

# How does 'Free, Prior and Informed Consent' (FPIC) impact social equity? Lessons from mining and forestry and their implications for REDD+



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## ABSTRACT

The principle of "Free, Prior and Informed Consent" (FPIC) is promoted through international agreements and safeguards in order to strengthen social equity in resource management by requiring consent from indigenous and/or local communities prior to actions that affect their land and resource rights. Based on early experiences with implementing FPIC standards in mining and forestry, we examine how FPIC has impacted social equity and why. In both sectors FPIC was first operationalized through non-governmental standards that revealed ambiguities surrounding its definition and implementation. In mining, FPIC was first codified in the standards of financial investors, while in forestry FPIC emerged within competing market-based certification schemes, resulting in contrasting definitions. In both sectors, contextual factors such as government laws and policies, the socio-political environment and the overall distribution of rights and resources strongly shape the impacts of FPIC on equity particularly for actors without strong legal rights. These findings are significant for emerging arenas such as REDD+, where there is much debate around the role of governments, financial institutions and market-based actors in applying FPIC for social equity outcomes.

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## Introduction

Indigenous peoples' right to free, prior and informed consent (FPIC) about activities that impact their lands, territories and cultural, intellectual, religious and spiritual property is enshrined in the UN Declaration on the Rights of Indigenous Peoples (United Nations, 2008), and in various international standards and social safeguard policies (Carino and Colchester, 2010; United Nations, 2008; World Bank, 2005). FPIC is widely viewed as a means for indigenous peoples and local communities to shape the direction and outcomes of resource interventions (Baez, 2011), and to promote social equity through the pro-active defense of property rights for vulnerable groups. This paper examines to what extent FPIC regimes have been able to meet these aspirations and why.

We focus in particular on the mining, oil and gas sector (hereafter referred to collectively as 'mining') and forestry as two areas where FPIC has been operationalized for over a decade. Both sectors operate in frontier areas where forests are economically and culturally important to local populations, and both have been widely

criticized for violating indigenous rights and negatively impacting local livelihoods (Carino and Colchester, 2010). While FPIC is thus of major relevance to both sectors, mining and forestry differ in the nature of their impacts, their broad governance structures and the specific strategies they have adopted to address indigenous and local rights.

This paper examines why FPIC governance has evolved differently in these two sectors and the implications of these different approaches for the end goal of social equity. In recognition that "equity" is complex and socially contested concept, we have drawn on McDermott et al.'s Equity Framework (2012c) to structure our analysis. Rather than adopt an *a priori* stance on what is "equitable", the Equity Framework provides a systematic means to compare and contrast core features of FPIC governance systems, including the balance of actors that have framed international sector-wide standards, how FPIC is operationalized at national and local levels, who is included or excluded as subjects of FPIC, and what counts as adequate FPIC outcomes.

Lessons from this analysis hold great significance for the broader application of FPIC in frontier areas where rights to forests and land, critical to livelihoods and culture, are frequently disputed. Of major current significance, they are relevant to Reducing Emissions from Deforestation and Degradation and forest enhancement (REDD+),

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a mechanism under the United Nations Framework Convention on Climate Change (UNFCCC) which could potentially leverage international finance to change forest use across the majority of the developing world (Anderson, 2011). Covering a suite of programs to arrest forest loss and conserve carbon (Peskest and Brockhaus, 2009), the sheer potential geographical and financial scale of REDD+ has heightened international controversy about the risks posed for local customary property rights and livelihoods. Although FPIC is embraced as the central social safeguard to mitigate risks and maximize benefits to these groups, this expectation is founded on very limited understanding of experience with FPIC to date, making our analysis both timely and important.

### Theoretical approach

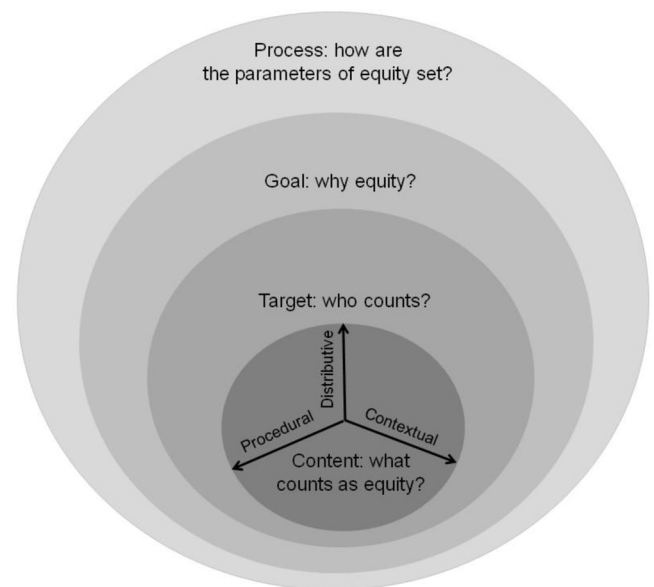
FPIC emerged from the convergence of international human rights agendas and civil society critiques of involuntary resettlement for infrastructure projects (Carino and Colchester, 2010; McGee, 2009; Szablowski, 2010). FPIC ultimately aims for a fairer treatment of indigenous and other affected peoples in development and resource interventions through:

- (i) the absence of coercion, intimidation or manipulation (**Free**);
- (ii) early consent with adequate time for local decision-making processes (**Prior**);
- (iii) access to sufficient, appropriate information for a considered choice e.g. on the nature of the activity – its size, pace, reversibility, scope, rationale, duration, location – and its likely impacts (**informed**); and
- (iv) the right to **consent**, or withhold consent, with due regard to customary institutions, gender and age (United Nations Permanent Forum on Indigenous Peoples, 2010).

FPIC is rooted in Western notions of formally codified property rights, which affirm the right of persons holding legal rights to property to not be alienated from that property without their consent. However, FPIC as an explicit policy has focused particularly on peoples governed by traditional or “informal” social systems who frequently lack clear legal identities and rights and/or lack equal access to legal defense and the information and power needed to defend their informal rights. FPIC thus functions as a tool promoting the formal recognition of property rights among legally disadvantaged peoples. This very act of formalizing traditional or informal rights impacts the equity of social relations within and between social groups. For example, FPIC inherently disfavors those without property rights to assert, i.e. FPIC policies are not necessarily designed to promote equal opportunity for landless and fully disenfranchised members of society.

While the impacts of FPIC on equity may vary, equity is a concept firmly embedded within the discourse on FPIC and human rights more generally. Both equity and human rights encompass notions of social justice, fairness, due reward, and accountability (Schroeder and Pisupati, 2010). Similar notions are captured in the UN Declaration on the Rights of Indigenous Peoples 2008. The Declaration aims to protect indigenous rights based on principles of social justice, fairness and equality (Article 46 (3)), which are to be realized through their free, prior and informed consent about matters relating to their lands and societies (Articles 10, 11, 19, 28 and 29).

The concepts of “equity” and “equality” are integrally connected, but equity highlights the social choices and trade-offs involved in determining precisely what must be equal and among whom. For example, societies and individuals may emphasize equality in terms of opportunity, and/or equality in the distribution of resources (Nicholson and Chong, 2011). Also significant is the



**Fig. 1.** Equity framework for analysis of equity in resource interventions. Source: McDermott et al. (2012c).

question of who is involved in defining the priorities of equity. These complexities are recognized in the Equity Framework by McDermott et al. (2012c), which allows for a comprehensive and systematic analysis of equity.

The Equity Framework is structured around four broad parameters. The outermost parameter concerns the *process* by which equity is defined, and who is included and excluded in governing decisions about equity. The second parameter addresses the *goal* of equity (e.g. are the stated goals to do no harm or to improve equity?) and to what extent equity is a goal. The third parameter highlights the *target* or *who counts* as a subject of equity. The ‘content’ or *what counts* in evaluating equity may involve three distinct dimensions. McDermott et al. (ibid) identify these dimensions as “procedural”, focused on equal access to decision-making, “distributive”, concerning fair distribution of resources and “contextual”, in the sense of overall capacity or empowerment (Sen, 2004). Fig. 1 summarizes these various parameters and dimensions.

This paper’s analysis is organized around the application of the Equity Framework to the case study sectors of mining and forests.

### Methodology

Our analysis of FPIC in the mining and forest sectors is organized into two main parts. Section “**FPIC in mining and forestry: how are the parameters set, why and for whom?**” addresses the outer three layers of the Equity Framework (Fig. 1). We identify the primary actors and institutions responsible for introducing explicit FPIC policies into each sector and setting its overall parameters, and how this has shaped the goals of equity and its target populations.

Section “**Operationalizing FPIC: what counts?**” then draws on a series of country case studies to address the inner layer of the framework. It provides a sector-by-sector examination of the different case study contexts in which FPIC has been operationalized, as well as the procedural and distributive outcomes.

The primary cases selected for the mining sector are Canada and Papua New Guinea (PNG), with Indonesia included for additional analysis. Both mining and forestry are key industries for Canada, and often require negotiations with indigenous communities, which has led to a relatively large body of literature on indigenous rights in both mining and forestry. The selection of Canada as a case study also permits comparison of FPIC experiences between

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