

# UN-REDD Programme Guidelines for Seeking the Free, Prior, and Informed Consent of Indigenous Peoples and other Forest Dependent Communities

**DRAFT FOR COMMENT – August 2010**

## **Based on Recommendations made by participants at the UN-REDD Programme Asia Regional Consultation on FPIC and Recourse Mechanisms, Hanoi, Vietnam, 16 – 18 June 2010**

To support UN-REDD Programme countries to implement the UN Declaration on the Rights of Indigenous Peoples, the Programme is undergoing a series of regional consultations with representatives of Indigenous Peoples' organizations, civil society and other stakeholders to develop specific guidelines for the UN agencies and countries participating in the Programme. This initiative responds to the demand from participating countries for concrete guidance on how to seek free, prior, and informed consent and provide effective recourse within the context of the UN-REDD Programme. As a partnership of one specialized UN agency (FAO) and two programmes (UNDP and UNEP), the UN-REDD Programme is obliged under international law to promote respect for, and seek the full application of, the provisions of UNDRIP, including the principle of FPIC, particularly-at the country-level (UNDRIP, Art 42)<sup>1</sup>.

Recommendations made by participants at the first regional dialogue, which took place in Hanoi, Viet Nam from 16 to 18 June 2010 have been consolidated in this draft which will serve as the basis for the upcoming regional consultation with Latin American stakeholders in Panama City, Panama in October 2010. For more information on the Asia Regional Consultation and the original presentations made by the working groups, please see:

[http://www.unredd.net/index.php?option=com\\_docman&task=cat\\_view&gid=756&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=cat_view&gid=756&Itemid=53)

### **Principles:**

All efforts to seek free, prior and informed consent and to provide recourse for indigenous peoples and other forest dependent communities should be guided by the principles of:

1. Transparency and access to information
2. Accountability
3. Inclusiveness
4. Participation
5. Independence and ownership of decision-making process

The motivation to seek free, prior and informed consent and provide effective recourse within the context of the UN-REDD Programme is founded on a rights-based approach, which includes:

- The right to self-determination

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<sup>1</sup> The UN-REDD Programme is also obliged, as a partnership of one specialized agency and two programmes established under the supervision of a UN organ (the General Assembly), to assist in the implementation of UNDRIP through the mobilization of financial resources and technical assistance for indigenous peoples, and to establish ways and means of ensuring their participation on issues affecting them (UNDRIP, Art 41)

- The right of indigenous peoples not to be forcibly removed from their lands or territories. Where relocation is unavoidable, it should be done with the free, prior and informed consent of the people, with fair compensation, and with the option of return (UNDRIP, Art 10)
- The right of indigenous peoples to practice their cultural traditions and customs (UNDRIP, Art 11)
- The right to maintain, protect and have access to religious and cultural sites (UNDRIP, Art 12)
- The right of indigenous peoples to participate in decision-making through representatives chosen by themselves in accordance with their own procedures, as well as to maintain their own indigenous decision-making institutions (UNDRIP, Art 18)
- The right not to be deprived of their means of subsistence (UNDRIP, Art 20)
- The right to traditional medicines (UNDRIP, Art 24)
- The right to the lands, territories and resources which they have traditionally owned, occupied or otherwise use or acquired (UNDRIP, Art 26), and
- The right to determine and develop priorities and strategies for the development or use of their land or territories and other resources, including the right to give or withhold their FPIC to any project (UNDRIP, Art 32).

The FPIC process should be set in a national legal and policy framework which respects these rights, based on the national government's commitment to existing international agreements such as the UN Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity, ILO 169, and the Universal Declaration of Human Rights. Analysis of state laws for compatibility with these international treaties and recognition of customary institutions and customary rights to land, resources, and forests should inform the FPIC process, including the arrangements to provide recourse. The free, prior and informed consent of indigenous peoples and other forest dependent communities should be sought through an open, transparent consultation process involving the rights holders.

### **What is consent?**

- A freely given decision that may be a "Yes" or a "No".
- It is a collective decision determined by the affected peoples (e.g. consensus, majority, etc.).
- It is based on full understanding of opportunities and risks associated with the proposed activity.
- It is the expression of rights (to self-determination, lands, resources and territories, culture).
- It includes the option to reconsider decision if there are changes in the programme design or if new information relevant to the programme emerges.
- It is given or withheld in phases, over specific periods of time for distinct stages or phases of REDD.

### **Who gives consent?**

- The directly and indirectly affected peoples, through their own representative institutions, following their own decision-making processes. (UNDRIP, Art 18 and 19).

- All rights holders represented in the decision-making process (including men, indigenous elders, women, youth, children and persons with disabilities, poor) (UNDRIP Art 22).

**What activities require consent in relation to REDD+?**

- Policy level - Adopting and implementing legislative or administrative measures that may affect the rights holders (Art. 19, UNDRIP), such as the development of national REDD+ strategies, and the process of spatial-planning for REDD.
- Project level - Projects affecting the lands or territories and other resources of indigenous peoples, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art. 32, UNDRIP).
- Forcible removal from traditional or customary lands or territories (Art. 10, UNDRIP).
- Taking of cultural, intellectual, religious and spiritual property (Art. 11, UNDRIP).
- Activities that may affect lands, territories, natural resources, traditional livelihoods

**Who seeks consent?**

- For UN-REDD Programme readiness activities, the Programme staff, representatives of the government, or civil society acting on behalf of the Programme, may seek consent.
- For national REDD+ activities, representatives of the national or sub-national government, or other institutions acting on their behalf, may seek consent.

**How to recognize consent?**

- Distinguish between geographically disaggregated (GDA) vs. non-geographically disaggregated activities (NGDA):
  - For GDA (activities which can take place over separate land areas), non-agreeing community simply does not participate.
  - For NGDA (activities which cannot be split up), the principle is to respect the wishes of all communities – ensure 100% consent.

	<i>Geographically disaggregated</i>	<i>Non-geographically disaggregated</i>
<i>Example of REDD activity</i>	REDD awareness training for villages	Measurement of carbon stocks
<i>Type of consent required</i>	Villages can opt in and opt out	Consent of whole community is required
<i>Effect on REDD activity</i>	Opt out villages do not participate	If 100% consent not given, whole community does not participate

- Interpretation of consent of multiple communities/ peoples may depend on the country's legal system (e.g. in Philippines, 2/3 of communities need to approve for FPIC for mining).

- Communities who do not agree to the project should not be included in project implementation.

**Guidelines for seeking free, prior and informed consent for activities proposed under the scope of the UN-REDD Programme:**

1. Review the national legal framework related to indigenous peoples and forest dependent communities. Review gaps between international and national frameworks on rights and national legislation. Identified gaps should be recognized and addressed in the national REDD+ strategy and in planning the FPIC process.
2. Establish a committee to review existing laws and regulations regarding REDD+ and the national legal framework related to indigenous peoples:
  - a. This committee must include equal representation of indigenous peoples and forest dependent communities (through self-selection), government officials and independent international and national agencies (e.g. NGOs and UN).
  - b. The committee should produce a report analyzing the existing policy, making recommendation for reform, and identifying elements of the Programme that require FPIC and outlining the process to implement FPIC.
  - c. Publish and disseminate the results to members of congress/parliament/political parties/donors/key stakeholders, in appropriate languages via appropriate means.
  - d. UN-REDD Programme to fund/support all necessary activities including workshops, research, travel, printing etc.
3. Facilitate mapping/scoping of indigenous peoples' territories/communities in areas targeted by the Programme:
  - a. Set up a process with indigenous peoples, local communities, and district government and verify that information is correctly gathered and representation is legitimate.
  - b. Identify:
    - i. Leaders/elders recognized by the community to interact with.
    - ii. Customary laws and decision-making processes and institutions.
    - iii. Status of land and forest tenure, existing land uses, overlapping land claims, deforestation/forest degradation drivers/patterns.
    - iv. Uses, values and livelihoods of indigenous peoples related to forest/forest management systems (traditional and modern).
4. Define the role of local government officials and agencies in the FPIC process while respecting independence of community decision-making process. Coordinate with relevant agencies, institutions, donors, and other stakeholders.
5. Ensure that the following key arrangements are part of the preparation and conduct of the FPIC process:
  - a. Allow communities to define their own decision-making process without interference.
  - b. Respect community's timeline to undertake the decision-making process.
  - c. Allow communities to nominate the language in which they wish to be addressed, including the language used for any written materials.

- d. Provide full, accurate information that is easily understandable for everyone, including innovative and creative forms, in the most appropriate language, to communicate issues, as well as access to other sources of information.
  - e. Seek additional information from local people and encourage local people to verify information.
  - f. Ensure that information is transparent and accurate and complete; positive and negative and potential short-term and long-term impacts, risks and benefits are described.
  - g. Verify that information reaches all community members.
  - h. Ensure that the decision-making process is free from outside influence.
  - i. Facilitate an environment for decision-making where communities feel secure and confident.
6. Facilitate information and capacity building campaign on REDD+, IPs and forest dependent communities' rights, FPIC process, etc. to make sure that all community members are aware of their rights:
    - a. Arrange a provincial/state or equivalent level workshop to determine awareness raising needs.
    - b. Provide UNDRIP in relevant local languages.
    - c. Engage local IP/CSO to develop information material (campaigns/radio script/street dramas) on rights and REDD+.
    - d. Information and capacity building and awareness-raising activities should be part of the national REDD+ communications strategy.
  7. Support training of government officials and civil society to build capacity to understand and implement this process.
  8. Contract facilitators to carry out FPIC activities that are mutually accountable to both UN-REDD Programme and the community, who are trustworthy and competent.
  9. Set timetable together with people whose consent is being sought, allowing sufficient time for internal discussions and decision-making; offer support for the process (e.g. moderator, resource persons) :
    - a. Communities should be supplied with relevant information before they decide on decision-making time requirements.
    - b. The community representative councils notify proponent(s) on the required time, number and location of meetings etc. for decision-making.
    - c. Proponents and community representative councils co-develop FPIC plan taking into account the time required.
    - d. All of the above activities can be brought to the recourse mechanism, if necessary.
  10. If needed, provide technical assistance to organize meetings and present information to ensure communities fully understand.
  11. Support the participation of all members of the community in internal meetings and the decision-making process. Community members should decide what form this support takes.

12. The national and local government must be informed, consulted, and involved in the process, if required, but must be neutral and not influence the process:
  - a. Where presence of local authority unduly influences the process, the local authority must be informed of their role (or they could open the meeting and then leave).
  - b. If the government does influence the process (coerce decision) then process (consent) is invalid.
13. Allow the community to decide where, when, and how consultation/sharing of information should be done; do not impose place or time, and respect the choices of the community.
14. Languages for communication materials and meetings can vary depending on what is most widely understood and culturally appropriate. The appropriate language should be determined by the people whose consent is sought.
15. Communities have the right to choose how and where to obtain additional information and technical support (so that community is not depending only on facilitators' information).
16. Support community to determine and document the collective decision-making process:
  - a. Use, build on, or improve existing transparent and participatory consultation and consent processes (e.g. raising of hands, voting, signing, deferring to leaders, etc.).
  - b. Consent process should take place in language preferred by peoples. If the population is heterogeneous, most widely understood languages should be used (fewest possible).
  - c. Document process, discussion, comments, question asked for decision, the decision, and/or terms of agreement.
  - d. Maintain a record of the result/decision (disaggregated by gender, income level, if possible), announce the result, and hold a self-validation process (e.g. village head signs), taking into account that the one validating might be illiterate.
17. An independent verification of the FPIC process and result should be undertaken by an institution, to be mutually agreed by all relevant stakeholders, to verify that:
  - a. Information was shared widely in an appropriate form and understood by rights holders, how many of the rights holders participated in the process, and that the process responded to the rights holders' timeline and decision making needs.
  - b. Officials understood the purpose of the process and respect the outcome/decision.
  - c. The FPIC process and decision is properly documented, verified and agreed before being shared.
18. Process for seeking recourse should be communicated as part of the FPIC awareness raising activities.

## **Guidelines for providing access to recourse for UN-REDD Programme stakeholders, including indigenous peoples and forest dependent communities**

### **The recourse mechanism should be:**

- Accessible (e.g. make sure IPs and forest dependent communities can find it and use it).
- Independent and impartial (e.g. not influenced by vested interests).
- Efficient (e.g. not take too long).
- Effective (e.g. should “have teeth”) (UNDRIP, Art 40 “Indigenous peoples have the right to ... effective remedies”).
- Using indigenous dispute-resolution institutions, where possible, follow the principle of subsidiarity, with disputes addressed as close to the administrative level where they arose as can be effectively resolved.
- Adequately funded.
- Able to result in necessary changes to activities, policies, and/or procedures.
- Able to report to decision-makers and make recommendations for changes in policies and procedures.

Recourse mechanisms should be guided by two main UNDRIP principles:

- State must establish a “fair, independent, impartial, open and transparent process” to adjudicate rights of indigenous peoples relating to land and resources (UNDRIP, Art 27)
- Indigenous peoples have the right to redress for land and resources taken without their FPIC (UNDRIP Art 28)

### **At the community or district level:**

The “informed” part of FPIC includes giving information about recourse mechanisms:

1. When consulting with IPs and forest dependent communities, the Programme should:
  - a. Ask IPs and forest dependent communities what sort of recourse mechanisms they already have and what they want in the context of the UN-REDD Programme.
  - b. Include information about existing recourse mechanisms (e.g. complaints can be made to the UN Resident Coordinator, any existing appeal rights, etc.).
2. Establish clear channels of communication between the Programme, FPIC facilitators, elders/leaders, and community members to enable those who are concerned about specific impacts to communicate their concerns to those who are able to effectively consider the concerns and take appropriate action.
3. Provide capacity-building support to indigenous peoples’ and forest dependent communities’ institutions, including NGO’s, to assist them to receive complaints and to take them forward to the appropriate forum for resolution.

### **At the national level:**

National REDD+ governance frameworks and REDD+ strategies should include a recourse mechanism, elaborating the role for national courts or tribunal system and ombudsperson:

1. Establish an independent audit and verification system to check that FPIC has been done properly.
2. Ensure that there are provisions/processes protecting complainants from retaliation.
3. Commission/tribunals hearing land disputes and other FPIC complaints should have the power to change the readiness and REDD+ activities concerned.
4. Commission/tribunal should have the power to suspend readiness and REDD+ activities until the complaint has been resolved (where the complaint is serious).

There should be no requirement for a complainant to exhaust their local remedies before they are entitled to bring a complaint at the national level. Preserve multiple avenues to pursue complaints.

### **In case of land rights disputes:**

Resolution of land disputes can be lengthy and is not always independent of the national government:

1. Use appropriate venue to resolve land disputes, respecting which mechanism indigenous peoples and forest dependent communities want to use (e.g. dispute may be between indigenous peoples, between indigenous and non-indigenous peoples, or with outsiders).
2. Ensure there is a venue to manage land disputes between the community and the State.
3. Consider an independent process (e.g. tribunal or land council) to resolve land disputes quickly and fairly.
  - a. Tribunal or land council should include indigenous peoples' and forest dependent communities' representatives.

### **At the international level:**

In order to ensure that national governments meet their FPIC obligations and REDD+ funders are aware of problems as they arise:

1. International REDD bodies (UNFCCC, UN-REDD Programme, etc.) should maintain a board to address complaints that includes indigenous representation":
  - a. Establish a REDD Dispute Resolution Board ("The Board")
  - b. The Board should include IPs and forest dependent communities representatives.
2. The Board should be able to receive BOTH:
  - a. Systemic complaints (e.g. weak legislation).
  - b. Individual complaints (where not solved at national level).

There should be no requirement for a complainant to exhaust their domestic remedies before they are entitled to bring a complaint at the international level. Preserve multiple avenues to pursue complaints.
3. Functions of the Board:



- a. Country should be required to report regularly to the Board on how it has met its FPIC obligations, including listing any complaints it has received (MRV for safeguards).
- b. The Board should investigate and monitor complaints.
- c. The Board should have an early warning system requiring REDD+ countries to address timely/urgent concerns.
- d. The Board should ultimately be able to suspend funding until country or government has resolved the problem.
- e. The Board should establish a clear mechanism to receive complaints.
- f. The Board should be empowered to uphold the right to appeal against government decisions regarding REDD.
- g. The Board should provide an impartial tribunal/commission to hear and resolve disputes (including indigenous representation).
- h. The Board should provide training and support for judges, officials, etc. on REDD and the scope of matters potentially subject to complaints arising from readiness and REDD+ activities.