in operation, there is no question that as a principle and as a practice, free, prior, informed consent is a key part of legitimacy. And if you wonder if that is true, simply ask this question: Is your company better off having the people in the communities where you operate with you or against you? It is just plain common sense.’

FPIC in national laws and procedures

- Philippines
- Venezuela
- Bolivia
- Colombia
- Australia (NT)
- Canada (Supreme Court and BC courts)
Is FPIC a right of ‘veto’?

- Does this mean that IPs can reject private sector development plans on their lands. As a general rule: yes.
- Does this mean that IPs can overrule the State?
- Not exactly, the jurisprudence clarifies that in ‘exceptional circumstances’ and where there are ‘compelling reasons’, the State may push ahead but should still allow the people to express their views through an FPIC approach.

In such cases, however, the State must then satisfy a number of additional requirements:
- It must acquire lands and pay due reparations through due process previously established by law
- Show that the intervention is ‘necessary’
- Show that the cost (to the people) is ‘proportional’ to the benefit being sought
- Must be ‘with the aim of achieving a legitimate objective in a democratic society’
- Should not ‘endanger their very survival as a people’
- Simply invoking the national interest is not enough.
Part 2: Lessons from the field

- FPP has been working on FPIC in detail in a number of countries including:
  - Russia
  - Indonesia
  - Cameroon and Republic of Congo
  - Guyana, Suriname and Panama
- As well as holding numerous international meetings to review progress with implementation
Who has the right to FPIC?

- Indigenous peoples
- ‘Local communities’
- Definitional challenge very great
- Legal basis unclear
  - All ‘peoples’ have the right to self-determination
  - But do all ‘social groups’ have same collective rights? Probably not.
- Representation issues very challenging: how is representation of a ‘local community’ different from devolution to local government?
- IFAD policy on access to land: IPs and LCs
FPIC over what?

- The law gives IPs the right to consent on decisions that will affect them, which is more than land
- Laws
- Policies
- Intellectual property
- Cultural heritage
- Changes to institutions

UNDRIP 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 adopting and implementing legislative or administrative measures that may affect them.
Which land?
Customary rights and state law

- **Customary rights**: Patterns of long standing community land and resource usage in accordance with indigenous peoples’ customary laws, values, customs and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State. (From World Bank Operational Policy 4.10).

- International law recognises custom as a source of rights. These rights obtain independent of whether the State has recognised these areas or not.
Forests and State lands in Indonesia

- 70% of national territory is defined as ‘State forest area’
- 122 m. ha. of forests
- 60-90 million forest people
- Forests assumed to be ‘State forest lands’
- Actually only 12% of these ‘forests’ have been gazetted, mostly PAs
- Meaning not clear if rest are State forests, ‘private forests’ (‘lands with rights attached’) or should be excised for farming etc.
Customary rights

- ‘Adat’ used by Dutch to regulate ‘native’ affairs
- Adat communities recognised by Constitution
- But land rights only weakly recognised in 1960 Basic Agrarian Law
- Affirmed in UN treaties and UN Declaration on Rights of IPs
Weak or Absent Tenures

- Less than 40% of all properties in Indonesia have been titled (WB)
- Percentage is declining as holdings being created faster than BPN can register
- Extremely few *ulayat* (*collective* tenures) registered
- Some recognised through local legislative acts but not mapped or recorded
- Procedures for *ulayat* recognition are absent or not well known
- Rural people esp MA v. vulnerable (3,500 land conflicts over oil palm)
Community mapping

- Maps can show not just the boundaries of use but also
- Land use zones
- Local names
- Customary rights areas
- Sacred sites
- Historical areas
Mapping ancestral territories

- Participatory maps help communities’ show their customary systems and histories of land use
- Such maps are powerful tools in FPIC processes to explain customary rights to governments and companies
Use rights or land rights?
Access to winter browse
Maps as negotiation tools
Local negotiation

- Working with Pygmy people in Rep. Congo in CIB logging concession
- Step by step negotiation in cutting zones
- Negotiation over which cutting blocks should be left out as crucial to livelihoods
- Which species should be left because they are valued
Who gives consent?

- Is the customary leadership enough?
- Indonesia: lack legal personality
- Guyana: colonial village administration now accepted
Social structures very varied: some ‘acephalous’, some hierarchical
Divided leadership: Pasaman Barat and PT PHP

- ‘Adat’ leadership divided
- Some pro and some contra
- Unclear which leaders have authority
- Divided leadership hinders community from strong negotiation with company
Complex *adat* structure

- Land is owned by women and by kindreds
- Kindreds (*kaum*) choose leaders
- Leaders hand land to government
- Government hands land to company
- Company gives plasma to KUD
- KUD gives plasma to KUD members
- Lots of room for manipulation
Challenges to participation

- Capacity
- Language
- Legal status
- Caste, class, status and gender divisions
Rule of thumb

- Sound consensus-based decisions emerge best from processes that:
  - Are iterative
  - And inclusive
  - Take time and allow interim offers to be taken back to community for discussion
  - Ensure right and resources for independent counsel (legal or NGO)
  - Allow scope for customary norms to be respected
  - Allow people to say ‘no’.
Free of what?
Prior to what?

- Proposal?
- Planning?
- Permits?
- Operations?
Consent by what process?
How long does it take?
Customary rights : customary laws
No to oil palm
Who provides the information?
Scoping: Are there any local communities in or using general area?

Yes
- Identify representative institutions

Will community consider plantation?

No
- No plantation

Yes
- Participatory mapping
- Participatory S & EIA
- Participatory HCV assessment

Provide information in right languages and forms
- Land overlaps
- Rightsholders
- Representation
- Impacts
- Benefits
- Finances
- Risks
- Legal implications
- Negotiation proposals

Do communities still wish to consider plantation?

No
- No plantation

Yes
- Negotiation process (see next page: cont.)
Negotiation process

Community consensus building

Allow communities to get legal & NGO advice

Are communities willing to enter agreement?

No

No plantation

Yes

Finalise written agreement

Get agreement endorsed by government and notary

Implement agreement

Participatory Monitoring

Plantation and all associated benefits and mitigations etc.

- Land deals
- Benefit sharing
- Compensation
- Mitigation
- Protections
- Financial arrangements
- Legal arrangements
- Dispute resolution
- Monitoring process
- Mechanisms for redress

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Who verifies FPIC was achieved?

- Certification bodies in FSC have not made FPIC requirement a ‘major’
- So instead of being failed for non-compliance companies are asked to make ‘corrective actions’ over coming years
- Result: Communities lose what little leverage the process gave them
Philippines: NCIP and 2006 FPIC Guidelines

- FPIC has become technical and procedural, very complex, increasingly weakened
- Guidelines do not conform with the definition of FPIC
- It unduly imposes government standards and policies
- Shifts the burden to the Indigenous Peoples to substantiate their rights to ancestral domains
FPIC and REDD

- CCBA, CARE, UNREDD require FPIC
- World Bank FCPF Charter requires respect for countries’ international obligations (but OP, which requires only FPICOn now being replaced by SESAs)
- UNREDD and FCPF now being combined? Which standards will apply? Who and how accountable?
- Meanwhile numerous requests for simplified guidance
- Risks of making FPIC a ‘one stop shop’ stand alone with simplified check list instead of iterative and
- Instead of part of wider RBA to development
BHP, Ekati Diamond Mine
Lessons from Indonesia: FPIC works!

Obstacles:
- Lack of legal recognition of customary rights
- Replacement of customary institutions by a uniform village administrative system
- Unfettered exercise of the States’ ‘controlling power’ over natural resources
- Forestry laws which are applied as if the State owned all forests
- Patrimonial and un-transparent governance
- Repressive use of security forces by private sector

Achievements:
- Agreements have been (re)negotiated on good faith basis
- Oil palm companies have restituted lands to communities (Sambas)
- Compensation has been paid for damages (Sambas)
- Local governments to recognise community livelihoods in protection forests (Lewolema);
- Communities have been able to revitalise their customary institutions (Lusan).
Community land care
www.forestpeoples.org

Thank you