



Free, Prior, and Informed Consent in REDD+

Principles and Approaches for Policy and Project Development

February 2011

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All views and errors in the report are solely the responsibility of the lead author.

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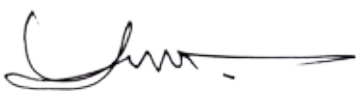
PREFACE

For the past two decades, many development cooperation agencies have been promoting a participatory approach to decision making in their programs. This has seen the emergence of many rich experiences, lessons, tools, and good practices for participatory natural resource management, conservation, and governance. This has certainly been the case for natural resource management projects in Asia commissioned by the German Federal Ministry for Economic Cooperation and Development and implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). For RECOFTC – The Center for People and Forests, participatory natural resource management in the Asia-Pacific region has been the focus since its establishment in 1987. In recent years, the call for an approach to development cooperation that is firmly based on the respect for human rights has become stronger and development partners are piloting ways in which such approaches can be adopted in practice. This publication is intended to support such efforts, particularly for those working on REDD+ policy and/or projects.

The principle that indigenous peoples and local communities have a right to give or withhold their Free, Prior and Informed Consent (FPIC) to developments affecting their resources is not new. However, through the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (2008) the legal status of this right has been strengthened. In the ongoing climate change negotiations it has gained prominence through the discussions about a mechanism for Reducing Emissions from Deforestation and Forest Degradation (REDD+). This new prominence is driving a new willingness on the part of implementers to grapple with it.

Experience with REDD+ implementation and with processes that respect the right to FPIC is still limited in the Asia-Pacific region and this publication therefore also draws on examples from other sectors and regions. GIZ and RECOFTC regard the guidance that this publication offers as an initial attempt that will need to be reviewed and adapted as more experience with REDD+ implementation and FPIC is gathered. In particular, we hope that it will serve as a basis for developing country-specific guidance. This would allow adapting recommendations to the specific legal situation of indigenous peoples and local communities with regard to rights to their resources, which differs widely from country to country in the region.

GIZ and RECOFTC invited a number of organizations to take part in developing this publication so as to bring together a diverse range of experience and expertise from both rights advocates and practitioners involved in REDD+ projects. This proved very fruitful not only for the publication itself, but also for the dialogue between these different actors. We hope that this dialogue will continue in different fora so as to build lessons on how FPIC can be implemented in REDD programs and projects.



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CONTENTS

<i>i</i>	Preface
<i>iii</i>	Contents
1	Introduction
5	REDD+ and the Importance of FPIC
13	Quick Reference Guide
15	What is Free, Prior, and Informed Consent?
16	How did the Right to FPIC Emerge?
17	Why Does REDD+ Need FPIC?
18	When Does a Project Need to Respect the Right to FPIC?
18	What Legal Mechanisms Oblige REDD+ to Respect the Right to FPIC?
19	What Does a Process that Respects the Right to FPIC Consist of?
26	What Resources are Needed for a Process that Respects the Right to FPIC?
27	What are the Potential Risks of FPIC?
29	Guidelines on Procedures for Respecting the Right to FPIC
31	Preparing for Rights Holder Engagement in FPIC
32	Element 1: Mapping Rights, Rights Holders, and Land-Use
35	Element 2: Identifying Appropriate Decision-Making Institutions
36	Element 3: Identifying National Support Structures for Rights Advocacy
39	Element 4: Developing a Process for Seeking and Obtaining Consent
41	Element 5: Developing the Content for Consent Agreements
44	Element 6: Agreeing on a Communication Plan
45	Element 7: Developing a Capacity-Building Strategy
47	Implementing a Process for Respecting the Right to FPIC
47	Element 8: Integrating the Right to FPIC with REDD+ Project Design
49	Element 9: Ensuring Alternative Information and Independent Advice
50	Monitoring and Recourse: Maintaining Consent
50	Element 10: Monitoring What is Agreed in Implementation
51	Element 11: Developing a Grievance Process
55	Element 12: Verifying Consent
57	References
63	Glossary and Acronyms
65	Glossary
68	Acronyms
69	Annexes
71	Annex 1: The Legal Framework of FPIC
78	Annex 2: Summary of What Indigenous Peoples and Local Communities Need to Know



INTRODUCTION



INTRODUCTION

This publication is targeted at people concerned with the design and implementation of REDD+ projects or programs. The audience includes independent community facilitators or advisors; indigenous and local community leaders; local government staff; project staff/liaison officers; private sector investors; and NGO facilitators, advocates and activists. It assumes highly literate readers with a basic level of understanding of REDD+ and focuses on the Asia-Pacific region.

Divided into three main sections, the publication begins with an overview of REDD+ and the importance of Free, Prior, and Informed Consent (FPIC). Next is a quick reference section that describes the development of a process that respects FPIC and summarizes key information. The final guidelines section provides more detailed information on twelve aspects or 'elements' of a generic process to respect the right of indigenous peoples and local communities to FPIC.

Respecting the right to FPIC is, by definition, a locally and culturally specific process in which the affected communities themselves determine the steps involved. It is therefore not possible to produce a universally applicable 'how to do it' guideline. This publication provides a basis for more specialized information and training materials, targeted at specific audiences in appropriate languages. It will be progressively adapted as the 'rules of REDD+' evolve.

There is broad agreement on the necessary elements of an FPIC process that respects community rights. This publication provides guidance on the issues that a REDD+ project proponent or policy developer should raise with affected groups to ensure that their right to FPIC is respected. It aims to set out the elements of a robust process for obtaining a community's FPIC and to highlight areas where there is still debate and uncertainty. The publication will help readers to conform to voluntary standards or to mandatory regulations on FPIC that may eventually be adopted for REDD+ through international processes.

Given that REDD+ will often apply to relatively remote forest areas, many of the people affected by policies or activities, including their leaders, may be illiterate or semi-literate, with minimal access to mainstream media and isolated from other sources of information. Intermediaries are needed to provide this access.

While detailed country-specific guidelines are not yet available, there are examples of negotiating agreements for large-scale infrastructure projects such as mines, dams, and oil exploration and extraction. Such projects have important differences to REDD+, but they can supplement the information provided here to help develop locally-appropriate processes to respect the right to FPIC in REDD+.

REDD+ programming is rapidly evolving and new international and national standards and guidelines governing REDD+ and its financing are emerging which may alter the landscape for how the right of FPIC is respected. It is likely that verifying whether consent has been freely sought and received, along with various measures of compliance, will increasingly be required along with a range of other social and environmental safeguards. There will, therefore, be a growing need for all actors to understand and accommodate meaningful and verifiable processes that respect the right of indigenous peoples and local communities to FPIC in REDD+ programming.

As FPIC requirements within climate mitigation efforts are still being negotiated at the international level, REDD+ scheme proponents concerned about the wider social and environmental impacts should engage with the international debate. This could help contribute to agreement on mechanisms that are effective and responsive to the needs of all stakeholders.



REDD+ AND THE IMPORTANCE OF FPIC



REDD+ AND THE IMPORTANCE OF FPIC

The fundamental idea behind REDD+ is deceptively simple – countries will be rewarded for improved protection and management of forests using carbon stocks as a measure of success. The practical implications are, however, complex.¹ Negotiations are continuing on the eventual REDD+ legal and regulatory framework – the ‘rules’ of REDD+. International agreement on a comprehensive framework for reducing global greenhouse gas emissions may be some years off, but REDD+ readiness activities are already underway, with REDD+ projects being designed and implemented in a number of countries. There is a high risk of such a ‘learning by doing’ approach resulting in adverse impacts on the rights of indigenous peoples and local communities.

Carbon forestry projects must establish a baseline for current greenhouse gas emissions from degradation/deforestation or from planned activities that will cause emissions from degradation/deforestation in the project area. To produce carbon credits the project must be able to demonstrate that its activities have reduced the rate of emissions from degradation and deforestation compared to the baseline. The difference between the two levels of emissions is called the ‘additionality’ of the project.

Achieving additionality will require changes to current or planned forest use, and this may have wide implications for forest users, including indigenous peoples and local communities who are the focus of this guide. These changes may affect traditional practices such as swidden farming; controlled burning to aid hunting and grazing; and the use of timber and other forest products for subsistence or sale. REDD+ policy developments, pilot projects, and demonstration areas may therefore have significant direct impacts on hundreds of millions of forest-dependent people in the Asia-Pacific region. It has the potential to affect not just their livelihoods, welfare, and income, but also their social order, identity, and culture. It is thus vital that the needs, rights, and interests of these peoples are recognized and addressed in the design and implementation of REDD+ projects.

¹ Parker, C. et. al, 2009. *The Little REDD+ Book: An updated guide to governmental and non-governmental proposals for reducing emissions from deforestation and degradation*, Oxford, UK. Available at: www.globalcanopy.org

The emergence of REDD+ has served to highlight the neglect of FPIC principles and respect for FPIC in practice in the forest sector as a whole. Project proponents have usually taken at face value claims by government and non-government organization (NGO) stakeholders to 'represent' indigenous peoples and local communities, and have continued on this basis with greater or lesser degrees of engagement and negotiation. This pragmatic approach has been adopted for many reasons including:

- The potential complexity, time, and likely expense of conducting a local consultation process effectively;
- Indigenous people and local communities may not be aware that they have a right to be involved;
- Project proponents may not be aware of their emerging obligation to seek consent; and
- There is uncertainty about what a robust consultation and consent process might entail.

The UN-REDD program is a recent, notable exception to this trend.² However, FPIC in the context of REDD+ poses particular challenges because of the evolving nature, scope, and scale of REDD+ programs, and the difficulties inherent in 'informing' people of details that few project staff may have a firm understanding of themselves.

The interaction of REDD+ with forest-dependent communities cannot be reduced to a negotiation about financial compensation for several reasons. REDD+ schemes differ from more familiar natural resource schemes because their products, usually referred to as 'carbon credits,' are not tangible, and not widely understood. The price, standards, and stability of the market for forest-based carbon credits are not yet known. Meanwhile, regulations and policies are developing simultaneously at international, national, and sub-national levels. Furthermore, most forest resources are already owned and in use and the market for carbon credits from these forests will therefore interact with the trade in forest products and will affect existing tenure and use rights. Most critically, the novelty of REDD+ has resulted in confusion and uncertainty among forest sector stakeholders, even though the practical activities will be drawn from prior experience in the fields of rural development and conservation.

REDD+ schemes are further complicated by the question of who 'owns' the rights over the forests and the carbon within them. REDD+ requires security of tenure, and has therefore brought renewed attention to the issue of forest tenure, which is disputed between governments and indigenous peoples and local communities throughout Southeast Asia. As governments attempt to

² UN-REDD is currently developing a trial process to seek village-level consent to the idea of a national REDD+ program in Indonesia and Vietnam.

take advantage of the potential financial value of standing forest through REDD+, it is not clear how they will act. Will they attempt to resolve these disputes by recognizing the rights of indigenous peoples and local communities, as required by international instruments and law? Or will they try to assert state control over the land and the carbon stored on and in it? In the latter case, loss of access to forests and a denial of the right to a share of REDD+ benefits could have dire, long-term effects on the welfare and resilience of these communities.

What Legal Experts Say about Tenure Security and REDD+

“Some countries adopt measures to directly incorporate indigenous communities in the process through direct contracting...In order to provide a stable regulatory basis...a country must have certainty with respect to interests in the title above all else. This necessitates finalizing and settling rights of appeal, customary entitlements and other grounds for the assertion of legal interests in land.”

From: Baker and McKenzie; Covington and Burling LLP, 2009. Background Analysis of REDD Regulatory Frameworks. Report prepared for the Terrestrial Carbon Group and UN-REDD. Available at: www.terrestrialcarbon.org

The communities affected by REDD+ have rights under international conventions, national laws, and voluntary industry standards, including the right to give or withhold consent for the field activities or policy and management changes involved in a REDD+ project or program. The right to FPIC requires governments and project proponents to ensure that REDD+ is implemented in a way that fully respects the rights of affected communities. In view of the adverse social impacts experienced by some carbon offset projects involving plantation forestry, FPIC has become a cornerstone of many indigenous groups’ demands – whether or not the land rights of indigenous peoples and local communities are recognized nationally. Increasingly, where significant grievances and disputes occur, international courts now require proof of respecting indigenous peoples’ right to FPIC.³

While REDD+ projects and policies may generate benefits for rural communities, numerous potentially serious risks for indigenous peoples and local communities have been identified, including:

- Violations of customary land rights and harsh enforcement measures. This can lead to loss of access to forests for subsistence and income generation needs, land use conflicts, and physical displacement from forests.

³ Weitzner, V. 2009. *Bucking the Wild West - Making Free, Prior and Informed Consent Work*, Speaking Notes for Free, Prior and Informed Consent Panel, Prospector and Developer’s Association of Canada annual convention, p3. Available at: www.nsi-ins.ca

- Marginalization by new land-use zoning exercises. Governments might undertake such exercises to capitalize on forest carbon revenues for the state, stalling or reversing the recent trends of decentralizing forest ownership and management responsibilities to communities.
- Decoupling forest carbon rights from forest management or ownership rights, thereby blocking communities' legal right to financially benefit from new forest carbon projects.
- Inability to participate in Payment for Ecosystem Services (PES) schemes, including REDD+, due to a lack of property rights (to forests or forest carbon), information, and high implementation and transaction costs.
- Exploitative carbon contracts. These could lead communities to unknowingly accept terms that sign away land use rights, assume liability for forest loss, or accept payments that undervalue the opportunity costs of foregone land use.
- Capture by elites (from within or outside the community) of intended REDD+ benefits due to inadequate forest governance systems.
- Decreased production of food locally, creating food security risks and deepening poverty.⁴

As well as being a legal requirement, there are practical reasons for REDD+ project proponents to respect the right to FPIC. Indigenous and local people will play a large part in determining the success of a REDD+ project. They are crucial to the implementation of activities and policies under the project, and thus to the achievement of results in terms of emission reductions. They will also be central to the evaluation of adherence to social standards, or safeguards, conducted by certification bodies on behalf of investors in forest-based carbon credits. Such evaluations will determine the validity and value of any carbon credits generated. There are numerous examples of project failure when procedural deficiencies have hindered adequately informed consent building, particularly in the development of protected areas and in large projects.⁵ These problems include: rushed processes leaving little time for adequate comprehension of often complex ideas and arrangements; insufficient (or inappropriately conveyed) information leading to differing or conflicting understandings; lack of sufficient resources for capacity building; and lack of safeguards to ensure that processes of engagement with local communities are adequately facilitated.

⁴ Lawlor, K., and D. Huberman. 2009. *Reduced Emissions from deforestation and forest degradation (REDD) and human rights. Chapter 12 in Rights-based approaches: Exploring issues and opportunities for conservation.* Edited by J. Campese et al. IUCN and CIFOR, Bogor, Indonesia: 271. Available at: www.cgiar.cifor.org

⁵ Brandon, K., and M. Wells. 2009. Lessons for REDD+ from protected areas and integrated conservation and development projects. Chapter 19 in *Realising REDD+: National strategy and policy options.* Edited by A. Angelsen. CIFOR, Bogor, Indonesia. Available at: www.cgiar.cifor.org

The Business Costs of Not Securing Consent

Newmont's Yanacocha mine in Peru is one of the best-known examples of what can happen when communities are not consulted about a project. Community protests cost Newmont an estimated US\$1.69 billion due to project delays, forcing the company to agree to never develop the Quilish Mine, worth an estimated US\$2.23 billion. Indeed, the company eventually asked the government to revoke its permit to explore Quilish. The experience provoked changes within Newmont, which is currently participating in one of the most extensive stakeholder engagement processes ever undertaken at its Akyem mine in Ghana. In Southeast Asia, many large infrastructure projects have been delayed or stopped due to community mobilization. In Thailand, Laos, and Cambodia communities have successfully challenged projects that would damage their local economies and livelihoods, causing expensive delays and modifications to project design.

From: Lehr, A., and G. Smith. 2010. *Implementing a Corporate Free, Prior and Informed Consent Policy*. Foley Hoag LLP, Boston and Washington, DC. Available at: www.foleyhoag.com

Respecting the right to FPIC cannot be reduced to a process with boxes that can be 'ticked' as they are completed. The right of indigenous peoples to give or withhold their consent to developments that affect their territory is part of their collective right to self-determination, which includes the right to determine what type of process of consultation and decision making is appropriate for them. Hence, one of the first stages of respecting the right to FPIC is agreement with the relevant community on the process itself. As indigenous peoples and local communities vary greatly in their histories, institutions, and approaches to resource management, the processes that they agree to undertake will be varied.

FPIC is a right. It is not a linear process that ends with the signing of an agreement by the community. By recognizing the right of indigenous peoples and local communities to be treated as the owners and managers of their customary territory, FPIC guarantees them a decisive voice at every stage of development planning and implementation for projects that affect them. FPIC needs to be understood as a right that requires the project developer to undertake an ongoing process of communication, with consent sought at key stages in the process.

Carbon Forestry without FPIC: A Case from the Ecuadorian Andes

In the uplands of Ecuador, voluntary carbon-offset plantation projects without FPIC have had a series of negative social, economic, and livelihood impacts on indigenous peoples and local communities who had participated in these projects in good faith. Several years into the project cycle, the communities complain that they:

- Were never properly informed by the carbon forestry company about actual net payments they would receive per hectare;
- Were not informed about social and economic risks, potential costs, and their legal obligations under the project;
- Have not been advised of the purpose or logic of certified carbon credits and how they produce income;
- Were not told about penalty clauses before community members and leaders signed long-term contractual agreements;
- Have been victims of manipulation or abuse of their own rules for FPIC;
- Have suffered economic displacement from communal grazing lands as a result of giving up land for the project;
- Have had to use much of the modest payments under the scheme to pay for outside experts to carry out technical work specified in the contract;
- Have endured long delays in payments despite completing work on time and according to contract;
- Have in most cases not received promised levels of income and employment;
- Are in several cases actually worse off and have become indebted in order to pay contract penalties for failure to meet obligations (e.g. due to accidental fire damage to plantations);
- Have been sanctioned by large fines payable under contract penalty clauses;
- Have in some cases become indebted due to accounting errors that have made overpayments for certain forestry works, which had to be repaid;
- Have had to bear almost all the unforeseen costs of the activity (e.g. replacement of failed seedlings);
- Have in one case been (falsely) threatened that their ancestral lands might be compulsorily confiscated as a penalty for failing to carry out forestry activities stipulated under the contract;
- Have had complaints and questions about company expenditures and accounting routinely dismissed by company officials.

From: Granda, P., 2005. *Carbon Sink Plantations in the Ecuadorian Andes: Impacts of the Dutch FACE-PROFAFOR monoculture tree plantations' project on indigenous and peasant communities*. WRM Series on Tree Plantations No.1.WRM, Montevideo. Available at: www.wrm.org.uy



QUICK REFERENCE GUIDE



QUICK REFERENCE GUIDE

Framed by a number of basic questions, this section provides an overview about the right to FPIC, including the origin and evolution of the concept; the legal framework surrounding it; and an outline of the basic process needed to achieve it.

What is Free, Prior, and Informed Consent?

The interrelated nature of the elements of *free, prior, informed, and consent* provide challenges for formulating a common understanding of FPIC. This is partly because it embodies a combination of processes and outcomes, as well as a requirement that it takes place at particular points in time in relation to a proposed activity.

Before trying to separate and describe the elements of FPIC, it is useful to establish what it is not. FPIC is not participatory engagement, it is not negotiations, and it is not consultation. Rather, these are means through which FPIC can be achieved.

FPIC can be described as the establishment of conditions under which people exercise their fundamental right to negotiate the terms of externally imposed policies, programs, and activities that directly affect their livelihoods or wellbeing, and to give or withhold their consent to them.

The right to FPIC can therefore be viewed as an additional component to any effective, ongoing consultation process, or as an extension to sound community engagement strategies. The more participatory the process of change is, the less emphasis and time is needed to secure 'consent', as communities will have already actively defined the processes and outcomes of any proposed change.

The most frequently referred to summary of FPIC is the one endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Fourth Session in 2005.

Other descriptions throughout the literature on FPIC appear to be largely based on this one, positioning the content differently under each element. The requirement of sufficient time to facilitate understanding and to come to consensus cuts across all elements. Additional requirements include that people must be properly informed in a manner that is free from coercion, sufficiently prior to commencing any stage of a project activity and that people must understand exactly what they are consenting to.

Elements of Free, Prior, and Informed Consent

- **Free** should imply no coercion, intimidation or manipulation;
- **Prior** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect of time requirements of indigenous consultation/consensus processes;
- **Informed** – should imply that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and/or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees, and others); and
 - g. Procedures that the project may entail.
- **Consent**
 Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples having reasonably understood it.

From: UN Permanent Forum on Indigenous Issues (UNPFII). 2005. *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples*. Document E/C.19/2005/3, submitted to the Fourth Session of UNPFII, 16–17 May. Available at: www.un.org

How did the Right to FPIC Emerge?

Originally developed in the context of indigenous rights, FPIC is increasingly linked to the right of all people to their land and territories based on customary and historical connection to them.⁶

The focus on FPIC grew out of a concern that many indigenous people, in rural areas in particular, lack political power and, as a result, their interests

⁶ Colchester, M., and M.F. Ferrari. 2007. *Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples*. Forest Peoples Programme, Moreton-in-Marsh, UK. Available at: www.forestpeoples.org

are not taken into account when international institutions, governments, and private investors make decisions over resources to which these people have a strong right. In theory, respecting the right to FPIC applies to any policy or project that affects the lives of these communities, but in practice it has been widely used for economic sectors, which exploit land and resources that local people may own or use: mining, forestry, and plantation development. The evolution of concern about the right to FPIC has been driven by increasing recognition of the right of indigenous peoples to self-determination and acknowledgement of the history of discrimination and appropriation of their ancestral or customary lands.

Why Does REDD+ Need FPIC?

It is becoming increasingly accepted that in order for REDD+ projects and programs to have local credibility, the negotiation of lasting agreements on the use of resources has to recognize both the rights of indigenous peoples and those of local communities who depend on a particular forest area for their livelihoods. Not doing so may lead to conflict or inequitable outcomes where established livelihood practices and access to resources are denied. Identification of who has rights to which land is therefore a vital step in facilitating a process to respect a community's right to FPIC.

It must be acknowledged, however, that rights to land or resources alone are no guarantee that they will be respected. This is particularly the case where external pressure to exploit these resources is exerted in ways that misinform or mislead local people, deliberately or otherwise. A robust enabling environment is required to ensure the realization of these rights in the spirit of FPIC. The legal basis for determining rights is discussed further under Element 1 below, and the practical involvement of stakeholders in mapping these rights is discussed under Element 4.

Part of the motivation for ensuring FPIC is respected as a requirement for REDD+ mechanisms is to give rights holders the power to veto REDD+ activities or policies on the basis of 'unreasonable claims.' Governments, in particular, may be liable to justify inequitable policies as part of national REDD+ strategies by citing 'national interest.' Processes to respect the right to FPIC must ensure that the specific interests of directly affected groups are met, by soliciting their consent before such vague and general benefits can be cited. Consent in the context of FPIC, however, does not imply that the agreement of *every* individual is required. Rather, consent is based on collective considerations, reached through customary processes of dialogue, deliberation, and agreement. The various international laws and instruments underpinning FPIC are discussed in the first section below, and the extent of the right to FPIC is discussed in the second section.

When Does a Project Need to Respect the Right to FPIC?

Consent is not a one-time process that gives everlasting social license to a development. Rather, it is part of a recurring process, described by various indigenous peoples as 'living consent,' which requires continual monitoring, maintenance, and reaffirmation throughout the various stages of a project. Likewise, decisions to withhold consent are not necessarily forever binding and can also be revisited by rights holders as situations change or become more favorable. For example, communities may decide to opt in to various development projects once more is known about their likely effects and benefits.

Respecting the Right to FPIC

"Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a 'social license' to operate."

From: Salim, E. 2003. *Striking a Better Balance: The Final Report of the Extractive Industries Review*. Extractive Industries Review, Jakarta and Washington, DC. Available at: www.worldbank.org

What Legal Mechanisms Oblige REDD+ to Respect the Right to FPIC?

While the concept of FPIC is still evolving, elements of it are recognized by a number of international agreements and instruments. The position of each is summarized here, for more detailed information, please refer to Annex 1.

- **The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** has the most complete description of FPIC and clear obligations on States regarding the rights of indigenous peoples, including their right to own and use their traditional territories.
- **International Labour Organization Convention No. 169** guarantees the rights of indigenous people to their land and to be involved in any decisions which affect their resources and livelihoods.
- **The Convention on Biological Diversity** recognizes that indigenous knowledge may only be used with prior approval and requires national governments to protect indigenous cultures and peoples.
- **The United Nations Framework Convention on Climate Change (UNFCCC)** refers to UNDRIP in Annex 1 of decision Conference of the Parties 16 – the Cancun agreement. This annex details the safeguards that countries should promote when undertaking activities under REDD+. By 'noting' that UNDRIP has been adopted by the United Nations

General Assembly, the document implies (but does not specify) that the obligations concerning FPIC as expressed in UNDRIP also apply in the context of REDD+. However, the safeguards also require REDD+ activities to be implemented with the ‘full and effective participation of... indigenous peoples and local communities.’ To fulfill this obligation, respect for their FPIC is necessary.

- **UN-REDD’s** strongly worded, explicit commitment to the principles of the UNDRIP and FPIC are included in the guidance adopted by the program.
- **The World Bank’s Forest Carbon Partnership Facility (FCPF) and Forest Investment Program (FIP)** both refer to the right to ‘Free, Prior, Informed Consultation,’ but this does not guarantee the right of communities to withhold their consent to proposed developments.
- **Voluntary carbon market standards.** The Voluntary Carbon Standard (VCS) makes reference to ‘community consultations,’ but not to FPIC. The Climate, Community, and Biodiversity Standards (CCB) on the other hand, require documentation of a process that respects the right to FPIC of indigenous peoples and local communities whose rights may be affected by the project.
- **REDD+ Social and Environmental Standards.** Designed specifically to apply to national or sub-national level REDD+ programs, rather than projects, these standards explicitly require adherence to FPIC for indigenous peoples and local communities. The standards are the result of a collaborative process, led by southern civil society organizations and facilitated by CARE International and the Climate, Community, and Biodiversity Alliance.⁷

Nationally and sub-nationally, even where laws and regulations do not mention FPIC explicitly, there are often legal instruments relating to human rights, the right to information, environmental impact assessment, and others which imply the need to respect the right of communities to FPIC.

What Does a Process that Respects the Right to FPIC Consist of?

The following summary points should be considered in designing a robust process for obtaining FPIC in the context of REDD+. The process hinges around three levels of consent:

- Consent to discuss the idea for a REDD+ project that will affect community forests,
- Consent to participate in developing a detailed plan for a project, and
- Consent to the implementation of the project.

The process leading to each level of agreement requires increasingly intense surveys, analysis, and negotiation.

⁷ See www.climate-standards.org to download the REDD+ Social and Environmental Standards.

Free

- Consultations or negotiations take place at a mutually agreed location and time and in the absence of actors considered coercive by either party;
- Project proponents (developers) clearly express their commitment not to proceed without consent at all stages of REDD+ project development and implementation where FPIC is sought;
- Rights holders have been informed of their right to say no and to negotiate conditions;
- Rights holders are given sufficient time to consider the information provided, and to undertake agreed decision-making processes thoroughly (though they should also respect agreed deadlines);
- External facilitators or those assisting with project development are able to work in a competent manner and be reasonably neutral to the outcome of consent processes (acknowledge their interest, divulge their sources of funding, etc.);
- An independent verification process confirms the process was free from undue influence;
- 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; and
- 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

- Consent is initially to be sought at the project identification/concept stage. Consent from communities should also be sought when governments, both national and sub-national, are developing REDD programs; and
- Consent is sought and maintained at various agreed points in the REDD+ project development process prior to proceeding to the subsequent phase.

Informed*Who is informed and how?*

- The broader community (including women, youth and vulnerable groups) are informed about all aspects of project development;
- All information is available in local languages and conveyed in a manner consistent with community learning needs (including time, location, support etc.). Meetings between the proponent and the community should be conducted in the local language;
- Direct communication (face-to-face meetings and other innovative, interactive methods) should be the default method of informing unless high levels of literacy are apparent;
- All information is disseminated as widely as possible by project proponents – transmission from leaders or elders cannot be assumed;
- Information dissemination strategies are adequately resourced – financial, human resources and time-wise – to facilitate proper understanding;

- Rights holders' understanding of technical content of information and agreements reached may need to be assessed, and where necessary, strengthened; and
- The effectiveness of communication methods should be continually assessed, and periodically verified independently.

Informing about the right to consent:

- Information about the right to consent (FPIC); when and to what (stages); and how (agreed consent process decided by indigenous peoples and local communities) is widely disseminated at the local level and understood;
- REDD+ proponents' are willing to stop activities at certain points along the way;
- There must be public disclosure of the process used to facilitate consent as well as the details of the agreement in ways people can access (writing, audio, video, etc.); and
- There is a grievance mechanism and the right to legal assistance regarding the consent process if required. Information on legal services and community costs of engaging those legal services should be provided by project proponents.

Informing about REDD+ projects:

- Balanced treatment of potential positive and negative impacts takes place, as identified by both parties, including direct and opportunity costs;
- Alternatives to the project and likely outcomes of different scenarios are proposed;
- The community and the project proponent receive updates of their legal rights regarding aspects of the proposed project as they evolve;
- Rights holders are engaged in all stages of project development, especially the Social and Environmental Impact Assessment; and
- Participation in monitoring aspects of project implementation to provide information on an ongoing basis (not just paid data collection).

Consent

The principles of consent include:

- Neither engagement nor consultation to inform is the same as consent. These are only the necessary means to consent;
- Varying degrees of capacity building will be required depending on previous/recent empowerment to make decisions with such far-reaching consequences for the entire community;
- The process of consent must be agreed and respected by the community and the project proponent; and
- Rights holders will develop their preferred process and institutions for REDD+ decisions. However, minimum standards for inclusive representation will be promoted.

Who gives consent?

Identifying rights holders to enter into negotiations between different forest-dependent communities within a geographic area (participatory mapping).

- Recognize the rights of both indigenous as well as non-indigenous people as good practice and to minimize potential future conflict.
- Where multiple groups are affected with differing claims to land, there is a need to establish whether there are differential rights. FPIC may need to be tiered, starting with those with the most recognized customary or legally supported claim (consent) to those with interests rather than rights (consulted).

Identifying institutions within forest-dependent communities that can enter into negotiations (participatory institutional analysis), requires:

- Identifying indigenous peoples and local communities' preferred decision-making institutions for REDD+ projects. This can be an existing one (traditional or formal, such as a State-sanctioned village committee), or a specially formed institution to meet expectations of inclusive representation and the potentially increased sophistication required for REDD+ decisions. What is important is that the community decides on this, rather than having to conform to a pre-determined decision-making institution.
- Periodic community review of their chosen decision-making entity and process to meet emerging needs, including the identification of capacity building needs to strengthen this entity. Are women, youth, other marginalized groups (as identified by rights-holder groups) satisfied that they are represented by existing decision-making institutions and processes?
- Ensuring decision-making institutions functioning according to broader community expectations.
- In the case of policy setting that will affect numerous indigenous peoples and local communities, such as the development of national or provincial laws and regulations on REDD+, consent cannot be sought or obtained from each community. In practice, governments should consult widely with representatives of indigenous peoples and local communities associations and networks, based on a schedule that is transparent and iterative. For example, draft policies developed based on initial consultations and presented again to community representatives for their consideration and consent. Sufficient time and support will be needed so that community representatives can consult within their networks and associations.

How is consent given?

- Identify the community's preferred procedures for consent and its actual form (existing or revised), including what constitutes consent for a given rights-holder group;
- Are there different levels of consent? The form of consent and who gives it may vary depending on the stage involved. There may need to be

broader-based, representative community consent at benefit sharing/changed land-use agreement stages;

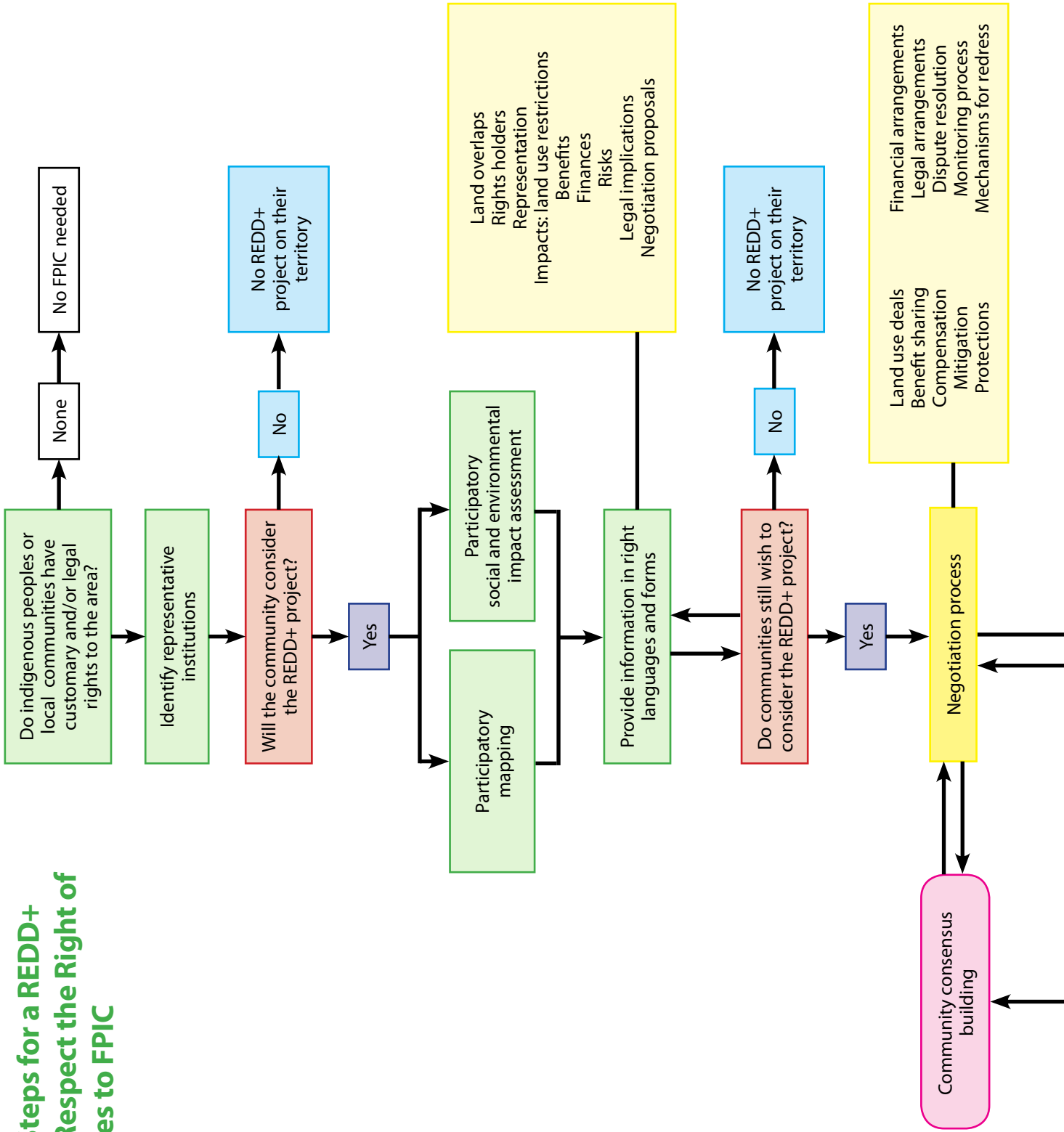
- Determine the form consent takes. There may be a requirement for written consent to satisfy the need for documentation but it may not be the most appropriate form culturally. This will need to be mutually agreed;
- The level of detail and format required to specify what was consented to will need to be agreed; and
- Consent to individual stages of the REDD+ project needs to be explicitly documented – including information on the next stage requiring consent.

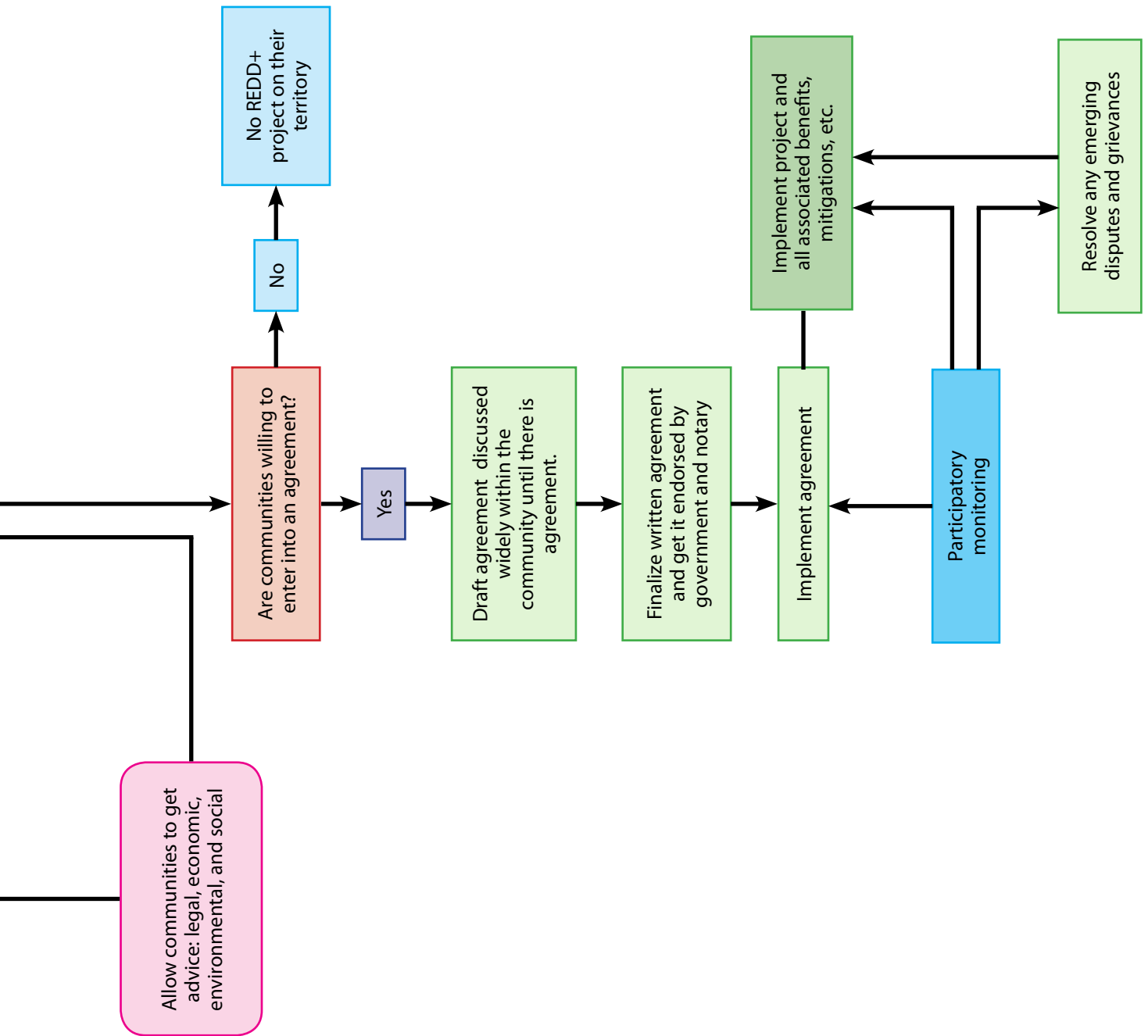
Consent to what?

The specific points in a REDD+ project or program cycle where consent will be required will need to be agreed. Possible policy and project cycle consent points could include the following:

Consent Points	Consent to What?	Primary Responsibility to Seek Consent?
National legal and policy framework for REDD+ programs	Consent to REDD+ as a possible solution to the forestry-related drivers of climate change that will impact the forests of indigenous peoples and local communities.	Government
Sub-national project identification	Consent to REDD+ as a possible solution to the forestry-related drivers of climate change (if not already given as part of national readiness activities). Consent to enter negotiations in rights holders' forest area.	Government, project proponent
Baseline setting, local drivers of deforestation identification, preliminary forest management plan	Consent to the method of baseline development, and the analysis of local drivers of deforestation (particularly to which rights holders are said to contribute), preliminary forest management plan/preliminary program design.	Project proponent
Socioeconomic, cultural and environmental impact assessment	Consent to the scope and content of the assessment design.	Project proponent
Project design including changed forest use and benefit sharing arrangements	Consent to all aspects and details that directly affect rights holders, especially benefit-sharing arrangements and forestry practices targeted for change.	Project proponent
Commercial agreement to purchase carbon credits	Consent to general framework of the commercial agreement and specifically to benefit-sharing arrangements.	Project proponent
Project implementation and monitoring	Maintenance of consent according to evolving implementation arrangements and issues arising at mutually agreed periods.	Project holder
Project cessation	Consent to the reasons for cessation and the arrangements for phasing out.	Government, project holder

Indicative Steps for a REDD+ Process to Respect the Right of Communities to FPIC





To maintain consent requires:

- A blueprint for dispute resolution mechanisms that are mutually agreed;
- Locally-based, non-legal grievance mechanisms are developed, although these should not supplant community rights to seek legal support where resolution cannot be reached locally;
- The grievance mechanism needs to cover two types of dispute: Those relating to the agreement and those relating to relations between the project proponent and community more generally (issues not covered by the agreement).

What Resources are Needed for a Process that Respects the Right to FPIC?

Implementing a robust and verifiable process to obtain the consent of a community to a proposed REDD+ project needs a significant investment in people, time, communication materials and strategies, capacity building activities, independent verification, and technical and legal advice. The bulk of these resources will be needed in the early stages of the project or program when preparation activities take place. Adequate resources will also be needed by rights holders to build up their capacity to consider the project or program. These include resources to develop effective community institutions or to strengthen existing ones, to negotiate effectively, to develop a clear understanding REDD+ implications at each stage of development, and to resolve conflicts. Where rights holders are interested in being involved in project design and implementation, additional resources will be needed for appropriate training and skills development. In most cases, rights holders in rural communities will not have access to funding to contract specialists (legal, economic, environmental, development) to help them consider the risks and benefits of the project. Project proponents will have to consider innovative ways that funding and technical assistance can be provided to rights holders without it being tied to the vested interests of the proponent.

Likewise, initiatives will be needed to create the right 'mind-set.' This requires understanding the rights of indigenous peoples and rural communities, and problems of marginalization and racism that they often suffer. It also needs an understanding of the skills within organizations to engage with indigenous peoples and local communities and accommodate their rights to FPIC. Many variables will impact the time and resources needed, including:

- The number of rights holders who need to be informed and participate in consensus agreements;
- Their geographic spread and accessibility;
- Effectiveness of existing leadership and social cohesion;
- Representativeness of existing leadership and access to decision making by women and other vulnerable groups;
- Who is responsible for informing the broader community beyond representative leaders (leaders, proponent, independent facilitators, government);

- Effectiveness of the process and level of disagreement within the community towards the proposed project;
- Access to telephones, radio, electronic media;
- Level of literacy and education;
- Time constraints to attend meetings/access informational events;
- Levels of interest in participating to become sufficiently informed;
- Availability and effectiveness of intermediaries such as NGOs, advisors, resource people; and
- Availability of independent facilitation/advice and its quality.

Close communication and coordination between project proponents and governments will also be crucial to avoid misunderstandings about the process to respect community rights to FPIC.

As noted above, respecting the right to FPIC requires an ongoing process which (if consent is given in the first place) continues to provide opportunities for discussions and renewal of consent. However, the time needed to secure a firm decision from rights holders about whether a REDD+ project can go ahead or not will be a major concern for project proponents. The time needed to achieve this decision through a robust process will depend on a number of factors. These include the complexity of land rights issues, the scale and design of the project, the education level of affected people, informational processes and technologies available, decision-making processes developed by individual communities, and the resources available to properly facilitate a project. The need to manage the tension between action (to access available funds, reduce greenhouse gases) and certainty (to ensure rights to land and carbon storage are agreed by all parties) will be continual.

Financial Costs of Respecting the Right to FPIC

The community engagement process for Shell's Malampaya natural gas project in the Philippines cost approximately \$US6 million compared to total project costs of \$US4.5 billion. Elsewhere, an experienced company manager estimated the costs for the process of gaining community agreement at the beginning of a specific controversial and extremely large mining project in a densely populated area to be approximately \$US1.5 – 2 million per year. The manager noted that in a less densely populated area, or for a smaller project, the costs might be significantly less.

From: Lehr, A., and G. Smith. 2010. Implementing a Corporate Free, Prior and Informed Consent Policy. Foley Hoag LLB, Boston and Washington, DC. Available at: www.foleyhoag.com

Herz, S, J. Sohn, and A. La Vina. 2007. Development Without Consent: The Business Case for Consent. WRI, Washington DC. Available at: www.wri.org

What are the Potential Risks of FPIC?

This publication emphasizes the importance of the right to FPIC and the risks of not respecting the rights of indigenous peoples and local communities. Project proponents should be aware of a number of risks for themselves and local communities when engaging in processes to obtain FPIC. None of these risks are created by the right to FPIC itself, but they may emerge as a result of

the consent process, and they may require a significant investment of resources to resolve before a REDD+ project can be developed.

Key risks include:

- Mapping of tenure rights through participatory mapping processes may reveal contested claims and lead to conflicts over resources within or between communities. Considerable time and resources (e.g., for independent mediation) may be needed to resolve disputes. It may be possible for a REDD+ project to receive the consent of two different communities, even when those communities contest each other's claims.
- The mapping of community tenure areas may lead a government to change its position from ignoring a community's use of a particular area to actively denying their rights, and then requiring the community to stop living in or using the area. REDD+ project proponents should be prepared to assist a community in this situation and to advocate for the community's rights to be respected by government. The project proponent can still seek the consent of a community to develop a REDD+ project on its customary territory even if they have been denied access or forcibly removed from it by government.
- Refusal of consent: when FPIC is explained to developers and government officials, it is often difficult for them to accept that communities have the right to withhold consent. As has been explained above, this right is fundamental to FPIC, and is supported by numerous international laws, instruments, and conventions. In explaining the risk of a community withholding consent, it is important to emphasize (a) the risk of proceeding without consent, (b) that the right to FPIC is the right of a community, and not an individual right of veto over a proposed development, and (c) giving *and* withholding of consent is time-specific – both can be re-visited and revised. It is also location specific: A community may agree that part of their customary area is included in a REDD+ project, but may want another area to be kept outside of the project.
- In many areas of Southeast Asia, FPIC is also being promoted by NGOs to support communities affected by plantation and forestry industries, so as to give these communities more leverage in their negotiations with companies. As a result, FPIC and the NGOs that promote it may be seen as 'anti-development.' REDD+ project proponents need to manage this risk by ensuring that regular communication is maintained with government, proponents, and other stakeholders to avoid them misunderstanding the right to FPIC and the process to obtain consent.
- In many cultures and land systems, ownership is demonstrated through clearing and planting forest. Even though this contradicts the aims of a REDD+ program and has little meaning in the relation to the right to FPIC, there is a risk that the appearance of a new investor in a forest area will stimulate speculative land clearance.



**GUIDELINES ON
PROCEDURES FOR
RESPECTING THE RIGHT
TO FPIC**



GUIDELINES ON PROCEDURES FOR RESPECTING THE RIGHT TO FPIC

This section details 12 elements that need consideration in REDD+ projects to effectively prepare for rights-holder engagement, implement a consent process, and maintain consent.

Preparing for Rights Holder Engagement

- Element 1: Mapping Rights, Rights Holders and Land Use
- Element 2: Identifying Appropriate Decision-Making Institutions
- Element 3: Identifying National Support Structures for Rights Advocacy
- Element 4: Developing a Process for Seeking and Obtaining Consent
- Element 5: Developing the Content for Consent Agreements
- Element 6: Agreeing on a Communication Plan
- Element 7: Developing a Capacity-Building Strategy

Implementing a Process for Respecting the Right to FPIC

- Element 8: Integrating the Right to FPIC with REDD+ Project Design
- Element 9: Ensuring Alternative Information and Independent Advice

Monitoring and Recourse: Maintaining Consent

- Element 10: Monitoring What is Agreed in Implementation
- Element 11: Developing a Grievance Process
- Element 12: Verifying Consent

Preparing for Rights Holder Engagement in FPIC

Indigenous peoples and local communities are likely to have to undertake a great deal of work, in terms of meetings and consultations within the community, with neighboring communities, with independent advisors and experts, and with project developers and government. This is necessary before they can be expected to decide whether or not to participate in a REDD+ project. This section covers the stages which form the first part of FPIC – establishing what the process to respect the right to FPIC will look like, who needs to be involved, and how they will participate.

Element 1

Element 1 | Mapping Rights, Rights Holders, and Land-Use

A process to respect the right to FPIC requires clarity on who holds what rights in the area of the proposed REDD+ project, as this will define who has the right to be consulted and which rights holders can give or withhold consent. There are often different customary and formal interpretations of rights operating in the same area. A proposed REDD+ project should map all tenure claims and a process to respect the right to FPIC should be developed to engage all communities whose lands and forests overlap with the proposed REDD+ project. Effective mapping of rights and land use needs to be a participatory social process, where the community is assisted to identify the areas that it uses and has customary rights over.

The process may bring up overlapping claims from within the community, with neighboring communities, and with government and third parties who have been issued licenses. The creation of maps and images (including sketch maps and GIS maps overlaid on topographic maps, satellite images, and aerial photographs) can serve as a catalyst for discussions and negotiations on who has rights to particular areas and resources, and as a way of recording the agreements reached.

Participatory mapping is an important means of documenting community-recognized rights over forests.⁸ Most indigenous peoples and local communities have detailed information about their resources but this may not have been written down or recorded on maps. In some areas there may be clear boundaries between groups, while elsewhere boundaries may be vague. Giving remote forests a 'new' value may actually catalyze conflicts over the location of boundaries, and these will need to be identified and resolved as part of the REDD+ process.

Some communities may wish to maintain their knowledge in an oral tradition rather than committing it to paper. This is often due to concerns about losing control of information, or due to the conflicts that can emerge when 'solid' boundaries on maps replace porous boundaries and reciprocal relationships between neighboring communities. In such cases the project may be able to agree to boundaries that function for the purposes of the project only and are acknowledged as within the area claimed by the community concerned, avoiding the need to define and map the community's own limits.

During the last twenty years, participatory mapping techniques have been developed that involve all parts of the community in mapping community resources. The participation of neighboring communities in the mapping

⁸ There are good arguments to engage specialist NGOs or companies to do the mapping work in collaboration with community representatives, rather than expecting the community to learn the complex skills necessary to do the work themselves.

process is essential so that they can confirm boundaries, and include their own access and use rights to the areas represented on the map. Good practice in participatory mapping makes sure that there is participation of different groups from within a community, including women, youth, poor families, as well as established elders and elites. Each group has different values, uses, and resources to include in the maps. This information is needed so that a REDD+ proposal can consider all of those values and involve all of those groups.

Rights holders, project proponents, government representatives, and other key stakeholders need to agree on the boundaries and rights of affected communities. Ideally, a participatory mapping process will lead to clarity on boundaries and the rights for each particular community. Governments may not be willing to acknowledge a community's ownership rights to a particular forest, but may be willing to acknowledge their use rights.

In preparation for a mapping process, the project proponent, together with the community will need to conduct an initial stakeholder analysis to agree on who should be involved in the mapping process (rights holders – based on the land-use/administrative boundary/forest area map). A representative range of rights holders, including women and representatives from any marginalized groups should be encouraged to become involved.

Sources of information should include existing documentation, local knowledge, and government records. The challenge is in weighing up the accuracy and legitimacy of information.

Indigenous peoples and local communities need to know:

- That they have a right to map their boundaries and negotiate them to mutual satisfaction;
- That they have the right to maintain control of maps, and determine what information they contain and who has access to the information;
- That they have the right to decline participation in transferring their knowledge into a written or recorded form;
- That they have a right to advocate for legal recognition of these boundaries and their rights over the land/carbon; and
- That people not directly involved in mapping exercises need to be informed about and consent to the boundaries and rights holders identified, especially neighboring communities.

Recommended resources

Chapin, M. and B. Threlkeld. 2008. *Mapping Indigenous Lands: A Practical Guidebook*. Centre for Support of Native Lands, Environmental Law Institute, Washington, DC. Available at: www.elistore.org

Corbett, J. et al. 2009. *Good Practices in Participatory Mapping*. International Fund for Agricultural Development (IFAD), Rome. Available at: www.ifad.org

Cotula, L., and J. Mayers. 2009. *Tenure in REDD – Start-point or Afterthought?* Natural Resource Issues No. 15. IIED, London. Available at: www.iied.org

Evans, K. et al, CIFOR, 2006. *Guide to Participatory Tools for Forest Communities*. CIFOR, Bogor, Indonesia. Available at: www.cifor.cgiar.org

Galudra, G. et al. 2009. *RaTA: A Rapid Land Tenure Assessment Manual for Identifying the Nature of Land Tenure Conflicts*, World Agroforestry Centre (ICRAF), Bogor, Indonesia. Available at: www.worldagroforestrycentre.org

Indonesian Network for Participatory Mapping. Website: www.jkpp.org

Mather, R. et al. 1998. *Aerial Photographs and 'Photo-maps' for Community Forestry*. Rural Development Forestry Network (RDFN) paper 23e. ODI, London. Available at: www.odi.org.uk

Corporate Experiences in Engaging Communities in Extractive and Infrastructure Projects

In the early 1990s, Hamersley Iron Pty Limited, a subsidiary of Rio Tinto, planned to develop an iron ore mine and railway at Yandicoogina in the Pilbara region of Australia. Several aboriginal groups lived in the region near the proposed mine. In 1994, Hamersley conducted initial consultations with community elders to ensure that the railroad that would connect the mine to the seaport had minimal impact on Aboriginal communities. In 1995, the company decided to negotiate a Land Use Agreement with communities near the site, which coincided with the project's environmental and social assessment process.

To gain a better understanding of the key stakeholders and their concerns with the project, Hamersley spent four months conducting a social mapping exercise. Based on this information, negotiations were held with local communities from January to June 1996. The stakeholders appointed an independent mediator, and three aboriginal groups decided to work together. They appointed an independent legal advisor, funded by Hamersley, and established the Gumala Aboriginal Corporation, which conducted negotiations on behalf of the communities and had the legal capacity to bind its members. By June 1996, the parties had agreed to a Negotiation Protocol and a method for reporting back to the communities on the status of negotiations, including having the elders of the Aboriginal groups observe the negotiations.

In November 1996, Hamersley and the Gumala Aboriginal Corporation agreed to a Memorandum of Understanding (MoU). The Corporation then obtained the consent of the Aboriginal parties it had represented by discussing the Memorandum at a large community meeting, and meeting with each individual to explain the terms of the agreement and obtain that individual's consent. The result was the Yandicoogina Land Use Agreement, which provided the basis for a long-term collaborative framework between Hamersley and the Aboriginal parties. Hamersley, in turn, reduced permitting time, completed construction under budget by US\$100 million, and commenced production six months early.

From: Herbertson, K., et al. 2009. *Breaking Ground - Engaging Communities in Extractive and Infrastructure Projects*. World Resource Institute, Washington DC. Available at: www.wri.org.

Element 2 | Identifying Appropriate Decision-Making Institutions

Element 2

Indigenous peoples have the right to use their own decision-making institutions rather than imposed systems (such as government appointed leaders). This right to use traditional institutions may be seen to be in conflict with international notions and expectations of 'representation' and the need to include women, youth, and marginalized groups in decision making.

There are several ways that a REDD+ proponent can respect the right of communities to use traditional decision-making structures while addressing the issue of broader representation in decision-making. Indigenous communities can be given the option to undergo a participatory institutional analysis to identify issues of representation and appropriateness for REDD+ decision-making. If a community chooses to make decisions using a traditional institution, the REDD+ proponent can encourage broader community participation by offering facilitation support for information gathering, sharing, discussions, and decision-making.

Some communities may choose to engage with a REDD+ proponent using a hybrid of a traditional decision-making institution with the addition of participants from the village's administration or those holding roles relevant to REDD+. Other communities may choose to create a novel institution to make decisions. In all cases, it is important that the offer of facilitation is independent of the interests of the REDD+ proponent. Agreeing with the community on a definition for independence or neutrality is important, as without clear guidance government could deem themselves as neutral and try to lead the process when they do have vested interests. Communities requesting assistance should be offered a choice of facilitators, including any suggested by the community themselves. Communities have the right to invite advisors or allies to observe or participate in facilitation and deliberations, and may need help identifying organizations that can provide such support.

Ideally, funding for facilitation would not come directly from the project proponent. In practice, until governments assume responsibility for assisting communities to understand and consider REDD+ proposals, proponents will have to pay for such facilitation or find a donor willing to provide support. In order to maintain transparency and independence, it is important that a contract for facilitation services is agreed to and signed between community leaders and the facilitator, as well as between the facilitator and the proponent.

Project proponents should consider supporting the creation of a fund for facilitation (and potentially other advice and support services for communities) created by a larger pool of REDD+ proponents. It would need to be managed independently so that the payment of facilitators is not directly connected to the interests of any particular proponent.

The *Lusan* community in East Kalimantan developed a hybrid decision-making system when negotiating with a logging company holding a government license to take wood from their customary lands. The community had a system of elders and customary law, but many families who had joined the community in recent decades relied more on the Government administration system. A meeting of the whole community agreed on the negotiation team to engage with the logging company, made up of customary leaders and elected officials from the village government.

Indigenous peoples and local communities need to know:

- Their right to decide their own representative bodies;
- The obligation of all stakeholders in REDD+ projects and programs (including themselves) to uphold non-discriminatory practices, in accordance with internationally-accepted standards (e.g. REDD+ social and environmental standards);
- Their right to independent facilitation assistance (if required and requested) to develop representative bodies that they think will best accommodate their cultural practice and the demands of decision making;
- Their right to make decisions in accordance with the principles of FPIC; and
- That they can insist on checks and balances within their own community where there is exclusion in decision-making or abuse of power.

Recommended resources

Andersson, K. 2006. *Understanding Decentralized Forest Governance: An Application of the Institutional Analysis and Development Framework*. *Sustainability: Science, Practice, & Policy* 2 (1): 25–35. Available at: sspp.proquest.com

Forest Peoples Programme. 2008. *Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil – A Guide for Companies*. Moreton-in-Marsh, UK. Available at: www.forestpeoples.org

Element 3

Element 3 | Identifying National Support Structures for Rights Advocacy

With the exception of the Philippines, where the law on Ancestral Domain and regulations on FPIC are in place, national laws and regulations in Southeast Asian countries provide limited protection of indigenous peoples' rights over their customary lands. Even in the Philippines, many indigenous communities have been unable to control mining and other developments on their ancestral lands due to a misuse of FPIC regulations. The rights of local communities to manage and control forest areas which they have historically used are also only weakly recognized in the region.

To be able to exercise their rights in relation to REDD+ developments, indigenous peoples and local communities will need assistance to understand their rights and to advocate for these rights to be recognized and respected by government and other actors. Communities may not be aware of advocacy groups, resources, and experts that can assist them in asserting their rights. REDD+ proponents need to research and distribute information on advocacy support to potentially affected communities. REDD+ proponents can play an important role in assisting community efforts to have their rights recognized by following and documenting a thorough process to respect their rights. Proponents should be prepared to assist a community's advocacy efforts, if requested, by informing relevant government authorities about FPIC and the proponent's recognition of a community's rights over its customary lands.

Few governments have established regulations on who owns forest carbon, and who has the right to receive investment for efforts to reduce carbon emissions and to sell any subsequent certified or verified emissions reductions. There is even less clarity when it comes to the rights of local communities and indigenous peoples to own, manage, or sell the rights to carbon in areas within their customary control.

UN-REDD's guidance sets out the obligations of governments to clarify these issues and the steps needed to respect FPIC. However, in many places where REDD+ pilot projects are being undertaken, community rights to benefit from forest carbon projects or programs are not recognized, and may not be recognized for the foreseeable future. Within a pilot or demonstration site, however, a REDD+ proponent should still be able to fulfill most aspects of FPIC. In some jurisdictions, though, it may be illegal for a proponent to canvas community interest in a REDD+ pilot before the proponent has a permit to begin planning for a REDD+ development (e.g. Letter of Intent, MoU, or development permit). Thus obtaining community consent prior to a decision to obtain REDD+ pilot planning permits may be hard or impossible. In such cases, a proponent can show good will towards a community and intent to respect the principle of Prior Consent by informing potentially affected communities as soon as a REDD+ planning permit is obtained. The proponent needs to make it clear that unless the community agrees they will not seek further REDD+ permits from government or implement further planning for a REDD+ project in areas under the community's customary control.

In some jurisdictions, a government may not be willing to issue a REDD+ development permit if the proponent acknowledges that the area includes customary land areas. In such cases, it would not be possible to develop a REDD+ site respecting an affected community's right to FPIC. Under prevailing law in Indonesia, the Government may only issue oil palm plantation development permits on lands to which no other rights pertain. Companies willing or obliged by voluntary standards to recognize customary communities within their concession are not able to obtain permits to develop these areas for oil palm.

It is therefore in the interest of a REDD+ proponent to help secure recognition of community rights to customary lands, both within the project site and at the national level. The emerging significance of REDD+ as a driver of forest policy reform at national level has, in itself, helped advance this cause with governments in the region. In Cambodia, for example, the national community forestry program has received added momentum as the Forest Administration there realizes national REDD+ program success will depend largely on the support and participation of local communities. Similar support from REDD+ proponents in other countries in the region could strengthen advocacy efforts to increase the pressure on governments to respect community rights to FPIC.

Assisting Communities to Access External Grievance Mechanisms

Companies have a range of ways to let affected communities know about the external routes of redress available to them – from simply including information about external options in a response to a grievance, to providing assistance to those who choose to use judicial conflict resolution systems. For example, when the Baku-Tbilisi-Ceyhan (BTC) pipeline project in Georgia realized that local stakeholders lacked official title to their lands or the titles were not clear, it provided help (including a fund for legal support for judicial cases) to people who needed to turn to local government and the court system to address this issue. In Azerbaijan, the BTC project provided a grant to a local NGO, the Center for Legal and Economic Education, to act as a third-party arbiter when direct negotiations were unsuccessful. The Center also provides free legal services to complainants who wish to take their cases to court.

From: Herbertson, K., et al. 2009. *Breaking Ground - Engaging Communities in Extractive and Infrastructure Projects*. World Resource Institute, Washington DC. Available at: www.wri.org

Indigenous peoples and local communities need to know:

- Implications of participating in a process to respect the right to FPIC where their rights to land/resources are not legally recognized nationally, i.e. decisions may not be upheld or subject to recourse;
- Good faith negotiations need to clearly spell out the rights a project proponent can and will uphold;
- The importance of continuing to advocate for land/resource rights;
- How communities can identify national support structures in their home country (legal aid, civil society support); and
- Communities have the right to consult with third parties not directly involved with the project.

Recommended resources

AIPP, IWGIA, FPP, and Tebtebba Foundation. 2010. *What to do with REDD? A Manual for Indigenous Trainers*. AIPP, IWGIA, FPP, and Tebtebba Foundation. Available at: www.forestpeoples.org

IWGIA, AIPP, FPP, and Tebtebba Foundation. 2010. *What is REDD? A Guide for Indigenous Communities*, IWGIA, AIPP, FPP, and Tebtebba Foundation. Available at: www.forestpeoples.org

Sprechmann, S., and E. Pelton. 2001. *Advocacy Tools and Guidelines: Promoting Policy Change*, CARE, Atlanta. Available at: www.care.org

Element 4 | Developing a Process for Seeking and Obtaining Consent

Element 4

An agreement on the process for seeking and obtaining consent is needed so that both the community and the project proponent understand the process through which the community will express its consent or rejection of the REDD+ project.

Developing a mutually agreed process for consent may take considerable time and effort on the part of the project developer and the community, and will require the establishment of a climate of mutual respect, openness, and trust. It relies on initial discussions having created community interest to take the process forward, and the community has identified the institutions it wishes to use to engage and negotiate with the project developer.

The right of a community to say no to a proposed development may not be respected or allowed by a government with jurisdiction over the area. Communities in such situations may be reluctant to assert their rights, and effectively counter government policy. The project proponent will need to find ways to assure communities that their right to reject the project will be respected. Where possible, this should include obtaining statements from government that accept the right of communities to say no to the REDD+ proposal. A particular community might only be opposed to certain aspects of a REDD+ proposal. Through undertaking a thorough and respectful dialogue and negotiation, a proponent should be able to establish which parts of a proposed project a community would be willing to support, and which parts need to be modified or dropped.

A consent process needs a schedule for all the stages of obtaining consent from initial discussions, information gathering, consideration of impacts, benefits and options, through to negotiating and implementing an agreement. It is important that the process includes the seeking and granting of consent at each significant step. For example, a community may agree to initial discussions but then decide that they don't want to proceed to information gathering. Another community may grant consent at every stage, but in the end not agree with the offer made in the negotiations. If important information is overlooked or omitted from discussions, trust between the community and the company will be weakened, and the community may be reluctant to continue to engage with the project developer.

The consent process must demonstrate that it is free from coercion and manipulation. It needs to identify representation, roles, likely stages/points of FPIC, how agreement will be reached within a community (consensus, voting, or other), the requirements for reaching an agreed decision (percentage of population present, percentage of votes etc.), conflict resolution processes, and protocols for where consent is withheld (conditions set, time period for renegotiation, etc.).

Coercive parties can come from within communities. Proponents, while respecting a community's right to determine its own processes, can ask how potentially marginalized groups (such as women, poor families, or groups lacking political connections) will be able to participate in the community's internal consent process.

It is essential that the right of a community to reject a REDD+ proposal is respected, and that the proponent does not try to immediately renegotiate the deal. However, a community can be asked to indicate under what conditions it would be prepared to consider the proposal again.

Common pitfalls of consent/agreement processes:

- Negotiating with the wrong leaders or in a way that leaves out the interests of important parts of the community;
- Thinking that initial consent to discuss a plan means the community is willing to negotiate over the REDD+ proposal;
- Failure to include important information on impacts or liabilities associated with the project; and
- Not allowing sufficient time for a community to discuss the development plan or obtain independent information and advice about the plan.

Indigenous peoples and local communities need to know:

- Their right to a mutually agreed consent process, their obligation to abide by it, and their right to recourse if it is not adhered to by project proponents; and
- Their right to independent legal advice at any stage of the consent process.

Recommended resources

Oxfam Australia. 2010. *Guide to Free, Prior, and Informed Consent*. Carlton, Victoria, Australia. Available at: www.oxfam.org.au

Suzuki, R. 2010. *The role of trust in REDD+*. *REDD-net Asia-Pacific Bulletin 2* (October 2010). ODI & RECOFTC. Available at: www.redd-net.org

Element 5 | Developing the Content for Consent Agreements

Element 5

A consent agreement between a project proponent and a community sets out the conditions under which the community gives its consent to the proposed development.

It is important to establish a mutually agreed form and format for consent that both parties recognize. This could be written, oral, traditional ceremony, or perhaps a combination.

The format of a consent agreement could include the following:

- Agreed signatory parties;
- Mutually agreed substantive evidence of consent;
- Description of location/rights holders/resources/drivers of deforestation/ecosystem services;
- Description of agreement details (according to location in the project cycle). For agreements on project implementation this may include:
 - ✦ Costs to be borne by the community;
 - ✦ Benefits accruing to the community;
 - ✦ Requirements (e.g. patrolling, data collection, reporting, etc.);
 - ✦ Rules and restrictions imposed on the community (such as limiting use of forest products);
- Duration/term;
- Arrangements for making agreements binding;
- Independent verification provisions;
- Recourse mechanism/grievance process;
- Monitoring plan;
- Withdrawal of consent terms;
- Agreed next point for consent to be sought; and
- Appendices such as management plans/details of agreed economic development activities/associated detailed processes for implementation.

The key actors in this process are rights-holder representatives, independent facilitators, project proponents, and governments. Project proponents can learn from other conservation or extractive industry agreements with indigenous peoples or local communities. An example from an extractive industry is the agreement between the Voisey Bay Nickel Company, the Innu Nation and the Labrador Inuit Association. The Voisey Bay agreement recognized the constitutional rights to land of the Innu, and that mining could go ahead only if the Innu people had provided their consent. In practical

terms, this meant the involvement of indigenous peoples in project design, employment, environmental protection, social security, and cultural protection measures. For more information on this agreement visit www.docstoc.com.

Indigenous peoples and local communities need to know:

- All aspects of the consent agreement (it must be made publicly accessible).

Recommended resource

Lehr, A., and G. Smith. 2010. *Implementing a Corporate Free, Prior and Informed Consent Policy*. Foley Hoag LLP, Boston and Washington, DC. Available at: www.foleyhoag.com

Cambodia: Community Consultations for the Oddar Meanchey Community Forestry REDD+ Project

The Oddar Meanchey Community Forestry REDD+ project is the first REDD+ project in Cambodia, and provides lessons for other community-based REDD+ initiatives in the country.

The project is located in Oddar Meanchey province and covers nearly 70,000 hectares of evergreen and deciduous forests, and involves more than 10,000 households across 13 communities. Most of the households are of Khmer ethnicity, with a small minority of ethnic Kuy. The province has been losing two percent of its forests annually due to the expansion of rubber, sugar and oil palm concessions, and small-scale migrant farms. The communities have recently secured Community Forestry Agreements, which legally recognize their forest management rights as well as rights to benefit from carbon.

To achieve a viable scale, the project bundled together 13 disparate community forestry areas. Since late 2009, it has been working on attaining the Climate, Community, and Biodiversity Standards (CCBS) and the Voluntary Carbon Standards. It will undergo validation for these in 2011 with the aim of selling carbon shortly thereafter. Funding for the project, which will sequester around 7 million metric tons of carbon over thirty years, has come from Danida, Pact, the Clinton Climate Initiative, and the United States Department of State.

Consultation process

Prior to consultations on the proposed REDD+ project, the communities elected representatives and authorized them to make decisions under the community forestry development process. Through their representatives, the 13 communities were empowered to negotiate individually and collectively with the REDD+ proponents. As a result of these efforts, as well as a project directive from the Council of Ministers calling for “maximum benefits to local communities,” it was eventually agreed that at least 50% of net income from carbon would directly benefit participating communities. The anticipated benefits include employment opportunities, improved cooperation in forest law enforcement, as well as funds and in-kind support. The specific mechanisms for delivery of benefits are currently under consideration. Pact is recommending to the Forestry Administration that communities will have a say in this decision-making process.

Cambodia: Community Consultations for the Oddar Meanchey Community Forestry REDD+ Project (continued)

Consultation with the communities comprised a series of workshops starting in March 2008 with the project's inception and culminated in a provincial-level workshop held in November 2009, after the submission of the CCBA Project Document. As the concepts of climate change and a carbon market for emissions reductions were alien to the majority of villagers and local officials, the project facilitators introduced these concepts over the course of a year, with more than 50 village and district-level workshops. By the provincial consultation, the community representatives were relatively familiar with the REDD+ concept and better equipped to raise questions and issues of concern.

The one-day provincial consultation was conducted in Khmer, with minutes taken and the entire proceedings recorded on audio tape. The meeting was facilitated by two project staff from Pact, a Forestry Administration official from the central government who is the project focal point, and the director of the project's local NGO partner, Children's Development Association. All 13 communities were represented in the meeting, with two community leaders attending from each village. The workshop participants were made up of 29 community leaders (17 male, 9 female), two local Forestry Administration staff and two local NGO staff. The workshop included small group discussions and plenary sessions, with comments regularly written down and posted on the walls to encourage open and free discussion.

The consultation focused on relevant sections of the Project Document but the facilitators allowed the discussion to take its course according to the interests of the participants. Community members asked questions and raised concerns freely. Some misunderstandings on the project objectives were cleared up. The facilitation team did their best to address concerns and made note of issues that needed further discussion.

Key issues raised by the communities

- There had not been consistent and regular visits to the communities by the project staff to explain the project;
- Some community leaders faced challenges in getting their members to understand and participate in the REDD+ planning activities;
- Communities needed financial support for their forest protection activities and wanted to know when this support will be available;
- Communities lacked capacity to implement some of the activities;
- Some community leaders were afraid that their members had too high expectations of carbon revenues;
- Two of the 13 communities had not yet received tenure agreements;
- There was some concern that villagers would be prevented from using existing agricultural land inside the community forest boundaries;
- Communities were not clear about who was responsible for protecting the forest in the leakage belt – the buffer zone surrounding the community forests;
- Some communities were being intimidated by armed loggers;
- Communities requested support for livelihood improvement including provision of livestock, tractors, and credit systems;
- There were new migrants in one community forestry area and assistance was required to deal with this issue;
- Communities requested a transparent benefit-sharing system where everyone is invited to meetings to discuss how income will be used and consensus is built. The use of funds and the achievements should be made public.

Cambodia: Community Consultations for the Oddar Meanchey Community Forestry REDD+ Project (continued)

None of these issues were considered serious enough by the villagers to affect giving their overall consent for the project. During 2010, the project team started to address the above issues as well as several other points that are important to the communities, such as demarcation of agricultural holdings within the REDD+ community forests. The provincial workshop was an important step in an ongoing process of consultation and cooperation between all of the stakeholders, and a schedule for regular meetings is being followed. Though the participants were not asked to sign a formal consent form, the consultation evaluations as well as a verbal agreement at the end of the workshop confirmed the consensus on moving forward with the project. Participants were encouraged to share what they had learned and discussed with other members of their communities upon return to their villages and to inform the facilitators of any other concerns. Ideally, final consultation workshops would have been conducted in all communities, but due to budget constraints, the project team had to rely on the community representatives to complete the process.

The Oddar Meanchey Community Forestry REDD+ project consultations attempted to integrate the right to Free, Prior, and Informed Consent over the course of many consultations during a period of one and a half years. While there were limitations, the experience demonstrated useful methods for organizing this process and highlighted issues that are important to local communities embarking on REDD+.

Written by Amanda Bradley, Pact Cambodia. For further information visit: www.pactcambodia.org

Element 6

Element 6 | Agreeing on a Communication Plan

A communication plan for the process to respect the right to FPIC is needed so that all aspects of the consent process are communicated to members of the community and to other interested parties, including neighboring communities, local government, NGOs, and companies operating in the area. Communications with each community must be in the language the communities speak and use a medium that they understand.

Some project developers may wish to rely on government to facilitate communication with communities, but this poses the risk that information won't reach important sections of the community, or that key information about the project won't be communicated at all. Designing and implementing a communication plan for FPIC should be seen as the responsibility of the project developer, but the plan must be developed and implemented with the community, and the community may take on responsibility for implementing certain parts of the plan. Communication plans can be developed and implemented with the community in stages, starting from preparing for initial communication with the community on the proponent's interest to develop a REDD+ pilot or demonstration area. At the outset, the project proponent should make clear their offer to assist the community in developing a mutually agreed communication plan to cover all stages of the consent process.

Project proponents and/or governments will take the lead in designing the communication plan and should consider bringing in external communication expertise. The communication plan will need to include an analysis of stakeholder information requirements, identify innovative and effective means of communicating information, and earmark appropriate tools to evaluate the effectiveness of the plan. Adequate resources for communication will need to be sourced. The project proponent, government, and the rights holders will need to establish roles and responsibilities to ensure all community members are informed.

Indigenous peoples and local communities need to know

- All key messages in the communication plan, which should cover necessary information about their rights in relation to REDD+, FPIC, customary/other affected land, carbon, and forest resources.

Recommended resources

Business and Biodiversity Offsets Programme (BBOP). 2009. *Biodiversity Offsets and Stakeholder Participation: A BBOP Resource Paper*. BBOP, Washington, D.C. Available at: www.forest-trends.org

Lehr, A., and G. Smith. 2010. *Implementing a Corporate Free, Prior and Informed Consent Policy*. Foley Hoag LLP, Boston and Washington, DC. Available at: www.foleyhoag.com

Element 7 | Developing a Capacity-Building Strategy

Element 7

A community will need a wide set of skills to engage effectively with a REDD+ project and to make an informed decision to allow the project on their lands. These range from literacy and numeracy through to the capacity to manage funds in a transparent and accountable manner. A capacity-building strategy for a community should aim to develop skills needed for its members to engage in each stage of the ongoing consent process. Different groups within the community, particularly potentially marginalized groups such as women, may require tailored capacity-building strategies that suit their particular situations and aspirations. Capacity building should continue throughout the life of the project and make skills and training available to community members on areas including project design, implementation, monitoring, evaluation, and for addressing grievances.

An initial survey should identify capacity needs within the community, for example: Can community leaders read? Can they understand project documents? Are community members aware of their rights as an indigenous or local community under national and international law? How can the capacity of the community be improved to better understand the potential opportunities and risks of the proposed project?

Capacity building is an important part of participatory mapping. Interested members of the community may need to learn how to read a map, use Global Positioning Systems (GPS), Geospatial Information Systems (GIS), and topographic maps, and how to overlay community data onto base maps.

Many rural communities lack skills to manage finances and funds. If the project includes benefit sharing in the form of cash payments, the community may need assistance to develop capacity and systems for transparent and accountable book keeping. Individuals may also need assistance to find effective means to best use or save their funds.

Other possible capacity building needs for rights holders include: rights in REDD, all technical aspects of involvement with REDD+ project development and implementation, conflict management, negotiating skills, advocacy techniques, monitoring and reporting skills, and transportation needs.

A capacity building strategy should also address needs within local government, local NGOs, and project proponents. This will help ensure they are better able to engage with the project and understand its intention to respect the rights of local communities and indigenous peoples. Capacity building for these parties may need to address biases or racism when such attitudes limit the institution's support to indigenous peoples and local communities in relation to the REDD+ project.

Other capacity building needs for project proponents, NGOs, and local government could include: cross-cultural communications, characteristics of the cultural groups in the project area, rights in REDD+, what is FPIC and how to facilitate it, effective communications strategies within the specific cultural context, receiving and using community feedback, etc.

Indigenous peoples and local communities need to know:

- That support is available to them to build their capacity and understanding in relation to FPIC; and
- That their input into the strategy is essential as it will guide the capacity building output.

Recommended resources

AIPP, IWGIA, FPP, and Tebtebba Foundation. 2010. *What to do with REDD? A Manual for Indigenous Trainers*. AIPP, IWGIA, FPP, and Tebtebba Foundation. Available at: www.forestpeoples.org

IWGIA, AIPP, FPP, and Tebtebba Foundation. 2010. *What is REDD? A Guide for Indigenous Communities*, IWGIA, AIPP, FPP, and Tebtebba Foundation. Available at: www.forestpeoples.org

Implementing a Process for Respecting the Right to FPIC

Communities approached respectfully by REDD+ project proponents, including the offer to fully involve them in project design, and the proponent's agreement to respect their right to FPIC, are likely to be open to becoming involved. This section covers integrating the right to FPIC in project design and the steps required for ensuring that communities have alternative information and independent advice.

Element 8 | Integrating the Right to FPIC with REDD+ Project Design

Element 8

The giving or withholding of consent by a community towards a proposed development is not a one-off process. The right to FPIC is ongoing throughout the life of a project. Consent from the community should be sought by a project developer at each stage in developing a REDD+ plan and project. Project developers often make the mistake of undertaking significant planning and licensing steps before consulting with affected communities. This does not respect their right to FPIC, and is likely to make affected communities, when they are approached and presented with a plan, reluctant or unwilling to get involved. On the other hand, proposals for REDD+ projects that are developed in close consultation with communities from the earliest planning stages are more likely to be accepted, are more able to understand and address community needs and aspirations, and are therefore more likely to be successfully implemented.

In presenting a project proposal to a community, the proponent should describe each of the steps in the process at which they think that community consent will be needed before the planning or implementation can proceed to the next step. The proponent should request community input into the project design and make it clear that their right to FPIC will be incorporated into all stages of planning and implementation, based on the community's decision on the steps in the process that will require community consent. A list of key questions/considerations could be developed with the community and used as a checklist for reviewing the design of each project stage in relation to FPIC.

If outside actors are needed to develop different parts of the project design and implementation, this information needs to be checked with the community as they may agree with the involvement of certain actors, but reject others.

Proposed changes in land use as a result of the project must be clearly explained to the community, including the potential benefits and costs – both direct costs of implementing the project and opportunity costs for foregoing existing or potential benefits from alternative management and use. Costs and benefits are likely to fluctuate over time. Communities need to be aware of

how different scenarios would affect them if costs are higher or benefits lower than suggested by the proponent.

The issue of benefit sharing will require detailed consultations within the community. The proponent should consider offering facilitation support to ensure all parts of the community, including women and other potentially marginalized parties, can be involved in designing and agreeing to benefit sharing arrangements. Close attention to the issue is important so that the project brings benefits to all parts of the community, limiting the possibility that grievances and jealousies damage implementation of the project at a later stage. It may be useful to inform the community of other examples of benefit sharing, and if possible to arrange for exchange visits with communities that have developed successful benefit sharing arrangements.

Governments should be informed about the project design phase, and how communities are involved in project design so that their right to FPIC is incorporated at each stage. Governments may have useful experience on delivering and distributing benefits, both services and payments, that can be considered in the project design.

Indigenous peoples and local communities need to know:

- About their right to FPIC, and how this right can be expressed through a community decision at each stage of designing and agreeing on a REDD+ project;
- About climate change: What it is and how does it happen? What are the likely impacts to the earth and to the community themselves?
- About REDD+: What is it and how does it work? What will it mean for community forests? How will it affect community livelihoods? How will it generate benefits?
- In the context of carbon offsets generated through REDD+ projects, they will also need information (or have access to independent expertise) on carbon offsets and the voluntary and/or compliance carbon markets including: Why is this approach being proposed? How does it work regarding financial arrangements and obligations? How might changing markets (which affect both costs and benefits) impact the project?

Recommended resources

CIFOR. 2009. *Simply REDD: CIFOR's Guide to Forests, Climate Change and REDD*. CIFOR, Bogor, Indonesia. Available at: www.cifor.cgiar.org

Gibson, G., and C. O'Faircheallaigh. 2010. *Negotiation and Implementation of Impact and Benefit Agreements*. IBA Community Toolkit. The Gordon Foundation, Toronto. Available at: www.ibacommunitytoolkit.ca

Life Mosaic. *Indigenous Peoples and Climate Change: A Video Guide*. Film. Available at: www.lifemosaic.net

Element 9 | Ensuring Alternative Information and Independent Advice

Element 9

Indigenous peoples and local communities have a right to obtain independent information on all issues and concerns related to REDD+ and on the details of the planned developments that will affect them. Most rural communities affected by a REDD+ project will need help to identify and to pay for independent information and advice. Project proponents can also provide information related to frequently asked questions on REDD+ and provide answers from the point of view of the proponent. However, they must keep in mind the right of communities to access independent information and advice as a cornerstone of an informed consent process.

To avoid apparent and actual influence over communities, some Canadian mining companies seeking agreements based on FPIC-created trust funds for communities to access and pay for independent expert advice on legal, social, economic, and environmental issues. The communities did not have to request and receive this advice based on decisions made by the company.⁹ Such funding mechanisms can also be used to provide payments for the participation of community members in impact assessments.

Project proponents, governments, and private investors are obliged to provide communities with access to independent advice and where necessary, to help the communities find the ways and means to pay for such advice. The FPIC verification process should monitor the independent advisers and ensure quality advice. Local and national civil society and international NGOs will be a primary source of alternative information, and the proponent should inform local communities and indigenous peoples affected by the project about these groups as a source of independent advice.

Indigenous peoples and local communities need to know:

- That they have the right to seek independent expert advice on legal, social, economic, and environmental issues; and
- That project proponents, governments, and private investors are obliged to provide funding and support for accessing this advice.

Recommended resources

Griffiths, T. 2008. *Seeing 'REDD'? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities*. Forest Peoples Programme. Moreton-in-Marsh, UK. Available at: www.forestpeoples.org

⁹ Sosa, I., and K. Keenan. 2001. *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada*. Canadian Environmental Law Association, Environmental Mining Council of British Columbia, CooperAcción. Available at: www.cela.ca

Client Earth: An organization of activist lawyers committed to securing a healthy planet. Website: www.clientearth.org

REDD-net: A website devoted to creating knowledge products and information services demanded by (and tailored for) southern civil society organizations on topics related to REDD+. Website: www.redd-net.org

REDD Monitor: A website with critical analysis of REDD-related problems to help facilitate public discussion. The website documents REDD projects around the world, looking at who is involved as well as how the projects are developed. Website: www.redd-monitor.org

Monitoring and Recourse: Maintaining Consent

As in any relationship, misunderstandings can develop between the project holder and a community as the REDD+ project is implemented. In any case, the community or project holder may wish to revisit aspects of project implementation or change the terms of their agreement. It is important that project holders approach the development of projects with communities with the willingness and intention to develop a long term relationship spanning decades, and are open to review and modify the project and its implementation as new information or interests come to light.

This section concerns monitoring an agreement and establishing a grievance mechanism. Monitoring the implementation of the agreement provides a way for the community and company to keep track of developments and learn from emerging issues or changing circumstances. Establishing and agreeing on a grievance mechanism and process means that as differences emerge, they can be often be dealt with quickly and appropriately before they become conflicts.

Element 10

Element 10 | Monitoring What is Agreed in Implementation

If the project design phase uses participatory processes to develop environmental, economic, and social baselines, then the community will be familiar with processes used to collect and record information. They will then be able to build on those skills to monitor project design, the consent steps, and implementation, based on their agreement with the project holder. While the community may wish to carry out its own monitoring independently, the project holder should seek to involve the community in its monitoring of project implementation related to agreements and consent. This starts with designing the monitoring approach, including what activities and issues will be monitored, what monitoring methods will be used, who will do the monitoring, and how the results will be recorded. It offers an opportunity to reassess whether the information given regarding the project was correct and has remained true (e.g. regarding costs and benefits) and how this

compares to alternatives to the project. It also includes how the results will be presented to the community and other parties and what steps will be followed if monitoring reveals problems in implementation.

A key contribution of participatory monitoring of project implementation is that it replaces rumor and misinformation with factual evidence that the community has participated in producing. The monitoring needs to be linked to the social component of Measuring, Reporting, Verification (MRV) systems.

The community needs to be informed about different methods for participatory monitoring and feedback which can be incorporated into the design of the project or program. Participation of community members in monitoring work must be planned with due consideration of the human and financial resources available for such work. An important part of a monitoring mechanism is agreeing on what will be done when monitoring reveals problems or disagreements in project implementation. It is necessary to understand what kind of problems and what level of disagreement can trigger grievance processes and what circumstances would re-initiate the consent process and require a re-negotiation of the agreement.

Indigenous peoples and local communities need to know:

- That they can play a central role in monitoring project implementation; and
- Deviations in implementing the consent agreement identified in monitoring can trigger the grievance process if either party is unhappy with project implementation. If the issues cannot be resolved through the grievance process, either party can request re-initiation of the consent process or take the issue to arbitration.

Recommended resource

Tebtebba Foundation. 2006. *Recent experiences and recommendations on the concept and implementation of the principle of Free, Prior and Informed Consent*. Permanent Forum on Indigenous Issues Fifth Session, Presented by Jennifer Corpuz, Tebtebba Foundation. Available at: www.sarpn.org.za

Element 11 | Developing a Grievance Process

Element 11

It is inevitable that in the implementation of the project, differences will occur based on varying interpretations of the agreement and the implementation plan. These misunderstandings may seem minor from one party's point of view, but may be important from another. For instance, a community may have members who were not closely involved with the negotiations, who burn off grassland in the dry season and feel unhappy that this activity is restricted by the agreement that their leaders signed. The project holder may see it as

a simple matter of implementing the existing agreement and stopping the lighting of grass fires. In contrast, for the people involved, the fires are needed for grazing and encouraging new grass shoots and they may feel that their consent for this activity to be stopped was not given. A grievance mechanism allows such issues to be aired in a way that can lead to their resolution before communication gets difficult or breaks down. The two parties may agree that consent to stop burning off grassland was not given by all members of the community, and that this part of the agreement needs to be revisited. This may lead to a new agreement, perhaps that burning during the beginning and end of the dry season is permissible when fires are less likely to spread into the forest. The grievance process may highlight other solutions to the problem, for instance, the community may be interested in training and tools for better fire management.

Five Principles in Designing a Grievance Process

1. Proportionality: Scaled to risk and adverse impact on affected communities;
2. Cultural Appropriateness: Designed taking into account culturally appropriate ways of handling community concerns;
3. Accessibility: Clear and understandable mechanism that is accessible to all segments of the affected communities at no cost;
4. Transparency and Accountability for all stakeholders; and
5. Appropriate Protection: A mechanism that prevents retribution and does not impede access to other remedies.

Five Process Steps of a Grievance Mechanism

1. Publicize the mechanism;
2. Receive and register grievances;
3. Review and investigate them;
4. Develop resolution options, respond to grievances, and close out;
5. Monitor and evaluate.

Continual Improvement

- Develop/improve strategies to address concerns raised through the grievance mechanism;
- Revise the social and environmental management system; and
- Improve management plans to handle impacts and implement corrective actions.

From: International Finance Corporation (IFC). 2009. *Addressing Grievances from Project-Affected Communities – Guidance for Projects and Companies on Designing Grievance Mechanisms*. Good Practice Note. Washington, DC. Available at: www.ifc.org

The overall aim of a grievance process should be to restore consent. Grievance mechanisms offer REDD+ project holders and communities an alternative to external dispute resolution processes. A grievance mechanism developed with a community has the advantage of a locally based and mutually beneficial way to settle issues within the framework of the agreement between the two parties. The mechanism should include the possibility of independent arbitration, and recourse to legal or administrative remedies if negotiations

break down. It is essential that the choice of which mediators or arbitrators to use is mutually agreed by the project holder and the community, and that they are independent of the project holder and the government.

An effective grievance process must be accessible to the community, with a designated person from the community and from the project holder to receive grievances, and an agreed process and panel to hear grievances. The process should include grievance tracking and response systems, reporting on project progress at monitoring meetings to discuss satisfaction and hear grievances. In designing a grievance mechanism, communities should be informed about government adjudication channels and processes, and access to justice (provision of legal aid). This is necessary if the grievances cannot be resolved by the two parties without outside assistance.

The grievance process should include provisions and protocols for withdrawing consent if suitable remedial action is not forthcoming and there is community consensus to withdraw consent to further implementation. Grievance processes should be designed to be able to hear and address concerns from members of a community about their exclusion from community decision-making processes related to the agreement with the project holder.

Indigenous peoples and local communities need to know:

- The grievance mechanism does not replace their right to take legal action;
- They also have a right to independent redress via a mediator, arbitrator, ombudsman, or court;
- Consent once given can be withdrawn under reasonable circumstances; and
- About the agreed grievance process and where, when, and how to access it.

Grievance Mechanisms in Lao PDR and their Relevance to REDD+

Social harmony within and between communities in Laos is highly valued. This is maintained through a variety of social norms and contracts, conflict avoidance, and when needed, use of conflict resolution and grievance mechanisms. Although yet to be trialed by REDD+ projects in the field, traditional grievance mechanisms are available. REDD+ project developers and involved communities will need to consider whether traditional grievance systems are robust and dynamic enough to deal with the conflict situations that may arise in REDD+ settings.

People in Laos prefer to use local grievance mechanisms over government ones due to convenience and familiarity, perceptions of fairness, speed, lower financial costs, and a lack of understanding of the state legal system. Moreover, taking a dispute to the courts could result in the involved parties becoming formal enemies, disrupting social harmony. The choice of grievance mechanism relates to the nature of the dispute or offence committed. Resolving grievances over petty crime in rural Laos such as theft of small items can be settled between the individuals or families with no outside involvement. More serious disputes, e.g. over land and more serious crimes, need the involvement of a village authority such as the Village Head, Consul of Elders, Clan Leaders or a Village Mediation Unit. In some cases, disputants may resort to outside authorities. Ethnic groups differ in their grievance mechanisms (e.g. council of elders vs. clan leaders).

Grievance Mechanisms in Lao PDR and their relevance to REDD+ (continued)

The boundary between customary and formal law in Laos is often diffuse. Members of a Council of Elders may or may not hold formal political positions (such as Village Head or Deputy, Lao Women's Union) or be on the Village Mediation Unit. Cases settled by a Council of Elders may be overturned by the Village Mediation Unit, depending on the village history (resettlement, multi-ethnic villages or revolutionary credentials). Which of these institutions will prove appropriate in the event of REDD+ related conflicts and grievances will depend on the kind of conflicts that arise and whether customary or formal legal institutions are used to solve them.

Other possibilities for REDD+ related grievance mechanisms include: modern mediation in the case of commercial disputes; administrative dispute resolution including the Prime Minister's Office or local administration at provincial and district levels; administrative dispute resolution for cases related to government ministries or authorities and commercial issues related to State-owned enterprises; expert determination; arbitration for commercial conflicts; and litigation for all types of conflicts, disputes, and crimes. Judgment Enforcement Officers from the Ministry of Justice and referred to in all civil judgment and civil compensation related to criminal cases, or those involving political party and government leaders are also used for dispute resolution.

These grievance mechanisms alone or in combination will need to be considered in the REDD+ context in tandem with village-level engagement. Preparing for potential REDD+ related conflicts by considering the grievance mechanisms and approaches that could be used to resolve them will help create equitable positions of stakeholders involved in the conflict resolution process and ensure greater community acceptance of REDD+ projects.

In the event of REDD+ related conflicts and grievances will depend on the kind of conflicts that arise and whether customary or formal legal institutions are used to solve them.

Written by Richard Hackman from the Lao Biodiversity Association
For further information see: www.idrc.ca

Recommended resources

Energy Sector Management Assistance Program (ESMAP), the World Bank, and the International Council on Mining and Metals (ICMM). 2005. *The Community Development Toolkit*. Washington, DC, and London. Available at: www.icmm.com

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Element 12 | Verifying Consent

Element 12

It is a requirement of FPIC that an independent party verifies that the consent of a community has been free, prior, and informed. If the verification process is known in advance by the project holder, and the community agrees to this process, both parties will be better able to ensure a satisfactory process to respect a community's right to FPIC.

Rights holders, project holders, and appropriate parts of government should all be made familiar with relevant standards that require verification of consent. The community and the project holder should agree on which verification standard will be used. The REDD+ Social and Environmental Standards referred to in the Introduction include verification elements and the UN-REDD global program is piloting an independent verification and evaluation process as part of its approach to FPIC. This latter effort, in partnership with RECOFTC, is intended to lead to the development of a toolkit for evaluators of FPIC processes in the REDD+ context.

Stakeholders should also agree on how frequently verification will take place and which party will carry out the verification of consent. If verification identifies deficiencies in the granting of consent, the community has the right to require that deficiency is addressed, for example by missing information being provided or wider consultations taking place. Also, the community has the right to require that their consent to the project is renegotiated from the consent stage that was identified as inadequate.

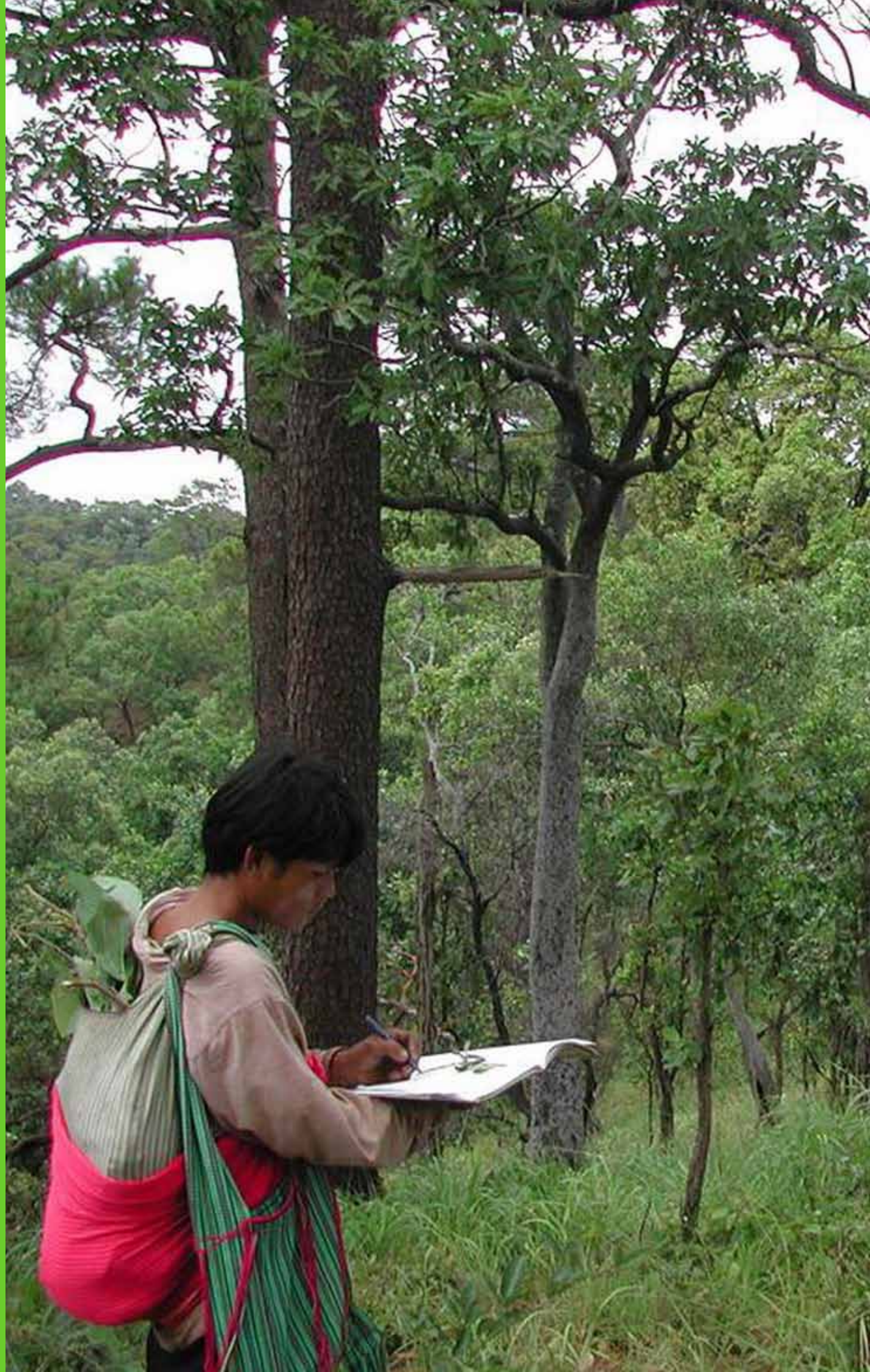
Indigenous peoples and local communities need to know:

- Their right to independent verification of the consent process – that it was free from undue influence, timely, and they understood the content and implications of the consent agreement.

Recommended resources

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GLOSSARY and **ACRONYMS**



GLOSSARY

Adaptation: Activities to address the effects that climate change is already having on land, ecosystems, and livelihoods.

Additionality: In the context of a carbon offset project, additionality is the reduction in greenhouse gas emissions that is in addition to what would have resulted in the absence of the project.

Afforestation: Developing a forest on land that has not been forested in recent times.

Baseline: In seeking to measure whether greenhouse gas emissions have decreased or increased, it is necessary to have a known previously emitted amount (often connected to a baseline date or year), against which a comparison can be made over time. This is called the baseline.

Carbon market: Transactions for the sale of emissions permits, reductions, or offsets comprise the 'carbon market.' Carbon dioxide is but one of several greenhouse gases that can be 'traded.' Moreover, there is not a single, unified international market for emissions reduction purchases. Rather, there are various markets in operation around the world, which can be classified as either 'regulated' or 'voluntary' markets.

Climate, Community and Biodiversity Alliance (CCBA): A consortium of mainly international, environmental NGOs including Conservation International, CARE, The Nature Conservancy, Rainforest Alliance, and the Wildlife Conservation Society. It promotes the development of management activities and standards that benefit climate, local communities, and biodiversity.

Climate, Community and Biodiversity Standards (CCBS): Provides rules and guidance for the design of land-based climate change mitigation projects. The standards require projects to respect the rights of local communities, including their right to FPIC. Projects must also have credible plans to benefit biodiversity and deliver carbon emission reductions.

Convention on Biological Diversity (CBD): An international legally-binding treaty with the goals of conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits arising from genetic resources.

Deforestation: The removal of a forest or stand of trees where the land is thereafter converted to a non-forest use. Examples of deforestation include conversion of forestland to agriculture or urban use.

Emissions trading (or ‘carbon trading’): Includes the sale and purchase of: ‘permits’ or ‘allowances’ to emit greenhouse gases; ‘certificates’ that prove a certain reduction in emissions from a particular activity beyond what would otherwise have been the case (i.e. ‘business as usual’ emissions); or ‘certificates’ that indicate a certain amount of actual emissions have been ‘offset’ somewhere else, through for example, carbon sequestration.

Forest degradation: Occurs when the structure or function of a forest is negatively affected, reducing the ability of the forest to provide services or products.

International Labour Organization (ILO): The United Nation’s agency responsible for drawing up and overseeing international labor standards. The ILO’s goal is productive and remunerative employment for all, based on the principles of social justice and equality. ILO Convention 169 concerns indigenous and tribal peoples in independent countries. It was adopted 1989 by the General Conference of the ILO and came into force in 1991.

Land Use, Land-Use Change and Forestry (LULUCF): A greenhouse gas inventory sector that covers emissions and removals of greenhouse gases resulting from direct human-induced land use, land-use change, and forestry activities.

Mitigation: Seeking to reduce the amount of greenhouse gases released into the atmosphere by human-related activities. Such actions might include reducing fossil fuel use and changing land-use activities – such as by reducing the rate of land clearing and deforestation, and increasing the rate of reforestation.

Reducing Emissions from Deforestation and Forest Degradation (REDD): An initiative to cut greenhouse gas emissions due to forest loss or damage by the inclusion of forest-related mitigation measures in carbon market mechanisms.

REDD+: The short-hand for the sentence describing the set of forest-related mitigation measures in discussion under the Ad-Hoc Working Group on Long-term Cooperative Action (AWG-LCA) of the UNFCCC. In addition to REDD (see above), REDD+ includes “the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.”¹⁰

Reforestation: The human-induced reestablishment of a previously-cleared forest. According to UNFCCC guidelines, reforestation can be performed on areas which were cleared no later than 31 December 1989.

¹⁰ UNFCCC Ad Hoc Working Group on Long-term Cooperative Action under the Climate Change Convention. Find out more at: www.unfccc.int

Reforestation: The reestablishment or regeneration of a forest.

Rehabilitation: Regaining the productivity or structure of a forest, but not aiming to regain the original biodiversity.

Removals: The opposite of an emission of greenhouse gas and occurs when greenhouse gases are removed from the atmosphere, such as by trees during the process of photosynthesis.

Restoration: Restoration of a natural forest to re-establish structure and function, and protect and restore critical habitat, riparian areas, watersheds, and other attributes.

Sinks: Reservoirs or locations that store or sequester a greater amount of carbon dioxide than they release. Major carbon sinks include forests and oceans.

Sustainable Forest Management (SFM): The stewardship and use of forests that maintains their biological diversity, productivity, regeneration capacity, and economic and social functions.

The United Nations Collaborative Programme on REDD+ (UN-REDD): The UN-REDD Programme was launched in September 2008 to assist developing countries prepare and implement national REDD+ strategies. It builds on the convening power and expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP).

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): Sets out the individual and collective rights of indigenous peoples, including their rights to culture, identity, language, employment, health and education. It emphasizes their rights to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations. It prohibits discrimination against indigenous peoples, and promotes their full and effective participation in all matters that concern them, including the right to give or withhold their Free, Prior, and Informed Consent to planned developments that may affect them.

United Nations Framework Convention on Climate Change (UNFCCC): An international environmental treaty with the objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human-induced climate change.

Voluntary Emissions Reductions (VERs): Reductions in greenhouse gas emissions through projects that are assessed and verified by objective third-party mechanisms, for subsequent trade on voluntary carbon markets.

Voluntary Carbon Standard (VCS): This is a standard for the voluntary carbon offset industry. It closely follows the standards developed for the Kyoto Protocol's Clean Development Mechanism (CDM) and establishes criteria for validating, measuring, and monitoring carbon offset projects.

ACRONYMS

BTC	Baku-Tbilisi-Ceyhan pipeline
CAT	Committee Against Torture
CCBS	Climate, Community, and Biodiversity Standards
CCPR	Human Rights Committee
CEDAW	Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
CMW	Committee on Migrant Workers
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
FPIC	Free, Prior, and Informed Consent
FPICon	Free, Prior, and Informed Consultation
GIS	Geospatial Information Systems
GPS	Global Positioning Systems
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
ILO	International Labour Organization
FCPF	Forest Carbon Partnership Facility of the World Bank
FIP	Forest Investment Program of the World Bank
MoU	Memorandum of Understanding
MRV	Measuring, Reporting, Verification
NGO	Non-government organization
OPCAT	Optional Protocol to the Convention against Torture
PES	Payments for Ecosystem Services
RECOFTC	The Center for People and Forests
REDD+	Reducing Emissions from Deforestation and Forest Degradation
SPT	Subcommittee on Prevention of Torture
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNPFII	United Nations Permanent Forum on Indigenous Issues
VCS	Voluntary Carbon Standard



ANNEXES



ANNEX I: The Legal Framework for FPIC

Resource Rights and Carbon Rights

FPIC is a right that guarantees that the property of an indigenous people will not be affected or taken away from them without their consent. REDD+ programs and projects relate to property, including to the question of indigenous peoples' and local communities' rights over carbon. Takacs (2009) has proposed that laws and contracts of forest carbon should distinguish between sequestered carbon, carbon sinks, carbon sequestration potential, carbon credits, and usufruct rights. In one sense, carbon within forests can be seen as the property of the forest owner, along with the right to use, benefit from, and transfer the property. In another sense carbon credits are an economic and political construct based on the difference between actual current and hypothetical future carbon emissions. This difference has led to two approaches on the allocation of entitlements to carbon. In the first, carbon rights are held by the authorities that set national and sub-national reference levels. In this model, entitlements to carbon are determined by a national REDD+ scheme that sets national and regional reference levels on which governments can base the allocation of carbon rights in the form of licenses. In the second, carbon rights belong to the entity that has rights to the forest, so carbon rights are inseparable from forest ownership rights. National and international legal frameworks are yet to provide a clear definition of carbon rights.

From: Takacs, D 2009, *Forest Carbon – Law and Property Rights*, Conservation International, 2011 Crystal Drive, Arlington, VA 22202, USA.

FPIC is a relatively new aspect of international policy and law, and in most national legal systems it is not yet as well established as other legal procedures and principles, such as the obligation of the state to respect ownership rights, access to information, or transparent licensing procedures.

International law and instruments mention FPIC both as a right and as a principle. Respect for indigenous peoples' right to FPIC becomes a requirement when a country has agreed (through ratification or signature) to a relevant international instrument. Three major international instruments address the right to Free and Prior Informed Consent: the ILO Convention 169; the Convention on Biological Diversity (CBD); and the United Nations Declaration on the Rights of Indigenous Peoples. Between them, these instruments provide a strong foundation for indigenous peoples to assert that their territories should be legally recognized by government and that their free, prior, and informed consent (FPIC) is necessary before development activities can take place on their territories.

FPIC in the International Labour Organization's Convention 169

The International Labour Organization Convention 169 on Indigenous and Tribal Peoples was an early exploration of the right of indigenous peoples to FPIC. Later law and jurisprudence have made even stronger requirements on States to respect the right of indigenous peoples to FPIC. ILO 169 requires that land, including the concept of territory owned or occupied by indigenous peoples, shall not be removed arbitrarily.

Article 14 point 1 stresses the right to land, stating that:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Article 15 point 1 states:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources.

Article 16 section 2 states:

Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

From: <http://www.ilo.org>

FPIC in the Convention on Biological Diversity

Article 8 (j) of the Convention requires that the traditional knowledge of indigenous peoples and local communities may only be used with their approval; this has subsequently been interpreted to mean with their prior and informed consent.¹¹ It requires that each contracting party shall:

Subject to its national legislation, respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local

¹¹ MacKay, F. and Colchester, M., 2004, Indigenous Peoples' Rights to Free Prior Informed Consent and the World Bank's Extractives Industries Review, Forest Peoples Program, UK.

communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

FPIC in the United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has the most complete definition of FPIC. The declaration contains strong formal wording regarding the rights of indigenous peoples, including article 26 sections 1 and 2 which state:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

As a result, UNDRIP requires the implementation of FPIC for any activities which may affect indigenous peoples. For example, Article 10 states:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 32 section 2 underlines that it is the State's responsibility to respect FPIC, so as to prevent development projects being forced onto indigenous peoples:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

UNDRIP places the obligation to ensure FPIC on the State, requiring the State to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions. UNDRIP also requires that before adopting and implementing legislative or administrative measures that may affect indigenous peoples, States must consult and cooperate in good faith with indigenous peoples through their own representative institutions

in order to obtain their free, prior and informed consent (article 19). That said, proponents of any project that may affect an indigenous people are also obliged to ensure that all elements of FPIC are fulfilled.

The ASEAN Socio-Cultural Community Blueprint includes Responding to Climate Change and Addressing its Impacts by proposing actions for member governments.¹² Although it makes no reference to FPIC, the Blueprint underlines concerns related to community participation and supports the involvement of communities in mitigating climate change. Overall, it encourages the participation of local governments, the private sector, non-governmental organizations, and communities to address the effects of climate change. Its strategies to mitigate climate change include the promotion of forest management involving communities living within and adjacent to forests for the sustainability of the forest and prosperity of the people.

FPIC in the United Nations Framework Convention on Climate Change (UNFCCC)

Annex 1 of the Ad Hoc Working Group Decision -/CP16 calls for 'promoting' and 'supporting' safeguards for indigenous peoples and local community rights, noting the UN General Assembly's adoption of UNDRIP. This language is only a partial commitment to FPIC, because it will be interpreted within the framework of national laws and circumstances in each country. Even if international REDD+ financing does become contingent on the demonstration of a verified consent process, the question of who has the right to give or withhold consent will be determined under national laws.

FPIC in the UN Collaborative Programme on REDD+ (UN-REDD)

UN-REDD has adopted its Operational Guidance on the engagement of Indigenous Peoples in REDD+ that is fully based on UNDRIP and commits to implement Free, Prior, Informed Consent in its REDD+ activities.¹³ Accordingly, UN-REDD is currently holding regional workshops to explore modalities to ensure the proper implementation of FPIC.

¹² The ASEAN Socio-Cultural Community Blueprint: Jakarta, ASEAN Secretariat June 2009. The Blueprint is derived from the ASEAN Charter, which has components relating to Economic, Political and Socio-Cultural issues.

¹³ UN-REDD Programme, Working Document, 2009. *UN-REDD Programme Operational Guidance: Engagement of Indigenous Peoples and Other Forest Dependent Communities*, page 8: "2. Free, Prior, and Informed Consent must be adhered to, and is essential to ensuring the full and effective participation of Indigenous Peoples and other forest dependent communities in policymaking and decision-making processes within UN-REDD Programme activities." www.un-redd.org

FPIC in the Forest Carbon Partnership Facility and Forest Investment Program

The World Bank-led Forest Carbon Partnership Facility (FCPF) and the Forest Investment Program (FIP), follow a criterion that falls short of fully integrating FPIC. Instead the requirement is Free, Prior and Informed *Consultation* (FPICon) aimed at obtaining Broad Community Support.^{14 15} This is a limited and arbitrary criterion that leaves it to the discretion of the World Bank staff whether consultations have obtained sufficiently broad community support.

There is a possibility that UN-REDD operations and those of the World Bank (FCPF and FIP) will be harmonized. If this occurs, a key challenge for indigenous peoples and their support groups will be to ensure that UN-REDD standards, including FPIC, are applied in those countries where the two entities operate together, rather than opting for the weaker World Bank FPIC standard.

FPIC in Voluntary REDD+ Market Standards

Most REDD+ pilot proponents seek to apply both of the main voluntary standards, the Voluntary Carbon Standard (VCS) and the Climate, Community and Biodiversity Project Standards (CCCB). The VCS requires detailed methodologies for assessing carbon and carbon changes/emissions in the ecosystem, and therefore assists those seeking to attract investment for REDD+ pilots and sell verified emission reductions. The CCB Standards were developed to assist project developers and other stakeholders (communities, NGOs, project investors, carbon 'offset' buyers, and governments) to design projects that deliver robust and credible greenhouse gas reductions, while ensuring net positive benefits to local communities and biodiversity. The CCB requires one assessment for validation, and then verification, at least every five years after project implementation. The VCS requires annual monitoring to determine emissions reductions. The VCS makes reference to community consultations, but is not explicit on the need for FPIC.

The current CCB Standards specify under the section on 'Legal Status and Property Rights' that project proponents must "demonstrate with documented consultations... has obtained FPIC with those whose rights will be affected by the project" in conformance with UNDRIP. Any relocation of

¹⁴ While FCPF does not officially support FPIC, its guidance on participation and consultation states that: "Countries that have signed on to the UN Declaration on the Rights of Indigenous Peoples will be expected to adhere to the principles of free, prior and informed consent (FPIC)". Page 3, Note FMT 2009-2, Forest Carbon Partnership Facility (FCPF) Readiness Mechanism National Consultation and Participation for REDD May 6, 2009.

¹⁵ *Design Document for the Forest Investment Program, A Targeted Program Under the SCF Trust Fund*, 2009. Annex III - Guidelines for Consultations to be carried out in accordance with subparagraph 16(d) of the Design Document for the Forest Investment Program, page 20, Available at: www.climateinvestmentfunds.org

habitation (resettlement) or community activities must also have FPIC and just and fair compensation.¹⁶

In June 2010, the CCB Alliance and CARE International produced a final version of the standards for REDD+ programs, for use in government REDD+ programs.¹⁷ The REDD+ Social and Environmental Standards were developed to apply to demonstration activities, whether under a future convention or a voluntary mechanism, and are expected to become a tool for governments to monitor REDD+ projects within their jurisdiction.

REDD+ Social and Environmental Standards

Principle 1: Rights to lands, territories, and resources are recognized and respected by the REDD+ program

The REDD+ program requires the free, prior and informed consent of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources.

- The policies of the REDD+ program uphold the principle of free, prior and informed consent of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources.
- The REDD+ program effectively disseminates information about the requirement for free, prior and informed consent of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources.
- Collective rights holders define a verifiable process of obtaining their free, prior and informed consent including definition of their own representative and traditional institutions that have authority to give consent on their behalf.
- Free, prior and informed consent is obtained from Indigenous Peoples, in accordance with their customs, norms and traditions, for activities that may affect their rights, particularly their rights to own and control traditionally owned lands, territories and resources.
- Free, prior and informed consent is obtained from members of local communities for any activities affecting their customary or other rights to lands, territories and resources pursuant to mutually acceptable procedures.
- Where any relocation or displacement, whether physical or economic, occurs in accordance with free, prior and informed consent, there is prior agreement on the provision of alternative lands and/or fair compensation, and the right to return once the reasons for the displacement have ceased.

From: www.climate-standards.org

The REDD+ Social and Environmental Standards refer to the need to respect the rights of a hierarchy of affected actors: rights holders - those whose rights are potentially affected; and stakeholders - those whose interests are potentially affected. The standards specify that REDD+ projects should recognize and

¹⁶ Climate, Community & Biodiversity Project Design Standards, 2008. Second Edition, CCBA, Arlington, VA, USA.

¹⁷ CCBA REDD+ Social and Environmental Standards, 2010. CCBA, Arlington, VA, USA.

respect both statutory and customary rights to land in the requirements for FPIC. The eight principles and corresponding criteria relate to all countries. However, these will be verifiable at indicator level, identified in the framework of the standards, and subject to country-specific interpretation.

Other International Human Rights Law

Whilst not specifically mentioning FPIC, there is a body of international law and instruments that protect human rights, within which many of the principles are the same as those contained in FPIC. A robust process that respects the right to FPIC would guard against accusations of breaches of human rights or environmental conventions.

There are eight human rights treaty bodies that monitor implementation of the core international human rights treaties:

- Human Rights Committee (CCPR)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Committee on the Elimination of Racial Discrimination (CERD)
- Committee on the Elimination of Discrimination Against Women (CEDAW)
- Committee Against Torture (CAT) & Optional Protocol to the Convention against Torture (OPCAT) - Subcommittee on Prevention of Torture (SPT)
- Committee on the Rights of the Child (CRC)
- Committee on Migrant Workers (CMW)
- Committee on the Rights of Persons with Disabilities (CRPD)

National Legal and Administrative Frameworks

The legal basis for FPIC in each country will be influenced by the laws and regulations that apply nationally and sub-nationally. These may include laws developed as a result of the ratification of international conventions and declarations, but could also include laws on human rights, access to information, spatial planning, forestry, development, and others. It is important to be aware of how the regulations on issuing a project license and the process to respect the right to FPIC interact. There may be regulations (for example, time limits within the licensing process) that limit the time available for obtaining consent from a community. It is impossible to give a checklist that will apply in each country. Every project proponent will need to complete a thorough legal due diligence process to identify legal obligations and risks and regulatory requirements in the country where the project is to be located.

The local government is another key actor for REDD+, especially in ensuring that social issues are considered properly in REDD+ processes. Current moves towards decentralization in some Southeast Asian nations are gradually giving local communities greater access to and control over forest resources, with both tangible and intangible benefits.

ANNEX 2: Summary of What Indigenous Peoples and Local Communities Need to Know

The following is a compilation of what information is needed by indigenous peoples and local communities, and could be used as a basic checklist by project proponents.

Preparing for Rights Holder Engagement

Element 1: Mapping Rights, Rights Holders and Land-Use

- That they have a right to map their boundaries and negotiate them to mutual satisfaction;
- That they have the right to maintain control of maps, and determine what information they contain and who has access to the information;
- That they have the right to decline participation in transferring their knowledge into a written or recorded form;
- That they have a right to advocate for legal recognition of these boundaries and their rights over the land or carbon; and
- That people not directly involved in mapping exercises need to be informed about and consent to the boundaries and rights-holders identified, especially neighboring communities.

Element 2: Identifying Appropriate Decision-Making Institutions

- Their right to decide their own representative bodies;
- The obligation of all stakeholders in REDD+ projects and programs (including themselves) to uphold non-discriminatory practices, in accordance with internationally-accepted standards (e.g. REDD+ social and environmental standards);
- Their right to independent facilitation assistance if required to develop representative bodies that they think will best accommodate their cultural practice and the demands of decision making;
- Their right to make decisions in accordance with the principles of FPIC; and
- That they can insist on checks and balances within their own community where there is exclusion in decision-making or abuse of power

Element 3: Identifying National Support Structures for Rights Advocacy

- Implications of participating in a process to respect the right to FPIC where their rights to land or resources are not legally recognized nationally, i.e. decisions may not be upheld or subject to recourse;
- Good faith negotiations need to clearly spell out the rights a project proponent can and will uphold;
- The importance of continuing to advocate for land/resource rights;
- How communities can identify national support structures in their home country (legal aid, civil society support); and
- Communities have the right to consult with third parties not directly involved with the project.

Element 4: Developing a Process for Seeking and Obtaining Consent

- Their right to a mutually agreed consent process, their obligation to abide by it, and their right to recourse if it is not adhered to by project proponents; and
- Their right to independent legal advice at any stage of the consent process.

Element 5: Developing the Content for Consent Agreements

- All aspects of the consent agreement (it must be made publicly accessible).

Element 6: Agreeing on a Communication Plan

- All key messages in the communication plan, which should cover necessary information about their rights in relation to REDD+, FPIC, customary/other affected land, carbon, and forest resources.

Element 7: Developing a Capacity-Building Strategy

- That support is available to them to build their capacity and understanding in relation to FPIC; and
- That their input into the strategy is essential as it will guide the capacity building output.

Implementing a Process for Respecting the Right to FPIC**Element 8: Integrating the Right to FPIC with REDD+ Project Design**

- About their right to FPIC, and how this right can be expressed through a community decision at each stage of designing and agreeing on a REDD+ project.

- About climate change: What it is and how does it happen? What are the likely impacts to the earth and to the community themselves?
- About REDD+: What is it and how does it work? What will it mean for community forests? How will it affect community livelihoods? How will it generate benefits?
- In the context of carbon offsets generated through voluntary REDD+ projects, they will also need information (or have access to independent expertise) on carbon offsets and the voluntary carbon market including: Why is this approach being proposed? How does it work regarding financial arrangements and obligations? How might changing markets (which affect both costs and benefits) impact the project?

Element 9: Ensuring Alternative Information and Independent Advice

- That they have the right to seek independent expert advice on legal, social, economic, and environmental issues; and
- That project proponents, governments, and private investors are obliged to provide funding and access for this advice.

Monitoring and Recourse: Maintaining Consent

Element 10: Monitoring What is Agreed in Implementation

- That they can play a central role in monitoring project implementation; and
- Deviations in implementing the consent agreement identified in monitoring can trigger the grievance process if either party is unhappy with project implementation. If the issues cannot be resolved through the grievance process, either party can request re-initiation of the consent process or take the issue to arbitration.

Element 11: Developing a Grievance Process

- The grievance mechanism does not replace their right to take legal action;
- They also have a right to independent redress via a mediator, arbitrator, ombudsman, or court;
- Consent once given can be withdrawn under reasonable circumstances; and
- About the agreed grievance process and where, when, and how to access it.

Element 12: Verifying Consent

- Their right to independent verification of the consent process – that it was free from undue influence, timely, and they understood the content and implications of the consent agreement.

RECOFTC's mission is to see more communities actively managing more forests in the Asia-Pacific region. During the past two decades, RECOFTC has trained more than 4,000 people from over 20 countries in devolved forest management: from national policy makers, researchers, and practitioners, right through to local forest users. Training services and learning events are complemented by on-the-ground projects, critical issue analysis, and strategic communication.

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