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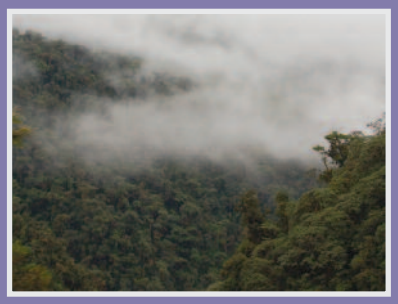

Free, Prior and Informed Consent

Making FPIC work for forests and peoples

Marcus Colchester

The Forests Dialogue (TFD)

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Scoping paper prepared for
TFD's FPIC Initiative

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Contents

Introduction

> 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.[1]

The shorthand phrase 'free, prior and informed consent,' and the acronym FPIC, refers to the right of indigenous peoples to give or withhold their free, prior and informed consent to proposed measures that will affect them. The right is affirmed in the UN Declaration on the Rights of Indigenous Peoples and in the jurisprudence of the international human rights treaty bodies including the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.

While the right itself is clearly affirmed, the practicalities for non-State parties to adhere to it are less clear and are to be the focus of a new dialogue stream of The Forests Dialogue (TFD). Agreed procedures for the application of the principle of FPIC are still evolving and in any case should vary according to legal and customary norms. Whereas in some countries, legal mechanisms for the recognition of indigenous rights are well developed in others there is a lack of clarity about the extent of the areas over which the right to FPIC should be exercised, owing to a lack of precision about which areas are subject to indigenous rights and / or because countries have plural legal regimes. The forthcoming TFD dialogue stream will aim to develop answers to such challenges.

FPIC has already emerged as a core theme in several of TFD's prior dialogue streams. The issue first came to the fore in TFD's dialogue stream on Intensively Managed Planted Forests, which in reviewing experiences in Indonesia, China and Brazil found that plantations often expand onto the customary lands of indigenous peoples' and local communities. Due to a lack of statutory recognition of these peoples' rights, serious land conflicts have become common. The multi-stakeholder dialogue stream concluded that companies should recognise customary rights in land and ensure that plantations do not expand onto such peoples' customary lands without the free, prior and informed consent of the customary owners.[2]

One outcome of this dialogue was that TFD commissioned a review of company best practice to assess what forestry companies were actually doing to resolve conflicts, particularly over land. FPIC emerged from the study as an acknowledged 'best practice' that companies should use to avoid conflicts. Moreover, the study found, the rights-based negotiation approach required to respect FPIC, when applied retrospectively, can also help resolve existing land conflicts by allowing renegotiations and the settlement of disputes.[3]

During more recent TFD dialogues, consensus has likewise built that respect for the right to FPIC is crucial for effectiveness in **R**educing **E**missions from **D**eforestation and Forest **D**egradation (REDD).[4] The principle was highlighted in the TFD's *Statement on Forests and Climate Change*,[5] which set out a broadly shared view of how forests should be incorporated into climate mitigation practices. The ensuing dialogue stream on REDD financing stressed the importance of safeguarding indigenous peoples' rights and adhering to the principle of FPIC.[6] Likewise FPIC has emerged as a key principle in providing an effective framework for those Investing in Locally Controlled Forests.[7]

So far, so good. But given that recognition of the right to FPIC is most vital when statutory law and forest governance is weak, much more guidance is needed on how to respect this right in practice. In recognition of this gap, TFD has decided to go ahead with a further dialogue stream specifically to address these practical challenges.

This scoping paper is a first contribution to this new dialogue stream. Rather than being intended to answer, or lay to rest, issues of contention, it is written in such as way as to open up contentious and challenging issues for discussion, to highlight areas where there are already different views, summarise some of the lessons learned and to provide some basic lines of enquiry as the dialogue stream begins to engage with national and local interlocutors, including in particular indigenous peoples. It is not intended to be a full and final treatment of the issue, which is in any case impossible, as respect for the right to Free, Prior and Informed Consent is a rapidly evolving field where laws, norms and practices are in a dynamic phase of definition.[8]

The Legal Basis for FPIC

The right of indigenous peoples to give or withhold their free, prior and informed consent to measures that may affect them is most usefully seen as an expression of the right to self-determination. Recognition that indigenous peoples, like all other peoples, enjoy this right has been a long time coming and efforts to secure recognition of this right can be variously dated back to the time the Haudenoshonee first came to claim their rights before the League of Nations in the 1920s or to 1977 when US indigenous peoples first took their concerns to the UN Human Rights Commission and sought access to its Decolonization Committee. Although this access was rebuffed, it led to the UN setting up a special 'working group on indigenous populations' which worked for over 20 years to elaborate human rights standards suited to the particular circumstances of indigenous peoples. This process culminated after thirty years of intense debates in the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007, but during these years it also stimulated the UN treaty bodies, which review the application of the UN human rights conventions in practice, to clarify how human rights apply to the special circumstances of indigenous peoples.

Parallel to the UN process, the International Labour Organisation also evolved standards with respect to indigenous peoples. After first developing standards designed to free indigenous people from slavery-like conditions in the 1920s, in 1957, the ILO adopted a Convention on Indigenous and Tribal Populations [9] which recognised for the first time in international law that indigenous peoples' rights in land derive from custom and are independent of any act of the State which they may in any case precede.[10]

The 1957 Convention had an assimilationist intent and was aimed at securing indigenous peoples' rights as an interim protective measure while such peoples were gradually incorporated into the national mainstream. By the 1980s, it was recognised that this approach was no longer appropriate, considering the developments in international human rights laws which had since taken place and the need recognise the aspirations of such peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions. Accordingly, noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives had often been eroded, in 1989, the International Labour Organisation adopted a revised Convention on Indigenous and Tribal Peoples in Independent Countries,[11] which in Article 6 notes that, 'in applying the provisions of this Convention, governments shall':

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Meanwhile the UN treaty bodies continued their review of how international human rights standards should be applied in particular local and national circumstances. After over a decade of such work and observing that indigenous peoples have and continue to suffer from discrimination, and 'in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,'[12] in 1997 the Committee on the Elimination of Racial Discrimination issued General Recommendations on how states-parties should apply the provisions of international law to indigenous peoples in order to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.'[13]

In 2001, the UN Committee on Economic, Social and Cultural Rights noted 'with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem.'[14] It then recommended that the state 'ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned …'[15]

The Inter-American Commission on Human Rights (IACHR) has found that Inter-American human rights law requires 'special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.'[16] The IACHR stated that this right is part of a number of 'general international legal principles applicable in the context of indigenous human rights.'[17]

In 2003, the IACHR stated that

> *Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and*

> *used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.*[18]

Crucially, in this case, the IACHR observed that Inter-American human rights jurisprudence 'has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.'[19]

Since then these committees have continued to insist on the need to respect the right of indigenous peoples to free, prior and informed consent, as have regional human rights bodies such as the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights.[20] In 2009, for example, the Human Rights Committee, in its case law under the Optional Protocol I, held that where indigenous peoples or minority communities with strong attachments to land face activities that 'substantially compromise or interfere with the culturally significant economic activities,' 'participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.'[21]

In September 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples.[22] The Declaration sets out what it describes as the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. The Declaration codifies a series of mostly extant and a few emerging norms regarding indigenous peoples which had evolved along the lines noted above. The Declaration not only clearly articulates indigenous peoples' right to FPIC but also affirms related rights including indigenous peoples' right: to be represented through their own institutions; to exercise customary law; to the ownership of the lands, territories and natural resources that they traditionally own or otherwise occupy or use; to self-identification; and, more fundamentally, to self-determination.[23]

The UN Declaration on Indigenous Peoples thus recognised that, like other peoples whose rights to self-determination are enshrined in common article 1 of the UN Covenants of Civil and Political Rights and on Economic, Social and Cultural Rights:

> *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.

Article 19 of the Declaration notes that:

> 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.

Article 32 of the Declaration also notes that:

> 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, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Articles 41 and 42 of the Declaration call on UN agencies to contribute to the full realization of the rights set out in the Declaration through financial cooperation and technical assistance and promote full application of the provisions of the Declaration.[24] Accordingly, immediately following the General Assembly's adoption of the Declaration, the United Nations Development Group elaborated *Guidelines on Indigenous Peoples' Issues*, in which the right to FPIC as an expression of the right to self-determination is strongly emphasised.[25]

One of the most significant and detailed judgments of the human rights courts since the UNDRIP was adopted is the case of *Saramaka People v. Suriname*, which looked into the case of the Saramaka, a 'Maroon' people whose customary lands had been handed out to mining and logging companies without any regard for their rights.[26] The judgment affirmed that the property rights of indigenous and tribal peoples derive from custom and not from any act of the State. These property rights are exercised conjointly with the right to self-determination and their right 'to freely dispose of their natural wealth and resources,' meaning that indigenous and tribal peoples have the 'right to manage, distribute, and effectively control [their]… territory, in accordance with their customary laws and traditional

collective land tenure system'. The court ruled that in cases where the State proposes large-scale interventions that may affect indigenous and tribal peoples' lands and natural resources their free, prior and informed consent is required in accordance with their customs and traditions. The court also looked in detail at the institutions through which the State should consult with the Saamaka, as they prefer to call themselves. Rejecting the Government's suggestion that this could be done through their State-recognised headman, the court affirmed the right of the Saamaka to choose their own representatives and make decisions in line with their traditional methods of decision-making.[27]

The universality of the emerging jurisprudence on indigenous rights including their right to FPIC was further emphasised in a recent 'landmark' decision by the African Commission on Human and Peoples' rights, which affirmed the right of the Endorois pastoralists of Kenya to own their customary lands and to 'free, prior and informed consent', rights which were violated when they were removed from their lands to make way for a protected area. The decision invokes the UN Declaration on the Rights of Indigenous Peoples and draws on the findings of the Inter-American Court of Human Rights including the *Saramaka People* case. The case vindicates the right of all indigenous peoples to restitution of lands taken without their consent, in this case to create national parks and reserves. This right has also been previously asserted by the InterAmerican Court of Human Rights which finds that indigenous peoples have a right to restitution of traditionally owned lands which have been taken or lost without their consent including where title is presently vested in innocent third parties.[28]

The African Commission's decision is also in line with norms emerging from the Conference of Parties (COP) of the Convention on Biological Diversity. The 7th COP through Decision VII/28 of the Conference explicitly upholds the rights of indigenous peoples consistent with countries' obligations under international law, an approach that is reaffirmed in the Programme of Work on Protected Areas agreed at the same meeting.[29] The COP also adopted the Akwe: Kon Guidelines for the conduct of cultural, environmental and social impact assessments prior to developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by 'indigenous and local communities', which also require FPIC.[30] In *Saramaka People*, the Inter-American Court held that the Akwe: Kon Guidelines—as an example of international standards and best practice—should be used as part of satisfying states' obligations to conduct environmental and social impact assessments in the case of indigenous and tribal peoples.[31]

In sum, the right of indigenous peoples to FPIC has been clearly articulated through international law and jurisprudence and the UN Declaration on the Rights of Indigenous Peoples merely affirms this right. There remain legitimate questions about how this right is best recognised in the very varied circumstances in which indigenous peoples' find themselves.

FPIC and the Right to Development

Many of the objections to both indigenous rights in general and the right to Free, Prior and Informed Consent in particular have come from assertions that recognition of this right poses an obstacle to national development. If indigenous peoples are 'granted' the right to veto proposed developments that will affect them or affect their lands, territories and resource, it is claimed, then valuable opportunities for countries to emerge from poverty will be blocked. Indigenous peoples' right to FPIC, it is claimed, is an obstacle to the realisation of other people's right to development, an individual and group right that has also been recognised by the UN through the 1986 UN Declaration on the Right to Development.[32]

In this, however, human rights norms are clear. As the 1993 Vienna World Conference on Human Rights declared, 'while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.'[33] In the same way, Article 9 of the UN Declaration on the Right to Development itself makes clear that:

> *Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.*

Indeed far from being contrary to indigenous peoples' rights, the Declaration on the Right to Development notes in Article 1 that:

> *The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*

Thus, in the normal course of things, where private sector developers have proposals for the development of indigenous peoples' lands, recognition of their right to free, prior and informed consent does mean that indigenous peoples have the right to say 'yes' or 'no' to such proposals. Where they say 'no', such decisions should be respected.

However, the jurisprudence also clarifies that in 'exceptional circumstances' and where there is 'compelling public interest', the State may seek access to and use of indigenous territories and the resources therein, including water resources. In such cases, the State cannot simply invoke the public interest, but must also satisfy a number of additional requirements. Any acquisition of lands or use of those lands to exploit resources must be sanctioned by previously established law and in accordance with due process standards. The State must show that the intervention

is 'necessary' and has been designed to be the least restrictive from a human rights perspective. It must likewise show that the means employed are closely tailored to the goal and that the cost to, or impact on, the affected people is 'proportional' to the benefit being sought. And finally, the proposed intervention should not 'endanger their very survival as a people.'[34] In order to ensure 'survival as a people,' four additional elements are required: effective participation in decision-making, which includes FPIC; participatory environmental and social impact assessments that conform to international standards and best practice and are undertaken in a culturally appropriate manner; mandatory benefit-sharing; and, finally, that negative impacts are effectively avoided or mitigated.[35]

In sum, States cannot override indigenous peoples' rights and their right to FPIC just by invoking the national interest alone. Thus, in the case of the 1.8 million hectare Palm Oil Megaproject planned for central Borneo by the Indonesian government, the UN Committee on the Elimination of Racial Discrimination recommended that:

> *The State party should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee's general recommendation No. 23 (1997) on indigenous peoples… The Committee, while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples. The State party should review its laws, in particular Law No. 18 of 2004 on Plantations, as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands. While noting that the Kalimantan Border Oil Palm Mega-project is being subjected to further studies, the Committee recommends that the State party secure the possession and ownership rights of local communities before proceeding further with this plan. The State party should also ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in it.*[36]

In like vein the World Commission on Dams, in qualifying its recognition of the right of indigenous peoples to FPIC, noted that:

> *When a negotiated consensus cannot be achieved through good faith negotiations within the agreed-upon timeframe, the established independent dispute resolution mechanisms are initiated. These may include amicable dispute resolution, mediation, conciliation and/or arbitration. It is important that these are agreed upon by the stakeholder forum from the outset. Where a settlement does not emerge, the State will act as the final arbitrator, subject to judicial review.*[37]

Why Businesses Seek Consent

In previous TFD dialogues streams, the importance for companies of going beyond the minimal permitting requirements of national law to get a 'social licence to operate' has been a common theme. This recognition that companies have moral and ethical obligations which go beyond the minimal requirements of national laws, coincides with the views of others who have reviewed this matter.

Moreover, as the UN Commission on Human Rights has noted:

> *A Licence to operate from the State is not a sufficient condition for success. Companies need to pay as much attention to their social relations of production as they did to the physical, and to be as attuned to their social licence to operate from surrounding communities as they were to the legal.*[38]

Companies have thus developed codes of conduct and policies of corporate social responsibility in order to improve more than the image of their companies. The conviction of corporate leaders in this field is that building good relations with local communities and wider society makes good business sense, as the returns on investment and the overall comfort of the working environment will be thereby improved and the market profile of the company is also improved. Companies with reputations for corporate good conduct are perceived to be more reliable as business partners and suppliers, and a better bet for investors.

In this context, respect for indigenous peoples' right to Free, Prior and Informed Consent is not just a requirement in terms of international human rights law but is also good business sense. As the World Resource Institute has noted:

> *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.*[39]

Workshop discussions about Free, Prior and Informed Consent with companies that are members of the Roundtable on Sustainable Palm Oil, for example, have repeatedly noted that consent-based agreements are sought by companies as these are considered to be a sound investment against conflicts, which are now a major problem in the sector.[40] For example, in Sarawak, over 40 oil palm companies are currently in the courts as a result of land disputes with local communities whose customary rights in land were, it is alleged, not respected in the permitting of lands to companies.[41] Some of these disputes have led to companies, and their whole business groups being held up from getting certification.[42] In Indonesia, the palm oil

monitoring NGO, SawitWatch, which is a member of the RSPO Board, has documented 579 land disputes between companies and communities related to land.[43] The actual situation may be worse. At a public meeting of the RSPO held in Kuala Lumpur on the 1st November 2009, a representative of the Indonesian government's National Land Bureau (BPN) claimed that there are some 3,500 oil palm related land disputes in the country. Detailed field studies show that for the large part these disputes stem from land acquisition processes which allow the takeover of indigenous peoples' lands without respect for their customary rights and without respect for their right to free, prior and informed consent.[44] Resolving and averting such conflicts is a major concern of RSPO member companies. As a study carried out for TFD shows, just the same logic explains why, among forestry sector companies, respect for the right to FPIC is seen as corporate best practice as a means of averting and resolving conflict.[45]

FPIC in Evolving Standards and Best Practice Norms

The World Bank was among the first development agencies to adopt a policy on indigenous peoples in 1983 and has since been through a series of revisions. The World Bank's current Operational Policy on Indigenous Peoples which was adopted in 2005 before the acceptance of the UN Declaration on the Rights of Indigenous Peoples, does not explicitly uphold the right of Indigenous Peoples to Free, Prior and Informed Consent, but instead refers to the need for the borrower to engage in a process of 'free, prior and informed consultations' leading to 'broad community support.'[46] The policy also requires the borrowers to make provisions to protect indigenous peoples' customary rights in land and proscribes any forced resettlement of indigenous peoples.[47] Projects for the commercial development of the cultural resources and knowledge of indigenous peoples are, however, 'conditional upon their prior agreement to such development.'[48] According to World Bank staff, this condition may also apply to other projects.[49]

The policy towards indigenous peoples of the private sector arm of the World Bank Group, the International Finance Corporation, differs slightly from the IBRD and IDA. While it similarly requires 'free, prior and informed consultations,' these are not required to lead to 'broad community support' but are interpreted as requiring 'good faith negotiation with and informed participation of indigenous peoples.' In the case of projects that may affect indigenous peoples' lands, clients are required to document indigenous peoples' 'informed participation and the successful outcome of the negotiation.'[50]

Respect for the right to FPIC has also been partially incorporated into the policies of three other international financial institutions. The Asian Development Bank's new policy on indigenous peoples requires FPIC but defers to national legislation as the determining framework. The InterAmerican Development Bank's indigenous peoples' policy likewise requires consent in projects which will involve the resettlement of indigenous peoples. FPIC is also required of indigenous peoples by the EBRD and in the draft policy of the EIB.[51]

The international development agency which has gone furthest in recognising FPIC is the Rome-based International Fund for Agricultural Development (IFAD), which sees FPIC as integral to its strategic objectives of enhancing the capabilities of the poor and improving access to natural resources and financial services and markets, while attending to the vulnerability of certain target groups.[52] IFAD emphasises the need for legal support and capacity building with indigenous peoples to make enjoyment of the right to FPIC effective and makes respect for FPIC a criterion of project approval.[53]

The Voluntary Approach

Given the slow progress in getting governments to effectively enforce laws protecting the rights of indigenous peoples and even to protect valuable ecosystems, increasingly attention has focused on the promotion of voluntary approaches to promote 'best practice' through industry self-regulation. Such approaches include the promotion of 'corporate social responsibility' and the adoption of internal 'codes of conduct'. Companies as varied as the US oil exploration company Talisman Oil and the Singapore-based pulp-and-paper giant, APRIL, have made public statements endorsing FPIC.[54] Private Sector Banks that have endorsed the Equator Principles have likewise agreed to adhere to the International Finance Corporation's Performance Standards in all project lending.[55]

Recent years have also seen the proliferation of so-called 'multi-stakeholder' dialogues and standard-setting processes, which are designed to bridge the gulf between civil society and indigenous parties on the one hand and corporate actors on the other. Most of these 'multi-stakeholder processes' have accepted the principle that indigenous peoples and other customary law communities have the right to give or withhold their free, prior and informed consent for activities planned on their lands. Notionally, these processes also ensure that companies' adherence to best practice are subject to checks, sometimes through 'third party verification' under increasingly popular certification schemes. These processes can create important political space for indigenous peoples to engage with the private sector, providing them with safer and more transparent fora than the often manipulated and intimidatory situations available back home. Nonetheless, there have been serious problems with ensuring that third-party certification bodies genuinely uphold rights.[56]

The Roundtable on Sustainable Palm Oil has gone further than most in upholding the right to FPIC. In 2008, the RSPO commissioned a series of workshops between industry, government and indigenous peoples to review their understanding of how an FPIC-based process should work and to develop a guide for companies in how to adhere to FPIC in line with the RSPO's Principles and Criteria.[57] The Guide explicitly acknowledges the right of indigenous peoples to reject projects on their lands. Retrospective application of this standard to resolve land disputes has even led oil palm companies owned by the Wilmar Group, that is a member of the RSPO

and the world's largest palm oil trading company, to return disputed land to communities and compensate them for damages caused. Very similar standards are now being adopted by the Roundtable on Responsible Soy[58] and the Roundtable on Sustainable Biofuels.[59]

FPIC has also come to the fore in forest sector policies. The Principles and Criteria of the Forest Stewardship Council adopted in 1993 prior to the WCD already required companies to get the 'free and informed consent' of indigenous peoples before logging indigenous peoples' lands.[60] As noted above, respect for the right to FPIC has been recognised as 'best practice' in the establishment of timber plantations by The Forests Dialogue, a forum which includes the World Business Council for Sustainable Development.[61] FPIC has been affirmed as an optimal way to avoid conflicts between forestry companies and indigenous peoples,[62] and reference to FPIC is made explicit in the FAO's Voluntary Guidelines for the Responsible Management of Planted Forests.[63]

Conservation policies have likewise endorsed FPIC. As early as 1996, the IUCN and WWF endorsed the then draft UN Declaration on the Rights of Indigenous Peoples and the right to FPIC has been explicitly endorsed through a series of Resolutions of the World Conservation Congress.[64] Conservationists have also agreed to restitute indigenous peoples for lands taken for protected areas without their consent.[65]

Not all sectors have made the same progress recognising FPIC. Notably, despite the strong recommendations of the World Bank's Extractive Industry Review, the mining sector has been very reluctant to make any industry-wide endorsement of FPIC. After several rounds of dialogue with indigenous peoples, the International Council on Mining and Metals issued a disappointing 'position statement' in 2008, which noted a commitment merely to 'seek agreement with indigenous peoples based on the principle of mutual benefit,' to be developed through participation and building 'long term partnerships.'[66] Indigenous peoples have characterised such policies as offering them the right to say 'yes!' but not the right to say 'no!' In 2009, the ICMM issued a consultation draft which recognises that in a 'growing number of countries' FPIC is required and suggests practical means of achieving this in cases where it is legally required by national law. However, the ICMM continues to shy away from general recognition of this right.[67] There has likewise been widespread criticism of the certification standard being developed by the Aquaculture Stewardship Council, which not only fails to endorse FPIC but has very weak provisions for securing peoples' livelihoods.[68]

Climate and Forests

International concern about global warming has led to intensified efforts to curb deforestation, especially of tropical forests. While international negotiations to agree a legal framework for reducing both climate change and deforestation have stalled,[69] wider efforts to set up a system for 'Reducing Emissions from Deforestation and Forest Degradation' have already been agreed and now promise developing countries substantial funds.[70] Only by persistent efforts have indigenous peoples managed to ensure that their voices are heard in these discussions and, despite World Bank efforts to clarify its approach,[71] it remains unclear to many concerned parties to what extent the World Bank, through its specialised funds, the Forest Carbon Partnership Facility and the Forest Investment Programme, will be able to ensure respect for indigenous peoples' rights, including their right to FPIC.[72] However, the realization that REDD projects will not likely be effective and certainly will not be just has been widely accepted. The UN REDD Programme, administered by the UN Development Programme, the UN Environment Programme and the FAO, has adopted a policy recognising FPIC,[73] in line with the standards of the UN Development Group. Likewise two voluntary standards being developed by the Community, Carbon and Biodiversity Alliance,[74] the second with CARE,[75] for the certification of voluntary REDD schemes and to guide government agencies implementing REDD, both include provisions for FPIC.

Challenges of Implementation

Respect for the right to FPIC implies informed, non-coercive negotiations between investors and companies or the government and indigenous peoples prior to plantations or logging operations being established on their customary lands. Ideally it ensures a level playing field between communities and the government or companies and, where it results in negotiated agreements, provides companies with greater security and less risky investments. FPIC also implies careful and participatory impact assessments, project design and benefit-sharing agreements. By establishing the basis on which equitable agreements between local communities and companies (and government) can be developed it can ensure that the legal and customary rights of indigenous peoples and other local rights-holders are respected and it ensures that they can negotiate on a fair basis to gain real benefits from proposed developments on their lands.

Although, FPIC has been adopted by international law and in the best practice standards in a number of sectors, it is also accepted that considerable practical obstacles remain to making this right effective. Consent-based dealings between companies and communities beg a number of questions. These include:

- Who has the right to FPIC?
- FPIC over what?
- Who gives consent?
- How is consent determined?
- Free of what?
- What constitutes 'prior' in the context of a permit-based process required under Statutory law?
- What detail of information can reasonably be provided to indigenous parties?
- What does 'free' mean for parties from very different backgrounds?
- How are any agreements that are reached made binding on both parties?
- What is the role of the government in such negotiations?
- How can fair processes be verified?

The following sections of this paper explore some of these dilemmas with the aim of explaining their context and contours rather than offering definitive answers, which it is hoped, the dialogue stream itself will shed light on.

Who has the Right to FPIC?

In line with the right of all peoples to self-determination, international law is explicit that indigenous and tribal peoples enjoy the right to give or to withhold their free prior and informed consent to activities or policies which may affect them. Just how far this right extends to other social groups remains a matter for legal clarification. Indigenous peoples are not the only social groups with ill-defined access to the resources that underpin their livelihoods and who suffer from being arbitrarily shunted aside in the name of development. All over Africa, the Middle East and in much of the rest of Asia, many communities have weakly recognised customary rights to their lands and yet, for a variety of reasons, not all these social groups identify themselves as 'tribal' or 'indigenous.'

Increasingly, the CBD, environmental advocacy organisations and development 'policy makers' refer to such social groups by the catch-all term 'local communities,'[76] a generic phrase which may include indigenous and tribal peoples, ethnic minorities, marginalised and remote villages, fisherfolk, pastoralists and rural settlements in general, and which has even been applied to

slum dwellers and other urban congregations. For example, the International Fund for Agricultural Development likewise recognises that FPIC is not only a right of Indigenous Peoples to be respected in its operations but it also the right of communities in general.[77]

The very wide use of the term 'communities' inevitably renders it legally imprecise. Clearly while all human beings are endowed with rights and all peoples have the right to self-determination, it does not follow that all kinds of social groups enjoy exactly the same collective rights *vis a vis* the State to control their lands, cultures and livelihoods.

What is least clear, in the assertion that the right to free, prior and informed consent extends to other kinds of communities, is the determination of who should express this consent in dealings with outside agencies or the government. If non-indigenous peoples are to be represented by local government, how does recognition of the right to free, prior and informed consent differ from policies of decentralization? Emerging norms and further jurisprudence may be needed to clarify these matters.

FPIC over What?

As the UN Declaration on the Rights of Indigenous Peoples makes clear, indigenous peoples have the right to FPIC not only over their territories, lands and natural resources but also in respect to 'legislative or administrative measures that may affect them.'[78] However, for the members of The Forests Dialogue, the most important issue to clarify is the extent of the land, territories and resources over which the indigenous peoples may exercise this right.

Because indigenous peoples' rights to their territories, lands and natural resources derive from custom and are to be recognised independent of whether the State has recognised them or not, there are often difficulties establishing the full extent of such areas, especially as peoples move and boundaries shift over time. One of the best ways of clarifying the current and historical extent of customary rights is through participatory mapping. Using geomatic technologies, like GPS, it is now relatively cheap, quick and simple for community members to map the boundaries of their lands and indicate which areas are important to them for various purposes.

Participatory mapping using GPS and GIS has been widely applied in indigenous peoples' areas since the late 1980s and networks of indigenous organisations and NGOs now exist of people who are practised in the use of this technology. A lot of lessons have been learned as a result of these experiences.[79] Among the most important are:

- The maps should be made with the full awareness and agreement, and under the control of, the communities involved

- The community members should be involved in all stages of the mapping from deciding what information is relevant, through gathering the information in the field, to recording and displaying the information on the base maps.
- Record both land uses and boundaries, wherever possible. Put the indigenous peoples' own location names, land use categories and terms for vegetation types onto the maps
- Ensure that all generations are involved. Elders are often the most knowledgeable about sites of historical and cultural importance.
- Involve both men and women in mapping. Men and women tend to use lands and resources differently—both systems are valid and need protection
- Where two or more ethnic groups use the same area, involve both in the mapping. Both have rights. Asserting the rights of only one group is likely to lead to conflict.
- Involve neighbouring communities in mapping boundaries that run alongside their lands. If boundaries are later disputed by neighbours, further conflicts may arise.
- Neighbouring communities may share an open boundary, whereby certain land use activities of one community are permitted on territory otherwise controlled by the other community and visa versa. In many cases, detailed boundaries have not been established. Mapping efforts should not force a fixed boundary between community lands where one does not exist.
- Ensure that draft maps are carefully checked over by community members and neighbouring groups, and revised if necessary, before being used in Free, Prior and Informed Consent negotiations.
- Take measures to protect the use of the information, so it is not misrepresented or distorted by other interests.

Who Gives Consent?

While international law is now clear that indigenous peoples have the right to represent themselves through their own institutions, there remains room for confusion even among the people themselves about just who best represents indigenous peoples in specific places and specific circumstances. Some indigenous societies consciously disfavour particular persons from assuming positions of authority over others. In such societies, even village headmen lead only by example and are followed only out of respect, not because they are considered to have the right to command obedience.[80] Decisions in such societies may thus be made collectively, through long discussions among all community members who are interested, and it may take days even weeks before consensus emerges. Or consensus may not even be achieved and disagreements may result in fission of the group, whereby disagreeing parties just split up and go their separate ways.[81]

By contrast, many South East Asian agrarian societies have highly developed hierarchies in which hereditary authorities are vested with power over families and lands and may even play a large part in the settlement of disputes and the application of customary law. In such societies, it may be all too easy to identify who represents the community but it may be much less clear that customarily such leaders are expected to exercise their power in line with societies' ethical norms and rules and subject to less visible checks and balances.

For outside agencies seeking to deal with legitimate community representatives both kinds of societies may entail complexities. When dealing with hierarchical societies, there is a notable tendency for companies and government officials to treat such leaders as if they were autocrats exercising untrammelled power. Self-interested leaders may then be tempted into making decisions that exclude the interests of other sections of their own communities, which then results in conflict at a later stage, often within the communities. On the other hand, for communities where power is very diffuse and consensus building not the norm, the lack of customary systems for achieving consensus and making binding decisions that require obedience from group members, does pose challenges both to them and to the outside agencies seeking to reach clear agreements.

Most indigenous peoples have now had a long history of interaction with national societies and colonial powers and these interactions have changed these peoples' institutions, sometimes radically. Some customary institutions may have been occluded, new institutions may have been imposed, novel hybrid organisations may have evolved. New indigenous NGOs may have been legally registered. Indigenous business groups may also have been incorporated. Any or all of these may now be accepted by the communities as representing them.

A basic principle that underpins international human rights law and which is upheld by the UN Declaration on the Rights of Indigenous Peoples is the principle of non-discrimination. Yet it is

also the case that some, arguably many, indigenous societies discriminate against women. It is not unusual for societies to limit the exercise of formal political authority to men and it may be considered quite normal to exclude women from meetings with outsiders. Although there are often complementary mechanisms by which women in such societies exercise influence over their menfolk and thus enjoy less unequal status than at first appears, nevertheless there are real risks that decision-making between outsiders and formal village authorities can disadvantage women. The emerging norm, already being piloted by IFAD and UNREDD for example, is for developers to take additional measures to ensure the inclusion of women in discussions, in parallel or separate from other meetings and to take measures to ensure that such issues are taken into account in decision-making.

The rule of thumb that best serves in all such situations is that sound, consensus-based decisions emerge best from processes that are iterative, inclusive and take time.

Free of What?

A fundamental principle for fair decision-making in line with the right to FPIC is that all forms of participation should be free of coercion, whether physical or mental. Yet the problematic reality in many developing country situations particularly on the 'resource frontiers' is that the administrative capacity of the State is quite limited and there may be an absence of the rule the law. Opportunities for free assembly and freedom of expression can be limited and intimidatory, bodies exercising extra-legal powers may be commonplace and may be linked to non-state actors, such as gangs, religious or political insurgencies and rebel movements, as well as state agencies and corporate interests.

In such circumstances, many corporations employ their own security forces or recruit state security forces to oversee their affairs. In Indonesia, for example, it is not unusual for natural resource development companies to have contracts with the armed forces and or with the local police, and such contracts are in fact essential for these forces as only about one third of their budgets come from state appropriations.

These kinds of realities make it hard to define blanket norms that are both acceptable to all parties engaged or seeking to engage in negotiations and optimise security, allow peaceful assembly and ensure there is no intimidation in decision-making.

Prior to What?

Getting access to lands and natural resources for private sector development is always a long process. Doing this in ways that are at the same time:

- open and transparent and respect the rights of indigenous peoples and local communities;
- obedient to state permitting procedures and;
- yet which do not disadvantage companies in relation to their commercial competitors;

is a three way stretch that is not easily balanced.

For example, it has become common practice, once promoted by institutions such as the World Bank, for logging concessions to be allocated to companies through competitive public auctions, as a means of avoiding graft. Yet, exactly because State forestry laws may ignore communities' customary rights, this approach then places companies which acquire concessions in this way in a very difficult position vis a vis the local communities whose right to prior consent was automatically abridged through this procedure. While companies choosing to respect voluntary standards above the laws can offer to negotiate openly with the communities after they have so acquired permits, the fact is that communities are placed in a position of considerable disadvantage in such circumstances. By legal process, their lands have been auctioned or handed away without their consent and their leverage in any subsequent negotiations with the company has been substantially weakened.

Processes of Giving Consent

The international laws and jurisprudence, summarised in section 1, emphasises that decision-making should observe customary norms and respect customary laws. Summarising from a review of numerous experiences with FPIC-based processes worldwide, FPP has recommended that negotiation processes should also accommodate the following norms:

- be iterative engagements not one off decisions
- allow community negotiators time to bring interim agreements back to their communities for wider discussion before further engagement
- ensure that communities have the liberty and the resources to engage independent counsel such as NGOs or lawyers

- allow enough time for the inclusive engagement of all community members.
- explicitly allow communities to say 'no' at any point in the negotiations.[82]

One of the most common complaints against processes designed to forge agreements between indigenous peoples and companies, is that procedures have been too hasty and have prevented representatives from building community consensus before final agreements are announced. This can result in other community members then challenging the legitimacy of the agreements reached with both their own leaders and with the companies involved. The moral would seem to be 'more haste, less speed.'

Who Provides the Information?

A further fundamental aspect of FPIC is, of course, the full provision of adequate information in forms and languages that allow affected peoples to make informed choices and decisions. Discussions of this criterion rightly give emphasis to the obligations of the developer or proponent of change to provide all the necessary information about their plans including such issues as likely costs and benefits, impacts and mitigation plans, legal implications, compensation schemes, and proposed payments for any transfers of rights.

Large scale developments usually require social and environmental impact assessments by law and provide a good opportunity, when carried out in a participatory manner, to ensure information gathered in assessments has the right baselines and look into issues of importance to local communities.

What too often gets left out of such discussion however is the importance of information sharing being a two way process. Communities' own systems of land tenure and land management, their cultural and religious links with the land, the presence of sacred sites and areas of cultural importance all need to be brought to the fore both in community decision-making and in impact assessments. The Akwe: Kon Guidelines, referenced above, provide details of best practice.

How are Agreements made Binding?

Where FPIC agreements are achieved, a normal conclusion, often required by custom, is that this is celebrated in a formal ceremony in which parties pledge to uphold the agreement and to hold the other party to account. It is the custom in 'Western' societies to solemnize such occasions by publicly signing and witnessing the agreement. In civil law countries it may also

be a requirement to get such documents notarised to make them legally binding. A widespread norm is that such agreements are made binding by invoking supernatural powers such as by oath on a religious text, through prayer, by ritual or by the invocation of tutelary spirits. The importance of such events and their legal significance in customary law should not be underestimated, and yet they are also open to abuse and misunderstanding.

More problematic however are the legal and juridical obstacles to ensuring such agreements are in fact binding and upheld. It is a common situation that indigenous peoples' institutions lack legal personality in national law. In many countries, indigenous peoples are not even recognised or registered as citizens. The rule of law may be absent and the independence of the judiciary may be in question. Such circumstances reinforce the importance of respecting customary laws and honouring customary systems for maintaining agreements.

What Happens after the Agreements?

Best practice norms likewise emphasise that FPIC does not end with an agreement. Once an agreement is reached, the next phase is to ensure that parties' mutual obligations are implemented and confidence in this is best secured by establishing a mutually accepted body to monitor and evaluate implementation.

Also because no agreement can foresee all outcomes it is recommended that mutually agreed grievance procedures are set up in advance so that difficulties in implementation and minor infractions of agreements can be resolved before they become grounds for serious disputes.

Potentially, this can be one of the greatest strengths of an FPIC-based process. Under favourable circumstances, the iterative nature of prior negotiations will have engendered mutual understanding and a measure of trust between negotiating parties. Consent-based management should ideally be followed for the duration of the project or development ensuring that any challenges and problems get addressed in ways mutually acceptable to both parties.

How can FPIC be Verified?

Where FPIC is required by national laws or by voluntary certification schemes, it may be a requirement that the FPIC process is independently verified. By reviewing available or required documentation and by interviewing randomly selected members from the parties involved, independent assessors can form a view of whether the processes pursued were genuinely free, prior and informed and whether consent was given through inclusive engagement, and in ways accepted by the people concerned.

It is important to note however that there have been serious problems with such verification processes. In the Philippines, the FPIC of indigenous peoples is required under both the Indigenous Peoples' Rights Act and the Mining Code. To ensure that FPIC is upheld, the National Commission of Indigenous Peoples, the statutory authority overseeing indigenous affairs, has developed regulations for its implementation which have been sharply criticised by indigenous peoples for turning FPIC into a formality that is no longer based on customary laws and which is commonly carried out in violation of indigenous peoples' rights to represent themselves through their own representative institutions. Indigenous peoples complain that mining developments have frequently manipulated FPIC procedures to gain access to resources.[83] It is further alleged that the FPIC certificates that companies are required to obtain from the Regional Director of the National Commission on Indigenous Peoples are sometimes given out without being based on an adequate review of whether procedures have been duly followed and without checking with the communities. There are obvious risks that such processes are open to abuse.

The alternative approach of third party verification of compliance by independent auditors has also experienced some difficulties. It has been noted that although the Principles and Criteria of the Forest Stewardship Council require companies to obtain free and informed consent from indigenous peoples to operate on their customary lands, in practice it transpires that companies which have failed to get such consent have nevertheless been certified. This is because the failure to get consent is not mandatorily considered to be a 'major failure' but may instead be considered a 'minor non-compliance,' to be put right by complying with a 'corrective action request' issued by the certification body. The company can thus go ahead with its logging or plantation operations while it seeks to make good the deficiency through further negotiation with the communities involved. However, such a process does much to undermine the negotiating position of the communities in dealing with the company. In effect their eventual assent is being taken for granted.[84]

Finally, the Good News: FPIC Works!

In Indonesia, there have now been multiple experiments with applying FPIC in a wide variety of sectors including logging, pulp-wood plantations, protection forests, oil palm development, conservation and now REDD. The cases reveal the multiple obstacles in national law, policy and practice which hinder easy adherence to the right. These include: discriminatory laws which offer less protection to customary rights than are provided individual landowners;[85] the systematic replacement of customary institutions by a uniform village administrative system; the States' exercise of its constitutionally asserted 'controlling power' over natural resources often in the absence of due process for compensation or redress; forestry laws which extend the jurisdiction of the forestry department over 70% of the country, which then treats all such areas as if they were State-owned even though they have not been gazetted;[86] and patrimonial traditions of governance which are untransparent, often repressive and where rent-seeking is the norm.[87]

Notwithstanding these formidable obstacles, NGO-supported efforts to support customary communities' assertion of their right to FPIC through awareness-raising, human rights training, assistance with participatory mapping and negotiation support have met with some success and have: led oil palm companies to restitute lands to communities and provide compensation for damages; persuaded local governments to recognise community livelihoods in protection forests; and in some cases helped communities revitalise their customary institutions.[88]

The lessons from Indonesia are important. Even where the political and social situation is unhelpful, strong social mobilisation and the application of a rights-based approach based on international law can secure fair or at least improved outcomes.[89] Indeed in contrast to the Philippines, it may be that the very absence of State intrusion into such local decision-making in part at least explains these 'successes.'

Annex 1: 'Fracture Lines' Identified in the Concept Note for this Dialogue Stream

Previous studies and discussions about FPIC have identified a number of legal, commercial and social obstacles to its implementation. Applying the principle of FPIC in practice is a challenging task. Because parties concerned come from different backgrounds conflicts naturally arise between them over important issues. The FPIC dialogue will attempt to accommodate differences of opinion and, most importantly, focus on the following areas of 'fracture lines' that need to be surmounted to make recognition of the right to FPIC effective:

- **FPIC and national law:** FPIC is a requirement of international law but is often only weakly accommodated by national statutory laws.
- **Plural legal regimes:** many countries have plural, legal regimes and accept that the customary laws of indigenous peoples have jurisdiction over community affairs. Clear recognition of land rights and tenure are central to FPIC.
- **IFI positions:** International Financial Institutions have divergent standards with respect to indigenous peoples and the right to Free, Prior and Informed Consent, which largely reflect the date at which they were incorporated but also different regional sensitivities. World Bank staff, for example, have expressed the intent to request the Board to accept a revised the Operational Policy on indigenous peoples to recognise FPIC. Consultations on this were expected in the second half of 2010 but are now postponed.
- **Government and company responsibilities:** observation of international human rights is the responsibility of government while the human rights obligations of companies are less clear. Forestry operations are commonly licensed by government agencies with responsibilities to hand out permits for logging and plantations, while different State agencies are meant to register land titles and others meant to deal with indigenous peoples' claims. Companies thus often find they have been granted concessions to which rights are contested.
- **Determining the extent of indigenous rights:** especially in areas where property rights or (other) customary rights have not been clarified, the extent of the areas over which the right to FPIC should be exercised by indigenous peoples is often unclear. Short of suspending all forestry operations until land claims have been settled what practical methods can be agreed between companies and peoples to achieve workable agreements?
- **Culturally appropriate decision-making:** who are the peoples own representative institutions enjoined by international norms and how can outside players be sure they are respecting customary or accepted mechanisms of community decision-making?

- **Engineering consent:** How do communities ensure independent decision-making given the widespread experience documented in previous reviews of FPIC in the mining and dams sectors, that FPIC results are often 'engineered.'
- **Elite capture:** Case studies show that community elites may make decisions that favour their own interests at the expense of wider community concerns and demands. What processes can be built in to FPIC procedures to ensure that decisions taken by leaders are genuinely representative?
- **Community capacity and awareness:** Engagement in negotiations and FPIC based procedures is a major undertaking for all concerned and may often exceed the capacity of local communities and other actors. How can affected communities get the assistance that they need to deal with third parties without losing their autonomy of action?
- **IPs and other communities:** The right to FPIC has been strongly affirmed as a right of indigenous peoples (based on its derivation from the right of all peoples to self-determination). Yet other affected communities are now also claiming the same right. Do they have such a right? And if so, what does exercise of the right to FPIC mean for such other communities who also depend on lands and forests?
- **Boundaries on consent:** some groups have started to discuss the application of FPIC for projects located outside Indigenous lands, but that could affect them in any way. Other groups defend that projects in any private property must have the FPIC from the owners in the same way that a project carried out within indigenous lands.
- **Dealing with past grievances:** Many forestry projects have inherited, or in the past may have contributed to, conflicts with indigenous peoples and local communities. Frameworks are needed to rebuild trust and address past grievances. Options include mitigation, compensation, apologies and enhancement programmes.

Endnotes

1 Moses 2000.

2 Kanowski and Murray et al. 2008.

3 Wilson 2009.

4 In the Bali Action Plan REDD is defined as including Reducing Enissions from Deforestation, Reducing Emissions from Forest Degradation, Conservation of Forest Carbon Stocks, Sustainable management of Forests and Enhancement of Forest Carbon Stocks.

5 TFD 2009.

6 http://environment.yale.edu/tfd/uploads/Investing_In_REDD-Plus_en_TFD_Recommendations.pdf

7 http://environment.yale.edu/tfd/uploads/TFD_ILCF_Panama_CoChair_Summary_1.pdf

8 This paper draws on Cariño and Colchester 2010.

9 http://www.ilo.org/ilolex/english/convdisp1.htm

10 Bennett 1978.

11 ILO Convention 169: http://www.ilo.org/ilolex/english/convdisp1.htm

12 *General Recommendation XXIII (51) concerning Indigenous Peoples.* Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

13 CERD/C/51/Misc.13/Rev.4 at para. 4(d).

14 *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001.* E/C.12/Add. 1/74, at para. 12

15 Id., at para. 33.

16 Inter-American Commission of Human Rights, *Report Nº 75/02*, Case Nº 11.140, Mary and Carrie Dann (United States), Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 131. See, also, in accord, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 116.

17 Id., at para. 130. (footnotes omitted).

18 *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, at para. 141 (footnotes omitted).

19 Id., at para. 116 (footnotes omitted).

20 Saramaka People v. Suriname, Inter-American Court of Human Rights, Judgment of 28 November 2007. Ser C No. 172 (see also Saramaka People, Interpretation Judgment, Ser C No. 185); and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, February 2010, at para. 226, available at

http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html.

21 *Ángela Poma Poma v. Peru*, Communication No. 1457/2006. UN Doc. CCPR/C/95/D/1457/2006, 24th April 2009, para. 7.6 (in relation to 'the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community…').

22 Commentators on a draft of this article have pointed out that four governments voted against the Declaration, others abstained and still others placed on the record reservations about how they thought the Declaration should be interpreted or applied. This is true. It is also true that a number of governments that originally voted against the Declaration have since made statements or passed legislation in support of it.

23 UNDRIP 2007.

24 UNDRIP 2007, Articles 41 and 42.

25 UNDG 2008.

26 MacKay 2009.

27 MacKay 2009.

28 *See Yakye Axa Indigenous Community Case*, Inter-American Court of Human Rights, 17 June 2005, Series C No 125; and *Sawhoyamaxa Indigenous Community Case*, Inter-American Court of Human Rights, 29 March 2006, Series C No. 146.

29 CBD 2005.

30 The Akwe: Kon guidelines may be found at http://www.biodiv.org/doc/publications/akwe-brochureen.pdf

31 *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12th August 2008. Series C No. 185, at para. 41.

32 *UN Declaration on the Right to Development*. UN Doc. A/RES/41/128 4th December 1986.

33 *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993.

34 'Survival' in this context "must be understood as the ability of the Saramaka to 'preserve, protect and guarantee the special relationship that they have with their territory,' so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected.' That is, the term survival in this context signifies much more than physical survival." Saramaka People, Interpretation Judgment, para. 37

35 MacKay 2009.

36 UN Doc. CERD/C/IDN/CO/3 15th August 2007.

37 WCD 2000:281.

38 UN doc. E/CN.4/2006/92 page 5.

39 WRI 2006.

40 www.rspo.org

41 Colchester, Wee, Wong and Jalong 2007.

42 For example, a company in the IOI group has been delayed from getting RSPO certification for its plantation in Sabah because of a land dispute concerning a sister company in Sarawak.

43 Norman Jiwan pers. comm. February 2009.

44 Colchester et al. 2006; Afrizal 2006.

45 Wilson 2009.

46 World Bank, 2007, Indigenous Peoples. Operational Policy 4.10, July 2005 available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html

47 FPP 2007.

48 OP 4.10 at para 19.

49 Comments from World Bank on draft paper.

50 IFC 2006; FPP 2008. Somewhat bizarrely, under its separate Sustainability Policy, the IFC requires 'broad community support' for projects that may have a significant impact on indigenous peoples but which do not involve use of the peoples' lands and resources.

51 IFAD 2008.

52 IFAD 2005.

53 IFAD 2009.

54 FPP and Scale Up 2009.

55 FPP 2006.

56 Colchester and Ferrari 2007.

57 FPP 2008a.

58 RTRS 2009.

59 RSB 2009.

60 Colchester et al 2003.

61 Kanowski and Murray et. al. 2008.

62 Wilson 2009.

63 FAO 2006.

64 FPP 2008b; FPP 2008c.

65 http: //cmsdata.iucn.org/downloads/durbanaccorden.pdf

66 ICMM 2008.

67 ICMM 2009:2,19.

68 See www.forestpeoples.org newsletter April 2010.

69 Martone 2010.

70 Griffiths with Martone 2009.

71 Di Leva 2010.

72 FPP 2009a; FPP 2009b.

73 UNREDD, 2009a, 2009b.

74 CCBA 2008.

75 CCBA and CARE 2010.

76 For example WRI 2006.

77 IFAD 2008.

78 UNDRIP Article 19.

79 This section derives from FPP 2007.
http://www.forestpeoples.org/documents/law_hr/fpic_and_rspo_companies_guide_oct08_eng.pdf

80 Colchester 1995.

81 Turnbull 1965; 1966.

82 For more detailed guidance see: WCD 2000, Colchester and Ferrari 2007; FPP 2007.

83 Presentations by LRC to the Cibodas conference. Press release *Lumads underscore NCIP's FPIC Guidelines as facilitator of development aggression*, LRC Cagayan de Oro, Mindanao, 12th March 2010.

84 Colchester and Ferrari 2007.

85 Colchester, Sirait and Wijardjo 2003

86 Contreras-Hermosilla and Fay 2005.

87 Dauvergne 1997; 2001.

88 Public presentations to the AMAN, FPP, JKPP National Workshop on FPIC, Jakarta, 14th–15th March 2010; see also Pusaka 2009.

89 Afrizal 2006.

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Founded in 1990, **Forest Peoples Programme** (FPP) advocates an alternative vision of how forests should be managed and controlled, based on respect for the rights of the peoples who know them best. We work with forest peoples in South America, Central Africa, and South and South East Asia to help these communities secure their rights, build up their own organisations and negotiate with governments and companies as to how economic development and conservation is best achieved on their lands. Through advocacy, practical projects and capacity building, FPP helps forest peoples deal with the outside powers that shape their lives and futures.

The Forests Dialogue (TFD), formed in 1999, is an outgrowth of dialogues and activities that began separately under the auspices of the World Business Council for Sustainable Development, The World Bank, the International Institute for Environment and Development, and the World Resources Institute. These initiatives converged to create TFD when these leaders agreed that there needed to be a unique, civil society driven, on-going, international multi-stakeholder dialogue forum to address important global forestry issues.

TFD's mission is to address significant obstacles to sustainable forest management through a constructive dialogue process among all key stakeholders. The Forests Dialogue's approach is based on mutual trust, enhanced understanding and commitment to change. Our dialogues are designed to build relationships and to spur collaborative action on the highest priority issues facing the world's forests.

TFD is developing and conducting international multi-stakeholder dialogues on the following issues:

- *Forest Certification*
- *Illegal Logging and Forest Governance*
- *Intensively Managed Planted Forests*
- *Forests and Biodiversity Conservation*
- *Forests and Povery Reduction*
- *Forests and Climate Change*
- *Investing in Locally-Controlled Forestry*
- *Free, Prior and Informed Consent*

There are currently 24 members of the TFD Steering Committee. The Committee is responsible for the governance and oversight of TFD's activities. It includes representatives of indigenous peoples, the forest products industry, ENGOs, retailers, unions and academia.

TFD is funded by a mix of core and dialogue-based funding. It is supported by a Secretariat housed at Yale University's School of Forestry and Environmental Studies in the United States.

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