Making FPIC
– Free, Prior and Informed Consent –
Work:

Challenges and Prospects for Indigenous Peoples

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Making FPIC Work: Challenges and Prospects for Indigenous Peoples by Marcus Colchester and Maurizio Farhan Ferrari was first published in 2007 by Forest Peoples Programme. This is the fourth in a series of working papers issued by the Forest Peoples Programme which explore the practical experiences of indigenous peoples seeking to exercise their right to Free, Prior and Informed Consent. Others in the series include: *Free Prior and Informed Consent: Two Case Studies from Suriname* by Forest Peoples Programme; *Habis Manis Sepuah di Buang* by Pokja Hutan Kaltim; *El Punto de Inicio: Libre Determinacion* by Racimos de Ungurahui.

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Cover photograph:	Minangkabau leader in Kapar, West Pasaman District, Indonesia, addressing a community workshop discussing Free, Prior and Informed Consent and relations with the PT PHP oil palm company
Photographer:	Marcus Colchester

Contents

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Acronyms

AMAN	*Aliansi Masyarakat Adat Nusantara* (Indonesian national indigenous peoples' organisation)
CELCOR	Center for Environmental Law and Community Rights Inc.
CERD	Centre for Environmental Research and Development
EKWGF	Pokja Hutan Kaltim (East Kalimantan Working Group on Forests)
FPIC	Free, prior and informed consent
FPP	Forest Peoples Programme
FSC	Forest Stewardship Council
HuMA	Association for Community- and Ecologically-based Legal Reform
IP	Indigenous people
LRC	Legal Rights and Natural Resources Center
NGO	Non-governmental organisation
RSPO	Roundtable on Sustainable Palm Oil
SLJ	Sumalindo Lestari Jaya
TNC	The Nature Conservancy
WALHI	Friends of the Earth–Indonesia

1 Summary

This report summarises some progress made by indigenous peoples' and supportive organisations seeking to assess and apply right of indigenous peoples '*to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resources*' (referred to as 'the right to FPIC'). It is informed by field programmes, case studies, and indigenous peoples' actual experiences which were also reviewed at a workshop hosted by Forest Peoples Programme and Aliansi Masyarakat Adat Nusantara in Indonesia in April 2007. This is a report on work in progress and is not presented as a definitive work.

Exercise of the right to FPIC derives from indigenous peoples' right to self-determination and is closely linked to peoples' rights to their lands and territories based on the customary and historical connections with them. As most commonly interpreted, the right to FPIC is meant to allow for indigenous peoples to reach consensus and make decisions according to their customary systems of decision-making. Indeed most of the peoples involved in this review not only insist on the importance of their right to FPIC but also note how FPIC is consistent with or already part of their customary forms of decision-making.

In many indigenous societies, these systems of decision-making are complex and may involve multiple fora and institutions. Ensuring that decisions are properly based on FPIC requires outsiders and, more importantly, the peoples themselves to have a good understanding of these decision-making procedures and the implications of the decisions they may take. Failures of accountability in decision-making by indigenous leaders result from a variety of factors including outsiders' lack of appreciation of indigenous decision-making; their purposeful manipulation of indigenous institutions; manipulation of decision-making by self-interested indigenous elites; and misunderstanding by indigenous peoples of the legal, social and environmental implications. While indigenous peoples' decision-making systems are very often highly inclusive and may take a long time to allow strong community engagement, they are not infallible and can entail social exclusion, for example of women or of marginal groups.

The report summarises some indigenous peoples' experiences with applying the principle of FPIC in Suriname, Guyana, Peninsular Malaysia, Peru, Indonesia, Papua New Guinea and the Philippines. National laws vary widely in the extent to which indigenous peoples' rights to their lands and to FPIC are recognised. Even where these rights are recognised there are notable deficiencies in implementation. In the same way, even where corporations profess to respect indigenous rights and international law, they may not adhere to their own standards in their actual dealings with communities. Corruption, manipulation and other malpractices are all too common but these are problems confronted by indigenous peoples everywhere and are not specific to FPIC.

The report also explores the options of who should verify that the right to FPIC has indeed been respected and how this should be done. It summarises some experiences with third-party audits for the FSC in Indonesia and suggests that verifiers are unduly lenient about what constitutes adequate compliance, thereby weakening any leverage that communities may gain from companies' obligations to respect their rights and priorities in accordance with FSC voluntary standards. However, verification of FPIC procedures by government as in the Philippines has also proven problematic.

The final section of the report summarises some conclusions reached by the reviewers and recommendations made by the participants of the workshop. Indigenous peoples can make FPIC-based processes work, or at least work better, by proactively preparing and taking time to make decisions with due care. But FPIC-based actions need to be part of a wider set of tactics to enable indigenous peoples to defend their rights and livelihoods and determine their own destinies.

2 Introduction

This report is about a 'work in progress'. Although the underlying principle that people should be free to make choices about the way they are governed and what happens on their lands is as old as history[1] and probably older, the notion of 'Free, Prior and Informed Consent' (FPIC) is a much more recent expression. It is only since the mid-1980s that indigenous peoples have made their demand for recognition of their right '*to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resources*' a central part of their struggle for self-determination. Since then, with support from organisations like the Forest Peoples Programme, this right, referred to in shorthand as 'the right to FPIC' has been widely recognised and has come to be seen as especially important for indigenous peoples' in their dealings with non-State actors seeking to control, or to gain access to, their lands and resources, whether for development or for conservation.

Respect for the right of indigenous peoples to FPIC has come to be appreciated as a crucial tool in the achievement of social and environmental sustainability. Respect for this right by conservation agencies should bring to an end the unfortunate conflicts that have developed between indigenous peoples and those seeking to establish protected areas in their territories. By respecting indigenous peoples' rights, and particularly their right to FPIC, future parks would only be established on indigenous peoples' territories when acceptable ways have been mutually agreed for managing these areas based on recognition of indigenous peoples' rights to own and control their lands and territories. Moreover, in accordance with the 'Durban Action Plan' agreed by protected area agencies at the 5th World Parks Congress in September 2003, in which indigenous lands have been taken for protected areas in the past without such consent, these lands should be restituted to them by 2015. Observation of indigenous peoples' right to FPIC should also help to ensure that imposed development schemes would only go ahead on their lands where impacts on indigenous peoples had been addressed to the extent that the peoples themselves were assured that the projects would bring them long-term benefits. Respect for the right to say 'no' should also stop the kinds of imposed and destructive development schemes which have given the very word 'development' such a bad name, and would contribute to the sustainable use and conservation of natural resources.

As previous FPP publications have noted, the right of indigenous peoples to FPIC is now increasingly recognised in the jurisprudence of international human rights treaty bodies. Observation of this right has now been recognised as 'best practice' or as required policy in a number of standards including in development projects, resettlement schemes, environmental and social impact assessments, dam construction, extractive industries, logging and plantation schemes, palm oil estates, the use of indigenous peoples' intellectual property or cultural heritage, micro-finance and the establishment of protected areas.[2] In other sectors – such as for soya, eco-tourism, biofuels – discussions about the principle are underway.

However, recognition and enjoyment of a right are two quite different things. The gap between what is increasingly accepted to be a requirement of international law and actual practice is still very wide. This is not just because State laws or sectoral standards have only partially accepted FPIC, but also because even where there has been significant progress towards acceptance of the right to FPIC, there

[1] E.g. Julius Caesar, 1982, *The Conquest of Gaul*, Penguin, Harmondsworth; Robin Lane Fox, 2005, *The Classical World: an Epic History of Greece and Rome*, Penguin, Harmondsworth.

[2] Fergus MacKay, 2004, Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review, *Sustainable Development Law and Policy*, Volume IV (2): 43-65; Marcus Colchester and Fergus MacKay, 2004, *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent*, Forest Peoples Programme, Moreton-in-Marsh.

has been considerable confusion about how this right is most effectively exercised by indigenous peoples and best respected by outsiders.

This report summarises the results of a long term programme of work undertaken by the Forest Peoples Programme partnered with indigenous organisations to close these gaps in both knowledge and practice. The report thus documents three different pieces of work carried out under the SwedBio-funded project 'Forest Peoples and Biodiversity'. First, it summarises the findings of four reviews ('case studies') of national experiences with Free, Prior and Informed Consent in Peru, Suriname, Indonesia and the Philippines. Secondly, it also draws out lessons from the extensive legal and literature reviews that were also carried out by FPP staff as part of this project. Thirdly, it summarises the main findings of a three-day workshop held in Indonesia in April 2007, which reviewed communities' experiences in the Philippines, Papua New Guinea, Indonesia, Malaysia, Cameroon, Suriname, Guyana and Peru in the exercise of this right.

However, these are not the only pieces of work that this report draws on. The SwedBio-funded project also helped FPP to finalise and to participate in, in an informed way, several other simultaneous initiatives to gain effective recognition and application of the right to Free, Prior and Informed Consent. This included the finalisation of an FPP study on the implementation of FPIC which had been presented to the International Association for the Study of Common Property in Mexico in 2004.[3] It also included FPP's continuing participation in the second stage of a project led by the North-South Institute of Canada, the Amerindian Peoples Association in Guyana and the Association of Indigenous Captains of Suriname (VIDS) on 'Exploring Indigenous Perspectives on Consultation and Engagement within the Mining Sector in Latin America, the Caribbean and Canada'.[4] This ongoing project seeks to help indigenous peoples in these two countries to negotiate with mining companies and includes developing a community guide on implementing Free, Prior and Informed Consent.

At the same time, FPP was involved in an intensive collaboration with the Indonesian NGO Sawit Watch which included successfully persuading the Roundtable on Sustainable Palm Oil (RSPO) to include the principle of Free, Prior and Informed Consent in its Principles and Criteria.[5] This parallel project to push for the acceptance of FPIC in the palm oil sector involved extensive training workshops with indigenous peoples in West Sumatra and both West and East Kalimantan, and also led to the development of another draft guide on FPIC in Bahasa Indonesian, for community use. The RSPO's acceptance of the right to FPIC has also led to major palm oil companies in Indonesia themselves requesting training in how they should observe the right, and a mini-project to pilot this training under the auspices of the RSPO is now underway. In close collaboration with the Indonesian national indigenous peoples' organisation (AMAN – *Aliansi Masyarakat Adat Nusantara*), FPP also helped develop and implement a project, with funding from the UK's Department for International Development, to assist specific communities in the Indonesian provinces of Riau, East Kalimantan and Flores to renegotiate with plantations, logging and forest protection schemes based on the principle for Free, Prior and Informed Consent.

During this same period FPP was also engaged, with Dutch Government, Hivos and SwedBio funding, in projects to help communities to map and document their customary systems of land use as part of an effort to persuade governments 'to protect and encourage customary use of biological diversity ...' in line with State obligations under Article 10(c) of the Convention on Biological Diversity. In the Cameroon, the outputs from this work on customary use documentation and the work on FPIC were combined to assist communities to renegotiate their status in protected area

[3] Ibid.

[4] www.nsi-ins.ca

[5] www.rspo.org

management plans. This work was successful in getting a revised management plan accepted for the Campo Ma'an National Park and helped spread this gain to the Nki and Boumba Bek National Parks. Insights from all these initiatives are also drawn on in this report.

Under this project a series of separate reports are being published summarising the various findings in Peru, Indonesia, Suriname and the Philippines. This synthesis report seeks to draw out some emerging lessons and challenges from all this material. Section 3 looks at how communities themselves understand the notion of 'free, prior and informed consent' and the extent to which it coincides with their own norms of decision-making in accordance with customary law. It also reviews the way 'Free, Prior and Informed Consent' procedures fit with communities' own institutions, examining what are the communities' institutions and how do they choose and hold accountable leaders or institutions that represent them in negotiations. Section 4 then examines how the law and legal processes constrain FPIC negotiations, while Section 5 reviews the procedures available by which consent-based negotiations are verified as having duly occurred. Section 6, purposefully given the title 'Towards Conclusions', tentatively sets out some of the main lessons and conclusions that can be drawn from this body of experience.

3 FPIC, Customary Law and Indigenous Representation

One of the perceived strengths of processes based on recognition of the right of indigenous peoples to give or to withhold their Free, Prior and Informed Consent to activities, laws and policies that apply to their lands – the right to FPIC – is that it implies also an acceptance of indigenous peoples' own processes of decision-making. Decisions based on the right to FPIC being, by definition, 'free' should allow scope for indigenous peoples to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws. Indigenous peoples exercise their right to FPIC *over* the lands, territories and natural resources that they have customarily owned, occupied or otherwise used (as well as over their cultural heritage and traditional knowledge). The right to FPIC derives from a people's right to self-determination and is strongly connected to their related rights to their territories and to self-governance.

Within their own histories and legends, indigenous peoples account for their rights to own and control their lands in a great diversity of ways. For example, in a manner widely prevalent in that part of Amazonia,[6] the Ye'kwana people of southern Venezuela recount a cycle of tales which explain how their ancestral culture hero, Kuyujani, travelled about the newly created world having various miraculous experiences and encounters and thereby imbuing the land with significance and laying down markers which have permanently connected the people to the land ever since. Subsequent events of cosmic or historical significance are also attached to specific localities, give places their names and establish connections between deep time and current occupants, the Ye'kwana, who memorise these tales and events. While Ye'kwana shamans can delve into these mysteries to perceive and recruit the underlying cosmic forces to help guard, care for and cure the ills of the world, everyday Ye'kwana know through these stories that the land belongs to them and how it must be cared for to provide them with a living.[7]

Flores, an island in eastern Indonesia that forms part of the province of Nusa Tenggara Timur, was once an important player in the lucrative trade that has linked the 'Spice Islands' to Europe since the early 16th century.[8] The turbulent history of the island, which experienced a succession of minor wars between local powers and colonisation by the Portuguese before becoming a Dutch colony, is reflected in the variety of ways that the communities in Lewolema base their rights in land. Since 1949, the island has been part of the independent Republic of Indonesia, although the Dutch colonial power and some local residents took some time to accept this. This complex and disrupted history of occupation is reflected in the way communities perceive their links to their lands. For example in Lewolema, where AMAN and FPP have been working with communities to help them renegotiate their rights with the local government, some of the communities assert their rights in land based on their long-term occupation and use, regulated through customary laws and institutions. Some other communities also assert that they have acquired their rights in land through conquest. Still others, while likewise also stressing their long-term occupation according to customary law, further invoke the recognition of the authority that was accorded them by the Portuguese, who exercised their jurisdiction over the island, as the Dutch were to do later, under the policy of 'indirect rule', through local customary authorities.[9]

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[6] Jonathan D. Hill and Fernando Santos-Granero, 2002, *Comparative Arawakan Histories: Rethinking Language Family and Culture Area in Amazonia*, University of Illinois Press, Urbana.

[7] Field research by author and Nalúa Silva pers. com.; see also Marcus Colchester, Nalúa Silva Monterrey and Ramón Tomedes, 2004, *Protecting and Encouraging Customary Use of Natural Resources: the Upper Caura, Venezuela*, Forest Peoples Programme. Moreton-in-Marsh.

[8] Giles Milton, 1999, *Nathaniel's Nutmeg*, Hodder and Stoughton, London.

[9] Findings of the AMAN-FPP 'FPIC Project'.

Since the right to FPIC is designed to give scope to decision-making based on indigenous peoples' own norms and customary laws, community workshops carried out as part of this project have necessarily involved discussions about how the concept of the right to FPIC coincides with customary practice. Almost everywhere, workshop participants insisted that the principles of FPIC were inherent in customary law, even though customary processes of decision-making are extremely varied. In Indonesia, for example, communities commonly relate the idea of FPIC to the customary practice of *musyarawah*, a widely used term that refers to communal meetings and discussions. Processes of *musyarawah* are designed to build consensus-based decisions, which are referred to as *mufakat*. Yet just how processes of *musyarawah* are carried out varies greatly from people to people in line with their customary norms.

The Minangkabau of West Sumatra retain parts of a once much more complex system of self-governance in which customary rule of the king was supported by a hierarchy of customary authorities. In the area examined in the case study, day-to-day rule used to be undertaken by a council (*Daulat Yang Dipertuan Parit Batu*) acting in the name of the king and this council in turn delegates authority over named self-governing polities, *nagari*, to their own leaders. In the case of the more recently established *nagari*, such as the one examined in the case study, Kapar in West Pasaman district, the *nagari* is controlled by a body of hereditary leaders known as the *Gampo Alam*.[10]

In Minangkabau society, lands are inherited matrilineally and are held under a number of traditional tenures, with some lands being held collectively by the *nagari* and some held collectively by matrilineal clans (*kaum*). Use rights in both areas may be allocated by different authorities to individual families. Clans are represented by appointed clan leaders, *ninik mamak*, while *nagari* lands are controlled by a specified group of appointed *ninik mamak* who are referred to as *ninik mamak ampek didalam*.

Government land agencies seeking access to *nagari* and clan lands in order to allocate them to third parties concede that negotiations need to be undertaken first with customary authorities. However, they understand these systems of land control imperfectly,[11] while community workshops and interviews concluded that many *ninik mamak*, for their part, imperfectly understand the legal implications of making land transfers to outside parties. The result is that lands are being transferred contrary to customary laws, which expressly prohibit the alienation of clan and *nagari* lands, and the deals are often being done by the wrong *ninik mamak* in ways that exceed their authority and violate the norms of *musyarawah* as interpreted in Minang custom. As a result land conflicts in West Sumatra are characterised by bitter disputes both between companies and communities and within communities.

The case studies from Suriname illustrate a similar confusion. Among the Saramaka Maroons, authority to represent the ethnic group as a whole with the Government is vested in the *Gaama* (paramount leader) who, however, does not have authority over land. Saramaka lands are held by twelve matrilineal clans (*lö*) which own land collectively and allocate use and occupancy rights over parts of this land to individuals and extended family units. Authority over clan lands is exercised by Captains and their deputies (*basias*). Ignorant of these niceties Government agencies, conservation bodies and bioprospecting companies assume that the *Gaama* on his own has authority to consent to

[10] This summary of the Minangkabau land tenure and decision-making system in Kapar *nagari* is taken from the case study carried out by Andiko of HuMA and published in Marcus Colchester, Norman Jiwan, Andiko, Martua Sirait, Asep Yunan Firdaus, A. Surambo and Herbert Pane, 2006, *Promised Land: Palm Oil and Land Acquisition in Indonesia – Implications for Local Communities and Indigenous Peoples*, Forest Peoples Programme, Sawit Watch, HuMA and ICRAF, Bogor.

[11] Afrizal, 2007, *The Nagari Community, Business and the State: the origin and process of contemporary agrarian protests in West Sumatra, Indonesia*, Forest Peoples Programme, University of Andalas and Sawit Watch, Bogor.

activities on Saramaka lands when, in fact such authority is shared with the clan leaders and would usually also entail extensive consultations with the wider community by the Captains and *basias*.[12]

In dealing with outsiders, indigenous systems of representation may fail to act in an accountable manner for a number of different reasons. Outside agencies may simply misunderstand customary decision-making systems and accept the authority of the wrong institution as binding. Outside agencies may also purposefully treat with, or manipulate, the wrong authorities in order to get a decision favourable to their interests (and see section 4 for examples). Indigenous peoples themselves may be unsure of the authority of their representatives, especially when they are acting in new contexts, such as in land markets or dealing with land acquisition processes, which they may not have encountered previously. As Keebet von Benda Beckman has noted, the very existence of plural legal systems tends to generate such confusions both by allowing community members to go 'forum shopping' to find the decision-making processes that may render them a favourable decision, and by allowing outside agencies to manipulate local authorities and sow conflict between them to gain their own ends.[13]

On the other hand, customary laws and institutions may themselves exclude the interests of marginal groups, such as women (e.g. in parts of Papua New Guinea), lower castes (e.g. Toraja), and dependent hunters (e.g. Bantu exclusion of 'Pygmies'). Institutions imposed by State interventions and land titling programmes also commonly exclude women (e.g. Orang Asli) and may compete with, replace or overlay customary institutions whose powers become gradually attenuated.[14] These are real problems – by no means unique to indigenous peoples' institutions – which communities entering into FPIC-based procedures need to bear in mind to ensure that decisions are made which genuinely represent the community and which do not generate inequality, social exclusion or conflict.

[12] LHRP, 2007, *Free, Prior and Informed Consent: two case studies from Suriname*, Forest Peoples Programme, Moreton-in-Marsh.

[13] Keebet von Benda Beckman, 1981, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra', *Journal of Legal Pluralism* 19 (1981):117-159.

[14] See for example: Owen Lynch and Emily Harwell, 2002, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and National Interest in Indonesia*, ELSAM, Jakarta; Colin Nicholas, 2000, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia*, International Work Group for Indigenous Affairs, Copenhagen.

4 FPIC, Indigenous Peoples, Business and the State

Governments and private companies have made very varied responses to the demands of indigenous peoples for respect for their rights, both to their lands and to have control over what happens on them. At the negative end stand countries like Suriname, which almost entirely lack national laws that protect indigenous rights. Along the spectrum stand countries like Peninsular Malaysia where indigenous rights are weakly protected but the Government does claim to observe international development agency guidance requiring that efforts be made to obtain the consent of indigenous peoples before resettlement. In Peru indigenous rights to village lands are recognised and land titling has been extensive but rights to wider territories are not effectively recognised either in law or in practice and rights to be consulted and to consent are only ambiguously recognised. In Papua New Guinea, customary rights in land are protected and landowners must be consulted with and agree to developments planned for their lands, though FPIC itself is not explicitly referred to. At the positive end are countries like the Philippines, where the law provides recognition of indigenous peoples' rights to their ancestral domains and explicitly requires Free, Prior and Informed Consent, and where detailed procedures have been developed to guide the application of FPIC.

The case study of Suriname examines in particular the situation of the Lokoño and Trio peoples of western Suriname who are facing the takeover of large parts of their ancestral lands by a major bauxite mine and processing plant and an associated hydropower dam. The study also summarises the situation of the Saramaka Maroons, who lost a substantial part of their territory to the Afobaka dam and now face the takeover of large parts of their remaining territory by Chinese logging companies and the extension of the Central Suriname Nature Reserve.[15] In both cases the Suriname Government denies that the peoples concerned have rights to their lands and does not accept that they have the right to FPIC. Faced with this intransigence, the peoples concerned have taken their concerns to the relevant international human rights treaty bodies, the UN Committee of the Convention on the Elimination of Racial Discrimination, the Inter-American Commission and the Inter-American Court of Human Rights. While a final hearing of the Inter-American Court is still pending, the decisions of the other bodies already make clear that the Suriname Government is failing to uphold its obligations under international law and should be seeking the communities' consent for these kinds of development.

The mining companies concerned, Alcoa and BHP-Billiton, notwithstanding having policies which appear to require that they respect human rights, have declined to treat with the affected communities as rights holders and, although they have gone beyond national legal requirements to carry out an environmental and social impact assessment, argue that they cannot go beyond the law in Suriname in respecting indigenous peoples' rights. They also argue that there is a lack of international consensus on the application of Free, Prior and Informed Consent. Peer reviewers of the Environmental and Social Impact Assessment consider that it was deficiently conducted and in particular did not engage effectively with the impacted communities.[16]

In Peninsular Malaysia the land rights of indigenous peoples, known collectively as *Orang Asli* (Aboriginal People), have been affirmed by the courts but are weakly protected in national legislation. Reserves, set aside for Orang Asli by the Government and administered by the Department for Orang Asli Affairs, are considered by the Government to be State lands and can be de-gazetted at the stroke

[15] LHRP, 2007, *Free, Prior and Informed Consent: two case studies from Suriname*, Forest Peoples Programme, Moreton-in-Marsh.

[16] The Indigenous Communities of West Suriname, 2007, *Interacting with Indigenous Communities the 'Right' Way?: a bottom-up examination of BHP Billiton, Alcoa and the Government of Suriname's interactions in West Suriname*, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

of a pen. The Malaysian Government does not accept that Orang Asli have the right to Free, Prior and Informed Consent. However, as recorded by the Centre for Orang Asli Concerns, in the development of the Kelau Dam, the Malaysian Government has accepted an 82 billion yen soft loan from the Japanese Bank for International Cooperation (JBIC), whose 'Guidelines for Confirmation of Environmental and Social Considerations' require that:

> Efforts must be made to obtain the consent of indigenous people after they have been fully informed ...

In their series of video and audio recordings, the Centre for Orang Asli Concerns has detailed the technical discussions about the resettlement of the Chewong people who live high on the watershed far above the area to be inundated by the proposed Kelau dam, which also requires the resettlement of the lower-living Temuan people, another Orang Asli group. In the recordings, the Department for Aboriginal Affairs claims, contrary to the expressed opinion of the Centre, that the Chewong have been consulted by the Department and have accepted the proposal that they be resettled, at the same time arguing that treating all the Orang Asli in the area in one go is the best way of solving the 'problem of land'. Queried by the Chair of the meeting, the Secretary-General of the Ministry for Energy, Water and Communications, following COAC's objections, the spokesman for the Department insisted that the Chewong had been consulted and had agreed to the move. Accepting the word of the Department, the Chair said that nevertheless he would look into the matter. However, several months later when the Centre visited the Chewong they found that not only did the Chewong clearly oppose the move but they had not been consulted or even visited by Department officials or by anyone from the Ministry. Community members interviewed were unanimous in opposing the resettlement. In a third interview the local Orang Asli leader of the lower-lying Temuan maintained that he had been pressured (*paksa*) to accept the resettlement. If given a choice, he (and many others in his community) would not want to be resettled.[17]

The case study of Peru carried out by the NGO, Racimos de Ungurahui, explains how the principle of consent is only partially recognised in national laws.[18] As well as being party to a number of relevant pieces of United Nations and Inter-American human rights treaties, Peru has ratified the International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples. Article 6 of the Convention requires:

1 In applying the provisions of this Convention, governments shall:

   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
   (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
   (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2 The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

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[17] COAC, 2007, *The Orang Asli and the Kelau Dam*, Centre for Orang Asli Concerns, Kuala Lumpur: http://www.coac.org.my/codenavia/portals/coacv2/code/main/main_art.php?parentID=0&artID=11735948473572

[18] Julio Davila Puño y Oscar Gutierrez Laya, 2006, *El Punto de Inicio: Libre Determinacion*, ms.

With respect to the resettlement of indigenous peoples, Article 16 of the Convention specifically requires:

1 Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2 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.

Specifically with respect to the establishment of protected areas Peruvian law also requires the Free, Prior and Informed Consent of communal property holders. However, the law only applies to communities that already have title to their lands and, moreover, the establishment of protected areas prevents property owners from extending their territories and may allow the State to limit people's enjoyment of their properties. Furthermore, surveys of indigenous experiences show that, in practice, communities' rights have not been respected and consultation prior to the establishment of protected areas has been minimal or absent. The study noted this was the situation in the Gueppi Reserve imposed on the territory of the Secoyas and in the Santiago Comainas Reserve imposed on the territories of the Huambisa-Awajum, who also rejected the approach of the World Bank-GEF Project for the Participation of Indigenous Peoples in the Management of Protected Areas (PIMA) for not recognising indigenous territories.

In Indonesia in recent years there has been an intense debate about the extent to which 'Free, Prior and Informed Consent' is required under national laws. While Indonesia is party to several international laws which imply or require respect for the rights of indigenous peoples to FPIC – including the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on Biological Diversity – equivalent terms to FPIC are not explicit in national laws. However, several laws, including those setting out the procedures for the demarcation and gazettement of forest boundaries, do require consultation with and the agreement of local communities. Subsequent to the 1999 Regional Autonomy Act, regional legislatures have been free to enact their own provisions regulating development activities. For example, according to research carried out by the legal reform NGO, HuMA, local communities in Minahasa and Bengkayang do now have the right to information about, and to approve, projects proposed by the Government before they go ahead.[19]

Taking advantage of these new possibilities at the local level, over the past two years, in collaboration with the Forest Peoples Programme, the national indigenous peoples alliance (*Aliansi Masyarakat Adat Nusantara* – AMAN), has been working with indigenous peoples in three provinces in Indonesia to help them to re-negotiate their rights over their lands and resources with companies and local government. In Flores, communities in Lewolema have been negotiating with the local government to regain recognition of their rights, initially just to access and control, over customary areas that were unilaterally declared to be protection forests during the Suharto era. As a result of a long series of community-mapping exercises and then workshops to inform communities of their rights and remind government of its obligations, followed by 'multi-stakeholder dialogues', local officials have now agreed to restore parts of these protection forest areas to community jurisdiction. The case shows how policies of decentralisation may afford communities opportunities to regain control of their lands if they are persistent, well prepared and do not confront strong vested interests.

[19] Presentation on behalf of Perkumpulan Untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis/HuMA (Association for Community- and Ecologically-based Legal Reform) to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

In Papua New Guinea, which is inhabited by peoples speaking over 800 languages, the rights of traditional landowners to own and control their lands is accepted in law, implying that some 97% of the country is under legally recognised customary tenures. Mining developments on indigenous lands are meant to involve consultation with local landowners and should be subject to reaching agreements with local authorities to lease community lands for the term of a mining project in exchange for agreed payments for community development. Application of these norms is, however, often deficient. The Port Moresby-based NGO, Centre for Environmental Research and Development (CERD), has documented the procedures being followed in the renewal of the licence of the Tolukuma Gold Mines Ltd., a local subsidiary of Emperor Mines of Australia, which commenced its operations in 1994 with a five-year gold-mining permit which had been agreed by community representatives. After over 10 years of operation, the company and the Government acceded to community demands to review the permit, which had long exceeded its five-year term, and in August 2006 distributed a document setting out the terms of the proposed renewal. The communities were given one month to respond to the proposal with their comments. NGOs consider such hurried procedures to be disrespectful of the rights of landowners and make it very hard for communities to become informed, carry out their own deliberations in accordance with customary law and develop consensus to ensure well-prepared negotiations with the government and the companies.[20]

With respect to the Forestry Law in Papua New Guinea, the legal rights NGO, CELCOR, reports that although 'Free, Prior and Informed Consent' is not explicitly required under the Act, the Government has accepted that the rights of customary land owners should be respected in transactions that affect them, especially in the elaboration of Forest Management Agreements between the Forestry Department and local communities. In practice, however, such agreements are often reached without proper engagement with the communities and often after only very cursory provision of information to local leaders. The Provincial Forest Management Committees which are meant to verify that such agreements are reached often do so on the basis of scant information relying for the most part on consultants or other urban spokespersons. Recent legal changes to the Forestry Law will further limit communities' rights and weaken existing provisions for securing indigenous rights to control their forests. This move is currently being contested in the Supreme Court.[21]

In the Philippines, some 12 million out of a total population of 85 million are considered to be indigenous, coming from some 110 different peoples or 'cultural communities'. One of the main threats they currently face comes from large-scale extractive industry projects – mainly mining – with no less than 16 of the 23 major planned projects being on indigenous peoples' lands. Under the Filipino Constitution (Section 22, Article II) the State recognises and promotes the rights of indigenous cultural communities within the framework of national unity and development. The Constitution (under Section 17, Article XIV) likewise states that the State shall recognise, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions... and... shall consider these rights in the formulation of national plans and policies.

The 1997 Indigenous Peoples Rights Act (in Section 13) expressly recognises 'the inherent right of indigenous cultural communities and indigenous peoples to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development'. The Act defines Free, Prior and Informed Consent to mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any

[20] Nanai Puka-Areni, 2007, *FPIC and the Tolukuma MOA Review*, Presentation on behalf of CERD to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

[21] Lynette Baratai-Pokas, 2007, Presentation on behalf of CELCOR to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community (Section 3[g]).[22]

According to the Filipino Legal Rights and Natural Resources Center (LRC), notwithstanding this strong legal basis, application of the principle of Free, Prior and Informed Consent in the Philippines has been defective. LRC notes a number of instances where community objections to operations on their lands appear to have been bypassed and identifies the following major defects in the process:

- Implementing rules and regulations issued by the National Commission of Indigenous Peoples have allowed too much latitude in interpretation by Government authorities thereby allowing companies to bypass customary laws and institutions

- In 2006, even more simplified guidelines were issued which allow for even more superficial and accelerated consultations with communities

- The procedure limits FPIC to areas that the Government has already listed as subject to indigenous rights, thus excluding huge areas subject to claim that have yet to be formally recognised.[23]

Reviewing indigenous experiences with FPIC-based processes in the Philippines, the indigenous policy and research group, TebTebba Foundation, notes that the current FPIC procedure, as set out in the 'Implementing Rules and Regulations' and accompanying guidelines, is too hurried and mechanical, provides limited information to communities and prescribes the establishment of indigenous authorities – Councils of Elders – even when these contradict customary laws and practices. Field studies carried out by TebTebba researchers have documented that in specific cases companies and local officials, sometimes acting with the collusion of staff from the National Commission on Indigenous Peoples, purposefully misled communities and falsified documents in order to secure FPIC certificates. Abuses include: falsifying signatures and names used on manifestos of support for projects; using people's signatures on the attendance lists of meetings to signify support for projects; use of force and bribery to secure consent from community leaders; installation of fake leaders and elders to gain consent when customary authorities were opposed to projects; exclusion of critical elements in communities from meetings to secure agreements from the rest; establishment of new indigenous organisations or duplication of existing ones to undermine the authority of opposing views.[24]

The AMAN-FPP meeting held in Indonesia heard testimony from indigenous peoples from Luzon, Mindoro and Mindanao giving details of such abuses. It was noted that companies and local government officials often get away with very abbreviated FPIC procedures because communities are unsure of their rights or the required due process. Instances were noted where information was provided in unfamiliar terms and even little-understood languages. Provisions which allow independent observers to attend meetings to provide information to communities are also often ignored. Contrasting the FPIC process in the Philippines with the process as conceived by the World Commission on Dams, TebTebba notes that contrary to the conception of FPIC as implying an iterative process of engagement between indigenous landowners and outside interests, the current procedure in the Philippines allows for a one-off decision for a project to get the 'green light'. On the

[22] Legal Rights and Natural Resources Center – Kasama sa Kaliskasan/FoE-Philippines, 2007, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

[23] Ibid.

[24] Clint Bangaan, 2007, *FPIC Experiences in the Philippines*, TebTebba Foundation, Baguio, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007

other hand, if a community rejects a project, they are sometimes subjected to repeated demands to give the project further consideration.

LRC concludes that procedures, initially designed to secure indigenous peoples' right to FPIC, has been reduced to a nominal procedure, tokenistically complied with by companies and local government merely to get a certificate that allows pre-determined extractive projects to access resources in indigenous lands.[25]

Critics concede that many indigenous communities with already defined rights in land have been able to use the FPIC process as defined in Filipino law to reject or modify a large number of proposed projects on their lands, but most of these have been relatively small-scale initiatives involving little capital investment and recruiting little in the way of outside political support. However, the current FPIC process does not serve well to defend communities against large-scale, capital-intensive projects which have major and long-term implications for community livelihoods. With major interests at stake, companies and government agencies find ways of circumventing indigenous resistance and gaining access to the lands and resources they need.

[25] Legal Rights and Natural Resources Center – Kasama sa Kaliskasan/FoE-Philippines, 2007, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and Free, Prior and Informed Consent, Cibodas, 2–6 April 2007.

5 Verifying FPIC

A final challenge which this report assesses is the verification of FPIC. Once a policy recognising the need for Free, Prior and Informed Consent has been accepted and attempts have been made to establish agreements based on such consent, how is the validity of such allegedly consent-based results to be verified and who by? And what should verifiers look for in assessing compliance? As the Kelau dam case highlights, development agencies may claim to observe the principle of informed consultation and consent but independent verification shows the reality to be far different.

There seem to be two possible 'official' approaches to independent verification, each of which brings its own uncertainties. On the one hand, verification of the validity of FPIC-based outcomes could be entrusted to an appropriate government agency, a procedure that may seem most appropriate where, as in the Philippines, FPIC agreements are required by national law. In such a case, the government agency is charged with ensuring that legally required procedures have been followed and consent given or withheld after due process. A second option is to entrust this task of verification to an 'independent, third party auditor', which may seem most appropriate when FPIC is required as part of voluntary standards accepted by a private company but not necessarily required by national laws. In this case the auditor reviews documentation and interviews the parties involved to assess the extent to which engagement between communities and companies has complied with procedures required by the standard. In both cases the outcome of these assessments is that if adequate compliance has been verified, a certificate is issued which can be used as evidence that required procedures have been followed and consent freely and fairly given. During this project, we examined cases illustrating both approaches.

In the Philippines, the Regional Director of the National Commission on Indigenous Peoples is entrusted with the task of verifying that due process has been followed in ascertaining whether or not communities have agreed to projects. His/her decision is meant to be based on the monitoring of the whole FPIC procedures by the Regional Review Team of the NCIP. NGOs and indigenous organisations complain that these certificates are sometimes given out without being based on an adequate review of whether procedures have been duly followed and without checking with the communities.

In contrast to the legally required FPIC procedure in the Philippines, the Forest Stewardship Council (FSC) has developed a voluntary standard against which companies and communities managing forests can be assessed to establish whether or not they are doing so in a responsible way. This standard is set out in 'Principles and Criteria' which detail how forests should be managed from social, environmental and economic points of view. Forest managers are expected to assess, and where necessary adjust, their systems of management to ensure they comply with these principles and criteria and then submit themselves to an independent auditor which will review the manager's performance against this standard. The FSC also has explicit procedures designed to ensure the impartiality of auditors. Auditors can only be accredited to carry out FSC audits if they have themselves been certified to be following international auditing standards and are approved by a specially established organisation which checks that the auditors have adequately developed assessment procedures.[26]

[26] The FSC recently strengthened its procedures for accrediting auditors following a series of complaints that auditors were developing over-close relationships with the companies they assess, not least because they get paid by the companies for such audits (see Simon Counsell, 2003, *Trading in Credibility*, Rainforest Foundation, London). Notwithstanding these improvements concerns continue to be voiced that FSC-accredited auditors and logging companies enjoy over-cosy relations.

The FSC standard has apparently strong provisions designed to require respect for the customary rights of indigenous peoples to their lands and resources. It explicitly requires that companies only operate on indigenous peoples' lands subject to their 'free and informed consent'. FSC-accredited third-party auditors are thus required to assess that audits have indeed complied with these requirements, meaning that they must assess whether indigenous peoples' rights to lands and resources have been recognised by the companies, whether indigenous peoples' institutions have been duly consulted and informed of company plans and whether consent to operations has indeed been freely given by the affected peoples.

In Indonesia it is hard for companies to comply with such a standard and it is even harder for indigenous peoples to insist that companies apply it. Until recently the Government denied that the concept of indigenous peoples even applied in Indonesia. The rights of communities governed by customary law (*masyarakat adat*) in lands are only weakly recognised under Indonesian law. Under State forestry laws, their rights in areas declared to be 'forests' are even weaker. Their customary institutions were, until recently, denied and were replaced with an imposed system of uniform governance that placed Government appointees to run villages, sub-district and districts. Although under recent reforms customary institutions can now be re-established at village and sub-district levels this has occurred in relatively few places. (However, it is more common now for local administrators to be elected rather than appointed.) These legal and administrative realities create serious obstacles to communities seeking to articulate their own views and priorities.

Further obstacles to FPIC come from the way logging concessions have been handed out in Indonesia. Areas have been classified as 'forests' subject to the jurisdiction of the forest department and then zoned as 'production forests' without consultation with local communities. Legally required procedures to consult communities before 'forests' are officially gazetted as such – a procedure introduced in the colonial era to ensure that areas subject to rights are not accidentally included in State forests – have been applied to very few forest areas but the Government has gone ahead and handed out concessions in these non-gazetted forests notwithstanding. Most large logging concessions were handed out during the Suharto dictatorship by the Jakarta-based forest department without any consultation with local communities. Instead of recognising communities' rights, companies are expected to carry out community development projects as part of their logging plans.[27]

A case that illustrates many of these challenges comes from near the top of the Mahakam River in East Kalimantan, Indonesia, where the Jakarta-registered company, PT Sumalindo Lestari Jaya, has one of its four logging operations known as SLJ II. SLJ II was awarded an FSC certificate in 2006 by SmartWood, the forest certification arm of the New York-based Rainforest Alliance, (as well as a complementary certificate issued under the Joint Certification Protocol by the Indonesian certification body, PT Mutuagung Lestari, under the national Lembaga Ekolabel Indonesia certification scheme).[28]

Sumalindo Lestari Jaya (SLJ) is a large corporation with four active logging concessions, additional areas of timber plantations, a plywood mill and a facility producing medium-density fibreboard (MDF). The company is 75% owned by PT Sumber Graha Sejahtera, which is part of a major plywood

[27] For details see Marcus Colchester, Martua Sirait and Boedhi Wijardjo (2003) *The Application of FSC Principles 2 & 3 in Indonesia: Obstacles and Possibilities.* WALHI and AMAN, Jakarta; Arnoldo Contreras-Hermosilla and Chip Fay, 2005, *Strengthening Forest Management in Indonesia through Land Tenure Reform: Issues and Framework for Action*, Forest Trends, World Bank and ICRAF, Bogor and Washington DC.

[28] The FSC certificate is registered as having been issued in January 2006 and is valid until January 2011 according to the FSC website: http://81.201.103.160/PS/VController.aspx?Path=5e8cddf3-9b09-46c6-8b11-2fbdad9e2d71&NoLayout=true

manufacturing conglomerate, the Hasko Group, that has close ties to the Indonesian armed forces. The other 25% of SLJ is shared between PT Barito Pacific, another major timber company, and the general public.

The SLJ II concession lies in the 'Heart of Borneo' and runs over the watershed from West Kutai district in the Upper Mahakam tributaries into Malinau district. For a number of years, SLJ has been seeking to upgrade its forest management standards to meet the demand from the US market, notably The Home Depot, for certified timber, with a focus on the largest of its four concessions, the so-called SLJ II concession, which it commenced logging in 1991. The 270,000 hectare concession is currently being logged from its southern end near the Mahakam river in West Kutai district, from the log pond near the community of Long Bagun, but the majority of the concession stretches over into the headwaters of the Kayan river in Malinau district, reaching almost to the border with Malaysia. As its logging advances, SLJ plans to extend its network of logging roads northwards over the watershed into the major part of its concession in Malinau.

In SLJ II, Sumalindo has been using high-tech timber inventory techniques, zoning its concession for High Conservation Value Forests and applying reduced impact logging, as part of a coordinated effort by The Nature Conservancy (TNC) and WWF-Indonesia called the *Alliance to Promote Forest Certification and Combat Illegal Logging in Indonesia*, mainly funded by USAID and The Home Depot. The system was also designed to complement an existing programme of collaboration between TNC and large-scale timber corporations, aimed at promoting responsible forestry by building market incentives for good practice.

Since the SLJ plywood and medium density fibreboard processing plants in Samarinda use timbers from a number of concessions, development of a technique that can distinguish between the SLJ II timbers and other woods is crucial to the success of this sustainable management and marketing effort. To this end TNC and SLJ, with technical advice from SGS and URS, have been experimenting with barcoding to assist timber tracking. The idea is that the barcodes can be stapled onto the logs when timbers are cut, traced by barcode-reading devices all along the 'chain of custody', applied to products made only from these timbers in the processing plants, and so allow timbers to be securely traced from stump to the point of import in the USA.

In January 2005, local forest watchers in Kalimantan calling themselves the 'East Kalimantan Working Group on Forests' (*Pokja Hutan Kaltim* – EKWGF), who have links with local communities at the headwaters of the Mahakam, alleged that timbers from outside the SLJ II concession were being laundered through the log pond and getting barcodes stapled in inappropriately. Whereas in its audit report, SmartWood notes how it looked carefully into these concerns and assured itself that the timber tracing procedures are now being adequately applied, EKWGF asserts that timber mixing is still going on.

In general, competition between loggers and planters for control of Kalimantan's forest lands has taken place with relatively little regard for the rights and priorities of the indigenous peoples who are the rightful owners of these forests. However, the whole of the SLJ II concession lies in the traditional territories of indigenous Borneans, now commonly referred to as Dayaks. Those in the south of the concession now resident near Long Bagun, used to be referred to as Long Glats, while in the north the peoples are Kenyah and Punan, who have been living in these headwater forests since the earliest historical records,[29] but who apparently settled in their present five villages – currently only accessible by week-long canoe rides or by missionary planes – between the 1950s and 2002.

[29] Carl Lumholtz, 1920, *Through Central Borneo: an account of two years' travel in the land of the head-hunters between the years 1913 and 1917*. Oxford University Press, Singapore.

FSC Principles and Criteria require that forestry operations are legal, recognise and respect the legal and customary rights of indigenous peoples and only go ahead with their free and informed consent. A detailed look at the SmartWood audit of SLJ II shows that the company still has a long way to go before it can be said to be meeting these conditions fully.

In common with most logging operations in Indonesia, the boundaries of the 'State Forest Areas' in which the SLJ II concession has been granted have not yet been duly surveyed, agreed and gazetted. This is important as the boundary delineation process is the main way that the Government checks that proposed forest concessions do not overlap communities' lands. In the case of SLJ II, only a very small part of the boundary has yet been gazetted, making the concession technically illegal. SmartWood, however, decided that the company has done its best to persuade the Government to regularise these boundaries and has granted the certificate on condition that the company continues to use its best efforts to get them sorted out.

Likewise, instead of waiting for SLJ II to comply with other FSC requirements, the auditors instead decided to grant the company its certificate as long as, within the next six months to two years, it sorts out its free and informed consent agreements with the communities – including finalising maps of community territories, agreeing areas of community tenure, negotiating agreements about employment and compensation for the use of traditional knowledge and agreeing methods of conflict resolution.[30] A second assessment of the operation, carried out in September 2006, confirmed that the company still needs to make progress on these issues within the remaining 18 months' grace period accorded by the certification body for the operation to retain its certificate,[31] but also documented the progress made in further mapping community lands and agreeing boundaries.[32]

Just before SLJ II secured its certificate from Smartwood, Forest Peoples Programme provided a small grant to EKWGF to carry out an independent review of the extent to which negotiations between the affected communities and SLJ II could really be described as being based on respect for the principle of Free, Prior and Informed Consent. The study team, made up of Dayaks resident in the lower Mahakam, was able to visit the community of Long Bagun which lives near the log pond in West Kutai district. The team found that the community members had very divided views about the logging operations but were reluctant to challenge such a powerful operator given the weakness of their rights in law, local government recognition of the company, and their lack of access to alternative employment or means of generating cash incomes. The team was not able to travel to the other communities within the concession as access to these areas by vehicles along the logging roads is controlled by the company and they hesitated to enter the area by boat as their presence was already causing concern and even dissension in the villages.[33]

The Smartwood audit carried out in January 2006 and the impressions of the EKWGF concurred that SLJ II has not yet achieved full compliance with FSC requirements, that companies recognise and respect the legal and customary rights of indigenous peoples and only go ahead with logging on customary lands with the people's free and informed consent. During the January 2006 audit Smartwood noted that the company recognised that the 'communities still had the matter of

[30] Smartwood, 2006a, Forest Management Public Summary for PT Sumalindo Lestari Jaya II, 5th January 2006, http://www.rainforest-alliance.org/programs/forestry/smartwood/public-summary-reports.html#indonesia

[31] Smartwood, 2006b, Forest Management 2006 CAR verification audit report for PT Sumalindo Lestari Jaya in Samarinda, Kalimantan Timur, September 2006, at pages 11-13. http://www.rainforest-alliance.org/programs/forestry/smartwood/public-summary-reports.html#indonesia

[32] Smartwood 2006b:9.

[33] Yoga Sofyar, Pius Nyompe, Faisal Kairupan, Sigit Wibowo, Didin Suryadin and Carolus Tuah, 2006, '*Habis Manis Sepah di Buang*' *Melihat Keberadaan Kesepakatan Dini Tanpa Paksaan, Antara Sumalindo dan Masyarakat Long Bagun, Kutai Barat, Kalimantan Timur*. Laporan Studi Kasus, Pokja Hutan 2005-2006, ms.

traditional lands under discussion' and required that within one year the company, local government and communities agree a strategy to 'define stable and recognised tenure in the SLJ II concession' and demonstrate 'significant implementation' within two years. The September 2006 audit noted that 'participatory mapping' had been carried out by the Indonesian Army's Terrestrial Brigade and that based on these maps compensation is to be paid to the communities, the details of which are still to be agreed. The September audit team did, however, accept that the maps so generated had been accepted by the communities, as represented by the local village heads and, in addition, by the customary leader of Sungai Boh. This information apparently all came from the company supplemented by an interview with two village leaders in the single community of Mahak Baru visited during a single day: 27th September 2007.[34]

Another controversial FSC certificate from Indonesia which shows similar discrepancies between assessments made by FPP and partners and those made by auditors is the PT Intracawood concession which overlaps parts of Malinau and Bulungan districts in East Kalimantan. A study of PT Intracawood carried out by FPP for the national indigenous organisation, AMAN, and WALHI (Friends of the Earth–Indonesia) in 2003 concluded that the company had not recognised indigenous land rights, had not carried out negotiations with the indigenous peoples, and was in dispute with several communities, notably Rian and Sekatak, over access to their lands. Community leaders who were resisting company operations on community lands had been arrested and jailed.[35] In April 2006, however, Smartwood issued an FSC certificate for the operation.[36]

In the publicly available documentation relating to this certificate, Smartwood confirmed that there had been disputes with these communities but reported that 'through 2002 and 2003, Intracawood did settle the disputes through appropriate agreements that appear to have been reached without any pressure. According to firsthand reports from a wide range of community members, the communities of Rian and Sekatak have agreed to the amount and forms of compensation they asked for based on voluntary agreement'. The report furthermore noted that although a dispute resolution mechanism had been developed 'the mechanism is one developed by Intracawood, and will need greater community involvement and feedback to make it a fully mutual dispute resolution process.' Accepting that Intracawod does not have the authority to officially recognise the legal status of community claims, nevertheless Intracawood claimed that it has been reaching agreements with communities about compensation payments payable prior to each year's annual cut. Smartwood notes that 'this is not a perfect process'.[37] In addition, a claim for damages to Punan graveyards was said to have been settled by customary consensus building (*musyarawah*).[38] While admitting that Intracawood had not yet achieved full compliance with FSC Principles and Criteria 2 and 3, Smartwood decided to issue the certificate in April 2006 with the requirements that over the next two years Intracawood would carry out further consultations with the communities and enter into contractual arrangements with them.[39]

On the one hand it may be argued that the existence of the FSC Principles and the resulting scrutiny of company operations by NGOs and auditors has resulted in communities getting more bargaining strength than they used to have and they are getting more benefits from logging than they used to get.

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[34] Smartwood 2006b:3-4.

[35] Colchester, Sirait and Budiardjo 2003:202-218.

[36] The certificate is stated to be valid from April 2006 until April 2011 see: http://81.201.103.160/PS/VController.aspx?Path=5e8cddf3-9b09-46c6-8b11-2fbdad9e2d71&NoLayout=true

[37] Smartwood, 2006c, Smartwood Certification Assessment Report for PT Intracawood Manufacturing, East Kalimantan, Indonesia at page 16. http://www.rainforest-alliance.org/programs/forestry/smartwood/public-summary-reports.html#indonesia

[38] Ibid: 36-37.

[39] Ibid: 49-50.

On the other hand, owing to the lack of formal recognition of the peoples' rights to lands and forests and lack of agreement about which institutions should represent them in negotiations with companies, communities are unable to enter into discussions with logging companies from a strong position. While voluntary adoption of the FSC standard of 'free and informed consent' is meant to level the playing field between communities and logging companies, in fact, companies appear not to accept that indigenous peoples have the right to say 'no' to logging on their lands and only agree that benefit-sharing should be negotiated given their claims to their lands. The companies enter into these negotiations from a position of strength because, while they enjoy official recognition of their logging concession, the communities enjoy no such official recognition of their land rights. Communities are thus obliged to settle for what they think they can get in the circumstances. Unfortunately the verification process weakens rather than reinforces the communities' bargaining position because certification bodies are not withholding certificates on the grounds that 'free and informed consent' has not yet been achieved. Instead, certificates are being handed out and companies are given fairly lengthy time-frames to gradually settle disputes and negotiate terms with village leaders.

6 Towards Conclusions

The right of indigenous peoples to Free, Prior and Informed Consent is not a free-standing right that acts as a panacea for the troubles indigenous peoples face. It is an expression of indigenous peoples' right to self-determination, intimately connected to their rights to lands and territories and to self-governance according to peoples' own priorities, customs and systems of decision-making. The concept, however, finds resonance with indigenous peoples everywhere. Its strength is that it implies a two-way interaction between indigenous peoples and outside interests, in which indigenous peoples have the right to give or withhold consent – to say 'yes' or 'no' – and can make such decisions based on their own customary laws articulated though their self-chosen representatives.

The fact that the right to FPIC may not be explicitly recognised in national laws should not prevent indigenous peoples from insisting on respect for this right. Although the recognition of indigenous rights in national constitutions, laws and regulations is, on the whole, welcomed, the Philippines experience reveals how this recognition can create new vulnerabilities. Indigenous peoples conceive their right to FPIC to be rooted in the exercise of customary law. It should be an iterative process of inter-cultural transaction. In the Philippines, however, FPIC has been reduced to a formal, almost bureaucratic, exercise in positive law, whereby communities are asked to sign away rights to their lands and resources. The process as implemented in accordance with an over-prescriptive set of regulations is neither iterative nor is it rooted in customary laws and systems of decision-making.

The case studies and workshops also show that despite efforts to insist on respect for the right to FPIC, communities face serious problems in their dealings with government agencies and companies. The list of these problems is somewhat daunting and even demoralising and has even led some to question whether insistence on the right to FPIC is not a blind alley. However, it turns out that these weaknesses are not inherent in the concept of FPIC itself but are part of the common experiences of indigenous peoples everywhere. Problems like the denial of land rights, coerced decisions, manipulations of indigenous leadership, bribery, corruption, the creation of false organisations and fake leaders, and the falsification of documents are widespread problems that indigenous peoples experience whether attempts are being made to respect the right to FPIC or not. In fact, these are not 'problems of FPIC' but 'problems of the lack of FPIC'. They are, however, important challenges for indigenous peoples to counter if genuine FPIC-based decisions are to be achieved.

An equally important challenge for indigenous peoples in their efforts to exercise their right to FPIC is to ensure that their systems of decision-making are genuinely representative and made in ways that are inclusive of , and accountable to, members of their communities. Prescriptive notions of who should represent a community are a recurring problem throughout the indigenous world and which have struggled to accommodate imposed 'Captains' and 'village councils' (e.g. Guyana), 'chieftaincies' (e.g. Suriname), 'tribal governments' (e.g. USA), 'band councils' (Canada), 'Gram Sabha' (e.g. India), 'Councils of Elders' (e.g. Philippines), Village heads – '*kepala desa*' – (e.g. Indonesia) and so on. Often the result is that communities have dual or even multiple systems of decision-making with customary systems acting in parallel to imposed ones. Yet, despite being imposed, in some cases indigenous peoples have been able to make these new institutions their own and reshape them to suit their own preferences and customs. The very plurality of institutions created by these histories of intervention can be both a strength and a weakness, either forcing outsiders to accommodate local realities and reinforced local voices, or allowing them to use 'divide-and-rule' tactics.

During the workshop in Cibodas, indigenous participants proposed a series of actions to help ensure successful outcomes in dealings with outsiders based on exercise of their right to FPIC. The most notable from a very long list include:

- Build community awareness through training in human rights, law, development options and environmental management
- Carry out participatory assessments of customary use of resources through mapping and documentation
- Review decision-making systems and asses them for accountability, inclusiveness and capacity
- Build up leadership, assess and confront internal divisions and generate community consensus
- Ensure the involvement of women and youth in community discussions and decision-making
- Establish broad-based negotiating teams and keep them accountable to communities
- Avoid a 'compensation culture' and insist on the 'no' option at all stages of negotiation
- Research companies' (or other external agencies') intentions, financing, track records, policies and decision-making processes
- Share information among indigenous peoples
- Elaborate simple handbooks on FPIC procedures for community use
- Develop model 'protocols' for FPIC-based interactions with outsiders
- Insist on the use of communities' own systems of decision-making and representation and on the use of local languages
- Refuse negotiation until satisfied that complete information has been provided
- Insist on an iterative process of FPIC (and thus avoid the initiative being taken away from communities through one-off agreements)
- Insist on the completion of Environmental and Social Impact Assessments before negotiating and accepting projects
- Develop peoples' own indicators of impacts
- Establish genuinely independent monitoring bodies to ensure compliance with due process and agreements

Perhaps most importantly, the meeting concluded that FPIC should not be relied on alone as the only defence of land and livelihood. Indigenous peoples need to defend their rights in a multitude of fora and at multiple levels simultaneously if they are to be successful.

Although the underlying principle that people should be free to make choices about the way they are governed and what happens on their lands is as old as history and probably older, the notion of 'Free, Prior and Informed Consent' (FPIC) is a much more recent expression.

This report, about a 'work in progress', summarises some indigenous peoples' experiences with applying the principle of FPIC in Suriname, Guyana, Peninsular Malaysia, Peru, Indonesia, Papua New Guinea and the Philippines.

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