



# THE FORESTS DIALOGUE

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## Initiative on Free, Prior and Informed Consent

### *Concept Paper*

### Introduction

'Free, Prior and Informed Consent' (FPIC) has emerged as a key principle in international law and jurisprudence related to indigenous peoples and is being widely considered in private sector policies of 'corporate social responsibility' in sectors like dam building, extractive industries, forestry, plantations, conservation, bio-prospecting and environmental impact assessment. It has also been endorsed by the Roundtable on Sustainable Palm Oil (RSPO) as a key principle in its Principles and Criteria (P&C). Likewise, 'free and informed consent' is a requirement of the Forest Stewardship Council. FPIC has now been adopted by the Asian Development Bank and IFAD in their policies on Indigenous Peoples and by the UN REDD Programme. More broadly, the UN Declaration on the Rights of Indigenous Peoples is affirmed in the (draft) text on REDD that resulted from the UNFCCC negotiations in Copenhagen.

The shorthand phrase 'free, prior and informed consent' or the acronym FPIC refers to the right of indigenous peoples to give or withhold their free, prior and informed consent to activities that will affect their rights to their lands, territories and other resources including their intellectual property and cultural heritage. 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 the proposed TFD Initiative. 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 Initiative will aim to develop answers to these challenges.

### Making FPIC effective: a central theme for The Forests Dialogue

FPIC has already emerged as a core theme in several of TFD's prior Initiatives. The issue first came to 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 Initiative 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.<sup>1</sup> 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 a key practice that companies should use to avoid conflicts. Moreover, the study found, the rights-based negotiation approach of FPIC, applied retrospectively, can also help resolve existing land conflicts.

During more recent TFD Initiatives, consensus has likewise built that respect for the right to FPIC is crucial for effectiveness in Reducing Emissions from Deforestation and Forest Degradation (REDD). The principle was highlighted in the TFD Statement on Forests and Climate Change,<sup>3</sup> which set out a broadly shared view of how forests should be incorporated into climate mitigation practices. The ensuing dialogue Initiative on REDD financing stressed the importance of safeguarding indigenous peoples' rights and adhering to the principle of FPIC.<sup>4</sup> Likewise FPIC has emerged as a key principle in providing an effective framework for those Investing in Locally Controlled Forests, another recent TFD Initiative.<sup>5</sup>

So far, so good. But given that 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 is committed to a dialogue Initiative specifically to address these practical challenges.

### **The Challenge of Implementation**

Respect for the rights to FPIC implies informed, non-coercive negotiations between investors and companies or the government with indigenous peoples / customary law communities 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 (see 'fracture lines' below for more details). These include:

- ➔ Who gives consent?
- ➔ 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?
- ➔ What are the boundaries of the concept?

## TFD Niche

The purpose of the TFD is to develop a platform for dialogue and action between leaders in the forest sector on key issues related to achieving sustainable forest management around the world. This inevitably brings in wider issues of social equity and cultural sensitivity and the fact that different players have different views about what sustainability means. Reaching true consensus on how forests should be managed effectively without stumbling into irreconcilable disagreements over economic, conservation or social constraints can be very challenging. Addressing these difficult issues requires a strong commitment from and the full engagement of the stakeholders involved in debates on how to make the implementation of the FPIC on forest regions viable. Through a series of activities TFD is leading a unique international stakeholders' forum to develop a mutual understanding of the concept of FPIC and its applicability. In order to achieve FPIC, it is necessary that all parties share the same understanding of it and its implications. The Forests Dialogue initiative on FPIC is in that sense an opportunity to build a basis for long-term forest management partnerships between companies, indigenous peoples, states and NGOs.

TFD has unique convening capacity and a proven track record in bringing together industry, conservation organizations, international agencies (such as the World Bank) and social/community representatives including Indigenous Peoples. It is thus very well placed to help advance thinking and develop collaborative solutions between parties about how to make FPIC effective.

### ***A dialogue on FPIC should engage:***

- ➔ Indigenous Peoples
- ➔ Local communities (those who do not consider themselves to be 'indigenous peoples' or are not considered as 'indigenous peoples')
- ➔ Forestry companies
- ➔ Local government agencies
- ➔ Certifiers
- ➔ NGOs and human rights lawyers with practical experience on FPIC
- ➔ International Financial Institutions (including the World Bank)
- ➔ REDD financing agencies (multilateral and bilateral)
- ➔ Conservation organizations

### **'Fracture Lines' (disagreements between stakeholders)**

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 revise the Bank's operational policy on indigenous peoples to recognise FPIC. Consultations on this are now expected in the second half of 2010.
- 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.

## Initiative Objectives

The FPIC Initiative has the following objectives:

- ➔ Share understanding of the basis for FPIC among varied stakeholders including indigenous peoples, forestry companies, development agencies and relevant government bodies.
- ➔ Examine and learn lessons from concrete situations where consent-based approaches have been, or are being, used.
- ➔ Make mutually agreeable recommendations for how application of FPIC approach can benefit affected parties.

## Anticipated Outcomes

- ➔ Publications: Influential report on FPIC and the forestry sector; Concept note; Scoping Paper; 5 Co-Chairs' summaries
- ➔ Shared understanding of the relevance of FPIC for the forestry sector
- ➔ Recommendations to forestry sector on how to carry out effective, FPIC-based negotiations
- ➔ Direct inputs to multilateral agencies developing FPIC-based REDD+ programmes
- ➔ Direct inputs to the World Bank review of Operational Policy 4.10 on Indigenous Peoples.

## 2010-2012 Programme

TFD plans to organize and convene a dialogue Initiative on FPIC in 2010 and 2011. The aim is to start with a scoping dialogue to be held in New Haven on 13-14 April 2010. Assisted by a scoping paper, this meeting will review the international basis for FPIC, it will then focus its efforts on identifying best practice standards and norms, and reviewing the dilemmas and 'fracture lines' that stand in the way of effective implementation. It will also agree the main locations and seek to identify the key participants for the ensuing four field/case-based dialogues.

In order to avoid the FPIC Initiative getting bogged down in debates about the international legal bases for FPIC, it is recommended that the field visits commence in a country where there has already been extensive on the ground experience between communities and corporations with FPIC. Indonesia is the one proposed. In this way the ensuing dialogues will focus on issues of implementation and not theory. In subsequent dialogues the lessons from countries with a longer experience of FPIC-based negotiations can then be shared with participants in countries where FPIC is a newer or less familiar concept.

The following schedule and potential locations and local partners are suggested:

1. SC discussion by teleconference: 2nd February 2010.
  - Clarify the composition of the steering group for the FPIC dialogue stream;
  - Clarify the main purpose of the FPIC dialogue stream;
  - Explore connections with the prior and ongoing TFD dialogue streams;
  - Agree the list of invitees for the April 13th-14th scoping meeting;
  - Agree the agenda for the April 13th-14th scoping meeting.

2. Scoping paper: to be drafted by FPP in March 2010.
3. Scoping dialogue: New Haven 13th -14th April. Reviews scoping paper and agrees on the key participants and main issues for the ensuing meetings. Co-Chairs' summary by June 2010.
4. 1st Field dialogue: Indonesia, hosted by Samdhana Institute with Aliansi Masyarakat Adat Nusantara (AMAN), October 2010. This meeting reviews and learns from AMAN/FPP project on FPIC in Indonesia and other SE Asian experiences, notably the Philippines. We will also invite UNDP to share its experiences with FPIC in its pilot UNREDD projects in Indonesia and Vietnam and lead companies in the Roundtable on Sustainable Palm Oil to share their experiences with FPIC. Co-Chairs' summary by December 2009.
5. Field visit and dialogue: Vancouver, Canada, hosted by First Nations, March 2011. Co-Chairs' summary by May 2011.
6. Field visit and dialogue: Ouessou, Republic of Congo, July 2011, hosted by CIB. Also reviews and learns from GTZ/GfBV case studies. Co-Chairs' summary by September 2011
7. Draft of final synthesis report: by October 2011
8. Field visit and dialogue with review workshop: Iquitos, Peru, December 2011, hosted by indigenous peoples' organisations. Main task is to review draft final report but includes field visit to examine how local concession policy deals with indigenous peoples' rights in Peruvian context. Co-Chairs' summary by November 2012.
9. Finalisation of FPIC report, February 2012, following iterative discussions by TFD Steering Committee and Initiative advisors.

### Potential partners, sponsors and contributors

- ➔ Writing assignments: Forest Peoples Programme is contributing staff time to draft concept note and to write the scoping paper and draft papers for Indonesia.
- ➔ New Haven Scoping Dialogue: TFD Secretariat will use core funds to support initial Scoping Dialogue in New Haven, USA
- ➔ Indonesia Dialogue: Samdhana Institute, Clinton Foundation, UNDP/ Bangkok and FPP
- ➔ Republic of Congo Dialogue: Intercooperation and GTZ
- ➔ Peru Dialogue: Finnish Foreign Ministry

### References

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