



Forest Peoples Programme

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FOREST PEOPLES PROGRAMME COMMENTS ON THE DRAFT UNREDD FPIC GUIDELINES

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Forest Peoples Programme welcomes the formulation of the draft FPIC guidelines as a positive development that takes into due account relevant international human rights obligations and jurisprudence, and is the outcome of an open and effective participatory process engaging CSOs and IPOs in regional workshops.

The indicative steps for FPIC detailed in Annex III are very useful and show clearly that FPIC is a staged process and not a one-off decision (as noted elsewhere in the guidelines at page 3).

A further key positive element in the draft FPIC guidelines is that they rightly point out that the communal property rights of indigenous peoples are “based on traditional use, culture, and customary laws must be respected whether or not they are explicitly recognized by the national government” (at page 11). This is a crucial point as governments and other stakeholders in REDD countries are still often not aware that the communal property rights of indigenous peoples and the collective right to FPIC applies to all lands and forests held under custom and is not confined only to those lands that are legally recognised by the State.

FPP believes that the draft duly incorporates many of the comments and inputs provided throughout the period of elaboration and consultation, and looks forward to a positive and fruitful exchange on modalities to ensure the proper and effective implementation of the Guidelines.

In the spirit of contributing to a robust and innovative application of FPIC in REDD activities and programmes, and convinced that this would create an important precedent and opportunity to advance and improve international standards and practices on FPIC, we wish to highlight some areas that might require further improvement.

In order to do so, a comparative analysis of the draft FPIC guidelines, the FCPF - UNREDD guidelines for stakeholder participation, the draft UNREDD social principles and criteria (SEPC), the draft Benefit and Risk Assessment Tool (BeRT) and the latest version of the Readiness Preparation Plan (RPP) has been carried out, to identify synergies, overlaps and options to ensure coherent and effective implementation of FPIC, as well as the relevant assessment and monitoring.

A. ENSURE CONSISTENCY BETWEEN UNREDD AND FCPF, BY APPLYING THE HIGHEST STANDARD (FPIC) IN COUNTRIES WHERE BOTH PROGRAMMES OPERATE

A cross-reading of the draft FPIC guidelines with the “Joint UNREDD-FCPF Guidelines for Stakeholder engagement for Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest Dependent Communities”, and with the new version of the RPP template, (Version 6, Working Draft, November 23, 2011), evidences some potential loopholes and double standards that might affect an otherwise robust and coherent approach to FPIC.

As pointed out at page 10 of the draft FPIC guidelines, these would apply not only to the National Programme Document (NPD) but also to the R-PP.

The latest formulation of the RPP template states that *“FCPF countries that have both endorsed the UNDRIP and enacted legislation to implement the principle of free, prior, informed consent (FPIC) should conform to their legislation that concerns FPIC”* while for the UNREDD programme, it states that *“The UNREDD programme requires that the right to FPIC shall be upheld in the UNREDD programme activities, following UNREDD programme Guidelines on FPIC”*. This would imply that for FCPF countries, FPIC would apply only if the country has endorsed UNDRIP and has legislation in place on FPIC.

A potential for double standards for FCPF and UNREDD is evident here, and the UNREDD-FCPF guidelines for Stakeholder engagement do not provide clear guidance on which of the two (FPIC or Free Prior Informed Consultation, if the delivery partner is not of the UN group) would apply in cases where a REDD country submits an RPP to both UNREDD and FCPF.

This lack of clarity risks opening a serious loophole in the effective recognition and fulfilment of International obligations on indigenous peoples' rights. This potential risk was also acknowledged in the recent FCPF evaluation (June 2011) according to which:

“The joint FCPF/UN-REDD guidance on stakeholder engagement in REDD-plus emphasizes that as a in As a partnership of one specialized UN agency (FAO) and two programmes (UNDP and UNEP), the UN-REDD Programme is obliged to promote respect for, and seek the full application of, the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including the right to of FPIC, particularly at the country-level (UNDRIP, Art 42). FCPF, on the other hand uses WB safeguards to ensure that the “development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples”. This suggests two different approaches to securing the engagement of IPs, even though the guidelines are “joint” and UN-REDD and FCPF often work in the same country”.

The same 2011 FCPF evaluation goes on to state that:

“It is not possible to state how the differences in operational guidance for IP safeguards will manifest themselves in countries with IP populations although it seems likely that some level of inconsistency is inevitable.” (Page 15)

FPP believes that efforts should be made to resolve such potential inconsistency, that might undermine an otherwise positive and consistent approach to FPIC.

B. DEVELOP CRITERIA TO ASSESS OPERATIONAL IMPLICATIONS OF FPIC AND EXTENT TO WHICH FPIC IS RECOGNIZED IN NATIONAL LEGISLATION

Another key element is related to the operationalisation of FPIC and related enablers.

The draft Social and Environmental Principles and Criteria (SEPC), currently under elaboration, rightfully and consistently recognizes in Principle 2 “Respect and protect stakeholder rights, including human rights, statutory and customary rights and collective rights” that *“criterion 9: seek free, prior and informed consent of indigenous peoples and other forest dependent communities and respect and uphold the decision taken (whether consent is given or withheld)”*.

The draft Benefit and Risk Assessment Tool (BeRT) is intended to guide the preparation of the National UNREDD programmes, and *“assisting countries in formulating National REDD+ programmes and initiatives for which they seek UNREDD support”*. It is also meant to be used in conjunction with the Stakeholder Engagement guidelines. There is therefore a substantial relevance on the way the BeRT is designed and applied and the scope and reach of Free Prior Informed Consent. In the specific The BeRT does provide criteria to assess existence of national legislation on FPIC (principle 1, criterion 4, 1b and more specific to FPIC, principle 2, criterion 9. 1).

It would be worthwhile extending such provision to the Readiness Preparation Plan in the sections where it provides an analysis of the existing legislative framework and guidance on the System of Information on Safeguards (component 4b) and component 6 (Design a program monitoring and evaluation framework), as well as in the guidelines for component 1c (Consultation and Participation process) of the RPP, that currently does not contain any element related to FPIC, and in component 2c (REDD+ implementation framework).

To sum up, in addition to criteria to assess the extent to which the FPIC is being recognized and upheld by UNREDD in its activities (when working together with FCPF), another marker will have to be established to assess - under the REDD+ institutional arrangements - the country's governance and REDD implementation framework in terms of alignment and mainstreaming of International obligations and standards on indigenous peoples' rights in their legislative and administrative systems. Such assessment would also include the recognition of FPIC in national legislation that would apply to any activity throughout the REDD phases.

C. EXPAND THE SCOPE OF CASES IN WHICH FPIC SHOULD BE SOUGHT

The draft document (page 7) defines FPIC and its reach, stating that it would apply to *“REDD+ discussion regarding potential changes in resource use that could impact the livelihoods of indigenous and other local communities”*. Tables on pages 12 and 13 suggest some cases where FPIC may or may not apply. In the Table on page 12, we would suggest the inclusion of other cases where FPIC may be required, notably:

1. Indigenous Peoples' participation in MRV and Systems of Information on Safeguards, carbon stock measurement and ground-truthing;
2. Decisions envisaging any possible changes in traditional livelihood practices and freedoms and any related income-generation proposals or activity;

The table on page 12 may need to be expanded further after consultation with rights holders, including in the February 2012 workshop and based on comments made in written submissions.

The table on page 13 containing suggestions where FPIC may not be required may also need careful qualification after discussions with rights-holders and FPIC experts.

In short, scrutiny of the list in the draft guidelines on page 13 raises a number of questions about when the UNREDD Programme and governments may or may not need to obtain FPIC, notably in relation to: the approval of a national REDD+ Readiness strategy; The provision of information sharing, awareness raising and capacity building activities; the identification of drivers of deforestation and forest degradation; assessment of land use, forest law, policy, and governance; assessment of key social and environmental risks and potential impacts (both positive and negative) of REDD+ strategy options; technical and scientific studies (e.g. to determine a national reference level); setting up a national monitoring system to measure, report and verify the effect of the REDD+ strategy on Greenhouse Gas emissions; taking aerial photographs of land; carbon stock measurement.

In the specific, as far as the approval of a national REDD+ Readiness strategy is concerned, we underline that, specific elements relating to indigenous peoples or proposed pilot actions within such readiness strategies that could affect indigenous peoples' lands and territories, and which might have implications for their rights and interests, may well require some measure of FPIC through freely chosen representative structures and processes agreed with rights-holders. This might require outreach and consultation in regions where REDD+ strategies will be focused, and also with any national membership organisations to which IPs and local communities may belong.

In certain circumstances, it may well be that REDD+ proposals for carbon stock assessments and technical and scientific studies, which might include fieldwork involving indigenous territories and customary lands, may well also require FPIC.

In the same way, while national-level social and environmental assessments may not require full FPIC, specific actions to undertake assessment activities and related studies in indigenous territories and customary forests would likely require FPIC (as indirectly shown in Annex III).

Similar observations the scope and coverage of FPIC would most likely apply to most of the suggested activities in the box at page 13.

D. MAKE THE NEED FOR VERIFICATION AND VALIDATION A GENERAL RECOMMENDATION

The guidelines make important references to verification processes. We also note that point 4c does allow for the possibility for independent validation, '*...where there is a question on the validity of the FPIC process*'. FPP suggests that options for independent verification and validation should be made a general recommendation in the guidelines in Section 4.b in order to provide clearer guidance to partner countries and help ensure robust implementation. Specifically, we would suggest the following adjustments to the guidelines at 4b (see text insertions in bold).

*"Methods of verifying the **FPIC process and its outcomes**, including, where relevant, participatory monitoring arrangements and **mechanisms for independent validation**"*

The guidelines rightly advise that the final FPIC Proposal must be “*mutually agreed upon*” with rights holders (page 16). FPP suggests that agreement on the FPIC proposal should be validated by rights holders. In this regard, an adjustment to the text on page 16 might read:

*“The FPIC Scoping Review and FPIC Proposal should be combined into one document and signed (or agreed upon in a culturally appropriate manner) by all relevant parties. Once this document has **been validated with rights holders and** been signed/agreed upon, the FPIC process can proceed as outlined in the Proposal.”*

E. ALLOW FOR THE RIGHT TO OBTAIN INDEPENDENT LEGAL, TECHNICAL AND OTHER EXPERT ADVICE

The need to allow communities to access legal and technical advice is important (as noted in the figure in Annex III). FPP suggests that the guidelines should recognise that such communities must have the opportunity to seek advice from *independent* legal and technical experts (i.e. people without direct links to the government and project proponent(s)).

F. FURTHER EMPHASISE THE NEED TO BASE FPIC PROPOSALS ON SYSTEMS AND PROCEDURES DEVELOPED AND AGREED BY RIGHTS HOLDERS

As already noted in D. above, the FPIC guidelines require that the agreed procedures for FPIC should be contained in an FPIC proposal that must be mutually agreed upon. The guidelines could be further improved by giving emphasis to the need for partner countries and project proponents to recognise FPIC arrangements and procedures set out in community rules and guidelines for community consultation and consent, where such guidelines exist and where they have been developed, agreed, validated and adopted collectively by affected rights holders. Where communities do not have such guidelines, they may need capacity building on FPIC and time to develop their own FPIC rules internally before they engage with government and project proponents.

G. ENSURE THAT FPIC PROPOSALS INCLUDE AGREEMENTS ON IMPLEMENTATION

As well as making sure that rights holders agree on the contents of FPIC procedures to be used by partner countries in UNREDD FPIC proposals, it will also be necessary for them to agree the *implementation* of these proposals on the ground. The agreed implementation arrangements for the FPIC proposal should therefore be explicit and be included in the same formal FPIC proposal document.

To this end, we suggest adding an additional bullet (before the last bullet) at section 4.b as follows:

How the agreed final FPIC proposal will be implemented and adequately resourced to ensure effective application