

Applying the Principle of Free, Prior and Informed Consent in the UN-REDD Programme in Viet Nam

UN-REDD PROGRAMME

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Acronyms and Abbreviations

CBD	Convention on Biological Diversity
CEM	Central Committee of Ethnic Minority
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CSO	Civil Society Organization
DARD	Department of Agriculture and Rural Development
DONRE	Department of Natural Resources and Environment
	Department of Planning and Investment
FAO	Food and Agricultural Organization of the United Nations
FPIC	Principles of Free, Prior, Informed and Consent
Lam Dong TV	Lam Dong Television
MARD	Ministry of Agriculture and Rural Development
PPC	Provincial People's Committee
PS Consultant	Planning and Supervision Consultant
REDD+	Reducing Emissions from Deforestation and Forest Degradation, and the role of Conservation, Sustainable Forest Management and Enhancement of Forest Carbon Stocks
RSPO	Roundtable on Sustainable Palm Oil
Sub-CEM	Provincial Committee of Ethnic Minority
TC Consultant	Trainer for Interlocutors and Communications Consultant
TV DL	Television of Di Linh district
TV LH	Television of Lam Ha district
UN	United Nations
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UN-REDD Viet Nam Programme	The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries in Viet Nam.

Part I: Background and Introduction

Participation and inclusion¹ are among the human rights principles that guide the United Nations' work at all levels. They include full and effective participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development.

The *UN Common Understanding on the Human Rights Based Approach to Development Cooperation* identifies participation and inclusion as key human rights principles that should guide the programming process and development cooperation². Broad participation is required to promote the views of all stakeholders and ensure country ownership of programmes delivered under the *Common Country Assessment* and the *United Nations Development Assistance Framework*.³ It is also essential to the strategies for the achievement of the Millennium Development Goals.

The UN General Assembly's *Programme of Action for the Second International Decade of the World's Indigenous People* (UN General Assembly Resolution 60/142), adopted in 2005, specifies that one of the five objectives of the Second Decade is "promoting full and effective participation of Indigenous Peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as Indigenous Peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent."

Likewise, in its *General Recommendation XXIII on the Rights of Indigenous Peoples*, the UN Committee on the Elimination of Racial Discrimination⁴ calls upon States parties to "ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."

The landmark *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP), adopted by the UN General Assembly in September 2007, provides a universal framework for action for the international community and States concerning Indigenous Peoples. It sets out the rights that countries should aspire to recognize, guarantee and implement. In Article 19, UNDRIP requires States to "consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

¹ *Participation and Inclusion*: Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized. United Nations Development Group (UNDG) (2003).

² UNDG 2003. *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*.

³ The United Nations Development Assistance Framework (UNDAF) is the strategic programme framework for the UN Country Team (UNCT). It describes the collective response of the UNCT to the priorities in the national development framework - priorities that may have been influenced by the UNCT's analytical contribution. The Common Country Assessment (CCA) is a tool used for strengthening the country analysis. The CCA/UNDAF guide the UN's intervention in the programme country. Therefore, the UN-REDD Programme should ensure it is aligned to the priorities outlined in these documents.

⁴ The UN Committee on the Elimination of Racial Discrimination is a body of human rights experts tasked with monitoring the implementation of the International Convention on the Elimination of Racial Discrimination, adopted by the UN General Assembly resolution 2106 of 21 December 1965.

Respecting the rights of Indigenous Peoples and other forest dependent communities is vital for the UN-REDD Programme to successfully carry out its activities. Indigenous Peoples' participation as partners can contribute to and benefit from UN-REDD Programme activities at both the national and international levels.

Indigenous Peoples and the UN-REDD Programme: United Nations Policies and Legal Framework

The UN-REDD Programme partners, UNDP, UNEP, and FAO derive their mandates for engagement with Indigenous Peoples from the Charter of the United Nations, which states: 'We the peoples ... reaffirm faith in fundamental human rights, in the dignity and worth of the human person... (and) promote social progress and better standards of life in larger freedom.' This mandate was reaffirmed in the *Millennium Declaration* in 2000, and most recently and importantly, in the UNDRIP.

UNDP, as a partner to the UN-REDD Programme, derives its corporate policy on Indigenous Peoples⁵ (2001) from its history of engagement with Indigenous Peoples at the country level. The key objectives of the policy are: i) to foster an enabling environment that: promotes Indigenous Peoples' participation in all decision making levels; ensures the co-existence of their economic, cultural, and socio-political systems with others; and develops the capacity of Governments to build more inclusive policies and programmes; and ii) to integrate Indigenous Peoples' perspectives and concepts of development into UNDP work.

These policy objectives are reinforced by the *United Nations Development Group's Guidelines on Indigenous Peoples' Issues* (February 2008), which aim to assist the United Nations system in mainstreaming and integrating Indigenous Peoples' issues in processes for operational activities and programmes at the country level. The UNDG Guidelines set out the broad normative, policy and operational framework for implementing a human rights based and culturally sensitive approach to development for and with Indigenous Peoples.

Furthermore, Article 42 of the UNDRIP states that: "The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

In addition, the *International Labour Organization's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries* (1989), ratified in twenty countries as of February 2009, provides guidance and overarching principles for engagement with Indigenous Peoples based on a human rights based approach. It is the main legally binding document entirely focused on the rights of Indigenous Peoples. The Convention on Biological Diversity (CBD) (1992) and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (1965) are additional international standard-setting instruments that provide provisions for the protection of Indigenous Peoples. For example, Article 8(j) of the CBD is the main instrument for the protection of traditional knowledge⁶.

⁵ UNEP and FAO are currently finalizing corporate policies of engagement with Indigenous Peoples.

⁶ <http://www.cbd.int/traditional/>

These documents provide a solid framework for ensuring proper respect and recognition of Indigenous Peoples' rights in REDD initiatives, and for dialogue between the international community, States, Indigenous Peoples and their organizations, other forest dependent communities, local communities, the private sector, civil society actors, and other relevant stakeholders. In particular, the principle of Free, Prior and Informed Consent (FPIC) is key to ensuring that national REDD+ strategies and programmes are effective, sustainable and equitable in terms of sharing costs and benefits among all stakeholder of reducing emissions of greenhouse gases from forests.

FPIC in practice

The right of stakeholders to FPIC is not new. In 2000, the World Commission on Dams endorsed FPIC as one of 26 guidelines necessary to ensure effective implementation of its "New Framework for Decision Making"⁷. In 2004, the Environmental Law Institute catalogued seven cases of the application of FPIC in the mining sector, some of the case studies dating back to a decade earlier, in the mid 1990s.⁸

The United Nations' Convention on Biological Diversity (CBD), adopted at the United National Conference on Environment and Development 1992, and coming into force in 1993, in Article 15, paragraph 5, dealing with access to genetic resources, states:

"Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources ..."

Subsequently, at the 6th Meeting of the Conference of the Parties, in 2002, the CBD adopted the "Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization".⁹ Although voluntary in nature, the Bonn Guidelines set out in some detail the steps that should be undertaken in ensuring prior informed consent in relation to access to genetic resources and fair and equitable sharing of the resulting benefits.

A number of countries have established clear legal frameworks establishing the right to FPIC. For example, under the Philippine "*Indigenous Peoples Rights Act*" (1997)¹⁰ the right of FPIC for Indigenous Peoples is recognized for all activities affecting their lands and territories including exploration, development and use of natural resources, bio-prospecting, displacement and relocation. Similar legislation exists in Peru and Australia.

Most practical examples of FPIC have emerged from the mining or oil and gas industries. However, there is some experience from the forest sector. For example, processes designed to secure FPIC were introduced in relation to a commercial logging concession for the community

⁷ World Commission on Dams, *Dams and Development: A New Framework for Decision- Making* (2000)

⁸ Environmental Law Institute. 2003. *Prior Informed Consent and Mining: Promoting the Sustainable Development of Local Communities*

⁹ COP 6 Decision VI/24: <http://www.cbd.int/decision/cop/?id=7198>

¹⁰ Office of the President, National Commission on Indigenous Peoples, Administrative Order No. 1, Rules and Regulations Implementing Republic Act No. 8371, otherwise known as, "The Indigenous Peoples' Rights Act of 1997."

of Long Bagun, in the district of Kutai Barat, East Kalimantan province (Indonesia).¹¹ The Roundtable on Sustainable Palm Oil (RSPO) has also endorsed the application of FPIC, and there are examples of FPIC processes in relation to oil palm development in Indonesia.¹²

Challenges for FPIC for REDD+

Thus, although the principle of FPIC is long-established, and there is considerable practical experience in its application, FPIC for REDD+ introduces significant new challenges. The most important challenge in applying FPIC for REDD+ is scale. In the case of mining, logging, or oil palm development, there is a distinct and generally quite compact geographical area over which the activity will take place, typically ranging from thousands to tens of thousands of hectares. Consequently, the number of communities involved may also be limited. In contrast, REDD+ applies to the entire forest estate of a country which, in the case of Viet Nam, covers nearly 20 million hectares, and affects tens of thousands of communities.

A second challenge concerns how the potential benefits of REDD+ are communicated, as raising false expectations can be detrimental to future implementation of REDD+. Again, in the case of mining or similar activities, both the magnitude and timing of potential benefits are relatively clear (even in the case of prospecting, it is a relatively simple matter to communicate the potential benefits, the likelihood of there being no benefits, and the time scale over which results will be clear). In contrast, for REDD+ both the timing and magnitude of potential benefits is very difficult to communicate; the latter being further complicated by the performance-based nature of REDD+.

In the case of Viet Nam (and many others countries too) an additional challenge stems from the ethnological composition of most forest-dependent communities. Very few such communities in Viet Nam are ethnically homogeneous. Rather, a very large proportion of such communities are composed of households of one or more ethnic minorities and households of the Kinh (Vietnamese) ethnic majority. Furthermore, there may also be households of mixed ethnicity.

As discussed previously, the UNDRIP confers a clear right to FPIC for Indigenous Peoples, but there is no equivalently clear statement of such a right for those peoples which do not identify themselves as being "indigenous". However, the UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming, adopted by the United Nations Development Group (UNDG) in 2003, states that "*All programmes of development co-operation, policies and technical assistance should further the realisation of human rights ...*", which include:

- **Universality and inalienability:** Human rights are universal and inalienable. All people everywhere in the world are entitled to them.
- **Equality and Non-discrimination:** All individuals are equal as human beings and by virtue of the inherent dignity of each human person. All human beings are entitled to

¹¹ Yoga Sofyar, Pius Nyompe, Faisal Kairupan, Sigit Wibowo, Didin Suryadin and Carolus Tuah. 2007. *'Can't see the people for the trees': Assessment of the free, prior and informed consent agreement between Sumalindo and the community of Long Bagun, district of Kutai Barat, East Kalimantan province (Indonesia)*. Pokja Hutan Kaltim and Forest Peoples Programme, Moreton-in-Marsh

¹² Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A guide for Companies. , Moreton-in-Marsh

their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies.

- Participation and Inclusion: Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized.¹³

Given that the right of Indigenous Peoples to FPIC derives from the right to self-determination, which is a right of all peoples, then by implication all peoples are entitled to the collective right to FPIC. The value of the UNDRIP is, firstly, in clarifying that this right applies to Indigenous Peoples, given historical discrimination against them in many parts of the world; and second, that the right to FPIC is enshrined in related rights, such as the rights to self-determination and to control their lands, territories and natural resources

In practice, therefore, decision-making based on respect for the right to FPIC need to be undertaken in such a way that they respect the rights of different persons and ethnic groups within individual communities and their wider areas. While all people have the same rights in principle it does not follow that all persons have rights to exactly the same properties and areas. Thus these need to be clarified, so FPIC as a right is exercised appropriately in relation to these other rights. Practitioners also need to ensure that rights-holders are able to understand REDD+, and consider, develop and deliver their decisions based on their right to FPIC in such a way that does not discriminate against any one group but takes account of their varied rights in lands and resources¹⁴.

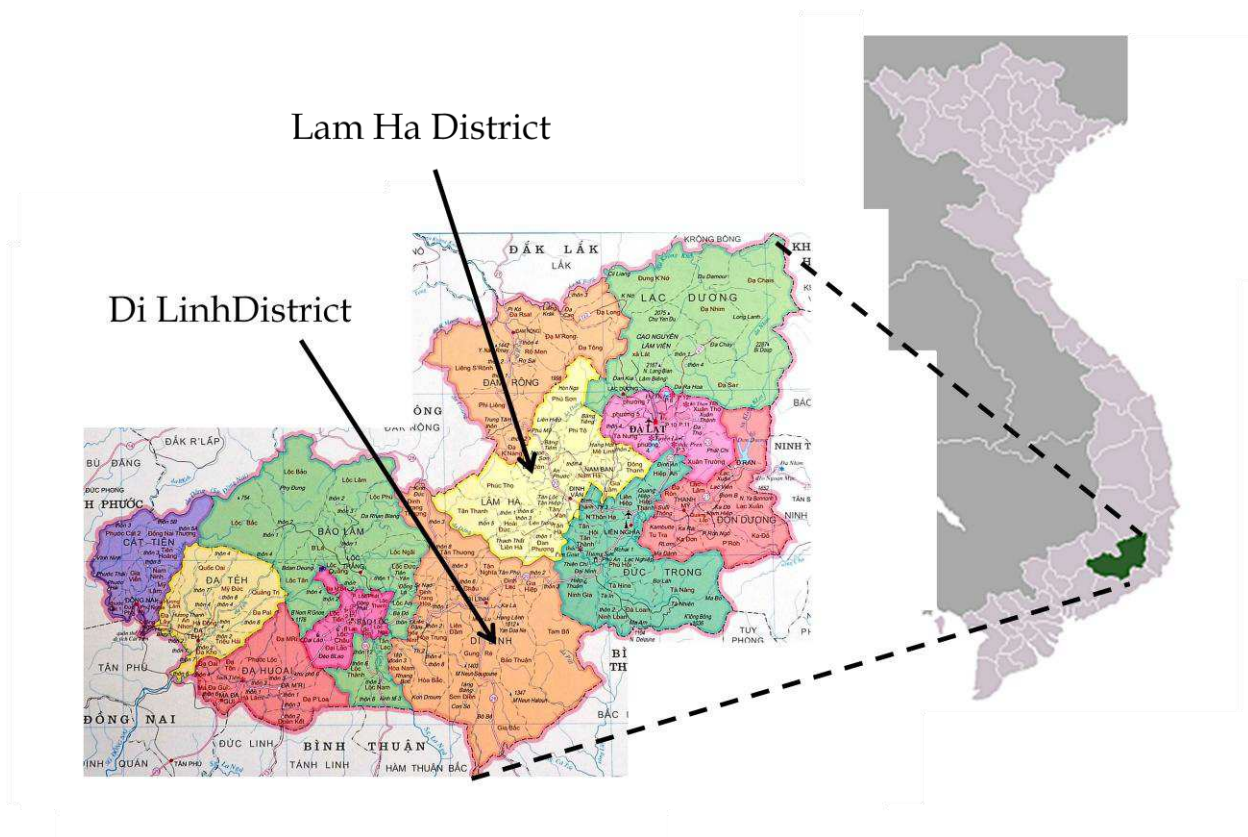
¹³ http://hrbaportal.org/?page_id=2127

¹⁴ The contribution of Marcus Colchester of the Forest Peoples' Programme to the preceding two paragraphs is gratefully acknowledged

Part II: Piloting FPIC for REDD+ in Viet Nam

Country actions under the UN Collaborative Programme Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) are funded by the Norwegian Government. The initial “Quick Start” phase of UN-REDD involves programmes in nine pilot countries, one of which is Viet Nam. The UN-REDD program in Viet Nam is executed by the Ministry of Agriculture and Rural Development (MARD) and is implemented by Department of Forestry, MARD. A pilot province has been selected as the focus for sub-national capacity building. This is Lam Dong in the Central Highlands, where UN-REDD activities are implemented in collaboration with Lam Dong Provincial People’s Committee (PPC) through its provincial Department of Agriculture and Rural Development (DARD). As the first UN-REDD Country Programme to begin implementation, the UN-REDD Viet Nam programme has pioneered the application of FPIC in two districts, Lam Ha and Di Linh, of Lam Dong province (see Figure 1).

Figure 1: Location of Lam Dong Province, and Lam Ha and Di Linh Districts



Viet Nam has 53 minority ethnic groups, comprising approximately 16 million people, who speak languages belonging to eight distinctive language groups. Most of them live in and around forests in highlands. Due to high levels of internal migration in recent decades, there is now a far greater diversity of ethnic groups in many localities than was the case previously. This is certainly true in Lam Dong province, where 30 of the nation's ethnic minority groups are now represented in the two pilot districts, among which only six are native to the districts, the others having moved from other parts of the country in the last generation.

The pilot FPIC process involved an eight-step programme; see Figure 2. These eight steps were implemented over a period of five months at the beginning of 2010; see Figure 3. Step 5, the village FPIC meetings, were divided into three phases. In the first phase, a total of 20 villages were covered; in the second phase a further 31 villages were visited, and in the third phase an additional 25 villages. The purpose of breaking the village meetings into three phases was to allow lessons from earlier phases to be incorporated into revised procedures for later phases.

The following sections describe each of the eight steps of the pilot FPIC process.