



THE GREEN CLIMATE FUND AND FREE, PRIOR AND INFORMED CONSENT AND A CALL FOR THE ADOPTION OF AN INDIGENOUS PEOPLES' POLICY:

The Lessons from a Wetland Project in Peru

A briefing compiled by the Forest Peoples Programme and Tebtebba¹

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Under considerable expectations and pressure to deliver shortly before the beginning of the UNFCCC 21st Conference of the Parties to be held in Paris, the Board of the Green Climate Fund (GCF) considered the first projects for funding at its meeting in Zambia in early November, 2015. One project presented to the GCF by Peruvian Implementing Entity (IE) PROFONANPE contains a proposal for wetland management with the participation of indigenous peoples in the province of Loreto in the eastern Amazon region. Being the first project adopted by the Green Climate Fund that has relevance for indigenous peoples, it represents an important precedent and a case study to substantiate the need for the Fund to develop strong monitoring, compliance and recourse mechanisms as well as an indigenous peoples' policy based on the highest international standards and aligned to international human rights instruments and standards such as the UN Declaration on the Rights of Indigenous Peoples.

As a matter of fact, the project has raised concerns on the Green Climate Fund's capacity to ensure the respect of the indigenous peoples' rights to territories, land and resources, effective consultation and Free, Prior and Informed Consent (FPIC). Such concern was evidenced in formal communications between the Achuar People Federation (FENAP) and PROFONANPE. FENAP rejected the possibility of any top-down or external project being carried out in its territory, since it could violate the Achuar "plan de vida" and their rights to land, territory and resources, while other Indigenous Peoples' organizations allegedly supported the project and gave their consent. This also raised concerns over the way PROFONANPE was handling the relationship with Indigenous peoples' organizations, and the ensuing conflicts and divisions among indigenous peoples in the region.

The Board decided to approve the project, on the basis that some of the communities in the project sent letters of support, but agreed that the funds could be disbursed only after some conditions are met, notably that evidence is provided that communities do effectively provide their Free, Prior and Informed Consent. However, concerns remain about the lack of

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independent monitoring capacity to ensure that these standards and obligations are upheld throughout the project cycle.

While the debate on the PROFONANPE project at the Green Climate Fund focused mostly on procedural matters, its potential impact on the ground, in a region where indigenous organizations and communities are claiming their rights to land, territories and resources, and their “Plan de Vida” might be significant.

The PROFONANPE case shows that the Green Climate Fund will need to develop its own capacity to fully assess and ensure compliance with international human rights standards and obligations relevant to indigenous peoples. In order to be accountable and apply appropriate standards, the PROFONANPE experience demonstrates the need for the GCF to adopt a robust policy on indigenous peoples, which must fully recognize the relevance of international standards and obligations such as those enshrined in the UNDRIP. It must adopt the core FPIC standard and must also enable direct access to GCF funding for indigenous peoples’ own projects and climate initiatives.

Introduction

In its meeting held in early November 2015 in Zambia, the Board of the Green Climate Fund approved – among others – a first batch of projects presented by Implementing Entities (IE)² One project approved by the GCF is the initiative for “*Building the Resilience of Wetlands in the Province of Datem del Marañón in Peru*”, presented by the Peruvian IE PROFONANPE.³

The project proposes to reduce deforestation and carbon emissions in the Datem region, focusing on working with local government and 120 communities (mostly indigenous). It further aims at strengthening protected areas created by the local government as well as creating a new protected area. It also includes supporting development of land use plans and ecological zoning for the area and a component dedicated to supporting community enterprises.

Potential impacts on indigenous peoples

The project area is home to 8 indigenous peoples and it is clear that the project has direct implications for their rights to lands, resources and to prior consultation, all of which are binding obligations for the Peruvian state and with which private sector actors, including international agencies such as the GCF, must also ensure consistency. Of immediate concern are the following issues:

- It is unclear how the creation and consolidation of protected areas in this region will affect the ongoing efforts of indigenous peoples’ to secure recognition of their collective customary lands, a grassroots process on land rights, which is very well advanced in this region. These land and territorial rights initiatives are not mentioned

² TWN Info Service on Climate Change (Nov15/02) 9 November 2015
Third World Network “Green Climate Fund approves first set of funding proposals after debate”
<http://www.twn.my/title2/climate/info.service/2015/cc151102.htm>

³ http://www.gcfund.org/fileadmin/00_customer/documents/MOB201511-11th/04_Add.01_-_FP001_and_NOL_20151015_fin.pdf

anywhere in the project proposal nor is there any information about how indigenous peoples' rights to customary lands and territories will be guaranteed.

- It is unclear how the development of state-sponsored management plans and the ecological categorization of forests will affect indigenous peoples' well-established rights to customary resource use. Indeed, the project documents do not address the ongoing efforts of indigenous peoples in this region to establish their own territorial and environmental governance initiatives. It is of particular concern that the project argues that these management plans will effectively replace the need for indigenous peoples to secure tenure rights, but at the same time highlights that these rights will be conditional on continued compliance of indigenous peoples with the conditions that are established.
- The project includes ambitious targets for emissions reductions through reducing deforestation by half over the 10 year life cycle of the project. However, given the low levels of deforestation in the region, it remains unclear where these reductions will be secured, raising concerns that indigenous peoples' traditional land use practices and customary resource use may be targeted. Nowhere in the project are there any guarantees that indigenous peoples' customary rights to resource use will be fully respected and unrestricted.

Whose support? The case for the adoption of an Indigenous Peoples policy by the Green Climate Fund and the stringent and effective application of Free, Prior and Informed Consent (FPIC)

In spite of the significant potential impacts on indigenous peoples in a region where communities are claiming their land rights and seeking to implement their "Planes de Vida", much of the discussion on the project developed around procedural matters. While procedural and participatory issues are important, a failure to pay proper attention to substantive land, territorial and livelihood rights in the initial phase of the Green Climate Fund's funding activities might set up risky precedents and jeopardize the Fund's capacity to respect high level social, human rights and environmental standards, in particular as regards indigenous peoples. The pressing need for more solid right-based due diligence in GCF project screening and approval is made even more compelling when considering the Fund's intention to significantly step up its funding portfolio in the coming years.

The initial announcement of the intention of considering a project in indigenous lands in Peru stirred the concern of various NGOs, and Peruvian Indigenous Peoples Organization AIDESEP, that in June 2015 sent a letter to the GCF expressing their opposition to PROFONANPE as a recipient of GCF funds. This was before it was revealed that the programme would be in the Datem region. AIDESEP highlighted the negative experience of indigenous peoples' organizations with previous work of PROFONANPE in Peru being it only focused on conservation and natural parks. Furthermore, they continue to insist that actions working with indigenous peoples to implement forest protection in indigenous territories should be implemented by funding mechanisms controlled by indigenous peoples themselves. They point out that in Peru the Dedicated Indigenous Mechanism established, which forms part of the Forest Investment Programme (FIP) pilot in Peru, is now operational and would be the

most appropriate mechanism for these kinds of projects,⁴ since it would ensure the direct participation of Indigenous Peoples,

In the same month, the Council of the Federation of Achuar Nationality in Peru (FENAP) met and issued a statement in which it rejected the invitation by PROFONANPE and Peruvian NGO CANDELA to attend a meeting in Achuar territory. The Achuar and FENAP reject any project that contradicts the Achuar “Plan de Vida”, could undermine their collective rights to own, manage and control an integral territory or risk violating their traditional ownership rights over natural resources. FENAP also expressed its disagreement with any project that would oblige indigenous peoples to renounce their rights to an integrated territory and reject any contract that would imply State’s control of natural resources that should be under their traditional ownership.⁵

The project proponent claimed to have the support and endorsement of all affected indigenous communities and organizations. However, while discussions may have been held with some of the concerned communities and there may well be enthusiasm for some components of the project, there is no clear evidence that the full details of the project and its potential impacts on indigenous peoples’ rights have been discussed with affected communities. Effective compliance with the obligation to secure the free, prior and informed consent of affected indigenous peoples according to international standards and best practice is therefore questionable in this case. The full proposal on the GCF website, for example, was available only in English and, other than some general statements of support for PROFONANPE and the project from some communities and organizations, there was no evidence provided that the full scope and nature of the project that had been presented to communities and organizations during these meetings or that the potential adverse impacts on indigenous peoples, including those outlined above, had been fully addressed.

In a letter to the Pastaza and Morona Santiago Project Manager of PROFONANPE, the FENAP presidency reiterated its position that *“PROFONANPE has never consulted with or obtained the free, prior, and informed consent of the Achuar People of the Pastaza River basin within the jurisdiction of FENAP, to either enter our territory or carry out projects within the Achuar zone.”*⁶ Another letter to PROFONANPE by the ACHUARTI IRUNTRAMU ATI ORGANIZATION on the contrary confirmed support to the project.⁷ The same position was conveyed in writing by representative organizations of the Kandozi people.

It should, also, be pointed out that according to the report of the Independent Technical Advisory Panel of the GCF (that was not made available prior to the Board discussion), PROFONANPE had consulted with 80 communities and 21 organizations. However, these consultations were carried out in a mere 2 weeks, and there seemed to be inconsistencies in the number of communities reported to have in fact been consulted. Additional concerns related to lack of grievance mechanisms and no clear institutional role for Indigenous Peoples in Project delivery. The way PROFONANPE handled the consultation has also already

⁴ AIDSEP (Asociación Interétnica de Desarrollo de la Selva Peruana), carta a Gabriel Quijandria viceministro de MINAM y co-presidente del Fondo Verde para el Clima y Henrik Harboe, co-presidente del FVC, Lima, 15 de Junio 2015

⁵ Consejo Directo de la Federación de la Nacionalidad Achuar del Perú (FENAP), statement “Acta de San Lorenzo” 14 June 2015; FENAP (Federación de la Nacionalidad Achuar de Perú) letter to PROFONANPE, 22 June 2015 ; (courtesy AmazonWatch)

⁶ FENAP letter to Sr. Yolanda Guzman, Gerente del proyecto Pastaza y Morona , “respeto de las decisiones del pueblo Achuar”, San Lorenzo, November 2nd, 2015

⁷ Minutes from the Extraordinary Assembly of the ATI organization, September 1st, 2015

generated tensions between and among indigenous organizations, and risks undermining indigenous institutions.

When challenged by NGOs and IPOs present at the Zambia meeting about the obligation for project proponents to ensure that the right of IP communities give (or withhold) their Free, Prior and Informed Consent, the GCF Secretariat stressed that PROFONANPE is an NGO and therefore according to their interpretation should not be obliged to respect the principle of FPIC. Furthermore, they argued that the Implementing Entity provided extensive documentation on consultations effectively carried out and a commitment to continue consulting with communities after project approval.

In fact, the process followed by PROFONANPE, and the interpretation of FPIC that was underlying the Secretariat's justifications to go ahead with the project approval, show that these do not take due account of international obligations in relation to FPIC, that require that the *community* or *people* affected is consulted, in a timely manner and on the basis of full information, not merely that some representative organizations (particularly where they have not been expressly authorized by the wider group to decide on the project) are consulted.

Furthermore the Secretariat interpretation that the legal status of the project proponent has any impact on the requirement for complying with the Interim GCF Standards is disputable. As a matter of fact, these Standards are applied as a function of borrowing funds from the GCF, irrespective of the nature of the borrowing entity. They reflect the obligation on State actors – and the undertaking by the IFC (at a minimum), and arguably the direct *obligation* on the IFC or any lender that would adopt these, such as the GCF - to respect international human rights law norms and to ensure that all third parties respect such norms.⁸ The Interim Standards are drawn in their entirety from the IFC performance standards, and as such contain a requirement to obtain FPIC from indigenous peoples, which applies in the process of accreditation, in assessing the capacity of the entity seeking accreditation to manage social and environmental risks, and in the conduct of proposed activities.⁹

⁸ The World Bank Group has at different times disputed or leaned towards accepting that it has obligations under international human rights law treaties. While as a legal point this has not been finally resolved, in practice the Bank has generally sought to sidestep the issue by voluntarily adopting such standards as binding on its operations (as is the case with the IFC and GFC). For a recent discussion of the evolution of the World Bank Group's legal position on this issue, see Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 4 August 2015, UN Doc. No. A/70/274, especially at paras 6-21.

⁹ *As a matter of fact, the interim ESS will be applied at the level of project and program identification, preparation and implementation, and will be used to establish criteria for accrediting, assessing institutional capacities of accrediting entities and for identifying, measuring and managing environmental and social risk. According to the IFC Performance Standards, FPIC must be sought in case of projects that might imply:*

- a. impacts on land and natural resources subject to traditional ownership or under customary use;*
- b. relocation of IPs from lands and natural resources subject to traditional ownership or under customary use;*
- c. use of cultural resources for commercial purposes.*

When adopting the IFC performance standards as interim standards for the GCF, the Board did not take into account the Secretariat proposal recommending that "at least during initial phase, not to adopt the IFC performance standards in total but to establish the safeguards of the fund in a style similar to the Adaptation Fund's environmental and social principles which include relevant risk issues from the IFC performance standards". The Secretariat proposal to the Board also explicitly stated that: "Projects/programmes will be consistent with the rights and responsibilities set forth in the United Nations Declaration on the Rights of Indigenous Peoples and other applicable international instruments relating to indigenous peoples."

http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF_B06_09_Guiding_Framework_for_Accreditation_fin_20140211.pdf. These elements will have to be taken into due account when developing an indigenous peoples' policy at the Green Climate Fund.

Hence the Secretariat argument that implied that PROFONANPE is not obliged to respect FPIC is misconceived: by virtue of PROFONANPE receiving GCF funding, GCF has an obligation to ensure that PROFONANPE respects FPIC obligations. The Secretariat's incorrect understanding of these obligations provides additional evidence for the need for the Board and Secretariat to develop and adopt a specific policy on Indigenous Peoples, as called for in a joint Tebtebba-FPP letter to the Board endorsed by dozens of IPOs and NGOs and sent shortly after the beginning of their Zambia meeting.¹⁰

Eventually, the Board decided to approve the PROFONANPE funding proposal, but made disbursement conditional to the accomplishment of clear steps, among others: *"the Applicant entity shall clarify which indigenous organizations wish to participate in the project and obtain clear written consent from their representative organizations in order to ensure that project is only implemented in the territories of the indigenous organizations that have provided their clear consent to the project"*. Furthermore *"the accredited entity should provide the opportunity for the participating indigenous organizations to take part in the project design, in dialogue with accredited entity"*.¹¹

PROFONANPE and the Adaptation Fund: fast tracking rights?

As an entity already accredited at the Adaptation Fund, PROFONANPE could benefit from the fast-track process, that consisted in a comparison of the Adaptation Fund's safeguards and Environmental and Social Management System (ESMS), to that provisionally chosen by the GCF as interim safeguards, notably the IFC performance standards. The fast-track applies to entities that are accredited to the Adaptation Fund, the Global Environment Facility and the EU DevCo and are in full compliance with relevant accreditation requirements.

NGOs following the Green Climate Fund have expressed concern that the lack of specific information on the name of the applicant to accreditation before the Board decision makes it difficult to carry out an assessment of its track record and capacity to fulfill the GCF requirements and at the same time ensure the due engagement of key stakeholders in the accreditation process. It should be mentioned here that the accreditation process requires an assessment by the Secretariat while the National Designated Authority (NDA) (or focal point as the case is with Peru where the Focal Point, Gabriel Quijandria is also Co-chair of the GCF Board) is given the task of ensuring that – through a letter of no objection – the entity seeking accreditation is effectively endorsed. The proposal then goes to the Board for final approval. The letter of no-objection is also attached to the project proposal, thereby implying that the project is in line with the government's strategy and programmatic priorities.

The case of PROFONANPE also raised serious concerns related to the perceived "flexibility" in applying the interim Environmental and Social Standards, in project design and implementation. That PROFONANPE is bound to implement FPIC is clearly a prerequisite embedded in the interim GCF social and environmental standards.

If this were not enough, a look at the Adaptation Fund Social and Environmental standards that PROFONANPE has agreed to be subject to – and this is also one of the preconditions to access the fast-track accreditation at the Green Climate Fund – reveals that the Entity is in fact

¹⁰ <http://www.forestpeoples.org/sites/fpp/files/news/2015/11/Letter-to-GCFBoard.pdf>

¹¹ decision B.11-11 "Consideration of Funding Proposals"

directly obliged to recognize and respect the FPIC principle and ensure that the rights of affected peoples and/or communities to provide or withhold consent, by virtue of its acceptance of these standards.¹²

The guidance document for Implementing Entities on compliance with the Adaptation Fund Environmental and Social Policy also commits the Fund not to support “*projects/programmes that are inconsistent with the rights and responsibilities set forth in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and other applicable international instruments relating to Indigenous Peoples*”.¹³

Concerns about the capacity of PROFONANPE to effectively fulfil the safeguards requirements contained in the interim safeguards adopted by the GCF are further substantiated by events surrounding another request for funding by PROFONANPE (“Adaptation to the impacts of climate change on Peru’s coastal marine ecosystems and fisheries”) to the Adaptation Fund Board. Funding application was rejected twice, the first time in April 2015 when the Board invited PROFONANPE to carry out additional consultation with affected communities and to elaborate an Environmental and Social Management plan and a grievance mechanism. In October 2015 the Adaptation Fund Board did not approve a second request for funding, due to the lack of an Environmental and Social Management Plan, a necessary prerequisite to ensure full respect of Adaptation Fund’s safeguards.¹⁴

CONCLUSIONS

The debate that developed around the PROFONANPE project, the conflicting claims by various indigenous peoples’ organizations in and around the project suggest a lack of proper understanding by the GCF Secretariat of the operative implications of the implementation of the principle of Free, Prior and Informed Consent and issues related to full and effective participation and consultation of indigenous peoples. The way PROFONANPE conducted its

¹² https://www.adaptation-fund.org/wp-content/uploads/2015/06/ESP-Guidance-document_0.pdf

¹³ *As regards FPIC, if indigenous peoples are present in the project/programme implementation area, the Implementing Entity will*

“Describe how the project/programme will be consistent with UNDRIP, and particularly with regard to Free, Prior, Informed Consent (FPIC) during project/programme design, implementation and expected outcomes related to the impacts affecting the communities of indigenous peoples.

2) Describe the involvement of indigenous peoples in the design and the implementation of the project/programme, and provide detailed outcomes of the consultation process of the indigenous peoples.

3) Provide documented evidence of the mutually accepted process between the project/programme and the affected communities and evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.

4) Provide a summary of any reports, specific cases, or complaints that have been made with respect to the rights of indigenous peoples by the Special Rapporteur and that are relevant to the project/programme. This summary should include information on subsequent actions, and how the project/programme will specifically ensure consistency with the UNDRIP on the issues that were raised.

¹⁴ For more information http://www.adaptation-fund.org/wpcontent/uploads/2015/08/Peru_Profonanpe_full_proposal_revised_combined.pdf

consultations has furthermore contributed to the creation of conflicts inside communities and indigenous organizations. It also points to the need to clarify the exact nature and effectiveness of any process to consult rights-holders or stakeholders by the focal point and PROFONANPE. At the same time, it raises questions about PROFONANPE's capacity to fully implement the GCF requirements on grievance mechanisms, access to information, stakeholder consultation and engagement, compliance with social and environmental safeguards and capacity to implement an Environmental and Social Management Plan.

More generally, it provides a case for the Green Climate Fund to develop and adopt stringent social and environmental safeguards and an indigenous peoples' policy based on international human rights standards and instruments such as those contained in the UNDRIP, as well as develop effective compliance mechanisms. In particular the recently adopted GCF Monitoring and Assessment Framework should be integrated by envisaging the possibility of supporting community-based monitoring activities and systems. The need for independent compliance and verification mechanisms and stringent monitoring is also evident (monitoring of compliance is currently limited to self-reporting by Implementing Entity).¹⁵ Furthermore, the GCF should establish a dedicated funding window to support indigenous peoples' adaptation and mitigation projects based on traditional knowledge and innovations.

¹⁵ Schalatek, L. "Relief not Jubilation as GCF Board approves the Fund's first eight funding proposals" Heinrich Boell Foundation US, November 17, 2015 <http://us.boell.org/2015/11/17/relief-not-jubilation-gcf-board-approves-funds-first-eight-funding-proposals>