



## The Forests Dialogue

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The Forests Dialogue

## The Forests Dialogue

### Scoping Dialogue on Free, Prior and Informed Consent

### 13–14 April, 2010 | New Haven, Connecticut Co-Chairs' Summary Report

by Marcus Colchester and Peter Gardiner

The Forests Dialogue held a two-day Scoping Dialogue on Free, Prior, and Informed Consent in New Haven, CT, USA on 13–14 April 2010. The Dialogue brought together twenty-five stakeholders drawn from various parts of the forest sector, including members of Indigenous Peoples, forest products companies, intergovernmental organizations, government agencies, conservation organizations, the legal community, and labor and women's rights organizations. With the overarching goal of creating a basis in trust for future dialogues, the purpose of this Scoping Dialogue was to identify key areas for discussion in the dialogue series, while of course not limiting future discussion to those topics. The Dialogue was hosted by the Secretariat of The Forests Dialogue, housed at the Yale School of Forestry and Environmental Studies.

#### BACKGROUND

“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 the policies of both the private sector and international organizations in sectors such as dam building, extractive industries, forestry, plantations, conservation, bio-prospecting and environmental impact assessment. In the context of the forest sector, FPIC refers to the right of Indigenous Peoples and other forest-dependent peoples to give or withhold consent on activities that will affect their rights to their forest resources, making their decision based on full information and before the fact.

The rights which FPIC affirms have been recognized by international bodies and numerous organizations, but respect for those rights has been inconsistent at best. Indeed, the urgency of implementing FPIC derives from experience around the world in both developed and developing countries where statutory law relating to the rights of forest-dependent peoples is weak, non-existent, or poorly enforced, or where plural legal regimes exist within a single country. TFD's dialogue stream on FPIC seeks to address the practicalities of implementing FPIC in such circum-



Marcus Colchester, dialogue co-chair

stances. FPIC is of special significance in the context of other ongoing TFD dialogue streams, notably the series on REDD Readiness and the series on Investing in Locally Controlled Forestry (ILCF).

As a starting point, participants in this Scoping Dialogue presented successful and unsuccessful cases of FPIC processes. One model put forward was that developed recently in the Democratic Republic of the Congo, where all logging concessions were terminated, with some reinstated but only following the signing of an agreement on benefit sharing between the company and the local community. The problematic experience in the Philippines was also presented, where a legally defined FPIC procedure has resulted in no significant change in the unequal relationship between customary owners and interested outsiders. By contrast the relative success with FPIC-based negotiations between outside parties and the government and the customary rights communities in Indonesia was noted. The inclusion of FPIC processes in the UN-REDD program was also presented, and discussion was held on the uncertain place of FPIC in the work of the World Bank.



Peter Gardiner, dialogue co-chair

## DIALOGUE THEMES

The key themes that emerged in discussion following presentations of FPIC cases are as follows:



Amity Doolittle

### Institutional Variability

Participants discussed that both the necessity for and the outcome of FPIC processes depends on an institutional and legal framework that can be imagined as having two components: substantive land and resource rights, and procedural due process. Government institutions can be weak or strong on either of these axes. FPIC may have a role in any of the resulting combinations, but it is naturally of greater necessity where substantive rights or procedural due process (or both) are weak.

### Defining Free, Prior and Informed Consent

Participants recognized that FPIC has historical precedents and current forms but best practice is still evolving and will need to vary according to local and national circumstances. It was observed that it is not a fundamentally new idea to declare that before a resource is exploited or its use is restricted, customary or formally recognized owners have the right to give or withhold consent based on full awareness of the predictable consequences of either decision.



Victor Kabengele Wa Kadilu

Participants expressed the view that FPIC is an assertion of this right, an assertion that in many circumstances implies a shift in power from outside parties to those to whom the right to decide belongs. It was recognized that requiring consent is now such a pressing matter for discussion because of chronic inequities in the relationships

between customary owners of forest resources and actors outside wishing to gain access to the resource or limit access to it by others. In other words, consent must now be insisted upon only because it has too often not been insisted upon in the past.

Thus the discussion of issues arising in the implementation of FPIC was prefaced upon the idea that requiring the owners' consent entails accepting their power to deny that permission; put simply, it entails recognition of their property right. Nevertheless, many questions arose in defining the components of FPIC. Briefly:

➔ **Defining consent and the situations in which it is required**

Participants considered that consent is a complex idea. It was noted that granting or denying permission is not merely a matter of choosing from options, but is rather an expression of self-determination. Furthermore, some might consider that forest resource owners have options other than a simple affirmative or negative response to a proposed project; consent might be granted for only part of a project, conditional on the fulfillment of certain prerequisites, or for a defined time. It was also noted that where agreement is reached, FPIC is iterative and should lead to permanent relations of trust between parties.

A further issue of discussion was found in defining the set of resources for whose use consent must be obtained. Considerations included the spatial scale of the proposed project, long-term impacts, and non-material features of the area in question, for example spiritual or cultural values.

➔ **Establishing whose consent is required**

Determining who is a relevant party generated substantial discussion. It was recognized that in many forest-dependent communities, decision-making power may be delegated to leaders, just as in most other communities in the world; such leaders must be legitimate in the eyes of the community for a meaningful FPIC process to take place. Issues arise with respect to discrimination against women, ethnic minorities, and others of low status. The extent to which such groups must participate in an FPIC process needs to be considered carefully in each case.

It was further recognized that there are many people who cannot be considered Indigenous Peoples but rely just as much on forest resources for their livelihoods. Do such groups have the same rights as Indigenous Peoples?

Finally, are those people who control a resource directly the only ones who must be consulted about its exploitation? For example, must users of a water resource downstream from a proposed logging concession also grant consent for the operation to proceed?

### Limits on the requirement of consent

It was discussed that the requirement of obtaining consent may have some limits:

- ➔ One area of discussion was whether the state may overrule the wishes of customary owners in the national interest. It was proposed that while simply invoking the national interest is not sufficient, state authority may take precedence over customary forest owners provided that an FPIC process is engaged in and other conditions are fulfilled. These include the payment of repara-



Gary Dunning

tions as well as demonstration that the costs of the project are proportional to the benefits, that the objective is a legitimate one in a democratic society, and that the project does not endanger the customary owners' survival as a people.

- ➔ It was also proposed that consent must also include some level of assurance to the parties requesting it that once it is granted, the project may be allowed to occur without perpetual renegotiation of terms. Likewise, it was noted that while communities must not be harassed with endless requests following an initial rejection, it may be reasonable for a project to be revisited after some amount of time has passed.

### Potential Requirements for Successful Implementation of FPIC

The following conditions were discussed as potential prerequisites for a successful FPIC process:



Herbert Pircher

- ➔ **Capacity building**  
FPIC-based experiences have a weak history in many parts of the world and entail a significant change in the way business is done. Therefore companies, conservation organizations, and governments must improve their understanding of the process and their ability to engage in it. In addition, forest-dependent peoples require an improved ability to gather information, as might be provided by systems of mapping, as well as improved negotiation skills.



Cassie Phillips

- ➔ **Independent advocates**  
There may be a role for independent advocates or intermediaries in negotiating the FPIC process, groups with experience in building the capacity of customary forest owners. However, it was also recognized that any outside group will bring with it its own perspective and that this may distort the FPIC process in a way that does not favor the customary owners.

- ➔ **Guaranteeing the process**  
It was noted that FPIC could remain purely conceptual in the absence of robust recourse mechanisms that allow affected customary owners an effective way of preventing projects that proceed without their consent. While the complexity of enforcing the requirement of consent was recognized—it is the crux of the current problem—it was nevertheless suggested that rule-based organizations such as multilateral donor organizations may develop various levels of review of their projects, including processes without the high profile of those that in the past have made such organizations avoid projects that might have had high impact but were considered too risky.



Estebancio Castro Diaz

➔ **Ownership of the process by customary owners**

Participants suggested that an FPIC process whose form is controlled by customary owners and reflects their traditions and values is more likely to lead to a satisfactory and lasting result. The example was given of customary forest owners' continued regard for land-use designations made by the Dutch colonial power in Indonesia because those designations reflected respect for sites of traditional importance.

➔ **Information on successful past FPIC processes**

It was proposed that information on successful processes in different parts of the world be kept in some database form as a resource for customary owners, companies, governments, and advocates.

➔ **A spirit of trust**

It was recognized that for an FPIC process to advance, parties must trust each other and be committed to reaching a lasting agreement. Indigenous Peoples expect agreements to build strong relationships and are not just looking for one-off commercial arrangements. Processes of continued engagement are thus important to keep agreements "alive."

## Potential Tensions in Implementation

➔ **Enforceability of international law and/or norms**

It was discussed that in many cases it is unclear whether agreements signed by states are legally binding, and as a practical matter it is rare that an enforcement mechanism exists even for binding agreements. Participants discussed both the legal status and the practicality of enforcement of documents such as the UN Declaration on the Rights of Indigenous Peoples, arguably the legal basis for a requirement of FPIC.

➔ **Role of the state**

Given the historically poor record of governments with respect to the rights of Indigenous Peoples and the lack of resources for facilitating an FPIC process in many parts of the world, channeling FPIC through the state may not be the best approach. On the other hand, engaging in an FPIC process without local government sanction may put companies at risk of prosecution under the laws of their home countries prohibiting corrupt practices abroad. Participants noted that an FPIC process carried out only by the concerned parties but sanctioned by and guaranteed by an effective local state may provide a way of extending limited state resources and avoiding conflicts. Attention must be paid, however, to making sure that the state is not delegating an essential role, i.e. protecting its citizens, to a process over which it has little control.

➔ **Firm guidelines vs. flexibility**

Donor agencies, conservation organizations, and companies require rules to operate. Furthermore, those trying to build the business case for FPIC need concrete guidelines to present to companies considering adopting FPIC as an operational procedure. On the other hand, case-by-case flexibility is needed for implementation, and the risk exists that an inflexible FPIC blueprint might become little more than an administrative formula with little impact on rights



Jenny Springer

protection. It was proposed that a typology of different scenarios be created that would serve as the basis for the development of guidelines for those organizations that require them.

➔ **Relationship vs. contract**

A potential tension was identified between differing perceptions of the outcome of an FPIC process. Customary owners may view an agreement as the establishment of a relationship with the outside organization, with latitude built in for changes in the future. Companies or conservation organizations may view the same agreement as a firm contract with little or no flexibility at all.

➔ **Overlapping claims to territory**

It was noted that a given forest resource may be claimed by more than one group with potentially legitimate claims, ranging from smallholders to companies with long-established formal or informal ownership. It was noted that the rights of Indigenous Peoples may not always supersede those of other claimants.

➔ **Costs of FPIC**

It was recognized that it is necessary to recognize the costs in time and resources associated with information gathering, negotiation, monitoring, and recourse mechanisms. On the other hand, it was noted that the costs of conflicts resulting from projects being imposed without consent could be even higher. In this sense, FPIC-based processes really could be of benefit for all parties compared to the alternatives.

➔ **Verification of FPIC**

The challenge of identifying the most appropriate party to verify that a fair process of FPIC has indeed been carried through was also noted. Options include the development or conservation agency or company involved, the communities themselves, a government agency or an independent assessor. There are pros and cons to all options.



Diweng Bakir



Jeff Campbell

**NEXT STEPS**

Participants considered possibilities for a series of four Field Dialogues in the FPIC dialogue stream. A Field Dialogue in Riau Province in Indonesia was proposed for October 2010, with a view to examining FPIC processes in the context of oil palm development, plantations expansion and REDD. It was noted that TFD will be invited to hold this meeting by the national NGO, Kemitraan, with funding from the Packard foundation. Local NGOs and indigenous organizations and local companies already have concrete experiences with Free, Prior and Informed Consent to share at the meeting.



Darryl Vhugen

Looking ahead to 2011, it was noted that in the Concept Note a Field Dialogue had also been proposed for the Republic of the Congo, where a concession granted to the company *Congolaise Industrielle des Bois* has received FSC certification and could serve as a starting point for discussion of FPIC in the central African context. However, the Democratic Republic of the Congo was proposed as an alternative, because of the recent experience—highlighted during the Scoping Dialogue—of the termination of concessions and the subsequent renewal of some under an FPIC process.

The Concept note had proposed Peru as the location for a Field Dialogue in Latin America. However, it was reported that local indigenous peoples' organizations were skeptical of holding a meeting there because of the unilateral way that REDD projects were being imposed and the delicate political situation following the Bagua incident. Suriname was proposed as a possible alternative location for a Field Dialogue looking at FPIC in South America. Likewise the Concept Note had proposed British Columbia in Canada, while in the meeting New Zealand was also suggested as a possible location for examining FPIC in a developed-country context.

In all these cases it was noted that it would be critical to identify strong indigenous and corporate counterparts in the host areas to ensure effective dialogues. Final decisions about locations and dates will be made by the TFD Steering Committee.

It was also agreed that the draft Scoping Paper presented at the meeting would remain open for comments from all participants until the end of May and would then be finalized as a Discussion Paper in June/July of 2010.

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