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Avoiding Possible Misuse of FPIC in REDD

by

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Abstract

Indigenous peoples have historically been subjected to repeated loss of basic human rights and dignity. Free Prior Informed Consent (FPIC) requires authorization by the indigenous people before implementing measures likely to affect them and is an important tool of respecting their rights and dignity. But its application in the specific context of REDD has the potential of misuse by vested commercial interests involved in forest degradation and deforestation through misleading or tempting the traditional indigenous institutions into withholding their consent. Also the traditional institutions of the indigenous peoples are sometimes not representative, may exclude women from positions of decision making and are not always fair to minority groups sharing their physical and economic space. Cleverness and greed are traits that permeate all human societies and have to be kept in check through appropriate mechanisms. The FPIC is crucial but its application must be tempered with reason. The author recommends that the (i) FPIC should be applied stringently where dislocation of habitation or core economic activities of the indigenous peoples are likely, (ii) when indigenous traditional institutions are not representative and practice discrimination based on gender, parentage or ethnicity, consent should be taken from a truly democratic institution set up specifically for REDD like the joint forest management committees in India, (iii) in instances where an indigenous traditional institution denies consent for REDD while allowing organized deforestation or degradation activities by commercial interests from outside the indigenous community the Country Government should have the right to overlook the lack of consent in consultation with the international body responsible for REDD to ensure that vested commercial interests do not use unfair practices to deny consent for REDD, and (iv) among indigenous communities who share their living and economic space with a significant number of disadvantaged poor of different ethnicities that do not form part of the traditional institutions of the indigenous people, the Country Government should be duty bound to protect their human rights by implementing REDD through an appropriate democratic mechanism. Further, whenever even a slight departure from FPIC is necessitated the international body governing REDD must be consulted by the Country Government.

Key words: REDD, Indigenous people, FPIC, UNDRIP

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The indigenous people form barely five percent of the total world population but constitute over

15% of the global poor (FAO 2010). The isolated tiny economies of the indigenous peoples across the globe have borne the brunt of the follies of the larger and aggressive economies out to become rich quickly from the days of the empire building Romans that reached its peak in the middle ages. The indigenous peoples can legitimately claim to have contributed nothing to the global warming but may now have to bear the cost of making amends. Fortunately, Reducing Emissions from Deforestation and Forest degradation (REDD), recognized as a major, and most benign, mitigation measure, can bring substantial co-benefits to the indigenous peoples. But for this to happen REDD needs to be designed and operationalized properly. There are indications that the world is indeed being careful going by the emphasis various UN bodies are placing on the welfare of the indigenous peoples. Most recent action in this regard is the issuance of FAO's policy on indigenous and tribal peoples formulated to ensure the rights and the concerns of the indigenous peoples are given their due place in the global governance in the fields of agriculture and forestry. This was preceded by a number of major initiatives more prominent of which was the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) signed in 2007 and the UN-REDD's operational guidance for the engagement of indigenous peoples and other forest dependent communities that followed from the UNDRIP (UNDRIP, 2007).

A fundamental principle of global governance under the United Nations is the premium on human dignity and on the freedom for the peoples of the world to give expression to their sociocultural values consistent with basic principle of nondiscrimination on grounds of ethnicity, religion, language, economic status, geographical location and gender. Poverty is indignity and the development process that brings people out of poverty is a coveted human right. And so are the social and cultural identities of peoples. This is what the latest FAO document describes as the principle of development with identity.

REDD concerns forest lands and the Article 26 (1) of the UNDRIP recognizes the right of the indigenous peoples "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26 (2) recognizes the right "to use, develop and control what they possess" and Article 26 (3) calls on the countries to give legal recognition and protection to their lands and resources in keeping with the customs and the land tenure systems of the indigenous peoples. The FAO policy also recognizes that rights over land and other natural resources like water, forest and rangelands are of particular importance to indigenous peoples on account of spiritual attachments to their ancestral origins.

The provisions of the UN REDD operational guidance for the engagement of indigenous peoples make it mandatory to obtain free prior and informed consent (FPIC) of the indigenous peoples for taking up any REDD activity. Under these operational guidance the word 'free' signifies complete absence of coercion or manipulation, 'prior' means enough time has been given to indigenous peoples to form a collective opinion and the word 'informed' implies that the nature, locality, size, reversibility, scope, duration and the purpose of the project have been duly informed to the indigenous peoples along with a honest assessment of socio-economic cultural and environmental impacts and the risk and benefits that are likely to accrue to the people (UN-REDD, 2009). On the issue of consent this operational guidance has erred in stating that the "consent to any agreement should be interpreted as indigenous peoples have reasonably understood it".

This is unlikely to meet the test of judicial scrutiny as it will not only be in conflict with the usual dictionary meanings of consent -agreement and acceptance – but also with the implied meaning of consent elsewhere in the same operational guidance. While the UN-REDD operational guidance may have run itself aground in trying to find the meanings of consent, the FAO policy faces no such difficulty. It states very clearly that the principle and the right of FPIC demands states and organizations at all level obtain indigenous peoples’ authorization before adopting or implementing projects, programmes and measures that may affect them in order to allow a development process determined by the indigenous people themselves (FAO 2010).

At the Cancun Climate Conference the UN REDD Program released a publication titled "Perspectives on REDD" which has raised the following very relevant questions pertaining to the implementation of REDD (UN-REDD 2010).

Will FPIC result in Indigenous Peoples refusing to accept activities considered important to national development by others and thus act as a barrier to the implementation of REDD+ activities?

Is FPIC too laborious and time consuming to be implemented?

Whose consent FPIC refers to and should it apply to all REDD activities or only some specific ones?

Who really represents the indigenous peoples?

Having raised these very pertinent questions the publication, however, shies away from critically examining them and has unfortunately taken the easy way out preferring rhetoric over reason. For example, to the first query its answer is “Firstly, the right to development must encompass the rights of all citizens, including Indigenous Peoples’ rights to self-determination, culture, and livelihoods in deference to communities’ own development pathways; the right to FPIC should accordingly be embedded in a rights based understanding of development.

Secondly, if applied meaningfully, in accordance with the law, measures to respect FPIC could serve to decrease the probability of conflicts that may disrupt activities.” It then goes on to claim that FPIC has already been utilized successfully by a number of private timber companies failing to note the widely differing circumstances and the scale of operations (UN-REDD 2010). The small scale activities of a timber lessee that brings immediate incomes to the land owners stand in sharp contrast to the country wide overwhelming size of REDD where incomes would not only be delayed but would also be subject to meeting stringently audited internationally acceptable measures. On the question of who should represent the indigenous people the UN REDD Program publication states that the “international law provides specific guidance on the rights of Indigenous Peoples to represent themselves through their own institutions. Approaches may vary from one cultural context to the next, and these should be identified and respected.”

The existing international laws do indeed suggest that the traditional institutions of the indigenous peoples represent them the best. Article 32(2) of the UNDRIP requires the states to obtain the free informed prior consent through the traditional indigenous institutions.

But this could have serious ramifications where the tribal institutions are either non representative, which is quite frequently the case in communities with hereditary chieftains or where the women are specifically prohibited from membership of governing positions. Also, increasing interactions with the outside world has also seen the settlement of people from elsewhere among the

indigenous people who, though often poorer and landless, are rarely represented, even after generations of living, in the traditional institutions which can often be severely discriminatory towards outsiders. And it would be wrong to presume that this happens only in a very few communities. The facts may surprise even the most diehard supporters of traditional institutions.

On the surface, there could be little objection to obtaining the consent of the peoples who are stakeholders in REDD. But in reality, the mandatory requirement of consent, as distinct from genuine consultations, has the potential of effectively giving veto over the REDD efforts to vested commercial interests involved in forest degradation and deforestation as all they have to do is to manipulate, through misleading the indigenous peoples or through corruption, the withholding of consent by the indigenous leadership which, as those who have worked on indigenous issues would readily testify, is not difficult at all.

There is a widespread belief in the innocence of indigenous peoples, of absence of corruption among them and of the abundance of deep democratic values in indigenous societies. The fact is that cleverness and greed are traits that permeate all human societies and have to be kept in check through societal mechanisms and the numbers of indigenous societies that fail to do so may not be far less numerous than the non-indigenous ones. This author has had a long and association with a very proud, brave and honorable indigenous people who were headhunters till the dying years of the nineteenth century and was struck by the complete absence of any hereditarily transferred malformations like congenital blindness and deafness among these people. Among them, traditionally, girls would reject a suitor without a human skull around his neck. And every generation had its share of young men who would not hesitate to compensate their limited skills in swordsmanship with cunning and serve their matrimonial interests with the severed heads of the defenseless blind and deaf of the neighboring clans thus decimating the responsible genes over several generations, long before they came in contact with the outsider.

REDD is too important a program to be allowed to fall prey to the cleverness and greed of any group or individuals. FPIC is an important tool of respecting human rights and human dignity and should be insisted on for as long as it results in achieving its objectives. But recognizing that it can be misused its application must be tempered with wisdom. Some broad guidance for this purpose is suggested as follows:

1 FPIC should be applied stringently over lands used for habitation, agriculture, and for other forest based primary economic activities to ensure that no dislocation of habitation or core economic activities for survival takes place without the full consent of the Indigenous peoples.

2 In the case of indigenous peoples whose traditional institutions are not representative and who practice discrimination based on gender, parentage or ethnicity there should be an insistence on setting up a truly democratic institution specifically for REDD like the joint forest management committees in India and consent should imply the consent of such an elected body.

3 In instances where an indigenous people deny consent for REDD while allowing organized deforestation or degradation activities by commercial interests from outside the indigenous community the Country Government should have the right to overlook the lack of consent in consultation with the international body responsible for REDD. This would ensure that vested commercial interest do not use unfair practices to deny consent for REDD. Among indigenous communities who share their living and economic space with a significant number of

disadvantaged poor of other ethnicities that are not represented in their traditional indigenous institutions the Country Government should be duty bound to take their views into account for implementing REDD through an appropriate democratic mechanism.

4 Even a slight departure from FPIC should necessitate consultation with the international body governing REDD.

These measures undertaken sincerely would ensure that REDD achieves its primary objective of mitigation of climate change without bringing misery in its wake to the indigenous people and other disadvantaged poor dependent on the forest resources.

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