



Towards Consent

Case Studies and Insights on Company-Community Agreements in Forest Landscapes

by Kristen Hite

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Free, Prior, and Informed Consent (FPIC)

Refers to consultation and decision-making processes based on the understanding that long-standing communities rooted in traditional cultures, and particularly indigenous peoples, have rights to determine their development pathways, own and access lands and resources, maintain their cultures, and live free from discrimination—and therefore require that others seek their consent in decisions that could infringe upon these rights.

Author

Kristen Hite works at the intersection of forests, climate change, and human rights. In recent years, she has undertaken work for philanthropic, indigenous, intergovernmental and nonprofit organizations such as the Climate and Land Use Alliance, United Nations Development Programme, legal office at the secretariat of the UN Framework Convention on Climate Change, and the Mainyoto Pastoralists Integrated Development Organization. Her practice has concentrated on international institutions and the role of property rights, human rights, customary rights, and cultural rights in pursuit of sustainable development. She has lectured extensively on free, prior and informed consent in the context of forests in locations ranging from Pekanbaru, Indonesia to World Bank headquarters in Washington, DC.

Acknowledgements

This publication would not have been possible without the contributions and support of many individuals and institutions. In particular, a team of consultants and field specialists enabled verification of both the company and community perspectives, many of whom are recognized in the individual case studies. Jon Sohn and Birgitte Feiring contributed substantially in researching, interviewing stakeholders, and drafting these case studies. Additionally, the sponsoring institutions—The Forests Dialogue and PROFOR—provided critical support for the project, with particular thanks to Diji Chandrasekharan, Peter Dewees, and Dan Miller at PROFOR, and Gary Dunning, Xiaoting Hu, and Denise Soesilo at The Forests Dialogue. We are grateful to Marcus Colchester and several other reviewers who provided valuable feedback on earlier drafts. Community consultants are acknowledged in the respective case studies for providing timely information and review, as are representatives of the companies profiled, who also provided logistical support to enable community visits and interviews. The author alone is responsible for any errors of fact or interpretation that remain.

Contents

Executive Summary	4
Background	4
Case study summary	8
Insights and lessons learned	10
Introduction and Background	14
National Context	17
Elements of Negotiation	18
Scope	19
Designing a Process for Reaching Agreement	20
Free, Prior, and Informed Consent	22
Addressing Conflict	27
Private Sector Considerations	27
Generally	27
Commodity Certification Schemes	28
REDD+ Standards	30
Summary	31
Case Studies	33
Company-Community Negotiations in the Face of Legal Uncertainty in Laos PDR	33
Evolving Statutory Recognition of Customary Rights in Kranskop, South Africa	42
Managing Conflict and Addressing Disputes in Pulau Padang, Indonesia	50
Clear Tenure and Class Disparities: Tiered Negotiations in Tacuarembo, Uruguay	57
Conclusion	64
Endnotes	68

Executive Summary

Background

Commercial operations in the forest sector include pulp, paper, and other wood product manufacturing as well as direct timber harvests. These operations generally require secure supplies of trees over many years, often leading to decades-long investments involving large tracts of land. These supplies may be purchased from others, or land may be owned or leased by a company. Whether purchased or leased, forest sector companies often find themselves negotiating with those holding prior rights to forest lands and resources. At the same time, forests have tremendous value beyond these uses, in particular for the over one billion people globally who depend on forests for food, medicine, and materials, which can provide both a means of subsistence as well as supplemental income.

Given that companies rarely begin operations owning all the land that serves as the basis for their operations, it is often necessary for them to engage those whose livelihoods more immediately depend on forests. Among various strategies to address poverty and marginalization of many forest-dependent communities, one approach has been to cultivate partnerships with timber or forest product companies on the theory that companies get a reliable supply of wood while communities receive development benefits and economic returns. These collaborative arrangements can include various actors (smallholders, communities, associations, etc.) and range from a formal title transfer to structured benefit sharing. The process of seeking and developing these arrangements has many components, including identifying potentially interested or impacted parties, disclosing information, discussing proposals, negotiating agreements, managing conflict, and monitoring and reporting on outcomes.

This publication seeks to offer insights on the process and substance for developing collaborative agreements regarding forest landscapes. Following an overview of the legal and political context, a series of case studies offers examples of companies and communities engaging on matters involving forest land use amid varying national tenure regimes.

Meaningful stakeholder engagement requires a process for mutually respectful dialogue and decision-making based on a suite of underlying rights, both statutory and customary. The rights underpinning consent and negotiations processes are reflected in various national and international laws, jurisprudence, institutions, policies, and standards. While the legal framework will vary by jurisdiction, every country is party to some suite of treaties that recognize rights to culture, information and participation in decision-making, freedom from racial discrimination, and rights to property and resources, with international obligations reflected to varying degrees in national laws and policies. At the same time, communities may have their own customary laws beyond national regulation.

To address gaps between statutory and customary rights (recognized under international human rights law), additional measures can be employed, including courts and grievance mechanisms, institutional and corporate policies, and other standards. Particularly when customary or community tenure rights are involved, one way to ensure effective engagement is through requiring communities’ free, prior, and informed consent (FPIC).

In addition to considering how national law treats customary rights, another important consideration is the degree of involvement by government officials as a third party to the process. A community’s perception of the role of the government may play a significant role in its acceptance (or not) of any agreed outcome. When perceived as a “fair” neutral third party, the government may play a constructive role in facilitating negotiations; in other cases, government involvement may be perceived as biased and therefore prove counter-productive to a negotiated agreement.

While the process for determining and expressing agreement is best articulated on a case-specific basis by those affected by a proposed activity, the following elements are key to effective engagement:

- ➔ **Quality of and access to information:** informed consent is not based on incomplete or biased information.
- ➔ **Cultural and legal context,** interpreted as a community reasonably understands it.
- ➔ **Timeframe:** external time demands should not pressure the consultation and consent process and should engage affected parties prior to operations.
- ➔ **Formalizing and documenting decisions** through representative institutions.
- ➔ **Gravitas of decision:** agreements should be respected and not easily or arbitrarily revoked.
- ➔ **Respecting “no”?** A consent approach includes the right to say “no” to a proposal.
- ➔ **Grievance mechanisms** identify the means for resolving disputes before conflict escalates.

One of the first steps in negotiations is defining the activities or transactions subject to negotiation and how those can impact stakeholders’ underlying rights. The question of who has the rights to sell or lease resources can require looking beyond formal title and identifying early any additional actors making claims to forest resources. Once the full scope of potential rights holders has been assessed, a “pre-consultation” phase determines the appropriate contacts to approach—such as indigenous peoples’ own representative institutions—to design a process for dialogue and any subsequent negotiations.

Agreeing a Process for Negotiation: The methods for dialogue and decisions are as diverse as the communities whose consent is sought. Assuming there is sufficient interest in discussions, it is important to jointly identify a process by which very different actors can engage in a culturally appropriate exchange of information and views, and by which a mutually acceptable decision could be reached. Negotiations should respect communities’ own institutions and decision-making methods. This can be more difficult where communities have decentralized decision-making processes, larger geographic footprints, and/or diverse cultural and political constituencies.

It is crucial to initiate dialogue upstream in the planning process, as recent experience indicates that periods of two to three years are not uncommon to identify a process, conduct consultations, and reach an initial consent-based agreement over forest resources. While consent is an important potential outcome, a critical part of the overall decision-making process includes robust consultations that respect communities’ deliberations through the course of a development dialogue based on cooperation, good-faith, and respect for traditional institutions and decision-making processes. It is also important to document and describe the decision-making process and any agreement reached in clear terms agreed by all parties involved. Provided it is culturally appropriate, formal written agreements are helpful for third party verification or addressing future complaints.

Free, Prior, and Informed Consent: FPIC generally refers to consultation and decision-making processes based on the understanding that long-standing communities rooted in traditional cultures, and particularly indigenous peoples, have rights to determine their development pathways, own and access lands and resources, maintain their cultures, and live free from discrimination—and therefore require that others seek their consent in decisions that could infringe upon these rights.

FPIC tends to apply on a collective basis to communities with longstanding and cultural ties to specific lands or resources, and is especially relevant in cases where the national laws do not fully reflect or recognize customary rights. International guidance indicates that in the forest sector, at the project level, consent is required in cases where there are substantive impacts affecting the lands, territories, resources, and/or livelihoods of indigenous and tribal peoples. Even when not formally required, a company may secure consent as a good practice measure, particularly in projects expected to be controversial, generate significant impacts such as relocation, or last for an extended period and require sustained engagement with communities.

UNDRIP affirms this requirement for consent secured through good faith consultation and cooperation with indigenous peoples’ own representative institutions prior to the approval of any project involving the development, utilization, or exploitation of resources. For FPIC, consultations are conducted not merely for the purpose of gaining

“Free” means the absence of any form of manipulation or coercion; rights holders agree with the consent process and decision-making structure, and understand their rights to say “no” and negotiate conditions.

“Prior” means sufficiently in advance to enable communities to form their own opinions and make decisions, before their rights are affected.

“Informed” means information is understandable, accessible, and complete—including social, cultural, and environmental impacts and risks; pace; reversibility; scope and benefit sharing considerations,

“Consent” goes beyond faith consultation and participation to include the expression of rights (to self-determination, lands, territories and resources, culture).

feedback on a proposal but also with the good-faith objective of securing consent for a proposal through mutually respectful dialogue. FPIC thus goes beyond standard environmental assessment practices for engaging communities in consultations (which may be required irrespective of any FPIC standard), as the project proponent is not the sole decision-maker.

The methods by which consent can be sought and expressed are as diverse as their predicate cultures. A number of guidelines explicitly recognize that consent can be an iterative process, with consent being required for different phases of project development and a decision to say “no” or “yes” could be revisited at a later time.

Addressing Conflict: When conflict does arise, either in the course of negotiations, or in allegations that forest resources have been taken without a community’s consent, various tools are available to help resolve disputes. Participatory mapping can be both a proactive and responsive tool to help clarify land claims. Additionally, a designated ombudsman can help mediate disputes as they arise, which can be particularly helpful when conflicts are entrenched and third parties can help bridge mistrust. More severe cases may require formal dispute resolution processes.

Companies interested in establishing operations at a new site often find themselves navigating nuanced cultural and legal norms. A number of sectors have begun adopting and implementing community consent standards such as FPIC, particularly at the project level. Best practice recommendations include: developing clear and binding policies on consultation and consent, both before operations begin and at each stage of project decision-making; supporting culturally appropriate, legally enforceable agreements that can be renegotiated to adapt to evolving community needs; adjusting timelines to enable full dialogue and community input; and maintaining clear and

binding policies on information disclosure, including identification of financially material risks to investors based on community concern with or opposition to projects.

Negotiated, consent-based agreements feature prominently in commodity certification schemes such as the Forest Stewardship Council (FSC), Programme for the Endorsement of Forest Certification (PEFC), and Roundtable on Sustainable Palm Oil (RSPO). While the individual standards vary, they generally require consent for activities impacting legal, customary and traditional rights, and specify a process for informed negotiations for any agreed outcomes, including fair compensation and documentation of results.

Substantial attention has been given to implementing REDD+ activities in a manner that respects the rights of indigenous peoples and local communities, giving REDD+ innovators new insights in stakeholder engagement involving forest resources. Within the private sector, most of the work involving communities and forests remains at the project level. The Climate, Communities and Biodiversity Alliance maintains a robust set of voluntary standards, including requirements for consent and participation in decision-making in project activities (“CCB Standards”), with indicators to demonstrate that a project will not “encroach uninvited” on private or community property or otherwise proceed without the consent of land, forests, and carbon rights-holders. Programmatic-level REDD+ standards also tend to require consent in cases of potential impacts to underlying rights, particularly for indigenous peoples.

Case studies

While the challenges are significant, successful agreements can reap substantial rewards: lasting, meaningful partnerships that generate long-term development benefits and profits. This report offers a series of case studies the provide insights for engaging a diverse set of actors in navigating forest tenure systems and developing long-term collaborative agreements involving forest resources.

Negotiations in the Face of Legal Uncertainty: Stora Enso and Communities in Laos

Stora Enso’s pilot eucalyptus plantation and agro-forestry project in Lao PDR involved consultations with the objective of obtaining consent for plantings in areas used by various communities comprised of multiple ethnic groups spanning two provinces and five districts. The company engaged communities through their own repre-

sentative institutions and shared information through videos, pictures and other concrete tools. The lack of clear national laws and local governance respecting communities’ customary tenure rights complicated negotiations, resulting in a “conditional consent” agreement. Given ambiguity in national laws, the corporate decision to apply FPIC was particularly important.

Evolving Statutory Recognition of Customary Rights in Kranskop, South Africa

Through a government claims process, two Zulu communities secured legal recognition repatriating traditional lands operated by Mondi for tree plantations. Mondi originally acquired the land with expectations that their rights were settled; when land allocated for commercial production became subject to historical claims, the government negotiated with the company to buy back community land while simultaneously helping build the capacity and governance structures to enable direct community management. Through newly established business structures and land trusts, the company negotiated leases with the communities to enable plantation operations to continue. In at least one case, tensions arose between traditional governance and the new trust and associated businesses’ governance structure; transparency and auditing processes combined with community actions played a role in helping address these tensions. While community members were quite pleased to regain legal recognition and have their land back, a number felt excluded from the negotiations or expressed concern that benefits did not accrue as widely as anticipated. Despite challenges, both the communities and the company spoke positively about the outcomes of the land repatriation process.

Managing Conflict and Addressing Disputes in Pulau Padang, Indonesia

At the time the project in this case study commenced, APRIL received a license by the government to operate within an area where communities claimed rights to lands within APRIL’s concession, although the forest license did not initially recognize these community rights. Conflict emerged when 2 out of 14 villages opposed to the project challenged APRIL’s plans to develop the concession area. A third party mediation team employed participatory mapping to help resolve land claims. The project went forward with government approval after revising APRIL’s permit and after removing areas pertaining to 2 villages that refused to consent.

Clear Tenure and Social Stratification: Tiered Negotiations in Tacuarembó, Uruguay

UPM employed various approaches to stakeholder engagement based on different tenure situations. The company negotiated directly for purchases or leases with landowners, who tend to be maintain larger estates with secure tenure. In an effort to bridge traditional land uses and booming plantation forestry operations, UPM negotiated easements for grazing and beekeeping on plantation lands. Most community members do not have sizeable land or grazing rights, so for their benefit UPM provided funding through a foundation supporting targeted development projects in order to benefit broader community interests.

Insights and lessons learned

The insights and lessons learned from these case studies can be utilized by communities, companies, governments, and other stakeholders to help develop more meaningful and lasting cross-cultural partnerships that enable more sustainable forest outcomes. In addition to private sector collaborative forest management activities, the insights and lessons generated here may prove useful to community-based natural resource management projects, conservation initiatives, REDD+ activities, and perhaps also to partnerships beyond the forest domain.

Legal context: Meaningful stakeholder engagement requires a process for mutually respectful dialogue and decision-making based on a suite of underlying rights, both statutory and customary. There is an inherent risk in receiving a license for a forestry project on land subject to conflicting claims. Particularly for forest agreements, negotiations may be easier when the same actor has rights to both land and associated trees. To address gaps between statutory and customary rights (recognized under international human rights law), companies use FPIC and grievance mechanisms, and also consider the role of community development funds for benefit sharing arrangements. When community members cannot openly claim significant land areas due to social stratification or lack of formal recognition by their government, company-supported community development funds can enable alternative benefit sharing arrangements not dependent on formal tenure. And when changes in governance correspond to changes in rights, capacity building measures may be necessary to enable negotiations to proceed to completion.

Cultural context: An early social impact assessment can help scope the cultural, economic, and development context, in addition to identifying stakeholder groups. The methods for dialogue and decisions are as diverse as the communities whose engagement is sought. Challenges can arise when new or proposed decision-making

processes deviate from cultural norms, which ultimately depend on the community itself to rectify. Outside actors seeking to validate community-level consent need to think carefully about gender and age-related considerations, as well as elite capture. Even where challenges are evident, they may be difficult to address, especially over the short term.

Quality of and access to information: “Informed” consent requires comprehensive information on project scope and risks presented in an accessible manner. Information dissemination can prove challenging over a large project area, particularly when the geographic footprint includes diverse cultures speaking different languages. Facilitating direct dialogue with communities already experienced in company operations potentially enables more informed decisions. Capacity building can substantially enhance longer-term opportunities for genuinely collaborative partnerships and potentially lead to direct revenue streams for community-managed operations. Radio communications can help inform communities of issues of concern across a fairly large geographic area.

Rights identification: Social impact assessments, land tenure surveys and participatory mapping help identify rights holders and clarify which rights will be affected by proposed projects.

Tailor benefits to community needs: Integrating local priorities into commercial activities can help improve long-term effectiveness of company-community partnerships. A company-sponsored community development fund can provide an opportunity for benefit sharing arrangements even absent secure tenure rights. Lease payments and supplemental development assistance help address community needs and reduce operational risks. Giving community members a direct say in fund management can strengthen buy-in and long-term effectiveness. Where many core government services are lacking, it may be difficult balance limited funds against competing development priorities as community members increasingly look to the company to provide social services. A “no” decision regarding operations may exclude encroachment of the project area but also can exclude the opportunity to share in the benefits.

Timeframe: external time demands should not pressure the consultation and consent process. Ensure that a consent decision is made before project begins, and is maintained at each stage of project decision-making. Initiate dialogue upstream in the planning process, recognizing it may take one to three years to build capacity, agree on a decision-making process, disseminate information, conduct consultations, and reach an initial consent-based agreement over forest resources. Sequencing matters: commencing operations amid controversy may heighten project risks and cause delays and uncertainty.

Adjust planning, assessment and decision-making timelines and procedures to allow for full local involvement and community input. Regular dialogue beyond initial arrangements can strengthen communication, clarify misunderstandings, and enable more effective implementation over the long term.

Formalizing and documenting decisions through representative institutions, interpreted as a community reasonably understands them. Adopt procedures that result in culturally appropriate, legally enforceable negotiated agreements that address the full range of issues of concern to host communities and that can be renegotiated if necessary as the project evolves. Agreements should be formal enough that they are respected and not easily or arbitrarily revoked.

Requiring consent: A consent approach includes the right to say “no” to a proposal; conditional consent allows one or both parties to stipulate conditions under which consent could be granted or revoked. Private sector certification schemes tend to require consent to forest-related activities impacting legal, customary and traditional rights. Consent challenges can come in a variety of project stages for the private sector, not just in gaining project support prior to any development. Indicators can demonstrate that a project will not “encroach uninvited” on private or community property or otherwise proceed without the consent of land, forests, and carbon rights-holders.

Grievance mechanisms identify the means for resolving disputes before conflict escalates. Participatory mapping processes, monitoring and verification can complement an ombudsman or more formal dispute resolution mechanism. These help address dissenting views and settle land claims. Depending on the cultural context, community members may prefer alternative avenues to a hotline or contact point, though it is helpful to have formal channels of communication available. Dispute resolution that incorporates mapping seems particularly useful in resolving disputes when conflict escalates.

Role of third parties: Experts teams and government officials may both play important roles in negotiating agreements. A community’s perception of the role of any third party may play a significant role in its acceptance (or not) of any agreed outcome.

- ➔ **Government involvement:** In most of the cases, the government served as interlocutor between villagers and the company for some of the discussions, with varying levels of success. For example, in South Africa, the government negotiated directly with the company to purchase lands for the communities, which enabled the State to fund the land transfer but also left some community members feeling excluded from the process. In Pulau Padang, instead of relying on the company to resolve disputes, the government became

directly involved in addressing disputes and revising the initial concession to accommodate some of the community concerns, which is notable given the government ultimately revised its initial licensing decision and adapted the project footprint to reflect community concerns.

- ➔ **Independent expert involvement:** third party experts or local NGOs can assist in capacity building and facilitating internal dialogue among community members, though care should be taken to avoid any perceptions of bias, especially for any third party expert funded by the company or government. One company specifically recommended that future FPIC deliberations consider utilizing independent monitoring and verification teams to help resolve disputes.

Strengthen corporate policies: Certification schemes requiring a corporate commitment to FPIC played a role in securing consent in several of the case studies. Focused corporate policies supporting community rights and biodiversity communicate project level expectations; implementation is key to achieving community consent and broader development outcomes in challenging environments. Develop clear, binding policies and procedures for disclosing information and securing consent. Fully disclose to investors and potential investors the financially material risks of community concern with or opposition to projects. A consent-based process for sensitive community engagements can be valuable whether or not consent is formally required.

While the process is not a short one and is not without conflict, the overall outcomes of collaborative agreements can be significant when communities are not only asked for their opinions but become an integral part of the development dialogue and in making decisions regarding their future.

Introduction and Background

Introduction

Businesses in the forestry sector frequently make decades-long investments on large tracts of land. Commercial operations in the forest sector include pulp, paper, and other wood product manufacturing as well as direct timber harvests. These operations generally require secure supplies of trees over many years. These supplies may be purchased from others, or land may be owned or leased by a company to secure its supply. Whether purchased or leased, forest sector companies often find themselves negotiating with those holding rights to forest lands and resources. These rights holders and others engaged in or impacted by the operations are collectively referred to as stakeholders.¹

Most of the world’s poor live in rural areas and many depend on forests to support their livelihoods.² Over one billion people globally use forest products for food, medicine, and materials, which can provide both a means of subsistence as well as supplemental income.³ At the same time, forests have tremendous value beyond these uses, in particular for timber and commercial fiber purposes. Yet many forest-dependent communities are politically marginalized and often excluded—including by the State—from access to high value resources, even when they have traditionally used and depended on them for non-commercial purposes.⁴ Among various strategies to address poverty and power imbalances of these many forest-dependent communities, one approach has been to cultivate partnerships with timber or forest product companies on the theory that companies get a reliable supply of wood while communities get adequate economic return.⁵ These collaborative arrangements can include various actors (smallholders, communities, associations, etc.) and range from a formal title transfer to structured benefit sharing.

About this Report

This report offers a series of case studies that provide insights on options for transnational companies to navigate tenure systems and engage a diverse set of actors in reaching collaborative agreements involving forest resources. It evolved from a discussions convened by The Forests Dialogue and PROFOR with companies, NGOs, and staff at international financial institutions discussing the implementation of free, prior and informed consent for commercial activities in the forest sector. To advance the dialogue, the following cases served as examples to generate insights and learn lessons about collaborative initiatives with communities and companies:

A team of independent researchers conducted interviews and site visits to glean information regarding the similarities and differences between company and community perspectives on these projects. Community consultants conducted the site visits and interviews in languages familiar to the communities and personally translated the

TABLE 1 CASE STUDIES

Project Location	Company	Communities	Project Description
Savannakhet and Salavan, Lao PDR	Stora Enso	Mangkong, Ta Oy, Katang, and Phouthai ethnic groups	Eucalyptus plantations spanning 2,400 hectares over five districts in two provinces. The company is, with villagers prior consent, leasing state land from the government. Villagers do not yet have formal private or community titles but pending legislation could change that. The company introduced a community development fund and a participatory agroforestry model to address food security and development issues on village level. While many villagers lacked a full understanding of the arrangements, the project was able to proceed amid legal uncertainty and deliver development benefits.
Kranskop, KwaZulu-Natal, South Africa	Mondi	AmaHlongwa and AmaBomvu (Zulu)	Repatriation of ancestral lands to two communities through government purchase of land operated by Mondi, which was then granted back to the communities. Once the communities had title through newly constituted land trusts, Mondi negotiated a leaseback in order to continue operations. A third party assisted with capacity building and facilitated discussions around community needs and governance. Despite significant tensions between the traditional and new governance systems, the overall process of repatriating land was viewed as positive by the company and communities alike.
Pulau Padang, Indonesia	APRIL	Fourteen diverse communities on one island	The company obtained a legal permit for government-granted concession rights in some areas also claimed by communities. While the company successfully negotiated benefit sharing arrangements with most villages, some opposed company operations. Mapping and a specially appointed team facilitated discussions to help mediate disputes. Ultimately, the company’s concession area was modified to exclude areas pertaining to the villages that remained opposed.
Tacuarembó, Uruguay	UPM	14 directly impacted, 83 in zone of influence; no indigenous groups	The company obtained a legal permit for government-granted concession rights in some areas also claimed by communities. While the company successfully negotiated benefit sharing arrangements with most villages, some opposed company operations. Mapping and a specially appointed team facilitated discussions to help mediate disputes. Ultimately, the company’s concession area was modified to exclude areas pertaining to the villages that remained opposed.

results to English. The resulting description is included in this paper. Where perspectives diverged (either within or between communities, or between community and company views), the team first sought to clarify facts from both company and community perspectives. Where the facts could not be fully reconciled or the existence of divergent views helped generate lessons learned, the different perspectives have been presented in the case studies with attribution to the respective stakeholder interests.

Of note, these case studies initially sought to generate insights regarding free, prior, and informed consent (FPIC). As the case studies developed, it became clear that while each of the studies offered important insights regarding the implementation of FPIC, it was perhaps more useful to view the activities through a broader lens of stakeholder engagement and collaborative agreements. While the case studies initially viewed the engagement through an FPIC lens, the hope in broadening this analysis is that the insights and lessons learned can apply to a larger set of projects that seek to develop a genuine partnership between communities and companies.

Based on the insights and lessons learned, the hope is that this report can be utilized by communities, companies, governments, and other stakeholders to help develop more meaningful and lasting cross-cultural partnerships that enable more sustainable forest outcomes. In addition to private sector collaborative forest management activities, the insights and lessons generated here may prove useful to community-based natural resource management projects, conservation initiatives, REDD+ activities, and perhaps also to partnerships beyond the forest domain.

Background

Commercial forest activities depend heavily on reliable access to land suitable to cultivate commercial tree species for decades. Given that companies rarely begin operations owning all the land that serves as the basis for their commercial operations, it is important to consider how companies and communities engage in discussions and transactions regarding long-term access to forest resources. It is helpful to consider under what circumstances communities and individuals can successfully develop collaborative agreements with large multinational corporations. Responsible stakeholder engagement has many components, including identifying potentially interested or impacted parties, disclosing information, discussing proposals, negotiating agreements, managing conflict, and monitoring and reporting on outcomes.⁶ This publication seeks to offer insights on the process and substance for developing collaborative agreements regarding forest landscapes. Following an overview of the legal and political context, a series of case studies offers examples of companies and communities engaging on matters involving forest land use amid varying national tenure regimes.

National Context

Meaningful stakeholder engagement requires a process for mutually respectful dialogue and decision-making based on a suite of underlying rights, both statutory and customary. The rights underpinning consent and ne-

gotiations processes are reflected in various national and international laws, jurisprudence, institutions, policies, and standards.⁷ This analysis will focus on the operational considerations associated with developing and implementing agreements. A brief discussion of the legal context can assist with understanding the scope and nature of negotiating community-company agreements. While the legal framework will vary by jurisdiction, every country is party to some suite of treaties that recognize rights to culture, information and participation in decision-making, freedom from racial discrimination, and rights to property and resources, and countries often (but not always) have national laws that recognize these types of rights.

To varying degrees, countries' international obligations are reflected in national laws and policies. In many cases, implementation of these obligations is an ongoing effort, and national laws and policies may not fully acknowledge communities' customary rights.⁸ Even where not explicitly mandated under national laws, the United Nations places a responsibility on business enterprises to respect internationally recognized human rights and identify potential human rights impacts in consultation with potentially affected communities in order to prevent human rights impacts directly linked to their operations.⁹

The importance of national legislation should not be underestimated. National legislation that recognizes indigenous rights and customary tenure, and financial institutions and corporate policies recognizing customary rights and consent standards can all help clarify the procedural and substantive rights implicated during negotiations. A number of countries have adopted laws supporting processes intended to provide opportunities for informed negotiations and meaningful participation in decisions where a community's interests are substantially impacted. Similarly, various international organizations have adopted policies on access to information and public participation, and may even require consent. On the other hand, when national laws conflict or do not fully recognize customary rights—or governments deny the very existence of indigenous peoples—the basis of negotiations may be less straightforward and require additional analysis of customary use and ownership in order to ensure that communities' rights are fully considered and respected.

To address gaps between statutory and customary rights (recognized under international human rights law), additional measures can be employed, including courts and grievance mechanisms, institutional and corporate policies, and other standards. Particularly when customary or community tenure rights are involved, one way to ensure effective engagement is through requiring communities' free, prior, and informed consent (FPIC) to operations which may affect their rights. It is these cases where FPIC may be particularly useful as a matter of corporate policy as a means to help ensure that customary rights are respected. The United Nations Declaration on the Rights of Indigenous Peoples, following decades of negotiations, contains a number references to FPIC and may be useful in understanding how FPIC can apply specifically to indigenous peoples.

In addition to considering how national law treats customary rights, another important consideration is the degree of involvement by government officials as a third party to the process. A community's perception of the role of the government may play a significant role in its acceptance (or not) of any agreed outcome. Reports of government participation vary substantially, and depending on the country or jurisdiction, government involvement may be seen as positive, essential and constructive or as negative, intervening and coercive. It is difficult to make any broad statement about this, other than to observe that the role of the government can considerably assist in the facilitation of negotiations when it is perceived as a “fair” neutral third party, perhaps as an observer and/or mediator.¹⁰

Elements of Negotiations

There are a number of important considerations for effective stakeholder engagement at the level of project operations. This section provides some illustrations of ways in which companies can undertake meaningful negotiations with a view towards achieving a mutual agreement regarding the use of resources.¹¹ While the process for determining and expressing agreement is best articulated on a case-specific basis by those affected by a proposed activity, broader considerations include:

- ➔ Quality of and access to information: how to best ensure that consent is fully informed and not based on incomplete or biased information. In one case in Uruguay involving a particularly large project footprint, a company employed radio broadcast techniques to ensure that information reached the full geographic scope of its intended recipients. Depending on the issue, it can also be helpful for decision-makers to have access to independent external advice.
- ➔ The cultural and legal context of negotiated agreements: An agreement should be interpreted as a community reasonably understands it. As such, the preconsultation phase is vital in determining a jointly agreed process for proceeding with the formal consideration of a proposal. In the case of indigenous and tribal peoples in particular, it is important to effectively identify representative institutions. It is also important to understand the degree to which an agreement is binding and enforceable by third parties.
- ➔ Timeframe for decision-making: it is important that the consultation and consent process is not unduly pressured by external time demands. Particularly when affected rights holders are not involved at the outset in design considerations, the timeframe for undertaking the consultations and consent processes may differ from proponents' expectations for completion timeframes.

- ➔ Formalizing and documenting decisions: It is important that whatever way in which a final decision is reached is recognized and respected as the formal process by which a decision becomes adopted and supported through representative institutions. To the extent that a decision can be captured in writing or otherwise recorded, it can be helpful to document the agreement for future reference.
- ➔ Gravitas of decision: while a decision need not be so enshrined that it becomes impossible to modify, it also should be one that is respected and not arbitrarily revoked by any party to the agreement.
- ➔ What happens when a decision leads to “no”? A consent approach includes the right to say “no” to a proposal. In this case, when consent is not reached, it is important that this right to say “no” is appropriately reflected in the overall project design and outcome. In some cases, it may mean redesigning or changing plans, relocating the proposed development or deciding not to proceed.
- ➔ Role of grievance mechanism: Given that consent processes are customized on a cultural basis and that the various parties involved can have quite different perspectives and approaches, it is helpful to identify the means by which disagreements could be resolved if/when they arise.

Scope

One of the important components of negotiating tenure rights is defining the activities or transactions subject to negotiation and how those can impact stakeholders' underlying rights. This helps identify relevant laws and standards that can frame the scope of negotiations and their associated outcomes. Indeed, one of the most relevant questions for stakeholder-focused negotiations is who has legitimate customary or statutory claims, because underlying rights presumably would not be given up without the agreement of the rights-holder.

The question of who has the rights to sell or lease the resources that are the subject of negotiation can be somewhat complicated at the operational level. Various cases illustrate both the importance of identifying early the actors with underlying resource claims, particularly given the variance in national legal frameworks.

International standards and policies offer slightly different approaches. For example, FSC recognizes “a growing recognition, including by FSC, that all communities should have a meaningful role in making decisions about projects that affect them in a significant way, including the ability to refuse to host projects that do not provide adequate benefits or help them to realize their development goals.”

International guidance indicates that in the forest sector, at the project level, requiring consent would be most appropriate in cases where there are substantive impacts affecting the lands, territories, resources, and/or livelihoods of indigenous and tribal peoples. For example, Colombian law applies “prior consultation” laws in the case of large project proposals impacting both indigenous and other ethnic groups. The same law requires the Ministry of Interior to scope out the specific activities of a company that would trigger a “consent” requirement. At the international level, UN-REDD notes that a “blanket application of FPIC is not required for all forest-dependent communities,” but does oblige that consultations occur in good faith, “with a view to agreement,” and encourages States to require consent on a case-by-case basis where communities that share some characteristics with indigenous peoples.¹²

Even when not formally required, a company may decide to apply a consent standard as a good practice measure, particularly in projects expected to be controversial, generate significant impacts such as relocation, or last for an extended period and require sustained engagement with communities. In the event that FPIC is not applied, consultations may still be required and appropriate in the context of environmental and social assessments; they simply would not rise to the same level of engagement that a full FPIC process might entail. For example, in one case involving forest plantations in Uruguay where no indigenous communities were identified, a company still undertook robust consultations and sustained long-term engagement with communities over a period of decades.

Designing a Process for Reaching Agreement

The methods for dialogue and decisions are as diverse as the communities whose consent is sought. We will not seek to define them here, as they should instead be determined on a case-by-case basis in a manner that respects and utilizes traditional cultural practices and institutions. If outside actors wish to engage communities in decision-making processes, best practices would be to first gauge the level of interest in a dialogue and to then identify the process by which a dialogue and decision could occur—i.e. assess and identify impacts, outline processes for consultation and decision-making, etc. Sometimes referred to as a pre-consultation, this initial step would be to determine the appropriate contacts to approach, such as indigenous peoples’ own representative institutions. Then, assuming there is sufficient interest in discussions, the next step is to identify a process by which very different actors can engage in a culturally appropriate exchange of information and views, and by which a mutually acceptable decision could be reached. Information provided during the preconsultation phase should be adequate for contacts to make a determination on whether to seek broader engagement on the matter

In a number of recent cases, companies have tended to be more inclusive in consultations but less specific in the precise terms of a “consent” agreement, and focused on tangible benefits that a company can provide to a community. While the FSC and other international FPIC standards have clearly distinguished “consent” from consultation and indicated that engagement should be undertaken with the objective of consent, this has not always translated to clear differences in approaches at the operational level (although sometimes there are stark differences). In practice, it can sometimes become less clear whether consultations are undertaken with the objective of obtaining consent or whether they are treated more as an opportunity to provide feedback to project design, perhaps as part of an environmental assessment process. Companies may conduct good faith consultations and engagement (perhaps akin to the environmental assessment consultation process) that retains their “social license” to operate even where practices may not fully reflect a “consent” process as articulated in international standards.

In cases where communities have centralized decision-making processes and have a strong cultural identity, it may be easier to use communities’ existing institutions to engage in dialogue and negotiations than in cases of significant cultural diversity or which do not have centralized decision-making processes. For projects with larger footprints, the decision-making process can become more challenging. An observation from a forest carbon case in Brazil raised the challenge of joint decision making by geographically or culturally diverse stakeholder interests (e.g. multiple villages, clans, etc.).¹³

It is generally understood that negotiations should respect communities’ own institutions and decision-making methods. It is important to jointly determine a clear process based on early conversations with communities to identify and understand their preferred decision-making process and representative institutions. In some cases, government officials may provide oversight to the process or serve as interlocutors between a company and community; in other cases, it may be more incumbent on a company to directly outreach to a community. In terms of timing, this pre-consultation phase has often commenced following an initial environmental or social assessment, with consultations and sometimes participatory mapping activities following during later planning stages and as part of the drafting stages of environmental and social impact assessments.

If and when an agreement is reached, it is important to document and describe it in clear terms agreed by all parties involved. In this context, a written agreement can be particularly helpful. For example, in Colombia, a notarized agreement between a company and community becomes part of the environmental operating license and is legally enforceable. A written agreement can also serve as an important record that can be referenced in future discussions, and can also assist with third party verification of FPIC or in addressing future complaints.

Implementation time to reach a genuinely collaborative agreement can be significant. Recent examples suggest that periods of two to three years would not be uncommon to identify a process, conduct consultations, and reach an initial agreement under an FPIC process in the forest sector. Recognizing these time commitments, it is crucial to initiate dialogue upstream in the planning process. In recent years, some communities have begun developing their own procedures on negotiations with external actors, and it may be worthwhile to consider whether the existence of a community-defined process could help expedite decisions.¹⁴

Free, Prior and Informed Consent

This section provides background and context for the implementation of free, prior, and informed consent (FPIC) in the private sector for forest-related activities. Inherent in negotiations is the notion that two parties are freely and voluntarily making an agreement based on their informed consent. In the case of a transnational enterprise dealing directly with a community, challenges may arise related to uneven power dynamics, capacities, and information flows. As such, there is an emerging standard that companies should obtain the free, prior, and informed consent for transactions that adversely affect community interests. A recent analysis found over 200 instances of at least some circumstances where a State would have duty and obligation to obtain consent in the context of FPIC.¹⁵

FPIC generally refers to consultation and decision-making processes based on the understanding that long-standing communities rooted in traditional cultures, and particularly indigenous peoples, have rights to determine their development pathways, own and access lands and resources, maintain their cultures, and live free from discrimination—and therefore can require others to seek their consent in decisions that could infringe upon these rights.

The methods by which consent can be sought and expressed are as diverse as their predicate cultures, presenting challenges for companies in implementing FPIC at the operational level. While there is no universal definition of FPIC, international standards generally apply FPIC to activities substantially impacting indigenous and tribal peoples’ lands, territories, and resources, and some standards also apply FPIC to other actors in certain circumstances.¹⁶ Given the hundreds of millions of indigenous and other communities globally whose traditional livelihoods depend on forests, it is important to understand the legal context and standard components of how an FPIC standard can apply to commercial forest activities.

FPIC tends to apply on a collective basis to certain communities with longstanding and cultural ties to certain lands or resources, and it is especially relevant in cases where the national laws do not fully reflect or recognize customary rights. In cases where the legal framework does not recognize customary rights, private sector actors

and others can utilize FPIC to ensure their actions do not inadvertently violate legitimate (even if not statutorily recognized) rights to lands, territories, and resources. In terms of national legal frameworks, it is important to consider both national laws and international obligations specifically applicable to a given country. While FPIC is most commonly applied to indigenous peoples, tribal and other groups have begun to successfully assert FPIC standards in operations impacting their lands, territories, and resources. For example, in Latin America, there is growing acceptance that FPIC is also required for Afro-descendants. Afro-Colombian communities are a culturally distinct ethnic minority group protected under Colombian law in a separate class than “indigenous peoples,”¹⁷ even though they would be considered “indigenous” under IFC policy and would have protections under ILO Convention 169 as applies to Indigenous and Tribal Peoples. Similarly, the Inter-American Court of Human Rights applied FPIC in Suriname when they invalidated a company’s concession on lands pertaining to Maroon peoples of African descent. In Asia and Africa, where colonization histories may not be as typically punctuated as those of Latin America, some governments have refused to recognize indigenous peoples even where international law would recognize their existence and affirm related customary rights. Such a failure of State recognition as “indigenous” would not necessarily eliminate the obligation to apply an FPIC standard.

FPIC components are often broken down into their constituent parts, often citing UN guidance on the components of *free, prior, informed*, and *consent* or similar references (see Box A).¹⁸ Definitions vary, but generally recognize that:

“**Free**” means the absence of any form of manipulation or coercion, which could range from presenting biased information all the way to the use of force. FSC guidelines further state that “free” means rights holders agree with the consent process and decision-making structure, and understand their rights to say “no” and negotiate conditions.

“**Prior**” means before project starts, sufficiently in advance of the commencement of activities to enable communities to form their own opinions and make decisions before their rights are affected.

“**Informed**” means information is complete, understandable and accessible. UNDG guidelines also list types of information, including, inter alia, “pace, reversibility and scope;” assessments of social, cultural, and environmental impacts (including risks); and benefit sharing considerations.

“**Consent**” recognizes that good faith consultation and participation (including through representative institutions) are necessary but not sufficient steps for a consent process, which includes the expression of rights (to self-determination, lands, territories and resources, culture). A number of guidelines explicitly recognize that consent can be an iterative process, and a decision to say “no” or “yes” could be revisited at a later time.

BOX A

FPIC Components as Defined by The Forest Stewardship Council

Free refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, manipulation or timelines that are externally imposed:

- ➔ Rights holders agree with the process, and decision-making structure
- ➔ Rights holders have been informed of their right to say “No” and to negotiate conditions and the Organization clearly expresses its commitment not to proceed without consent at all stages where FPIC is required
- ➔ Information is transparently and objectively made available as a responsibility of the Organization and at the rights holders’ request
- ➔ Meetings and decisions take place at locations and times and in languages and formats agreed by the rights holders
- ➔ All community members are encouraged to participate regardless of gender, age or standing and this should be considered in setting meetings
- ➔ Where negotiations break down, there is access to third party assistance—legal or otherwise—to provide additional sources of information, mediate resolution, or strengthen rights-holders’ position
- ➔ Where consent is not given, the period before which it can be sought or given again is mutually agreed, as well as the conditions under which consensus reversals can take place.

Prior means ‘in advance’. The community must be given the opportunity to form their opinion and make their decision before the proposed activity or project starts, and also before a final decision is taken that such activity or project will be implemented. In an ideal situation, the community must be asked about the initial idea before the project or activity is developed in detail. The decision-making timeline established by indigenous peoples and/or local communities must be respected and time must be provided to understand, access, and analyze all relevant information on the proposed activity, including its potential impacts and the community’s rights.”

Informed refers to the type of information that should be provided prior to decision making to ensure that there is clear and confirmed understanding that rights holders are aware of the specific question which they are being asked to consent to. Information should be:

- ➔ Objective, covering both the positive and negative potential impacts of both the forest activities and of giving or withholding consent, including the perspectives of the affected people expressed through participatory impact assessments
- ➔ Complete, covering the spectrum of potential social, socio-economic, cultural, environmental and human rights impacts
- ➔ Accessible, clear, consistent, accurate, and transparent
- ➔ Delivered in appropriate language and format (could include radio, video, theatre, graphics, documentaries, etc.)
- ➔ Delivered by culturally appropriate personnel, ideally independent from the Organization, in culturally appropriate locations, and include capacity building of indigenous or local trainers. Direct communication (face-to-face meetings and other innovative, interactive methods) should be the default method of informing unless high levels of literacy across the community are apparent
- ➔ Presented to a proportionate representation of the communities, including from remote, rural communities, men and women, and marginalized members of these affected communities
- ➔ Provided on an ongoing and continuous basis throughout the FPIC process and also after consent has been given, and passed on to the affected communities as soon as new information is available.

Consent is:

- ➔ Not the same as engagement or consultation. These are only the necessary means to arrive at a consent decision
- ➔ The expression of rights (to self-determination, lands, resources and territories, culture)
- ➔ Given or withheld in phases, over specific periods of time for distinct stages or phases of the operation
- ➔ Not a one-off decision that gives an everlasting social license to a forest operation. Rather, it is part of an iterative process, described by various indigenous peoples as ‘living consent,’ which requires continual monitoring, maintenance, and reaffirmation throughout the various stages of a forest operation
- ➔ Likewise, decisions to withhold consent are not necessarily forever binding and can also be revisited by rights holders as situations change or become more favourable
- ➔ Once consent is given, the community is, however, not able to withdraw consent arbitrarily. The FPIC agreement is a binding agreement for both parties. If the conditions upon which the original consent was based are being met, ongoing consent is implied.

While this breakdown of the individual terms of the FPIC acronym helps understand what consent means in the context of FPIC, it is also useful to explore the measures by which consent is sought and obtained. While consent is an important potential outcome, a critical part of the overall decision-making process includes robust consultations that respect communities’ deliberations through the course of a development dialogue based on cooperation, good-faith, and respect for traditional institutions and decision-making processes.

In recent cases, some national laws, financial institution policies, and certification standards have all supported the adoption of company FPIC policies. Additionally, countries like the Philippines have a national FPIC law, although its effectiveness has been questioned.¹⁹ Not all enabling environments are as clear.

UNDRIP requires consent through good faith consultation and cooperation with indigenous peoples’ own representative institutions prior to the approval of any project involving the development, utilization, or exploitation of resources.²⁰ In this manner, FPIC may go beyond standard environmental assessment practices for engaging communities in consultations, as the project proponent is not the sole decision-maker.²¹ While consultations can take many forms, in the case of FPIC, consultations pertain to a specific subset of stakeholders: namely, to applicable rights-holders. For FPIC, consultations are conducted not merely for the purpose of gaining feedback on a proposal but also with the good-faith objective of seeking consent for a proposal through mutually respectful dialogue. This underscores the importance of identifying the right contacts and processes in the preconsultation phase.²² In the case of indigenous peoples, it is particularly important to engage rights holders through their own representative institutions and respect both formal and informal channels for political representation and agency.

Addressing conflict

When conflict does arise, either in the course of negotiations, or in allegations that lands have been taken without a community's consent, various tools may be employed to increase equity and efficiency considerations to help resolve disputes. Participatory mapping can be both a proactive and responsive tool to help clarify land claims. Additionally, companies will frequently appoint an ombudsman to help address complaints as they arise, which can be particularly helpful in lower conflict cases or for straightforward requests which are under the company's control. In other cases, more formal dispute resolution processes may be necessary. This will be considered in more detail through the case studies in the next section.

Private sector considerations

Generally

Companies interested in establishing operations at a new site often find themselves navigating nuanced cultural and legal norms. While most would agree that those with established property rights to lands and resources should be able to exclude uses incompatible with their rights to lands and resources, stakeholder negotiations can go a step further in assessing and recognizing collective interests rooted in other rights beyond formal property rights, such as the cultural rights and the right to self- determination. Additionally, the Voluntary Guidelines on the Responsible Governance and Tenure highlight the importance of good faith consultations for all communities, and, specifically for indigenous peoples, that consultations should be through their own representative institutions and in order to obtain their free, prior and informed consent.²³

A number of international and regional institutions apply a consent standard as a matter of policy.²⁴ Of particular importance to the private sector, the International Finance Corporation takes an integrated approach to consent and consultation. It applies an informed consultation and participation standard broadly to projects which may generate significant impacts, and adds an explicit consent requirement in certain circumstances involving impacts to indigenous peoples on lands and resources subject to traditional ownership or customary use, as well as critical cultural heritage sites.²⁵ IFC performance standards also recommend a consent process in cases involving relocation, even where companies have the legal means to acquire land without the seller’s consent.²⁶ IFC performance standards are not only significant for IFC’s own investments but also because private banks adopting the Equator Principles as well as some national export credit agencies²⁷—all apply or benchmark against IFC performance standards.

A number of sectors have begun adopting and implementing standards requiring community consent such as FPIC, particularly at the project level. For example, as early as 2000, the World Commission on Dams recommended binding agreements directly negotiated with affected groups such as indigenous and tribal peoples, and also included women as a category of affected groups.²⁸ The sector with the most experience in negotiating towards consent agreements is perhaps the mining sector. In this context, project sponsors deploying best practices find that it is crucial for companies to:²⁹

- ➔ Develop clear, binding policies and procedures for disclosing information and securing consent.
- ➔ Ensure that a consent decision is made before project construction begins, and is maintained at each stage of project decision-making.
- ➔ Adopt procedures that result in culturally appropriate, legally enforceable negotiated agreements that address the full range of issues of concern to host communities and that can be renegotiated if necessary as the project evolves.
- ➔ Adjust planning, assessment and decision-making timelines and procedures to allow for full local involvement and community input.
- ➔ Fully disclose to investors and potential investors the financially material risks of community concern with or opposition to projects.

Commodity certification schemes

The Forest Stewardship Council has issued implementing guidelines as part of its certification scheme.³⁰ FSC includes five consent criteria with two principles that apply to cases involving impacts to customary or statutory rights to lands or resources or the appropriation of traditional knowledge, with slightly different standards for indigenous peoples and local communities (see Box B).³¹ FPIC is also part of certification criteria for the Programme for the Endorsement of Forest Certification (PEFC), which requires that forest management activities apply a consent standard to any activities infringing upon “legal, customary and traditional rights such as outlined in ILO 169 and the UN Declaration on the Rights of Indigenous Peoples,” and provides for appropriate compensation “where applicable.”³² An additional component of this criterion allows for dispute resolution processes for “just and fair resolution” of cases where rights are unclear or contested, with interim provisions for meaningful engagement in forest management decisions “whilst respecting the processes and roles and responsibilities laid out in the policies and laws where the certification takes place.”³³

The Roundtable on Sustainable Palm Oil (RSPO) also requires consent from indigenous peoples, local communities and users in its Principles and Criteria,³⁴ and also requires that land ownership is not contested by communities (indicator that any disputes have been resolved with compensation on an FPIC basis), land rights of users (both statutory and customary) are not diminished without consent, no new plantings on peoples’ lands without consent (with customary and user rights demonstrated through participatory user mapping), and FPIC is applied to negotiations regarding compensation of local rights/interests in land.³⁵ RSPO standards further include, as an indicator that land conflicts have been resolved, copies of negotiated agreements with evidence of a plan devel-

BOX B

FSC Consent Criteria (Version 1, 2012)

- 3.2 The Organization shall recognize and uphold the legal and customary rights of indigenous peoples to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources and lands and territories. Delegation by indigenous peoples of control over management activities to third parties requires Free, Prior and Informed Consent. [‘Third parties’ should be understood as any other party besides the affected indigenous peoples or local communities.]
- 3.3 In the event of delegation of control over management activities, a binding agreement between The Organization and the indigenous peoples shall be concluded through Free, Prior and Informed Consent. The agreement shall define its duration, provisions for renegotiation, renewal, termination, economic conditions and other terms and conditions. The agreement shall make provision for monitoring by indigenous peoples of The Organization’s compliance with its terms and conditions.
- 3.6 The Organization shall uphold the right of indigenous peoples to protect and utilize their traditional knowledge and shall compensate indigenous peoples for the utilization of such knowledge and their intellectual property. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the indigenous peoples for such utilization through Free, Prior and Informed Consent before utilization takes place and shall be consistent with the protection of intellectual property rights.
- 4.2 The Organization shall recognize and uphold the legal and customary rights of local communities to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources, lands and territories. Delegation by local communities of control over management activities to third parties requires Free, Prior and Informed Consent.
- 4.8 The Organization shall uphold the right of local communities to protect and utilize their traditional knowledge and shall compensate local communities for the utilization of such knowledge and their intellectual property. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the local communities for such utilization through Free, Prior and Informed Consent before utilization takes place, and shall be consistent with the protection of intellectual property rights.”

Source: Forest Stewardship Council, FSC guidelines for the implementation of the right to free, prior and informed consent

oped in consultation with affected groups, information on decision-making steps, and “evidence that the legal, economic, environmental and social implications for permitting operations on their land have been understood and accepted.”³⁶

REDD+ standards

Forest work involving negotiated agreements with communities has received increased attention over the past several years, owing in part to new activities involving REDD+. These REDD+ activities are forging new frontiers for stakeholder engagement, as they tend to involve more public sector activities at the strategic/national level. Within the private sector, most of the work involving communities and forests remains at the project level. Substantial attention has been given to implementing REDD+ activities in a manner that respects the rights of indigenous peoples and local communities, giving REDD+ innovators new insights in stakeholder engagement involving forest resources. A number of institutions have developed standards and guidance for stakeholder engagement and negotiated agreements in the context of REDD+.³⁷

The Climate, Communities and Biodiversity Alliance maintains a robust set of voluntary standards, including an requirements for consent and participation in decision-making, for both strategic/national REDD+ programs (“REDD+ SES”) and project activities (“CCB Standards”). Under the REDD+ SES, a set of criteria provides indicators by which compliance can be demonstrated and documented.³⁸ The REDD+ SES are customized at the country/jurisdictional level and to qualify for REDD+ SES, programs must include explicit requirement that a REDD+ program maintain an FPIC standard, and provide five categories of indicators for effective implementation: (1) FPIC policies apply to all activities and legislative/administrative measures affecting rights to lands, territories, and resources ; (2) collective rights holders define a process of obtaining their consent; (3) consent is obtained from indigenous peoples in accordance with their own customs, norms and traditions; (4) consent is obtained from local communities when affecting customary rights, using mutually agreed procedures; and (5) consent is required for negotiations involving any relocation or displacement. FPIC is also required for any use of traditional knowledge. To address community capacity, REDD+ SES includes indicators for publicizing the FPIC requirement and building the capacity for engaging in negotiations and monitoring outcomes. For the CCB Standards, a consent standard is found in three of six indicators for the project proponent to demonstrate that there are no unresolved property disputes: demonstrating that the project will not “encroach uninvited” on private or community property, no relocation without FPIC (including just compensation), and the full consent of carbon owners (if the project is undertaken by someone else).³⁹

Of the multilateral REDD+ funds, UN-REDD and the FCPF have developed joint stakeholder guidelines for stakeholder engagement.⁴⁰ Under UN-REDD, “countries are expected to adhere to standards outlined in key relevant international instruments, and to uphold the principle of free, prior and informed consent (FPIC) as stated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).”⁴¹ To this effect, UN-REDD has issued a detailed guidance note and legal compendium regarding the application of FPIC to REDD+ activities. The guidelines are intended primarily to assist governments in implementing their national REDD+ programs but also contain guidance relevant to the private sector. In the guidelines, FPIC applies in cases where “potential changes in resource uses [...] could significantly impact the substantive rights of indigenous peoples and, where relevant, other forest-dependent communities.”⁴²

Summary

When appropriately structured, negotiated agreements between multinational companies and smallholders or communities can offer significant potential for development. The national context matters, including the degree to which customary rights are reflected in national laws as well as the perceived role of the government in facilitating any agreed outcome. Negotiation elements include: assessment processes to scope potential impacts as well as identifying resource rights-holders and other potential beneficiaries; a pre-consultation phase to define the negotiating process; information sharing; consultations and dialogue; formal consideration and decisions regarding any agreement; and measures to monitor implementation and address conflict as it might arise. Institutions, governments, and companies are increasingly requiring free, prior and informed consent as the basis of these negotiated agreements. Commodity certification schemes and REDD+ standards provide guidance on new standards for companies to engage stakeholders in the forest sector.

While the challenges are significant, successful agreements can reap substantial rewards: lasting, meaningful partnerships that generate long-term development benefits and profits. This next section offers case studies that provide insights into the process of developing and structuring these collaborative agreements.

Case Studies

Negotiations in the Face of Legal Uncertainty: Stora Enso and Communities in Laos⁴³

Summary: Stora Enso's pilot eucalyptus plantation and agro-forestry project in Lao PDR involved consultations with the objective of obtaining consent for plantings in areas used by various communities comprised of multiple ethnic groups spanning two provinces and five districts. The company engaged communities through their own representative institutions and shared information through materials such as videos, pictures and other concrete tools. The lack of clear national laws and local governance respecting communities' customary tenure rights complicated negotiations, resulting in a “conditional consent” agreement. Given the ambiguity in national laws and the importance to have the consent from the communities, the corporate decision to apply FPIC was particularly important.

Background information

Stora Enso is an integrated paper, packaging and forests product company that produces paper, biomaterials, packaging board and wood products for global market consumption with approximately 28,000 employees in 35 countries. It is running a pilot eucalyptus plantation and agro-forestry project in the southern part of Lao PDR, involving five districts in the Savannakhet and Salavan provinces. This part of the country was heavily bombed and defoliated during the Vietnam War. The total project size is approximately 2400 hectares with possible expansion over time beyond this initial area. Each plantation within the Districts will be managed as an individual, independent economic unit providing wood to local, regional and ultimately international markets to meet commercial demand for wood fibre. The project is self-financed by the company, whose annual sales are approximately US \$14 billion.

Poverty is pervasive in the project area, which combined with the ethnic diversity among the local population leads to a challenging environment for community engagement by a foreign corporate entity. The majority of the villagers are upland rice growers and shifting cultivators with just a few families having paddy fields. Ethnic groups include Mangkong, Ta Oy, Katang, and Phouthai groups. The two main linguistic groups in the region are Lao-Tai and the Mon-Khmer. These villages, according to the a social impact assessment⁴⁴ conducted by UNDP, are among the most disadvantaged in Lao PDR and face significant development challenges including minimal education, low literacy, poor access to health facilities, serious and chronic lack of food security, minimal cash income and few opportunities for sustainable income generation. Further, they experience problems with their water supply, they do not have electricity and existing infrastructure is in bad conditions. All of these familiar

FIGURE 1 STORA ENSO PROJECT IN LAOS



poverty challenges are exacerbated by the daily risk of unexploded ordnances that litter the countryside, a legacy of the Vietnam War.

The project area is located in an area of critical natural importance to the ecosystems of mainland Southeast Asia. The project is located in the lower Mekong Basin with areas of high biodiversity and associated aquatic ecosystems that provide “valuable nodes in the natural network that supports the ecological integrity of the regional environment,” home for several endangered plant and animal species. The project is close to three national protected areas, although much of the forest area pertaining to the project footprint has been heavily degraded. Forests in the area have significant cultural values, with many community-identified “spirit forests” containing a myriad of local spirits of large trees, forests and mountains that are sacred and protected by the communities, often in areas of high biodiversity. In some villages, there is a merging of these animist beliefs and mainstream Lao Buddhism owing to the influence of the dominant Lao culture. From a gender perspective, in the impacted communities of the Laos PDR project, women contribute significant income through weaving, selling vegetables, non-timber forest products and poultry and are traditionally marginalized in both internal (within the community) and external (e.g. community with the government) decision-making processes.

Under present law, all land belongs to the Government, and upland areas are regulated through collective land arrangements based on customary law, which is currently not recognized under the national statutory framework. As of June 2014, Stora Enso pays a land concession fee, according to the Concession Agreement, to the

provincial and district governments; the villagers do not have recognized land titles. A New Land Policy has been prepared by the Government of Laos and was debated as recently as December 2013 by the National Assembly Session but was not approved. It is expected to be debated again before the end of 2014. If passed and backed up by suitable legislation, it will fully recognize the legal rights of all ethnic groups and the concepts of customary land utilization, as well as collective land use rights.

Stora Enso has affirmed its commitment to a community engagement process that seeks partnership and consent. The company has moved forward with a community consent process in the context of an uncertain strategic legal environment according to corporate officials. As land payments are received by the government and not the resident communities, the company created a Village Development Fund as a benefit sharing mechanism as a means to compensate villagers and help improve their livelihoods. This Village Development Fund is not required by the government under Stora Enso’s land concession; rather, Stora Enso developed the fund on its own initiative.

Stora Enso views itself as a company that operates in a manner that respects human rights and sustainable development. Stora Enso’s Principles for Social Responsibility support the United Nation’s Universal Declaration of Human Rights and the Core Conventions of the International Labor Organization (ILO). Furthermore, Stora Enso has pledged under corporate Principles for Wood & Fibre Procurement to not procure wood in violation of traditional and civil rights; and to recognize the unique economic and cultural needs of indigenous peoples in order to promote practices that respect their traditional uses of forests. The company has no official corporate policy that specifically requires FPIC, but it does view their Lao PDR Project as a best practice example, and it hopes to gain forest certification recognition for these efforts.

According to the Environmental and Social Impact Assessment (ESIA) commissioned by Stora Enso and undertaken by third parties that included International Union for Conservation and Nature (IUCN) and development organization (UNDP), the standards for this project are “high and consistent with those expressed by the World Wildlife Fund, FAO, ITTO, IUCN and World Business Council for Sustainable Development.” The ESIA emphasizes that “no native forests will be cleared in establishing the plantation estate.” Coupling conservation considerations with sensitive social issues, the Lao PDR project is a challenge.

Process

Throughout the consultation process, the communities’ own decision-making processes have been used, which is in accordance with FPIC principles. At the beginning of the consultations, the District Agriculture and Forestry

Office (DAFO) interfaced with the communities to keep the district informed and have a “third party” presence during meetings. Specifically, the DFAO joined the meetings as a witness/observer. Initially, meetings introduced the project and asked the villages if they were interested in discussing it further. The discussions eventually progressed, in part thanks to conversations with other communities who shared their experiences, to the villagers deciding they wanted to work with the company and also to conduct land surveys. Representatives of Stora Enso and DAFO worked together (where DAFO served as an observer in the discussion) in the process of consultation. The role of the District officers was to facilitate the negotiations between the company and the communities and to ensure that the process is fair and that all parties are fully informed. The process led to negotiations between villagers and the company over land.

At the center of engagement processes representing communities are “Village Councils,” which consist of 9 members of whom at least one is from the local Women’s Union Group.⁴⁵ According to the company, the Village Head is ultimately responsible for making final decisions after listening to consensus-based deliberations from within the Council. According to community members, their decision-making processes are based on internal consultations where the villagers meet and discuss. By some accounts, women and youth generally attend consultations without sharing their ideas (although women were encouraged to speak), as only men are traditionally involved in such decision-making processes. During all consultations, meetings, and negotiations with communities, in addition to Stora Enso representatives, district officials were present as observers.

The company’s process for community engagement started with learning the local culture, followed by surveying the poverty and development challenges in the region. To this effect, Stora Enso commissioned an Environmental Social and Impact Assessment, undertaken by IUCN (biodiversity), Swedish University of Agriculture (soil, water and carbon) and UNDP (social impacts).⁴⁶ The assessment process began in May 2007 and field studies commenced in January 2008. No major barriers to the project were identified, and the impact assessment was approved in January 2009 after being presented to the Lao Government and other stakeholders during two open hearings. Additional communities were included in the project following the assessment process.

Social surveys and outreach assisted in determining the salient characteristics and main issues in the communities. The main issues identified in the surveys were food security, income generation and livestock, education as well as health, water, sanitation. Additionally, unexploded ordinances from the Vietnam War era are a continued threat to the communities present.

After identifying these issues, the company approached local matters through a sustainable forest management lens focused on productive and profitable plantations, social responsibility, environmental responsibility and

good governance. In regard to local community needs and engagement, the project consultation plan sought to address development challenges by improving the livelihood of people, which is a key part of the Project’s Plantation Model.

Stora Enso’s “Plantation Model” aims for a partnership between the company and the communities where villagers are empowered to grow agricultural crops and increase production of rice and other cash crops over time on land cleared from unexploded ordinance. Stora Enso pays for the clearing of unexploded ordinances to help make it safer for villagers to plant agricultural crops and to make it safe for workers to work at plantations. For example, consultations led to a decision to employ wide spacing methods in tree planting to address income and food security needs, enabling higher productivity, more income through new labor opportunities, and safer areas to plant rice as well as a rotational system that includes additional crops and livestock grazing.

Presenting complete information in an accessible manner is critical for “informed” consent. Stora Enso provided information orally, through written material, pictures, video and through facilitation of exchange visits with other communities also going through similar project consultations and information sharing with the company. While environmental impact assessments are supposed to facilitate information sharing, community members interviewed were generally unaware of the full process and claim to only have been informed about the project’s benefits. It is difficult to determine the degree to which the communities understood the potential impacts, despite the company’s and IUCN/UNDP’s efforts. This could potentially be attributed to the process by which the EIA was conducted, as it was based on sampling in all districts and also new villages were included in the project area after the environmental and social impact assessment was completed. Lack of ownership of the decisions and process was also reflected anecdotally in interviews, as villagers, including the village authorities, had a difficult time describing the plantation project and its purposes.

Stora Enso has supported land use mapping exercises with the active participation of community members and District leaders. The most important aspect of the “Village Mapping” is that it allows the Project to identify land use types that are important to the communities and/or identify high conservation value areas, which should be respected and preserved. The villagers participate in all steps of mapping and land use planning from demarcation of the village borders to planning of annual plantation areas to “no-go zones” for project activities.

In the context of participatory mapping, the company starts with satellite data to help refine priority areas potentially suitable for plantations. Then a survey process beings, including identifying the outside perimeter of each village, which is undertaken via GPS with the participation of farmers within the village as well as representatives

from adjacent villages. Once a village boundary becomes clear, the process moves to consider other land use types for the villages such as spirit forest, conservation forest, housing, production forest, roads, etc. The company then identifies areas potentially suitable for plantation trees. When the map is in final draft format, the company returns to the village to verify and validate the results.

The map, which is the outcome for the entire exercise, is called a “Land Use Survey Report” and contains a mosaic of the various land types inside the community and project areas. It can serve as a useful basis for land related discussions with the communities, as well as government authorities.

Outcomes

Following consultations and negotiations, a map-based “Land Use Survey Report” was prepared with the involvement of the villages. The report demarcates various land use types, including housing, spirit forests, protected forest, National Biodiversity Conservation, permanent agriculture, and plantations. The company uses the maps and information contained in the Land Use Survey Report in order to identify potential plantation land. This document is signed by the Village Committee and the District, with the company involved separately as a witness/observer.

The information contained in the Land Use Survey Report can serve as the basis for further discussions with the communities, government, and company regarding land use and planning. The company is able to identify areas that are not well suited for planting, whether due to environmental conditions, high conservation value forest area, or spiritual or other sites important to the villages. The company can then discuss any proposals for new planting areas potentially compatible with existing land uses. Under the agreements that have been reached, local farmers still have the right to plant crops in a sustainable manner between the rows of trees that Stora Enso will grow and harvest for their project.

Based on identified community needs, the company created at village development through a Village Development Fund (VDF) worth \$350 USD⁴⁷ per hectare to support and improve food security, income generation, education, water, health and sanitation. The fund is co-managed by the village and the company. Once the village receives a certificate of payment into the VDF, the community proposes how to program the funds, which must be endorsed by both the village and the district government who certifies the use is consistent with the country’s national socio-economic development plan. The selected projects typically include water pumps, electricity, health and educational needs. Balance sheets track the ways the village spends the funds over time.

the benefit package provided by Stora Enso through this project includes not only the VDF projects (education, water, health, sanitation, food security, etc.) but also agroforestry (support for rice and cash crops), land clearing, UXO clearing, jobs, infrastructure development, vocational and educational opportunities.

The Land Use Survey Report document provides “conditional consent” meaning that the negotiated community benefits can be provided if they are able to give the company a share in the land, and while Stora Enso receives the right to plant trees, farmers can continue with agricultural activities and access their land. The benefit sharing scheme (including the VDF) provides a means by which communities can benefit before they receive formal legal recognition of their tenure rights.

While benefits have clearly been identified and Stora Enso contributes substantially to community-identified development priorities, the company has no formal “benefit sharing” agreements with local communities but does have provisions for compensation for damage to land and expropriation of land. While it may not be a formal agreement, Stora Enso highlights its contributions to employment opportunities for cash income, unexploded ordinance clearing and safe land, assisting with soil preparation for agricultural areas, provisions of rice seedlings in the first year, and technical support provided by company staff.

Community concerns tend to be related to the uncertainty of land tenure, as negotiated benefits to be provided by the company (such as electricity and water) are in part contingent on acquiring land under the control of the community that is incorporated into formal concession documents, which involves coordination with the District, Province and Central Governments. Towards the beginning of the project, overlapping concessions and disputed ownership complicated negotiations from the community perspective, but district authorities successfully resolved the complaints which helped facilitate administration of this project. There are also questions around the long-term sustainability of project benefits, as some community members feel there is no plan for long-term development of the communities beyond the \$350/hectare payments associated with the Village Development Fund. While this is supposed to be addressed by structuring fund payments over a period of time to allow for ongoing operational needs (vs. providing a single lump sum payment up front), some villagers still wonder how they would afford repairing a broken water pump in the future. Stora Enso’s view is that beyond the Village Development Fund, long-term development is possible through enhanced land access through clearing of unexploded ordinance (one of the key barriers identified by UNDP for reducing poverty), new employment opportunities, more cash available for food and health needs, and increased rice productivity, which increases yields and reduces the amount of time for foraging in the surrounding forest area.

Assuming each Party fulfills their obligations, the agreement should hold legal force. The company has appointed a “Farmers Ombudsman” to address grievances. Formal arbitration or complaints regarding the overall agreement can be addressed under Lao law. The company plans to monitor developments in Lao law, including those relevant to villagers’ land rights. Furthermore, it appears that the legal force of the Land Use Survey Report places a burden on the capacity and broader governance of the District to enforce should any compliance issues arise. For example, the company capitalizes the VDF Fund through a certified Debt Certificate signed by the company and witnessed by the District and Village. Community authorities play a role in measuring and monitoring the land for the concessions, but they have also indicated the need for capacity building to be able to do this effectively.

All interviewed villagers expressed that they will be generally satisfied with the project, if the company provides what is promised. However, villagers also expressed concerns that the company may not live up to the promises. According to some villagers, the plantation project has already shown its value as it provides benefits for the communities in terms of job creation but they are concerned about the sustainability of the project benefits. Others expressed concerns that initial support for rice crops and integrated agriculture within the plantations was diminishing, which may be a point of contention with Stora Enso’s intent to provide start-up support for rice cultivation with the hope that operations could be self-sustaining over the longer term.

Villagers report that Stora Enso has begun providing seeds and technical support to plant crops in the plantation area and that some villagers can obtain training in managing crops and eucalyptus plantations. Jobs created by the company, such as tree planting, are mainly available during the initial years of the project, while other opportunities are available in later years such as rice farming and grazing. The company has also supported law students at the National University of Lao’s School of Law and International Relations to train some of the communities about their rights with regards to land and engagement in this project.⁴⁸

According to some reports, female stakeholders have been given a voice at the table through the Women’s Union Group noted above, but community members interviewed were not aware of the Women’s Union Group. In any event, the Group’s goals are addressed in the project through: a Scholarship Program for school children (notably including girls) to attend secondary school; targeted Fund investments in health and sanitation; offering equal job opportunities and agricultural exchange programs; and communication materials in local languages.

Stora Enso indicates that principles of FPIC should be used for all sensitive community engagements, whether with indigenous or non-indigenous peoples. Furthermore, their experience is that while the communication challenges can be difficult technically, the benefits far outweigh the costs by greatly reducing risk of conflict with local communities.

Further Considerations

This is a useful example of a collaborative arrangement process with significant poverty alleviation potential. Development needs are significant, and corporate engagement to help address this opened doors to joint land management opportunities. It can benefit communities that the company helps train villagers in managing plantations and also provides seeds and technical support for integrated crop planting. Similarly, Stora Enso can benefit from more access to land for its tree plantings.

Stora Enso's plantation project in Lao PDR is a typical scenario that many multinational companies face in high risk sectors. Working in developing countries in environmentally and socially sensitive sectors with uncertain governance structures and a mixture of community cultural backgrounds and expectations is nothing new. Yet the range of ways in which a multinational can manage these challenges and risks varies greatly. This case study provides an example of a company that has sought to conduct operations in a national context with evolving customary rights.

At a corporate level, Stora Enso has in place high level policies that specifically address the sectors and risks that their company will face and provide global direction on operational goals and expectations. Corporate policies alone are not enough and it is always the corresponding implementation that is key in achieving community consent and broader development outcomes in challenging environments. However corporate policies that are focused, e.g. in this case directly addressing rights, indigenous peoples and biodiversity as specifically pertaining to the wood and fibre sector, does set a tone for implementation by managers at the project level. Project managers' attention to these risks could be quite different if corporate policy was, for instance, brief and vague language of little direct significance to the mainstream of corporate strategy.

Fundamentally key to the stakeholder engagement process in Lao PDR is the baseline cultural and biodiversity assessment work. Before going too far and too fast with project operations, the company carefully surveyed local cultures, poverty challenges, development goals and environmental risks. From that baseline work and self-education, Stora Enso came to the table as a more thoughtful and credible organization. This baseline work formed the core building blocks from which flowed further consultation, legal agreements, partnerships and development funds that could be meaningfully developed.

This case study illustrates some of the challenges an international company may face in undertaking meaningful negotiations at the community level. First, barriers owing to the ethnic languages spoken by various community members who did not all speak Lao created some communication challenges that impeded full dialogue. Second, cultural and gender dynamics made it difficult to gauge the breadth of internal support, as customarily women

and youth traditionally do not speak at meetings. Third, the direct involvement and engagement of government as an independent third party observer can be helpful or complicated depending on how the presence is perceived by community members. In this case, given the uncertainty regarding land tenure and national legislative arrangements, building the District Agriculture and Forestry Office and other local government entities into the negotiation process created more sense of an official process and may have given the company more confidence to proceed with a collaborative agreement. At the same time, the presence of officials at meetings may have impacted the degree to which this impacted communities' sense that their decision was freely made.

The specific agreements, funds and the relative legal certainty of those outcomes even in the absence of clear national legislation on land tenure are one of the most interesting outcomes in this case. While some benefit distributions were still pending legislative changes, several of the land claims initially contested at the outset were successfully and efficiently resolved. There is a Land Use Survey Report incorporating negotiated community benefits, signed by key stakeholders and providing conditional community consent. There is a corresponding Village Development Fund that seeks to financially ensure community benefits, development goals and consent are achieved over the lifetime of the project. The company has followed international best practice by designating an ombudsman to the project who answers directly to the issues raised by local communities.

Interviews with community members indicated some level of satisfaction with the current arrangement. The language and cultural barriers made it a bit difficult to go in depth in dialogue; nevertheless community members seemed to appreciate some of the development benefits associated with the project. At the same time, there were some complaints regarding limited seedling provisions and also some confusion regarding the nature of payments and their relation to the Village Development Fund. From the community perspective, a 6-12 month period of dialogue could provide more opportunities to address some of these challenges.

Stora Enso to date has developed an admirable top down and bottom up strategy to achieve consent for their project in Lao PDR. Longer term, however, they will need to ensure that minority voices in impacted communities are continually mainstreamed into dialogue and benefits from the Village Development Fund are inclusive of those voices. At the same time, as the national legislative landscape may shift in ways that impact this project, Stora Enso will need to adapt to these changes in order to ensure consistency in their approach and promises to local communities.

Evolving Statutory Recognition of Customary Rights in Kranskop, South Africa⁴⁹

Summary: Through a government claims process, two Zulu communities secured legal recognition repatriating traditional lands operated by Mondi for tree plantations. Mondi originally acquired the land with expectations that their rights were settled; when land allocated for commercial production became subject to historical claims, the government negotiated with the company to buy back community land while simultaneously helping build the capacity and governance structures to enable direct community management. Through newly established business structures and land trusts, the company negotiated leases with the communities to enable plantation operations to continue. In at least one case, tensions arose between traditional governance and the new trust and associated businesses’ governance structure; transparency and auditing processes combined with community actions played a role in helping address these tensions. While community members were quite pleased to regain legal recognition and have their land back, a number felt excluded from the negotiations or expressed concern that benefits did not accrue as widely as anticipated. Despite challenges, both the communities and the company spoke positively about the outcomes of the land repatriation process.

Background Information

Mondi is a large international packaging and paper company. This particular case study involves eucalyptus, wattle, and pine plantations in South Africa associated with nearly 4000 hectares that span across 17 farms located within the AmaHlongwa and AmaBomvu communities in the Kranskop area of KwaZulu-Natal. This study concerns the process by which the State transferred ownership of land from Mondi to the communities while Mondi continued its forestry operations through a negotiated lease.

In South Africa, a 1994 national law enacted post-apartheid allowed communities dispossessed of their lands to put forward claims for consideration by the State.⁵⁰ By 1998, South Africa’s Commission for the Restitution of Land Rights (“the Commission”) had received claims from the AmaHlongwa and AmaBomvu communities for land which at the time was owned by Mondi. The Commission processed a claim of 1668 hectares for the AmaHlongwa community and 2266 hectares for AmaBomvu pertaining to land owned and managed by Mondi. By 2005, the Commission had determined that the two communities within Kranskop had legitimate claims to the land. The government found that while Mondi had not been personally responsible for displacing the communities, it had purchased land where a previous owner had done so, and determined that the communities’ claims were valid.

FIGURE 2 MONDI, SOUTH AFRICA



Image courtesy of National Geographic

After the government validated claims of the community members—known as beneficiaries⁵¹—it contacted Mondi to negotiate a purchase. As the first forestry land claim under negotiation, Mondi helped develop and proposed a settlement model suitable for the forestry sector. This included establishing a community-managed land trust and new business entities to manage land-related operations such as agriculture and forestry. In part due to its precedent-setting nature and need to develop and agree upon a settlement process, it took two years for Mondi and the Commission to settle these land claims.

While Mondi was negotiating the purchase of land with the government, it simultaneously negotiated with the communities for a 20-year leaseback to Mondi that would allow the company to continue its planned forestry operations in the area. The Commission participated in the negotiations as an observer. The lease which Mondi now holds is for rental and stumpage rights to areas roughly equivalent in size to the previous land areas which Mondi had planted for forestry operations.

Poverty levels are high in the communities. Some development needs include potable water, electricity, infrastructure, grazing land, computer technology, and higher education opportunities. The communities enjoy certain collective property rights and have community property associations incorporated as land trusts. Some community

members have previous experience with NGOs and government departments, construction, security employment, subsistence farming, and limited areas regarding forestry and sugar cane. At the same time, there is a need and desire to build capacity for forestry management, financial management (e.g., accounting), marketing/fundraising, community governance and conflict management. The Siyathokoza community has a development vision that includes livelihoods involving sugar cane, agriculture, livestock, charcoal, and forest production.

Mondi is proud of its relationships with the communities in the Kranskop area and claims to have leveraged substantial financial support from the government forestry agency to build the capacity of the two claimant Trusts to manage their lands for forestry. The two communities now actively participate in silviculture, maintenance and fire protection services. According to Mondi, the longer-term objective is still to enable the communities to implement broader job creation and poverty alleviation programs. Business plans have been developed but no grant funding has been allocated by government.

Community Engagement and Negotiations Process

After the communities registered their claims, the land rights Commission investigated the basis of the claims. After affirming their validity, the government commenced negotiations with Mondi to purchase the communities’ ancestral land and Mondi negotiated with the communities for terms that would allow Mondi to lease back the land to continue forestry operations. This was complicated in part due to the fact that the government only purchased the land and not the existing plantations, so the communities owned land but Mondi owned the trees. These negotiations took more than two years. Mondi led and financed the drafting of the lease, settlement, and purchase agreements.

Land trusts were set up quickly to manage the communities’ property. These trusts are legally constituted entities that have a board of trustees as well as a business arm that is managed by a board of directors. In terms of equity considerations, women are supposed to comprise approximately 1/3 of the membership of the trusts, and governance documents affirm the importance of equitable composition that is diverse in terms of gender and age. However, interviews with community members revealed a lack of awareness of this expectation and no indication it is actively respected in practice. The trusts are a new type of management entity for the community and operate independently from traditional decision-making systems although they also report to the community councils.

After the land was transferred, Mondi appointed a consultant, paid for by the State, to build community capacity for managing business operations. In at least one case, community member interviews revealed concerns that

due in part to lack of business experience and varying educational backgrounds, these capacity building investments did not achieve the desired results.

Because the trust governance is a new decision-making model, community consultation, participation and consent processes have been difficult to navigate, particularly at the level internal to the community. In one community, problems arose in part due to the dynamics between traditional governance and the new decision-making model imposed by the trust and associated businesses’ governance structure. In this particular case, the community chief (iNkosi) was named chair of the trust, and he and his wife were appointed as the two directors to manage the business operations and reportedly were the only signatories to the bank accounts. During the initial phase of operations of the trust and associated business operations, that particular management style raised significant concerns regarding equitable distribution of benefits. Under traditional custom, it is expected that community members should not challenge or pressure the chief, so while governance challenges were evident to many, there was no simple process to rectify those challenges. While the leadership has since changed and those initial management practices are now the subject of audit and investigation, it took a number of years before the issue could be addressed.

The Commission provided some support to the communities during negotiations, and also represented them during negotiations with Mondi. One of the communities felt they did not receive adequate support during the negotiations process, noting for example that the Water Act has certain legal requirements for landowners. There were also some concerns raised about pressures on the community to finalize restitution settlement agreements, particular regarding a separate lease concerning land for sugar cane production (which was not managed by Mondi but still relevant to the overall land transfer process).

While community representatives did participate directly in negotiations, some community members expressed a sense that some key provisions had been pre-negotiated between the Commission and Mondi, noting that some still refer to the agreement as “the Mondi-Commission deal.”

Agreed Outcome

Mondi prepared legal title and lease documents that reflected the negotiated terms of the agreement. The lease documents are extensive and provide details about how the land will be managed with respect to Mondi’s operations. Title to the lands was formally transferred to each community’s land trust in May 2009 and Mondi paid its first lease payment within days of the title transfer. In addition to lease payments, each community receives some

development assistance to the communities in the form of community projects and educational support, including annual awards of two university scholarships per community.

According to some community members, there was a sense of urgency and rush in getting deals signed. There was substantial excitement about “getting our land back” that built trust that the lease and purchase agreement details would be positive, although in hindsight some community members wish they had not simply assumed things would work out as promised. Some claimants were not included in negotiations early on in the land claims process. There is now a process in place to identify additional beneficiaries within the communities, which has created a new window of opportunity for those who felt they had been unfairly excluded during the original negotiations. At the same time, Mondi is planting in new areas, which has been interpreted by at least some community members as having an intention to continue operations, which could potentially led to conflicting interests with those community members interested in directly managing forestry plots.⁵²

Following the negotiations, Mondi commissioned, and the state forestry agency paid for, a consultant to help the land trusts develop strategic plans for land management, strengthened governance, and business development. This included a participatory rural appraisal workshop for the communities as well as a capacity training and needs assessment that included socioeconomic analysis and helped community participants better identify and prioritize their needs and expectations. The consultant spent three months conducting workshops and modules to develop the plans and another three months supporting their implementation. Information provided to the communities included legislation, business training, and good governance capacity building. The trusts developed governance guidelines and incorporated them into their formal trust management documents.

Interviews with community members indicate that while they believe the government negotiated in good faith on their behalf, it also could have done more to help them take a more active and informed part in the negotiations. Even many years following the completed agreement, interview reflected an overall lack of awareness of the details of the agreements. While training programs were undertaken for the purpose of constituting and building capacity within the trusts, interviews with community members indicate limited awareness of the communities’ overall rights and responsibilities under the trust arrangement and associated businesses operations. Generally, the trustees are working professionals with a different knowledge base and social status than many of the other beneficiaries, which may exacerbate existing inequalities within the community. In a few cases, officers to the trust or business operations had lower educational levels, and in many cases trustees and directors lack direct business experience, which according to some community members meant that even with “quality information” provided by Mondi, much of it was not adequately understood.

Interviews with community members also revealed concerns about access to unbiased external advisors during the negotiations process, as the assistance offered to them was either from the government or paid for by Mondi, both of whom were interested parties to the transaction. According to one community member, “[d]uring the negotiation process, government officials and Mondi staff informed the community of what benefit would accrue to them for accepting the deal. With hindsight, this was not appropriate as both government and Mondi were interested parties to the process. They had already made up their minds that this is what would work for us.”

Representatives from the land trusts, Mondi, and the government are supposed to meet quarterly to discuss implementation of their land management plans and lease terms. While the government no longer participates in the meetings, Mondi and the communities’ trusts and business directors still meet periodically. According to community members, in these meetings, Mondi provides rental updates, explains how the rentals are calculated, and indicates how much money they have deposited on the basis of sales, and sometimes also reports back on financial support for education and scholarships provided. Interviews with some community members reflected some difficulty in meeting with Mondi beyond these quarterly meetings.

The communities are still navigating the new arrangements. In at least one case, there have been challenges involving the distribution of benefits associated with the community’s business operations enabled through the trust. In part, that may be because the trust’s businesses have not been recording any profit. Internal management, transparency and information sharing challenges related to the initial management of the trust are now being audited and investigated. That said, every beneficiary did receive a one-time payment in 2011. While widespread reports of benefits to the broader community were lacking during interviews, in at least one case community members credited the process for giving a severely impoverished family a three-room house. Community members said they have not received training on forest plantation management, but they have received training from another company on sugar plantation management.

Interviews with community members reflect a mixed experience. On one hand, there are reports that community members are content to have their land back. On the other, there is a sense from a number of community members that the land purchase and lease agreements were more of a two-way deal with the government and Mondi, where the community was brought in after key provisions had already been negotiated. Additionally, it appears that many community members felt that lease-related benefits have not accrued as widely as anticipated, which has presented both internal and external challenges. There have been a number of reports of elite capture of benefits by those who are more directly involved in the management of the trust and business operations, and some community members expected more development-related support from Mondi such as infrastructure devel-

opments and housing. Many community members interviewed appear to recognize Mondi’s educational support, although it is not clear they recognize this is a condition of the community lease agreement with Mondi.

Mondi views this experience as a positive one. Ultimately, the company hopes to empower the communities to become direct business partners in forest operations. Mondi expects that devolving the land to a lease arrangement will help build the capacity of the communities to gain business and technical experience such that the arrangement with the community might evolve into direct purchase agreements.

Even with all of the concerns about the agreement, the communities still speak positively about the land repatriation process. They consider knowing that their claim was considered legitimate an important healing expression. For them, the earlier land seizure associated with Apartheid represented both an affront to survival and dignity of the black communities. Community interviews reflected the view that having the Commission declare their claims as legitimate was like “the rebirth of our dignity as a people” and the actual transfer of the title itself was a bonus in that process.

Further Considerations

The challenges that Mondi faces in South Africa are daunting. The company engaged in extensive negotiations with both Government and local communities over land rights that were determined after operations had already begun. Mondi had acquired the land originally with expectations that their rights were settled. Indeed, at the time the new land claims statute became law, much of Mondi’s land allocated for commercial production was subject to historical claims. Mondi recognized this risk and proactively worked to help develop a process by which its wood supply could continue to be secured even as ownership was changing hands. The result was a fairly extensive process whereby the State purchased land which could then be leased back to communities through newly created land trusts and managed by newly formed community-based enterprises. While the process was well thought-out, cultural challenges emerged over time because the process was imposed upon the communities.

This sort of risk scenario is a challenge to any company and finding a path forward that meets the goals and rights of the landowning communities and Mondi’s business strategy will be an ongoing balancing act. Maintaining community consent will be the core risk management strategy to ensuring profitable forestry operations. At the core of this challenge are overlapping land rights and intentions. The South African Commission has clearly awarded landownership to the AmaHiongwa and Amabomvu communities. At the same time, Mondi through negotiation and agreement has achieved some measure of consent through a leaseback arrangement for rental and stumpage rights. The lease payments and supplemental development assistance by Mondi to the communities will

ideally deliver upon a range of community development goals that will in turn allow Mondi to continue its forestry operations with minimal risk going forward.

The role of the South African Commission/Government in this context has been incredibly important and will remain so for the lifetime of project operations. The Government returned land ownership rights from Mondi to the communities thereby setting the environment and framework for future arrangements between the two stakeholders. Importantly, the company was compensated for the land lost, and the simultaneous leasehold negotiations between the company and community enabled a smoother transition among property interests. While the land transfer has been celebrated by the communities, what role the government plays after that initial decision has proven more difficult. Additionally, communities have increasingly recognized that notwithstanding their newly recognized rights, the full potential of their land management potential had yet to be realized. In particular, land that in recent decades had been allocated for agricultural purposes could have other options including homes and grazing.

The case study references a “rushed” process and a community view that this is a Mondi-Commission deal. Those perceptions bear monitoring going forward particularly as the details of the lease deal are implemented. Thus far, it seems that results have been mixed: communities are glad to have their land back and the economic gains from leasing land to Mondi have been significant. At the same time, internal management tensions and capacity gaps in business operations have created new challenges, in particular in addressing equitable benefit distributions.

Mondi will need to work with the communities and the Commission directly to sort through a range of risks during implementation to ensure inclusiveness in dialogue and benefit sharing, and encourage the Land Trust Associations to be culturally sensitive and transparent. Mondi has hired consultants to work on Land Trust Strategic Development Plans and the Government is involved in the negotiation of those plans. However in the urgency to achieve outcomes and do things right, the voice of the communities directly impacted must be mainstreamed into these processes. If communities feel disempowered by this process, small issues risk becoming large problems over time.

The Mondi case study demonstrates that consent challenges can come in a variety of project stages for the private sector, not just in gaining project support prior to any development. The study also demonstrates that while government involvement and good governance are key for achieving consent, government and the private sector also most seek to find the right balance in their bilateral engagement so that it does not come at the expense of potentially disempowering the local communities they are actually seeking to empower. Capacity building can substantially enhance longer-term opportunities for genuinely collaborative partnerships and potentially lead to new

opportunities for communities to engage in commercial tree planting operations—a practice previously reserved only for large companies.

Managing Conflict and Addressing Disputes in Pulau Padang, Indonesia⁵³

Summary: Indonesia’s laws regarding community forestry rights are changing. At the time the project in this case study commenced, APRIL received a license by the government to operate within an area where communities claimed rights by virtue of being there first, although the forest license did not initially recognize these community rights. Conflict emerged when 2 out of 14 villages opposed to the project challenged April’s plans to develop the concession area. A third party mediation team employed participatory mapping to help resolve land claims. The project went forward with government approval after revising APRIL’s permit and after removing areas pertaining to 2 villages that refused to consent.

Background

In 2009, Indonesia’s Ministry of Forestry awarded APRIL a forest concession license for the development of Acacia plantations in peat forests on the Island of Pulau Padang, in the Riau Province of Indonesia. The island is 1,109 square kilometers in total area and has a population of approximately 47,000 people. At the time the concession was awarded, the island had about 14 administrative villages, whose economies consisted largely of traditional livelihood activities (agriculture and fishing) dependent in large part on the forest and land, as well as some jobs associated with oil and gas operations. According to the Government, much of the forest is degraded, in part due to selective logging activities from previous forest concessions. There were also reports and evidence of massive illegal logging.

Conflict occurs in part because in Indonesia, the Ministry of Forestry controls forest areas and gives out forest concessions, which by definition are not ownership permits, but only a permit to manage the forest concessions for a certain purpose in a certain period of time. Companies applying for a forest concession are required to undertake an environmental impact assessment which includes identifying impacts to the environment and to communities, and to obtain their consent. The government must review and approve the environmental impact assessment in order to proceed with the licensing process. When the government does grant a forest conces-

sion, the license specifies that the company is responsible for solving problems that arise where community rights are identified.

The Ministry of Forestry classifies Pulau Padang as a “production forest area” owned by the State, the same area where there are communities who claim some forest areas as theirs. When the Ministry of Forestry issued APRIL a concession license in 2009, within the concession area there were no State-designated Customary-rights Forest areas (a particular classification by the Ministry of Forestry that recognizes customary rights). Indonesia’s constitutional court has recently recognized customary rights to forests in 2013 as distinct from State forests and the country is now in the process of implementing that decision.

While the community still has access to non-wood resources, APRIL also conducts various community development programs within the forest concession area. Some community members have claimed that the land concession granted to the company included the land and gardens of many villagers, which they say were taken without their consent. In many cases, the villagers’ land is located a bit far from the village center, but they claimed that these are gardens and not just empty land and can point to sago plantings. But in all cases, they do not possess required license to plant from the Ministry of Forestry.

Engagement and Negotiations Process

After receiving the concession license from the Indonesian Government in 2009, over a period of two years, APRIL undertook more than 60 rounds of consultations on its land use management plans with 14 villages on the island and with government officials, NGOs and academics. When tensions escalated, the local government established a joint commission to help address conflicts. When protests continued, the Ministry of Forestry established a mediation team to help resolve disputes. An additional monitoring and verification team was constituted to provide oversight.

The consultation and consent process included discussions at the community level with representatives appointed by villages and larger stakeholder dialogues at sub-district, district and provincial levels. Some say the company issued open invitations, so that everyone could participate in these meetings. Other villagers were concerned that only a small group attended the meetings held by the company but that group claimed to represent the entire community.

Not all consultation procedures went smoothly. While 12 village heads endorsed APRIL's concession, there was also opposition from 2 villages. Additionally, there were some reports of internal disagreement within villages as well as debates and conflict between communities (and different groups within communities) and also with the local government. Those opposed to the concession said APRIL's license should be revoked based on destruction of the island's peatland ecosystem and APRIL taking land without consent. Some of the objections were directed at the Ministry of Forestry's original decision to grant a concession on lands without recognizing the villagers' customary rights. While many communities and constituencies did not oppose the concession, for the villages and constituencies opposing APRIL's operations, this case could be characterized as a high conflict situation.

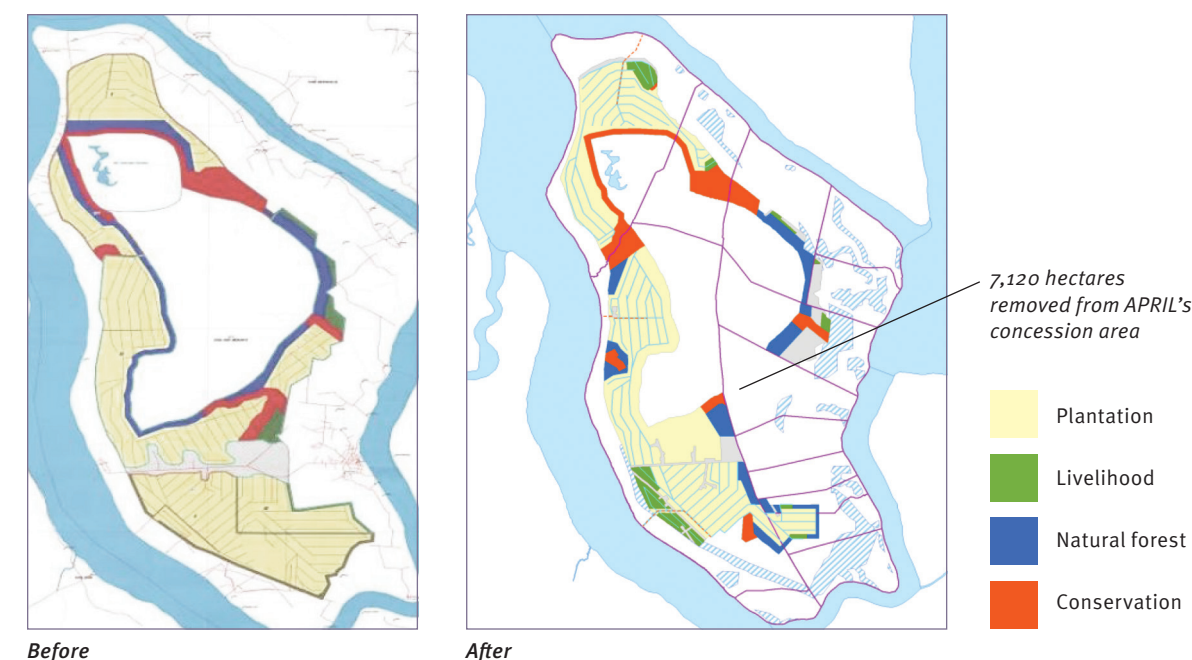
As tensions escalated, the Head of the district government formed a joint commission of community representatives, local government officials and APRIL representatives, with the objective of identifying and helping resolve community claims. The joint commission conducted several consultations involving local government, local communities and NGOs. Heads of the villages that participated signed voluntary community agreements with APRIL expressing their support of APRIL's plantation activities and set out a series of "shared-value initiatives" to improve the living standards and meet local community development goals as condition of APRIL moving forward with their concession objectives.

One month later, some protesters continued opposing APRIL's concession. Protest activities ranged from expression of concerns, to protests by the Riau Farmers' Union, and, according to April, arson and the murder of a contractor. To address these tensions, the Ministry of Forestry created a new multi-stakeholder mediation team specifically to address conflict associated with this project. APRIL suspended forest activities on the island while the mediation team carried out its work.

The Mediation Team recommended an independent monitoring and verification team to ensure the integrity of concession boundaries, community consultation, and participatory mapping/boundary demarcation. This led to a new independent multi-stakeholder team to carry out and monitor the process. APRIL began supporting this work in February 2012 and helped to form an independent team consisting of NGOs, community chamber and Ministry of Forestry representatives.

Following the establishment of the monitoring and verification team, mapping commenced to inform boundary demarcation determinations. The agreed process included participatory rural appraisal activities with each village and processes within communities to appoint their own representatives to engage in the process. Each village head endorsed the appointments with a "decision letter." In addition, new dialogues with each village (not just the designated representatives), were carried out over three months and were carefully documented.

FIGURE 3 APRIL'S PULAU PADANG CONCESSION BEFORE AND AFTER THE PARTICIPATORY BOUNDARY DEMARCATION PROCESS



Map courtesy of APRIL

Once land boundaries were set through the participatory mapping and consultative processes, work began to settle community land claims that overlapped with APRIL's concession area. Land claims were presented to and resolved by the Mediation Team through a negotiation processes witnessed by independent monitors, ultimately resulting in delineated maps. While most maps were endorsed and signed by all parties, some in the villages opposing the concession disagreed with some boundaries of the newly delineated maps. This appears to be related in part to boundary disputes between villages and in part due a lack of agreement on the appropriate map to serve as the basis for delineation.

Following the consultations, joint commission, mediation process, and MRV team involvement, the process did not lead to full consensus within and among villages. Two villages declined to engage in the demarcation processes in their villages. In addition, a third village carried out a separate participatory mapping exercise with an NGO but declined to engage further with the Mediation Team. The boundary and demarcation field process was completed in six months, followed shortly thereafter by map development processes and final submission of materials to the Ministry of Forestry.

Agreed Outcomes

Based on the conflict resolution process, participatory boundary demarcation, and the MRV process, the Ministry of Forestry issued a “Letter of Decision” in March of 2013 revising APRIL’s concession boundary area on the Island of Padang, with new conditions. Changes to APRIL’s concession included (1) a reduction in the overall size of plantable land; (2) substantially less project activity in the part of the island with 2 villages opposed to the plantation; and (3) enhanced emphasis on peatlands conservation, including new conservation areas.

A few areas remain in dispute, with some villagers disagreeing with specific areas indicated by the Ministry of Forestry’s revised concession decree; at the same time, community interviews indicate some level of satisfaction that villages opposed to APRIL’s operations have been excluded from the concession (Figure 3).

APRIL now operates based on the revised concession. Community interviews reflected that in at least some villages, operations are mostly running smoothly, most payments for land have been satisfactorily disbursed, and APRIL has provided support for local development priorities including education, infrastructure, and health.

Notably, over the course of two years of consultations and protests, the project footprint changed demonstrably from the original proposal, ultimately reducing the overall size and excluding the villages who remained opposed. The concession area was reduced from 41,205 hectares to 34,865 hectares, reflecting in part the exclusion of the villages that opted to not participate in the multistakeholder Mediation Team process. Notwithstanding the conflict associated with part of the concession area, the fact that the communities’ right to say “no” resulted in a modification of the process would appear a significant development in demonstrating an FPIC outcome.

While the process resolved many claims, some boundary disputes persisted, and some villagers expressed concern that APRIL would operate in the future without their permission. While some villagers in the communities opposed to the concession affirmed that they have been able to continue with their desired land uses, some also expressed a fear that new clearings or plantings would occur in some of the areas where claims remain unsettled.

Company and Community Perspectives

From the community perspective, those who are in favor of the company’s operations feel that villagers can easily convey concerns to the company and express satisfaction with payments and the infrastructure, education, and

health benefits received. They note that the company has engaged in negotiations leading to resolution of land disputes, contemplating three different options for the villagers whose lands were located within the concession area. There are also some who remain opposed to APRIL’s operations, particularly in the communities that refused the allow operations within their boundaries. Additionally, there have been reports that community members feel powerless to effect any modification to operations.

The main community benefit mentioned by villagers is that the company creates employment opportunities. Those employed by the company say that they are pleased with the regularity and of their work and the income, which they estimated to be higher than their traditional occupations such as working in the gardens (villagers opposed to the project say that income from their independent businesses are higher). Other stated benefits are roads, health facilities, educational facilities, and mosques.

APRIL acknowledges that the overall process “might not be an ideal example of a full fledged FPIC process” while noting that the participatory approach is novel for Indonesia and a good step forward for the forestry sector in the country. The process takes good faith, time, commitment from many diverse stakeholders and financial support provided by APRIL and the Government of Indonesia. APRIL has observed that empowering the communities and environmental conservation can lead to its own set of challenges, noting that the removal of 7,120 hectares of plantation ring exposes a core conservation area directly to community land. APRIL thinks a well-managed ring area and community zone could support ecological integrity of the core area.

APRIL views FPIC in this case as an ongoing process and notes that because communities have few economic opportunities and need innovation, future success will depend on ongoing dialogue, innovation and development solutions. APRIL has suggested that independent monitoring and verification teams could be a useful tool to integrate into future FPIC deliberations.

Further Considerations

APRIL’s engagement in Pulau Padang has been a long and challenging road for all parties involved but provides some important lessons learned. These lessons are being reviewed and acted upon by APRIL and also can help enhance global discussion on best practices for community consent and engagement going forward.

There is an inherent risk in receiving a license for a forestry project on land subject to conflicting claims. The company was indeed awarded a legal forest concession license by the Government of Indonesia in the context of historical use and claimed customary rights not recognized by the national government. Additionally, boundary disputes complicated resolution of claims in certain areas. It is a clear risk accepted by the private sector to go into that sort of environment with competing statutory and customary rights claims.

At least some of the competing claims wound up being incompatible with APRIL's operations by virtue of the opposition of certain communities and interest groups. Perhaps the most readily identifiable insight from this case is that sequencing matters: it is difficult for a company to engage in community consent processes at the same time licensing and operational decisions advance. The various starts, stops and new consultation and engagement processes designed along the way by the various stakeholders involved in the process demonstrates the importance of the timing of decisions for effective stakeholder engagement. Indeed, the sequencing of APRIL initiating operations over protests by certain community members may have led to distrust and controversy with some communities that only heightened project risk and caused further delays and uncertainty.

Several other challenges are worth mentioning here. First, the matter of representation is difficult for a company to navigate: APRIL initially negotiated with village heads, but some communities were internally divided, yielding a new process more inclusive of various perspectives. Second, it is difficult to determine how free and informed consent is best measured, as there was at least one instance of community members reporting their decision felt pressured; at the same time, decisions were documented and maps were signed following in some cases lengthy discussions. The question thus becomes what the appropriate measure is for determining that it is appropriate to proceed, and who has the authority to make such a determination. Finally, a range of different grievance mechanisms were employed by the district government and APRIL along the way with varying degrees of stakeholder buy-in and success: these grievance mechanisms ultimately enabled operations to proceed by providing a means by which dissenting views could be considered and addressed.

Despite these obvious challenges, the case study does provide some positive steps that were taken to develop a more equitable process. Once a balanced multi-stakeholder team was designed that was inclusive and better incorporated various interests and perspectives, more claims began to resolve. Participatory mapping and demarcation processes helped some communities be better informed in negotiations, enabling a more fair and transparent process that previously experienced. Indeed, the mapping and demarcation efforts helped clarify and revise forestry boundaries. It also led to enhanced conservation efforts in the region by APRIL and the government.

Importantly, persistence by all stakeholders also led to a process that respected those communities who exercised their right to refuse consent and reject APRIL's operations within in their boundaries. To their credit, the State and APRIL respected these decisions by revising to a smaller project footprint. As Indonesia works to better incorporate customary rights into statutory and regulatory decisions related to forests and land use, APRIL's work with communities in Pulau Pundang will continue to evolve and require a patient and reliable engagement strategy.

Clear Tenure and Social Stratification: Tiered Negotiations in Tacuarembó, Uruguay⁵⁴

Summary: UPM employed various approaches to stakeholder engagement based on different tenure situations. The company negotiates directly for purchases or leases with landowners, who tend to be maintain larger estates with secure tenure. In an effort to bridge traditional land uses and booming plantation forestry operations, UPM negotiates easements for grazing and beekeeping on plantation lands. Most community members do not have sizeable land or grazing rights, so for their benefit UPM provides funding through a foundation supporting targeted development projects in order to benefit broader community interests.

Background Information

UPM is a multinational forest products company with global sales topping US \$10 billion in 2013. One of their biggest operations involves “biorefining” for pulp, timber, and biofuels, with four plants located in Finland and Uruguay. To support their operations in Uruguay, UPM's landholdings in Uruguay cover over 230,000 hectares in area. Most of the land that feeds UPM's forestry operations has historically been pasture used for grazing, particularly cattle. While UPM much of the land is directly owned and managed by UPM, it also maintains leases, purchase agreements, and easements that span nearly 20% of its total land area. A recent company-commissioned study estimates that UPM added over US \$600 million to Uruguay's economy in 2012, representing 1.28% of the national Gross Value Added.⁵⁵ Notably, forest products have surpassed both dairy and leather products in the past decade to become Uruguay's third biggest export. UPM maintains various certifications for its forestry operations under various international standards including FSC, PEFC, and ISO.

In Uruguay, UPM's Forestal Oriental⁵⁶ carries out its activities directly in five regions, distributed on the departments of Río Negro, Paysandú, Soriano (River Coast Region), Tacuarembó (North Region), and Durazno, Rocha

FIGURE 4 TACUAREMBÓ, URUGUAY

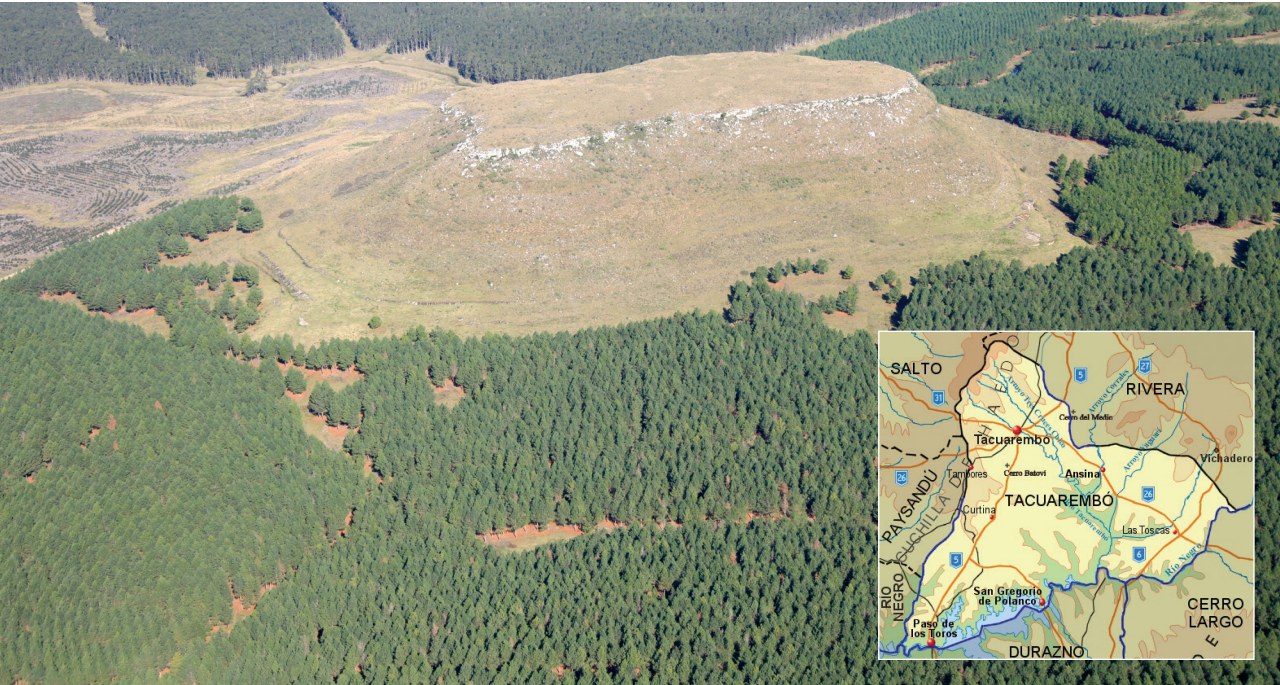


Photo courtesy of UPM | Map courtesy of Wikipedia

and Cerro Largo (South-Central Region). In the Tacuarembó region alone, the company has some 26,000 hectares of planted areas within the 44,000 hectares of operational area. There are 14 communities directly impacted by UPM’s operations in the Tacuarembó region. Within the area of influence there are in all 83 communities. These communities have quite different characteristics and needs. The vast majority of these communities have populations of less than 1000 inhabitants: indeed, many have populations below 100 people.

The company has been operating in Uruguay for more than twenty years. In the late 1990s, Uruguay opened its doors to foreign investments and changed its forestry law to enable forestry plantations. UPM and various subsidiaries substantially grew their operations and have been purchasing and leasing land for operations while coordinating with government officials to obtain permits for forestry operations, which concentrate on Eucalyptus plantations. UPM takes pride in having a sustainability policy and also participates in forestry certification schemes such as FSC, which provides additional motivation for the company to update its community relations procedures. UPM’s corporate policy supports sustainability through policies such as not converting natural forests to plantations and leaves much to the country office’s discretion to define the most appropriate context and approach.

In Uruguay, land use laws have relatively strong statutory rights for private owners. According to UPM, all plantation lands are either purchased or rented from households with registered, recognized titles whose ownership is not disputed. Land holdings tend to be structured around larger scale estates (“estancias”). Abutting these estancias are communities of generally 50-150 residents, may rent or own their house but generally do not have sizeable land or grazing rights. Community members generally provide labor services to nearby estancias, often working in the agricultural sector and tending livestock. UPM has not identified any indigenous peoples or customary owners with disputed lands within the project area. Most of UPM’s negotiations for plantation land are with individual owners: of approximately 300 lease contracts, only 11 are with institutions (such as pension funds) or associations. Easement agreements (explained in more detail below) are more varied between individuals and associations.

Stakeholder engagement involves landowners through negotiations regarding sale and lease, neighbors through easements for cattle and beekeeping, and social development through activities undertaken by the UPM foundation. UPM also employs local labor on its plantations, either directly or through contractors. Much of its operations are mechanized, which requires fewer but more highly skilled personnel. The company undertakes some ad-hoc dialogues with select political and opinion leaders from various stakeholder constituencies regarding ongoing plantation management matters associated with their operations.

UPM designates areas for forestry plantations which are selected according to crop growth potential and as consistent with land use criteria designated by national and local law that set forth which soils are eligible for plantation forestry activities. UPM owns about 2/3 of the land used for plantations and leases another 1/3 through a “Programa de Fomento,” which includes leases and purchase agreements.

In an effort to bridge traditional grazing and booming plantation forestry operations, UPM enters into agreements for easements to allow grazing (mostly cattle) activities in non-planted areas, which also benefits UPM in reducing fire risks. UPM approaches land use planning with a view to balancing project operation impacts and respecting and preserving the environment. The core legal framework in Uruguay according to UPM is one of responsible management requirements. UPM notes that some areas are “non-plantable areas” or no-go zones for forestry activities under the law according to environmental and social characteristics. For those areas eligible for plantation forestry, an environmental impact assessment is required to obtain a permit for any areas exceeding 100 hectares. UPM also undertakes periodic social and economic assessments at its own volition.

Broader community development priorities include electricity, potable water, secondary education, improved health care, and enhanced road infrastructure.

Engagement and Negotiation Processes

UPM describes several key elements of the consultative processes involving UPM's operations. Broadly speaking, UPM considers direct consent reflected in the form of legal agreements for the leasing and purchase of land as well as the easements, and broader community consent in the form of a social license to operate through UPM Foundation activities and dialogues. The company follows different procedures to address different stakeholder needs, including:

- ➔ Social and Environmental Impact Assessment: UPM evaluated and monitored the social impacts of forestry on the areas of influence by hiring intermediaries to work with communities from before the project started through the entirety of the process. UPM conducted surveys based on indicators to identify the socioeconomic, cultural and spiritual characteristics of the communities located in the area of influence.
- ➔ Negotiated Agreements: UPM negotiates with both individuals and associations to secure formal legal agreements in the form of purchases, leases, and easements. The purchase and long-term lease (20+ years) negotiations can take up to one year to complete and generally involve medium to large tracts of land designated for at least two ten year planting cycles. The easements are shorter in duration and include usufruct rights for grazing and beekeeping activities. Both lease and easement agreements proscribe specific management activities and include penalties for non-compliance. Due to the tenure structure in Uruguay, these agreements tended to involve larger landholders and producers. Engagement with communities adjacent to the larger land holders was more focused on periodic dialogue (see below).
- ➔ Community Talks: UPM prepared and engaged in culturally-sensitive public presentations and discussions with locally impacted communities. UPM conducted “visits” with interested stakeholders to explain its operations, technology and environmental stewardship. The company engaged in “solidarity days,” taking part in events to promote social responsibility in project impacted communities and build partnership and trust with communities. However, it is unclear how effective these visits were, as interviews with community members indicated a limited awareness of UPM's forest operations, often with the view that land containing UPM forests did not immediately impact them.
- ➔ Stakeholder Meetings: In addition to formal meetings with political officials ranging from the local to national levels, UPM periodically convened informal meetings of 15-20 opinion leaders with diverse backgrounds in order to provide a platform for dialogue related to forestry operations. Based on interviews, it was unclear whether these meetings resulted in significant changes in either UPM's operations or local perceptions of the company.

- ➔ Communications and outreach: UPM created a radio campaign to inform impacted communities of project related news and information such as truck routes, healthcare issues, workshop consultation opportunities and related consultation issues UPM also maintains a complaint hotline advertised on trucks. While information flows out from UPM, community members interviewed were generally not aware of how to contact the company regarding any concerns and did not appear to be aware of any telephone hotline. Primarily for cultural reasons, it is unclear whether a hotline would lead to reports of concerns even if community members were widely aware of its existence. That said, interviews with company representatives as well as some opinion leaders and community representatives suggested that the company is generally aware of local concerns.
- ➔ UPM Foundation (particular to the Tacuarembó region): In addition to project impact related stakeholder consultations, the UPM Foundation contracted with a local NGO to help identify community priorities for educational development within UPM forestry operations' area of influence. The UPM Foundation is structured to help support community-identified needs that are also consistent with UPM's strategic and development priorities. The approval of projects and fund allocation is decided by a Board that is jointly managed where UPM has minority voting representation. This approach, including local capacity building and community-identified priorities, is consistent with international good practices for development-focused benefit sharing arrangements. This project appears to be one of the flagship benefits available to broader community members, and this approach appears sensible in a socially stratified country like Uruguay where land agreements with UPM tend to benefit larger landholders.

Outcome

Landowners—including individuals, collective groups, and private/institutional entities—who partner with UPM for commercial forestry activities receive technical advice, purchase agreements, and preference for grazing and beekeeping easements on land managed directly by UPM. The monetary benefits to the landowner could be for UPM's use of the land for planting (expressed in dollars per hectare per year) or for direct purchase of trees (payment for a certain volume of harvested trees). There are also institutional partnerships with associations where UPM jointly manages an area for two rotations and helps build capacity for longer-term supply agreements.

In terms of easements on company-owned land, UPM has over 300 active agreements covering some 65,000 heads of cattle (the value of the easements is based on the local price for cattle meat) and gives easement preferences to those already affiliated with the Programa de Fomento. Additionally, UPM entered into a joint management partnership with local and national beekeeping organization, resulting in 150 agreements with beekeepers

for 20,000 hives on UPM-manage lands that span approximately 35,000 hectares of forest land. The easement rights are paid to UPM on a per-colony basis and valued based on the local price of honey. The partnership agreement includes clauses establishing a joint management team, strategic planning, annual management plans, a Forest Beekeeping Fund, reporting and monitoring requirements, and conflict resolution procedures.

For the broader community, UPM Foundation activities did have some influence in the region. The flagship social benefit is a school, about which a number of community members in the zone of influence spoke positively notwithstanding general frustration with inadequate transportation infrastructure leading to students having to leave very early in the morning (e.g. 5am) and frequent reports of the school bus breaking down due to road and weather conditions. Generally the community members interviewed were grateful for the school project and had generally positive views of UPM though their involvement with UPM’s forestry operations appeared minimal. Community members interviewed were aware that UPM has operations and leases lands from landowners. They were not aware of future plans for expansion. UPM has earmarked funds to pave one of the main roads going through the Clara community but is dependent on official approval at the province level, which has not happened yet.

Some had complaints about dust from the trucks and expressed broader development concerns such as electricity, health care, and potable water—and appeared at least indirectly to hold some expectation that UPM could or should provide some of these services. Community members interviewed were not aware of a process by which to express these concerns even though the company maintains a contact point to receive complaints and the telephone number is advertised on company trucks.

Further Considerations

A key challenge for UPM is developing meaningful collaborative arrangements across a large amount of land and diverse communities. Different strategies will work in different settings and depending upon the stakeholder at issue. Uruguay’s land ownership tends to be tiered between larger estates and adjacent communities whose residents generally lack significant ownership rights and instead provide labor and other services to the estates. As such, UPM’s approach has followed a tiered system where formal lease, purchase, and easement agreements are negotiated with landowners and commercial interests.

Strong statutory rights combined with a lack of competing customary claims means that private landowners have strong tenure rights in Uruguay. UPM has to meet those rights with a robust policy and platform for engagement that has resulted in clear, legally enforceable written outcomes with land owners, and ranchers and beekeepers. While UPM is guided by a range of traditional government regulations with respect to their forestry operations,

their negotiations and consent are not with local communities that are in precarious positions with respect to their customary land rights. Rather, the primary negotiations that occur for UPM in Uruguay are with other private interests who own land or engage in commercial operations for grazing or beekeeping. Clearly for specific land leases, a negotiated legal agreement, often spanning decades is necessary. For specific easements within a particular piece of land more short-term targeted agreements are reached. This dynamic creates a more even balance in negotiations with land and cattle owners than perhaps that of the stakeholders engaged in discussions regarding UPM foundation.

At the same time, UPM has developed processes to engage a broader set of community stakeholders through the more dispersed benefits associated with the UPM Foundation. Some of this work has been undertaken through a local NGO who has assisted with convening and facilitating meetings to discuss foundation activities and building community members’ management capacities. As the case study notes, UPM has several outreach strategies in its toolbox to inform communities on both its operations and foundation giving programs. By most accounts, UPM has developed broad community support for its operations in the region.

Interviews with local communities do, however, note some issues that bear monitoring to ensure community consent is maintained over the lifetime of UPM operations. First, communities do not appear particularly well-informed with respect to UPM’s future plans and any associated cumulative impacts of UPM operations. It is often the cumulative impact of industrial activities that can in aggregate create the most concern for local communities. As industrial activity expands local community interaction with a company can evolve in both positive and negative ways. It is imperative for companies to inform communities of what that expansion will look like ahead of the curve. Second, communities are increasingly expecting UPM to provide services that have historically been—and still are—the domain of the State. Community priorities include electricity, potable water, secondary education, health care and road infrastructure. While UPM has supported some projects for the provision of services, the company has been selective in supporting primarily those projects that also benefit the company’s forest operations (road infrastructure, etc.). UPM Foundation has more broadly supported community-identified development priorities (such as education). The State has not always been as proactive in addressing the broader community needs. Enhanced periodic dialogues with stakeholders regarding UPM’s operations and expectations can help keep communities informed and help deepen collaborative arrangements, whether through foundation or formal land management agreements.

Conclusion

Expectations and best practice standards for forest operations have evolved over the years. There is now an abundance of standards and criteria that recognize that communities and other stakeholders need to understand, fully participate in and negotiate the terms of any agreement that impacts underlying rights—and those underlying rights should not be infringed upon without the consent of the rights holders.

At the same time, it can be challenging for companies to work in environments with unclear or evolving tenure environments. For example, in Laos, the lack of clear national laws and local governance respecting communities’ customary tenure rights or requiring FPIC (as well as the lack of any noted financial or shareholder expectations on the issues) can complicate even good faith negotiations. One response to evolving or insecure tenure is a “conditional consent” agreement where communities agreed to trade land for benefits, but only if they could clarify and demonstrate their rights to the forest lands in question. Similarly, in Indonesia, forest permits have at times been issued to companies in areas where communities claim they also have rights to be there. Indonesia’s constitutional court recently recognized customary rights to forests as separate from State-owned lands, particularly from a company perspective.

It is all too often true in the case of forests that many underlying rights to forest resources may not be recognized by the State. Even where protected under international law, customary rights to forests and related lands and resources may be overlooked or ignored at the outset (e.g. Pulau Padang, Lao PDR, and even the Kranskop case), in part because statutory laws may fail to recognize their existence. Given that forest-dependent communities are some of the most economically impoverished and marginalized in the world, it is perhaps not entirely surprising to encounter statutory laws that conflict with customary rights. Such a situation creates a challenging operating context for businesses, particularly in the land-extensive forest sector.

The case studies suggest there is a trend for benefit sharing arrangements to become increasingly important where communities lack state-recognized rights to forest resources. This appears to be one means by which companies have been able to obtain a “social license” to operate even where the State has provided a formal permit to operate without recognizing customary rights. Even when not required under statutory law, companies may find that this social license to operate can make a significant difference in reducing conflict and ensuring smoother operations.

It is clear that the more stakeholder engagement occurs before decisions are made and operations commence, the more problems can be addressed before conflict escalates. Indeed, one of the most relevant questions for stakeholder-focused negotiations is who has legitimate customary or statutory claims, because underlying rights

TABLE 2 SUMMARY OF ENGAGEMENT, NEGOTIATION, AND CONSENT PROCESSES

Site	Country	Outcome	Role of Government	Clarity/ Security of Tenure	Community rights recognized?	Disputed claims	Level of external conflict	Level of internal conflict	Grievance mechanism available
Savanna-khet and Salavan	Lao PDR	Land Use Survey Report	Grant concession; Approve Fund projects & Survey Report	Weak	Legislation pending	At outset	Low	Unclear	Company ombudsman
Kranskop	South Africa	Title transfers and leases	Evaluate community claims, compensate company	Medium	Not at outset	Few	Low to Medium	High	Formal State-sponsored Commission
Pulau Padang	Indonesia	Signed maps, revised permit	Grant/ revise concession license; ad-hoc team to consider complaints	Weak	Not at outset	Various	High in certain places	Medium	Multiple: State-sponsored unit and multi-stakeholder team
Tacuarembó	Uruguay	Purchase, lease and easement agreement	Grant environmental permits; enforce contracts.	Strong	Yes, for large estate owners.	Minimal	Low	Low	Telephone complaint hotline

presumably would not be given up without the agreement of the rights-holder. This begins with identifying the appropriate actors at the outset. The Lao PDR case demonstrates the value of a robust early social impact assessment process, which enabled the company to move forward even before national law provided formal recognition of customary rights. On the other hand, Pulau Padang demonstrates the complications that can occur when communities’ customary claims are overlooked at the outset—even where this is not required under statutory law.

Starting from this premise, historically marginalized communities may find they hold significant decision-making authority by virtue of their claims to forest land. The Kranskop study illustrates the changes that can occur when communities receive new recognition by the State. In some cases these rights may be evolving, increasingly towards recognizing customary rights (Pulau Padang). But there are many other cases where countries lag behind

in recognizing communities’ traditional land management rights. The Lao PDR case is an interesting example of communities on the cusp of recognition, whose ability to finalize an agreement is hampered in part due to pending legislation that may better recognize community rights.

Effective engagement in negotiations means ensuring that stakeholders—including both statutory and customary rights holders—learn about proposed activities well enough in advance to understand potential benefits and impacts, and make an informed decision regarding whether and how to proceed. Each case study analyzed included elements of capacity building and external support: Mondi supported a consultant to work with the communities for several months in order to help enhance their internal management and business capacities; Stora Enso supported law students to work with community members; communities in Palau Padang worked with an independent NGO to undertake participatory mapping; and UPM supported an NGO to help facilitate discussions regarding UPM foundation activities as well as providing training to some landowners for plantation land management.

Collaborative agreements also demand an element of genuine—and not forced—agreement. In each of the case studies presented, stakeholders were given opportunities to dialogue with companies regarding at least some key terms of agreement. At the same time, cultural limitations can present challenges for meaningful dialogue. For example, in Lao PDR, it is not customary for women to speak in public meetings, so it was difficult to ascertain whether any expressed community agreement incorporated their perspective or whether the agreement was imposed upon them.

Another insight from these case studies is that government has the potential to play an important and constructive role in facilitating agreements between companies and communities. As demonstrated in the Kranskop study, the government claims commission played a central role in enabling a more equitable outcome by transferring title from the company to community while compensating the company for its loss. Additionally, in several of the case studies, government officials participated as observers to company-community discussions, and reports by community members on the State presence ranged from a sense of government being a helpful to somewhat intimidating presence. Finally, there were reports in multiple cases where even though agreement was reached and generally accepted, some key community representatives felt as if they did not have much of an option to object to a proposal, feeling as if a decision had already been made between the government and company. That said, in most of the case studies, validation processes as well as the act of formally signing leases and maps all provided important opportunities for community members to make a formal decision regarding whether to formally

document their consent, and reports from the field found many community members expressing satisfaction with much of the negotiated arrangements.

Grievance mechanisms become increasingly important where the State has failed to recognize customary rights and operations have commenced notwithstanding customary claims. Indeed, the Pulau Padang and Kranskop cases provide interesting insights into this process: in both cases, the companies had a State-recognized right to operate but then the State became involved to address community claims and renegotiate terms impacting the company’s operations. In the case of Kranskop, this arrangement entailed State payments to the company for land, which perhaps helped enable resolution regarding ownership and facilitate subsequent lease negotiations. In Pulau Padang, the State also intervened by revising the company’s operating license and FPIC was applied to a company’s forest concession area affecting more than a dozen communities who were not initially recognized as having customary rights by the State or formally identified as indigenous. Nevertheless, the concession generated substantial controversy, as communities’ livelihoods were dependent in large part on subsistence agriculture. State-mediated negotiations and participatory mapping helped address claims on a case-by-case basis and ultimately reduced the company’s concession size by thousands of hectares by excluding the areas claimed by communities who refused their consent, which then allowed the modified project to proceed. Ultimately, it was the grievance mechanisms that enabled resolution of the conflicts.

Finally, there may be an under-appreciated value to stakeholder engagement processes whereby the act of negotiations may actually help strengthen community development outcomes. For example, conflicts in Pulau Padang ultimately resulted in more recognition and resolution of community claims to land. In Tacuarembo, community networks became stronger through community participation in decisions regarding secondary education programs, and at least one village gained electricity access from the State which may have been indirectly related to UPM’s stakeholder engagement efforts.

While the process is not a short one and is not without conflict, the overall outcomes of collaborative agreements can be significant when communities are not only asked for their opinions but become an integral part of the development dialogue and in making decisions regarding their future.

Endnotes

¹ The International Finance Corporation defines “stakeholder” as “persons or groups who are directly or indirectly affected by a project, as well as those who may have interests in a project and/or the ability to influence its outcome, either positively or negatively.” This includes communities, individuals, NGOs, government officials, and academic interests. See IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007).

² PROFOR, Poverty and Forests Linkages: A Synthesis and Six Case Studies (2008), available at <http://www.profor.info/Documents/pdf/livelihoods/PovertyForestsLinkagesCaseStudiesSynthesis.pdf> (citing World Bank 2004).

³ Id. (finding forest products can account for some twenty percent of income beyond home-based consumption).

⁴ Id. (citing Sunderlin et al. 2005; Sunderlin et al. 2006).

⁵ Id.

⁶ IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007).

⁷ “More than 200 States have ratified numerous international and regional treaties and covenants that expressly provide for, or are now interpreted to recognize, a State duty and obligation to obtain FPIC where the circumstances so warrant.” UN-REDD Legal Companion to the UN-REDD Programme Guidelines on Free, Prior, and Informed Consent (2013), at 4.

⁸ See Marcus Colchester, Free, Prior and Informed Consent: making FPIC work for forests and peoples. The Forests Dialogue (2010), at 4.

⁹ Office of the High Commissioner on Human Rights, Guiding Principles on Business and Human Rights (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See, e.g., Principle 18

¹⁰ Compare, for example, Colombia’s Ministry of Interior (which is tasked with, inter alia, certifying companies’ consultation processes) with the Philippine National Commission on Indigenous Peoples (which has at times been the subject of allegations of biased actions in favor of extractive industry companies in the national FPIC process). See, e.g., Cheryl L. Daytec-Yaño, FPIC: A Shield or Threat to Indigenous Peoples’ Rights?

¹¹ The specific names and details of each project have been omitted at the request of some of the companies referenced in this document.

¹² UN-REDD FPIC guidelines, at 11-12.

¹³ See, Gamebey & Surui Carbon, Free, Prior and Informed Consent: Surui Carbon Project, ACT Brazil (2010), at 31.

¹⁴ See, e.g., Gamebey & Surui Carbon, Free, Prior and Informed Consent: Surui Carbon Project, ACT Brazil (2010). There are also incipient initiatives in Guyana. Beyond the forest sector, groups such as the Mursi People in Ethiopia developed an FPIC template for outside actors wishing to approach them regarding project proposals.

¹⁵ See, e.g. UN-REDD Legal Companion to the UN-REDD Programme Guidelines on Free, Prior, and Informed Consent (2013). While consent can apply to a broad scope of cases involving cultural identity, the most relevant standard for forest sector activities is perhaps that articulated in UNDRIP, which requires FPIC in the case of projects affecting lands, territories and resources “in connection with the development, utilization or exploitation of mineral, water or other resources.” See United Nations Declaration on the Rights of Indigenous Peoples (UN-DRIP) Art. 32.2. Note that FPIC is also required for legislative and administrative measures that affect indigenous peoples’ rights, see e.g. UNDRIP Art. 19.

¹⁶ For example, FSC and CCBA also have provisions for local communities, although the standards are different than for indigenous peoples.

¹⁷ In Colombia, “pueblos indigenas” are generally considered communities with cultures of pre-colonial origin.

¹⁸ See FSC FPIC Guidelines, UNGD Guidelines on Indigenous Peoples, UNREDD FPIC Guidelines, and RECOFTC guide on FPIC and REDD.

¹⁹ See Cheryl L. Daytec-Yaño, FPIC: A Shield or Threat to Indigenous Peoples’ Rights?

²⁰ UNDRIP Art. 32.2 (2007).

²¹ If the process were merely consultations, expectations for international good practices would include providing notice of a proposed activity, describing the impacts, and making the proposal available for public comment; best practice would be to respond to comments received and to communicate whether/how any changes were made. Implicit in this consultation model, however, is that the ultimate decision rests with the project proponent and regulatory bodies, and that communities may have a voice but not have a formal role in decision-making. The consent model is different.in that communities would have a formal role in making decisions regarding activities that directly affect them.

²² We reference “contacts” as an option in preconsultation to reflect that a company may not be able to immediately identify representative institutions and may instead need to identify a contact capable of assisting them in doing so.

²³ Committee on Food Security & FAO, Voluntary Guidelines on the Responsible Governance of Tenure of land, fisheries and forests in the context of national food security (2012), at 9.9. Note that the consent element is articulated in the context of UNDRIP.

²⁴ In addition to the IFC, the UN Development Group, Asian Development Bank, and European Bank for Reconstruction and Development all apply FPIC to certain activities and actors—and consistently to potentially significant impacts to indigenous peoples.

²⁵ See Performance Standard 7, IFC Performance Standards on Environmental and Social Sustainability (2012).

²⁶ See Performance Standard 5, IFC Performance Standards on Environmental and Social Sustainability (2012).

²⁷ The US Overseas Private Investment Corporation also applies IFC performance standards.

²⁸ World Commission on Dams, Dams and Development: A New Framework for Decision Making (2000), at 215.

²⁹ Steven Herz, Antonino LaVina, & Jon Sohn (J. Sohn, ed.), “Development Without Conflict: The Business Case for Community Consent. World Resources Institute (2007).

³⁰ Forest Stewardship Council, FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC), version 1 (October 2012) (hereinafter “FSC guidelines”).

³¹ FSC guidelines at 16.

³² See PEFC Council, “Endorsement and Mutual Recognition of National Systems and their Revision,” PEFC Guide Procedure Document 1007:2012 (2012), at 5.6.4, available at http://www.pefc.org/images/documents/PEFC_GD_1007-2012_Endorsement_Process_121015.pdf; see also PEFC, “Sustainable Forest Management – Requirements,” International Standard Requirements for Certification Schemes PEFC ST 1003:2010, at 5.6.4.

³³ Id.

³⁴ RSPO, Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A Guide for Companies (October 2008).

³⁵ Roundtable on Sustainable Palm Oil, Adoption of Principles and Criteria for the Production of Sustainable Palm Oil (2013).

³⁶ Id. at 12 (see indicator 2.3.2).

³⁷ In addition to the sources described below, another useful resource on this matter is a training manual developed by RECOFTC on REDD+ FPIC implementation. See Edwards et al., Putting Free, Prior, and Informed Consent into Practice in REDD+ Initiatives. RECOFTC, IGES, & Norad (2012).

³⁸ REDD+ Social and Environmental Standards Version 2 (October 2012), available at REDD-standards.org.

³⁹ Climate,Community and Biodiversity Standards, Project Design Standards (Second Edition, 2008).

⁴⁰ See Forest Carbon Partnership Facility & UN-REDD, Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (2012). FCPF employs a more complicated standard which requires substantial equivalence with World Bank safeguards (which currently require free, prior, and informed consultation leading to broad community support) and recognizes international obligations that governments have towards communities and indigenous peoples. FIP applies the policies of its implementing institutions, all multilateral development banks, which have adopted various standards ranging from consultation to consent, with a notable outlier that the African Development Bank has no indigenous peoples policy.

⁴¹ Id. at 2.

⁴² UN-REDD FPIC guidelines, at 18.

⁴³ Mr. Khamla Soubandith served as a freelance consultant to this project and assisted substantially in facilitating the incorporation of community perspective. Mr Soubandith graduated from Chulalongkorn University’s Southeast Asia Study Programme in Thailand (Master of Art) and works on translations, evaluations, project surveys, social impact assessments, case studies, climate change and forest issues. Stora Enso representatives Helena Axelsson, Antti Marjokorpi, and Heikk Rissanen provided very helpful assistance and information regarding the company’s operations.

⁴⁴ This was part of the overall environmental assessment process.

⁴⁵ The Womens Union Group is a national initiative, and is present at central, provincial, district and village levels.

⁴⁶ Stora Enso was the first plantation company in Lao PDR to receive an Environmental & Social Certificate for plantation establishment.

⁴⁷ The Village Development Fund to be Inflation adjusted

- ⁴⁸ It is unclear the degree to which interviews included the communities which were directly engaged by the law students. Only one community member interviewed was aware of this training, and they were not clear on whose behalf the training was intended.
- ⁴⁹ This case study was prepared with substantial input from consultant Dr. Blessing Karumbidza and representatives from Mondi. Dr. Karumbidza is a Post-Doctoral Fellow in Public Management and Economic at the Durban University of Technology. He is an Economic Historian and Development Sociologist by training and specializes in agrarian systems, rural development and climate change. The following representatives from Mondi provided information, logistical support, and timely review of drafts: Melanie Dass, Maurice Makhathini, Khethiwe Mlotshwa, and Peter Gardiner.
- ⁵⁰ The Communal Land Rights Act was thrown out by the Constitutional Court in 2013 as unconstitutional. It is unclear whether this decision would have any impact on any outstanding claims related to these communities.
- ⁵¹ Not all community members are beneficiaries who have the right to make a claim. Note that community members also include those people resident in the area who are not part to the claim and have no legal and historical right thereto
- ⁵² Note that it is also possible Mondi might be amenable to such an arrangement. This emphasizes the importance of continued engagement and good faith negotiations.
- ⁵³ This case study was prepared for the TFD’s Learning Event on “FPIC in the Private Forest Sector”, hosted by the World Bank in Washington D.C., USA (October 22-23, 2013). While the situation evolved somewhat between the learning event and the workshop, those new developments are not included for the purpose of this case study. APRIL representatives Jemmy Chayadi and Dian Novarina provided helpful information and review of drafts. Additionally, several expert consultants who wished to remain anonymous provided critical support for interviews with community members.
- ⁵⁴ The following representatives from UPM provided helpful and timely information, logistical support, and draft reviews: Magdalena Ibanez, Alberto Brause, Alexander Burwood, and Marcelo Ginella. Additionally, various individuals representing community, nonprofit, and government perspectives provided helpful input.
- ⁵⁵ This study was commissioned by UPM and undertaken by external consultant CPA Ferrere.
- ⁵⁶ This case study uses UPM and Uruguay’s UPM Forestry Oriental interchangeably. Globally, UPM is headquartered in Finland and has operations in many other countries.

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 and purpose is to bring key leaders together to build relationships based on trust, commitment and understanding and through them, generate substantive discussion on key issues related to achieving sustainable forest management around the world. TFD’s dialogues serve as a platform to share aspirations and learning and to new seek ways to take collaborative action on the highest priority forest conservation and management issues.

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

- ➔ Forest Certification
- ➔ Illegal Logging and Forest Governance
- ➔ Intensive Managed Planted Forests
- ➔ Forests and Biodiversity Conservation
- ➔ Forests and Climate Change
- ➔ Forests and Poverty Reduction
- ➔ Investing in Locally-Controlled Forestry
- ➔ Free, Prior and Informed Consent
- ➔ Food, Fuel, Fiber and Forests
- ➔ Understanding Deforestation Free
- ➔ Genetically Modified Trees

There are currently 24 members of the TFD Steering Committee. The Committe is responsible for the governance and oversight of TFD’s activities. It includes representatives from private landowners, the forest products industry, ENGOs, retailers, aid organizations, 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.



The Forests Dialogue
Yale School of Forestry and
Environmental Studies
360 Prospect Street
New Haven, Connecticut 06511
USA

+1 203 432 5966
www.theforestsdialogue.org
info@theforestsdialogue.org



PROFOR

Program on Forests
1818 H Street NW
Washington, D.C. 20433
USA

+1 202 458 1692
www.profor.info
profor@worldbank.org