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## **Frameworks for and Implementation of FPIC over land and knowledge in Sarawak, Malaysia**

*By Jennifer Rubis*

*“Consultation without the right to say NO is meaningless and a cynical exercise,”  
Chief Lapointe.*

### **Introduction**

Throughout the nineties, it was the kind of picture proudly featured in the Sarawak papers. An Iban farmer, in this case, Changgai Dali, from Rumah Ranggong in Ulu Sungei Niah, was receiving a cheque from beaming representatives of government and BLD Resources, a private oil palm company. Glowing headlines lauded both ‘Konsep Baru’, the underlying scheme of land trust promoted by Chief Minister Taib Mahmud and the Dayak ministers responsible for ‘bringing development’ to the indigenous peoples of the Sarawak state of Malaysia.

Not ten years later, Changgai Dali made headlines again in 2008 when he was sued by the same company for trespassing on the land provided to BLD under the trust scheme. The ministers and departments that had been witness to the first cheque ceremony had disappeared, leaving the Iban man and his family alone in their struggle to keep their lands.

In an American pharmaceutical lab, researchers work to distill a cure for AIDS from the bintangor tree. They had acquired the knowledge through the Sarawak Biodiversity Centre and financial profits from any successful outcome would be shared by the company and the state of Sarawak. Though the healing properties of the bintangor tree are well known among the indigenous peoples of Sarawak, little or no acknowledgement of this role was evident in the literature from the state or the researchers, much less talk of benefit-sharing with the local communities.

In both cases, the acquisition of land for oil palm plantation development and knowledge passed through a process of consultation wherein indigenous communities were made aware of the project and had, to some extent, expressed their willingness to cooperate on to the use of their land and knowledge. This case study examines both scenarios to understand whether such cooperation met international standards of being acquired through processes of free, prior and informed consent and attempts to adhere with these processes to indigenous ways of acquiring permission and consent from communities.

### **Background**

Malaysia consists of two landmasses separated by the South China Sea. The first, Peninsular Malaysia is located between Thailand to the north and Singapore to the

south. The second landmass consists of the states of Sabah and Sarawak on Borneo, the world's third largest island.

Malaysia's government system is based on a constitutional monarchy and a three-tier governance system that comprises the local, state and federal government. The nation was formed as a federation in 1963 with Malaya, Singapore, Sarawak and Sabah coming together as Malaysia. Singapore would later withdraw from this federation in 1965.

With 124.5 sq km, Sarawak is the largest of the thirteen states of Malaysia and contains 37.7% of the nation's land mass. In contrast, the eleven states of peninsular Malaysia (Malaya) comprise 39.9% of the nation. Sarawak shares Borneo with Brunei Darussalam, Sabah and Kalimantan. The capital of Sarawak is Kuching, in the south of the state. While it is the largest state, Sarawak is also the least populated state, with an average of 19 persons per square kilometer. Over forty different indigenous peoples collectively form the majority of the population at 70%.

The indigenous peoples of Malaysia, collectively known as Orang Asal, comprise Orang Asli groups of Peninsular Malaysia as well as natives of Sabah and Sarawak. The aforementioned Mr. Changgai Dali and his community are Iban and these form the largest population of natives in Sarawak.

Next to Indonesia, Malaysia is the second largest producer of oil palm which is used both as an edible oil and as agrofuel. The two neighboring Southeast Asian countries control 90% of the world's oil palm output. Of the three land regions in Malaysia, Sarawak currently contains the least amount of oil palm plantations; however, aggressive oil palm development policies are seeking to redress this fact.

## **Legal Frameworks relevant to Indigenous Peoples in Sarawak**

This section provides an overview of the frameworks that govern indigenous peoples' access, tenure and ownership of lands, territories and resources in Sarawak. Implicit within Malaysia's recognition of legal plurality is an acceptance of different bodies of law, including customary law and authority.

### ***International Law***

Under international law, Free, Prior and Informed Consent (FPIC) is one of the basic rights enjoyed by indigenous peoples who have established distinct cultures, settlements and civilizations in countries across the world, long before the formation of present nation-states. It recognizes two basic facts: the first that indigenous peoples have always had and still have rights over their lands, territories and resources and the second that indigenous peoples have the right to determine their own direction, priorities and processes of development and lifestyles.

FPIC is most often required in when projects which deal with either 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).' (Tamang, 2005)

The application of FPIC in relation to indigenous peoples is formally and explicitly recognized in international law in the various declarations and conventions, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), ILO Convention No. 169 on Indigenous Peoples (ILO 169), and the Convention on Biological Diversity (CBD). Other instruments like the 2005 UNESCO Declaration on Bioethics and Human Rights set 'prior informed consent in the context of human dignity and autonomy', while the CBD links it to the sovereignty of nations over their resources, and the interests of indigenous and local communities' (Mauro, 2000).

The UNDRIP is a universal instrument adopted by the UN General Assembly. In his comments to the UN Permanent Forum on Indigenous Issues, Permanent Forum member Carsten Smith (2009) states that the Declaration is formulated as a principle of law and, as such, part of binding international law and a source of international law which, according to the Statue of the International Court of Justice Article 38, should be applied by the Court.

With its strong support for the passage of the DRIP from the UN Human Rights Council to the General Assembly, Malaysia has a special obligation to show that the principles and articles of UNDRIP are upheld within the State.

While Malaysia is one of the nations that have agreed to the principles of the UN-DRIP, of the different human rights conventions, Malaysia has only signed and ratified the Convention on Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). On the other hand, Malaysia has been more progressive in endorsing environmental treaties, among them the Convention on Biological Diversity (CBD), which provides several articles, most notably Article 8(j) for the protection of indigenous peoples' resources. In part fulfillment of its obligations under the CBD, the Malaysian Government has established a committee concerned with Access, Benefit-sharing & Traditional Knowledge, with three government agencies led by the Conservation and Environmental Management Division.

## **2. Constitutional and National Frameworks**

Malaysia recognizes the status of indigenous peoples through several articles in the Malaysian Federal Constitution which defines who are indigenous peoples<sup>1</sup>. These are further reinforced in Sabah and Sarawak state constitutions that define native peoples through Interpretation Ordinances. Within Sarawak, a generic (though not universally accepted) term for non-Muslim natives is Dayak<sup>2</sup> whereas Muslim natives will identify themselves as Malay.

Matters pertaining to land, forests and its resources are under the purview of the sub-national governments (i.e. the states). This is further reinforced in Sabah and Sarawak through the 20 Points Agreement negotiated by Sabah, Sarawak and Malaya during the formation of Malaysia. While the federal government has a Ministry of Natural Resources and Environment, individual states are able to make independent decisions over resource use which may lead to a conflict of policies.

### **3. State Frameworks: Statutory, Customary and State Law**

#### **I. Statutory Laws Pertaining to Land and Resources**

In addition to the recognition of indigenous peoples, Sarawak constitutional law recognizes certain land and resource rights bundled under Native Customary Rights (NCR). These include the rights to native land which recognizes the rights of indigenous peoples to their traditional land. The interpretation of traditional land is done in accordance to adat (customary law). Conflicts within adat may be settled through customary leadership and native courts which are also formally recognized.

Native customary rights consists of rights to tradition and custom, land and its resources, defines the territories of the different indigenous communities as well as the right to self-determined development.

Formal recognition of adat by the government began as early as the Brooke period, from 1841. The Brookes did not seek to alienate land where 'no rights or claims, whether documentary or otherwise, existed' (Bulan, 2006). Succeeding governments were not as protective of what the Brookes saw as 'indefeasible rights to land' (Bujang, 2008) and a series of amendments gradually limited the customary rights of the indigenous peoples of Sarawak.

#### *Statutory Laws Pertaining to Traditional Knowledge and Resources*

In 1997, the State government enacted an ordinance called the Sarawak Biodiversity Center Ordinance which sought to 'initiate programmes for the conservation, utilization, protection and sustainable development of biodiversity in Sarawak' (SBC, 2009). In 2003, an amendment was passed to

*... initiate intensive biotechnology based research and development on the State's biological resources – particularly those that have been utilised by indigenous communities and to facilitate the documentation of the fast disappearing traditional knowledge of indigenous communities on the utilisation of biological resources. (SBC, 2009)*

### *Customary Law*

The indigenous peoples of Sarawak's ways of defining territories are clearly embedded in *adat*, a term that encompasses custom, law, history and a way of life. *Adat* law governs the transfer of lands between people in a community, defines the traditional territories of the different indigenous communities and sets out a clear system of punitive fines and penalties when *adat* is broken. *Adat* informs the process of FPIC in a community by identifying who owns the land and therefore whose consent is needed in the development of X or Y parcel of land.

Within *adat*, land is a source of livelihood that

*'governs the whole spectrum of human behaviour pertaining to subsistence farming, fishing, hunting and gathering or harvesting forest products and the environment as a whole.'* (Ngidang, 2002)

Land tenure in *adat* recognizes individual ownership, family ownership and communal ownership of lands. Both individual and family lands are typically farmlands (whether fallow or currently cultivated), and communal ownership is typically assigned over forest areas that are used by the community as a natural resource base<sup>3</sup>. *Adat* does not just define what constitutes these areas of land, it also sets out the physical location of the territory (e.g. the village of Changgai Dali is situated from this mountain range to that mountain range), communal forests (setting out which areas are forest areas and therefore not open for cultivation) and individual lands (e.g. the physical boundaries between Changgai Dali's land and his cousins').

*Adat* is traditionally narrated orally and intra-community disputes are usually mediated by the village head, while inter-community disputes are negotiated with the respective village heads, with the *penghulu*<sup>4</sup> holding the role of the judge of the Native Court. Although the state is empowered to document traditional lands, this process has been slow, hampered by the lack of will from the state government to facilitate the process. A representative of the Sarawak State Government and former State Attorney General, Fong further claims that a full-scale statewide registration of native interests constitutes a 'time-consuming, tedious and costly operation' (Bulan, 2006). In response, many communities have initiated documentation and community mapping of their own areas through training and technical support provided by NGOs, including the Borneo Resources Institute (BRIMAS) and Sahabat Alam Malaysia (SAM).

## **I. Situating FPIC within the different frameworks**

### ***I. 1. FPIC over land and resources***

#### **II. a. FPIC in Customary Law**

The process of FPIC within *adat* will vary depending on the ownership of the resource that is being requested. For lands and resources that belong to an individual or family, FPIC will be sought from the rights-holders. It is not considered necessary (although it is considered polite) to engage consent of the rest of the village or community. If ownership of the resource is in dispute, the village head and then the penghulu will be consulted as to the identity of the rights-holders. From there, FPIC will then be applied to the confirmed rights-holders.

For projects and programs that affect communal lands and resources, FPIC is to be solicited from the community, usually through a series of meetings that take place in a communal space. Traditionally during community meetings, all families and genders are given equal opportunity to raise questions and issues, and discussions typically go long into the night. This dialogue process is known as 'randau' by Iban people.

Decisions are seldom taken during one meeting, especially with regards to land and resources. Several open meetings may be held until a majority view is reached. FPIC can be said to have been attained only if a clear majority of the community is in agreement. The village head and/or committees are then tasked with implementing the decisions of the community.

Although traditional leadership is vested in the village head, it is understood that he is a representative, not the sole decision maker.

#### **b. FPIC in conflicted lands**

The fraught process of FPIC within Sarawak is an extension of the problems that have long existed between the indigenous peoples and the state government on the issue of tenure over land and resources. In cases where the government feels that land belongs to the state, there it simply does not invoke the right of FPIC. Lands usually at stake here include forest lands and lands that the community describes as being fallow but the government describes as being abandoned.

The viewpoint of the state government which, since 1973, has been represented by an oligarchy of business interests fronted by a compliant indigenous Muslim and Dayak clique, is that untitled lands and forest resources of Sarawak belong to the government. In contrast, *adat* clearly defines both lands and forest resources as belonging to identified peoples and individuals.

While the Federal Constitution, the Constitution of the State of Sarawak, the Sarawak Land Code Cap 81 and the Sarawak Forest Ordinance Cap 126 protect native customary rights, the current government chooses to interpret these rights as 'weakly secure use rights on State lands'. This interpretation has led to amendments of the Land Code and Forest Ordinance that not just curtail native customary rights but redefine the nature of it.

In addition, this policy outlook has allowed the government to issue licenses and concessions, mostly given to business interests, over lands that already have clearly defined ownership in *adat*. In the last two decades, over one million hectares of land, 'the bulk of which is Native Customary Rights land, have been leased...to many companies and state agencies (Bujang, 2008)'.

In response, many local communities have mounted legal challenges to these licenses and concessions, the most significant of which is the case known as *Nor anak Nyawai*, in which the judge upheld the preexistence of *adat* law. Although challenged at the Court of Appeal and, finally at the Federal Court, the original judgment as stated by Justice Ian Chin, was upheld. Thus, according to case law, native customary rights land includes cultivated land, communal forests, burial grounds and former longhouse sites found within the longhouse/village territory. Significantly, the court found that common law respected the pre-existence of rights under native laws or customs and affirmed that the Land Code did not do away with native customary rights that existed prior to passing of the legislation (Bulan, 2006). This proved, said Harrison Ngau, an indigenous lawyer, that 'licenses for logging and planted forests and leases for oil palm plantations issued by the state which overlapped with the land within the communal land boundary of the longhouses do not or cannot extinguish the prior NCR of the natives' (Malaysiakini, 2009).

### **c. FPIC in lands recognized as NCR lands**

In many farmlands where Native Customary Rights (NCR) status is not in conflict, the government encourages development of these areas. Indigenous politicians, administrators and civil servants invariably give speeches on the advantages of 'modern development' of land (*vis-à-vis* traditional multi-cropping farming). In pursuit of the vision of modern agriculture that is 'globally competitive' and which prioritizes private sector participation, the Department of Agriculture was converted into a ministry called the 'Ministry of Modernisation of Agriculture'.

Two of the schemes devised are discussed in greater detail below; however, it suffices to note that these schemes are not envisioned to bring about just economic and social changes among indigenous peoples, but are about 'power, control and the expansion of state spaces' (Cooke, 2007).

## **FPIC in Practice**

### **1. FPIC processes in land schemes**

The majority of indigenous peoples in Sarawak own and manage multi-crop farms that include both subsistence and cash crops. Decisions on which cash crops are grown are made by the indigenous landowners, most often in response to the prevailing market value of the different crops as well as government promotion of certain cash crops. Many indigenous landowners, responding to favorable market prices, have in the last few decades set aside areas of land for oil palm. Landowners who engage in the traditional multi-crop farms sell the raw fruit bunches to intermediaries at prices that follow market prices.

The FPIC process within the small holdings model is not applicable, as landowners themselves will plant on their land. There may be cases of conflict over ownership, most commonly among family members, however these are usually dealt with and actual ownership is established prior to actual cultivation of land.

In contrast to traditional smallholdings, the state government widely promotes two agricultural schemes meant to encourage increased returns to the state and the local communities. Bujang (2008), Majid Cooke (2006) and Bulan (2006) provide analyses of the impact of these schemes, and this review focuses primarily on the issues pertaining to FPIC, both under the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) and under Konsep Baru<sup>5</sup>.

The first scheme is under the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) which seeks to make

‘use of the existing unutilised or under-utilised lands for the benefit of landowners or claimants without jeopardising their rights of ownership or claim to such land. Implementation of projects are modelled in such a way that SALCRA will provide the funds, expertise, and management, while the landowners or participants are to provide land and labour (if they can)’ (SALCRA, 2009).

Within the SALCRA model, a village or group of villages will jointly provide land which is then developed into a plantation. SALCRA invests start up capital and management, the costs of which are deducted from dividends that are meant to be paid out on a yearly basis to the shareholders (i.e. the villages). In addition, the plantation is meant to create jobs for the villagers who can earn income in addition to dividends.

While there is no formalized FPIC process, there is a model used for soliciting consent and participation within SALCRA schemes. The process starts with SALCRA staff introducing the model at a community gathering, during which consent is sought from the villagers to be involved in the project. A potential area is then identified and surveyed and an agreement made between involved parties.



When SALCRA was first established, it was promoted as a good model for indigenous peoples as it did not force communities to abandon their traditional farming. There was also the promise that land titles would be issued (Bian, 2004). The model, however, has since been subject to much criticism by indigenous peoples themselves, as high operating costs, alleged corruption and mismanagement reduced the value of dividends payable to the communities. In addition, the promise of jobs seldom materialized because fair wages were deemed by the SALCRA management as being 'too high', thus preferring to employ illegal migrant workers for less.

In 1981, a government agency, the Land Custody Development Authority (LCDA) was established with an objective to be the 'catalyst of land development in Sarawak' (LCDA, 2008). Under LCDA, a joint venture concept (JVC), more commonly known as Konsep Baru (New Concept), was implemented in various communities throughout the state.

Konsep Baru describes a model of land trust that is meant to enable native communities to partner with companies to 'develop' the land and benefit economically from it. Native lands, while recognized, do not have titles, preventing the indigenous landowners from raising capital needed to 'develop' the land. Through Konsep Baru, a land bank is created from the traditional lands, administered by LCDA as the trustee. A provisional title is issued to the company. In Changgai Dali's case, the village lands were put into a land bank, and a joint venture agreement was entered into by the villagers, LCDA and BLD (the private sector partner). A provisional lease over the land for 60 years was then issued to BLD, with the expectation that the land would be eventually returned to the villagers.

Agents of the process of acquiring FPIC include the state and local governments. As in SALCRA, there are no formalized procedures, however, typically agents of the LCDA are the initial promoters of the Konsep Baru programme. These are discussed *in situ* with the communities until a process of consensus is reached. Local government servants and politicians are, in addition, brought in to support the scheme.

In a typical consent-seeking process, 'campaigns, dialogue sessions, meetings and civic assemblies were held to promote the JV project. The Minister and LCDA made many promises and encouraged all the NCR landowners in the affected areas to participate' (IDEAL, 2000).

The process of FPIC in SALCRA and Konsep Baru is thus initiated by government. In the case of Konsep Baru projects it is usually at the behest of a pre-identified private sector entity that is interested in investing in oil palm in the general area. While

consent is sought during a consultation process, this consultation process is also an exercise to promote the supposed 'wealth, development and modernization' that the community will acquire upon entry into the scheme, heavily biased towards the advantages of the scheme with little information on the risks and challenges involved.

The semi-authoritarian tendencies that characterize the Malaysian state reduce avenues for access to alternative information and dissent. The space that civil society moves in, is limited and restricted, bound by repressive laws that govern organization, freedom of expression and access to information. In addition, civil society is often stigmatized in local media and by the governing state as being unfriendly, anti-development and in opposition to the rule of order and progress that is offered by the ruling government. As a result, intervention by civil society into the FPIC process is not only not done by the stakeholders involved in these land schemes, it is also actively discouraged.

For government and private sector stakeholders, queries by civil society are either outright ignored or dismissed through the use of catch phrases that include or imply being anti-development. While concerned landowners themselves may freely avail of information provided by these groups, they risk being branded by association, and the act of expressing similarity of ideas puts at risk their social standing and relationship with the local government.

Ngidang (2005) calls this supposed process of FPIC from the community 'cooptation through the psychology of consensus', linking it back to fundamental attributes of Sarawak indigenous society where landowners, once a community decision has been made, will participate in it regardless of their reservations 'primarily to maintain solidarity and harmony in the longhouse and for fear of being branded 'deviant' and 'anti-development''

Thus, though the indigenous peoples may not fully understand the concept and risk of joint-venture formations, they are induced to give consent through the combined force of persuasion from authority figures and compliance with a harmonious community decision. Majid Cooke (2005) describes the resulting pattern of communication as one where key questions about Konsep Baru 'concerning the security of tenure of Native Customary Land and the economic viability of joint ventures were not being openly debated, for fear of being stigmatised'.

Of Konsep Baru, Bulan (2006) remarks that 'Many people participated in the projects without a full understanding of what such alien concepts as the trust, a joint venture, or shares in a company, entailed. This could give rise to the question of whether there has been effective consultation and informed consent on the part of the participants'.

In 2000, IDEAL, a Sarawak NGO, did a survey of participation in Konsep Baru joint ventures and found that some longhouse villages participated after illegal bulldozing of their land and pressure from neighboring villages. This despite unclear information about Konsep Baru and its implementation 'especially in the division of shares, dividends and the return of the land at the end of the 60 years lease. Most of the community members are worried that there will be no land left for future generations. Without it, their survival will be extremely difficult'.

## **2. FPIC in traditional knowledge**

The issues that surround participation in land schemes are also present when acquiring traditional knowledge from communities. Traditional knowledge is intangible and this, coupled with the innate hospitality of Sarawak's indigenous peoples, renders traditional knowledge vulnerable to exploitation by people outside the communities.

In 1996, scientists announced that they had discovered that the local Bintangor tree could be a cure for AIDS – without referencing the fact that indigenous peoples in Sarawak had long known about the medicinal value of the plant, using it to cure common ailments including stomach aches, headaches, skin rashes, rheumatism, diarrhea and childbirth after care (Munan, 1999).

Initially, the development of the extract from the Bintangor tree, Calanolide A, into a drug was done by an American company called MediChem Research who then formed a partnership with the State Government of Sarawak in 1996, a 50:50 joint venture company called the Sarawak MediChem Pharmaceuticals. Should Sarawak MediChem Pharmaceutical's drug prove marketable, Sarawak and MediChem will split the revenues equally (NST, 2005).

Within this context, the Sarawak Biodiversity Centre plays the role in regulating research in the state. Its other functions include 'facilitating the documentation of Traditional Knowledge of the local communities' use of biodiversity', stating that 'with more than 30 indigenous groups in the state, there is a wealth of such knowledge, which needs to be documented as heritage before they are lost in the fast changing world'.

SBC as well compiles registers of traditional knowledge, so that 'if the knowledge is used, the benefit can be shared. The onus is on the government to act in trust for the community and negotiate on their behalf' (Oorjitham, 2000). On the other hand, participating communities on the ground do not understand the purpose of the documentation and, in some cases, are not given a copy of the register of knowledge.

Although Parshuram (2005) describes the SBC an example of FPIC, the Center does not enable protection for indigenous knowledge holders but rather protects the

state as an institution against misappropriation of indigenous knowledge from the state. The ordinance does not identify rights of knowledge holders nor enables a benefit-sharing regime that rewards indigenous knowledge holders, instead vesting benefit-sharing to the state. While the SBC ordinance may be described as a FPIC framework for the state against foreign interests, its role in protecting the collective rights of indigenous peoples' knowledge is unclear within the ordinance, as well in the practice of its programs related to traditional knowledge. In the case of the bintangor tree, the silence of SBC on potential benefits to the original holders of the knowledge or at least a discussion on which indigenous communities' knowledge was instrumental in providing such medical benefit to the world does not render confidence that the SBC can be said to be a model for a FPIC framework for indigenous peoples.

In addition, several criticisms of SBC originating from civil society, include the lack of flow of information, especially the lack of transparency with the AIDS drug (BRIMAS, 2005), the ease by which indigenous knowledge documentation would enable scientists to access traditional knowledge but not benefit from the profits, and the lack of public discussion or participation by indigenous peoples in the formation of the Sarawak Biodiversity Centre Ordinance (IDEAL, 2001). In addition, civil society questioned whether indigenous peoples would have safeguards from the eventual patenting of genetic material stating that 'when a medical plant that is currently used by the indigenous people is patented, the continuous use of the plant by the communities would be considered as an offence' (IDEAL, 2001).

### **Conclusions & recommendations for integrating FPIC in the current frameworks**

Since the late 90s, indigenous activists have articulated the need for free, prior and informed consent at the international level. This need, in some respects, acknowledges the right of indigenous peoples 'to own and control their territories and resources' (Tauli-Corpuz, 2005). The process of needing consent assumes some level of ownership of the resource being accessed. Within Sarawak, where control over territories and resources continues to be a contested space between indigenous peoples and the state, a truly FPIC process cannot be said to be practiced or in place, despite the frameworks that acknowledge indigenous control over forests, resources & knowledge.

The process of FPIC recognizes

'an acceptance of indigenous peoples' own processes of decision-making...in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws.' (Colchester, 2007)

Any process of FPIC that does not hold these principles of ownership and acceptance of the indigenous right to decision-making will be flawed. Consent and participation can be manipulated purely through the exploitation of the “I” in FPIC – information, rendering the “F” invalid.

The process of FPIC should be understood as a complex one that is dependent not only on a set of principles but also upon the character and culture of the indigenous community itself. When FPIC is regularized and reduced to a process, not taking into account the decision-making culture and practices of the people, this further increases the risk that true FPIC is not solicited and obtained. This then manifests later as problems and issues.

Based on the Malaysian case study, the following specific recommendations are proposed to ensure that the character of FPIC is maintained in consultation processes.

***Free***

1. The consultation process should take into account the traditional culture of indigenous peoples. Potential avenues for exploitation of the process due to aspects of this culture need to be examined and understood prior to the initiation of the FPIC process.
2. Indigenous peoples must have access to all information needed including full disclosure as to the parties involved as well as assumptions and risks of the schemes.
3. Indigenous peoples should be able to access sources of dissenting information without fear of reprisal from government agents or involved companies or organizations.

***Prior***

1. Consultation processes should be initiated prior to private sector interest in the area. Indigenous peoples should be aware of programs like SALCRA and Konsep Baru even if they are not specifically targeted by the process at the time.

***Informed***

1. That native institutions and civil society be able to carry out capacity building on trusts and other financial investment programs and schemes.
2. That the nature, risks and challenges of joint venture partnerships be understood by affected communities
3. That sound financial information including projected future returns as well as opportunity costs, be delivered to the communities, including assessments of future prices.

### **Recommendations for Indigenous peoples and organizations**

- FPIC begins in the communities. While conditions can be set for improving the FPIC process, it is ultimately the communities that are determined to defend their lands, territories and resources, and will insist on FPIC. Indigenous peoples need to understand this as part of a basic right of their being indigenous peoples.
- Indigenous peoples should insist that any consultation process, including that of sharing information, includes the right to say no.
- Indigenous peoples need to continually strengthen and renew their knowledge of *adat* as these not only contain the principles of access to their lands and territories but also in order to reaffirm their collective identity as indigenous peoples.
- Indigenous peoples should be prepared to engage private and independent financial and legal advisors who can safeguard their interests and to insist upon this as part of the obligations of the prospective investor.
- Indigenous organizations and organizations that support indigenous peoples need to support indigenous peoples in the strengthening of *adat* and basic rights.
- Indigenous organizations and organizations that support indigenous peoples need to understand the nature and risks of sharing traditional knowledge and help devise strategies to protect this knowledge.

### **Recommendations for Governments**

- Clarify and ensure the security of native land before the implementation of Konsep Baru schemes.
- Harmonize, recognize and respect different legal systems and ensure that statutory laws do not conflict with pre-existing laws.
- Secure commitments to respecting indigenous peoples' rights of private sector companies and be prepared to introduce severe penalties for breach of trust.
- In the case of joint ventures, allow full and effective participation of the local communities in the active management of joint ventures.
- Secure clauses for labor and employment of indigenous peoples at fair labor prices and other labor conditions.
- In the case of traditional knowledge, define and separate benefits sharing that accrue to indigenous peoples and those that accrue to the state. Mechanisms can be made for collective trusts meant for these peoples.

### **Recommendations for Corporations**

- Understand the risks and additional costs involved in pursuing an FPIC process that is fundamentally flawed and pursue more appropriate processes.
- Understand and respect the different legal frameworks that govern indigenous lands and resources.

- Undertake an obligation to ensure that the communities are regularly informed about the progress of the joint venture.

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<sup>1</sup> The specific **term** used in the constitution is “Malays and natives of any of the States of Sabah and Sarawak”. Do you mean the term \*for\* indigenous peoples, or does the constitution specify that Malays and natives... are indigenous peoples?

<sup>22</sup> There are over 40 different distinct indigenous groups within Sarawak and not all necessarily identify with the term.

<sup>3</sup> This statement is subject to certain differences between the different Sarawak indigenous peoples. For example, Jagoi people will also have forest lands within a territory that belong to a certain descent group but not to the entire village.

<sup>4</sup> A *penghulu* is a government appointed representative of several communities.

<sup>5</sup> A third, oldest scheme is based on the FELDA model but the government since abandoned this model in 2002.