

**Dansk Ornitologisk Forening**

BirdLife Denmark

**Indigenous Peoples**

**in**

**DOF's Development Cooperation**

Policy Paper

October 2013

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## **Abbreviations:**

CBD	Convention on Biological Diversity
CPD	Community Partnership Department
CERD	Convention on the Elimination of All Forms of Racial Discrimination
DOF	Dansk Ornitologisk Forening/ BirdLife Denmark
FPIC	Free, Prior and Informed Consent
ICESC	International Convention on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IWGIA	International Working Group for Indigenous Affairs
REDD	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

## 1. Background

Indigenous peoples are addressed in several Danida documents, most specifically in Danida's *Strategy for Danish Support to Indigenous Peoples*, last reviewed in 2012. The *Strategy for Danish Development Cooperation*<sup>1</sup> refers to the rights of indigenous peoples as a component of a Human Rights Based Approach while *A Greener World for All. Strategic Framework for Natural Resources, Energy and Climate Change*<sup>2</sup> states that 'Denmark will support indigenous peoples' rights to free, prior and informed consent'. Indigenous peoples live in some of the localities in Africa and Asia where DOF supports sustainable natural resource management and will also be part of our program. Our goal is to strengthen our and our BirdLife partners' attention to the rights of local indigenous communities. Our emphasis will be on the full involvement and participation of these communities, on integrating their knowledge and traditional natural resource management systems in the program and on supporting the process of Free, Prior and Informed Consent.

There are at least 370 million people around the world divided into approximately 5000 distinct peoples considering themselves to be indigenous. Most of them live in remote areas. They have their own distinct languages, cultures, social and political institutions that are often different from those of mainstream society. Many indigenous peoples are excluded from society and deprived of their rights as equal citizens of a state. Their continued existence as peoples is closely connected to their possibility to influence their own fate and to live on their customary lands in accordance with their own cultural patterns, social institutions and legal systems. Indigenous peoples often inhabit land, which is rich in natural resources. They have customary rights to these lands and resources, but often face constant threats of territorial invasion, plundering of their resources, cultural and legal discrimination, as well as lack of recognition of their own institutions.

There is no universal and unambiguous definition of the concept of 'indigenous peoples', but there are a number of criteria by which they can be identified. The most widespread definitions are those proposed in the International Labour Organization (ILO) Convention no.169 that states that people are 'considered indigenous either:

- because they are descendants of those who lived in the area before colonization; or
- because they have maintained their own social, economic, cultural and political institutions since colonization and the establishment of new states'.

Furthermore, self-identification is crucial.

A similar definition is given by the UN<sup>3</sup> stating that: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves

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<sup>1</sup> The Right to a Better Life 2012

<sup>2</sup> September 2013

<sup>3</sup> Martín Cobo's Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986)

distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.’

## 2. Indigenous peoples and rights

The ILO *Indigenous and Tribal Peoples Convention* 169<sup>4</sup> and the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) are the most important international instrument for indigenous peoples’ rights. The following articles of UNDRIP are of particular relevance for the rights of indigenous peoples in the context of the DOF program:

- The right (of the indigenous group) to participate in decision-making through representatives chosen by themselves in accordance with their own procedures;
- The right to be consulted in good faith, through representative institutions, with the objective of seeking Free, Prior and Informed Consent, before the adoption and implementation of legislative or administrative measures that may affect them;
- The right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;
- The right to determine and develop priorities and strategies for the development or use of their land or territories and other resources;
- The right to promote, develop, and maintain institutional structures and distinctive customs, spirituality, traditions, procedures, practices

Other international instruments that address the rights of indigenous peoples include the Convention on Biological Diversity (CBD), the International Convention on Economic, Social and Cultural Rights (ICESCR), and the international Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The rights of indigenous peoples are contentious in the countries in which DOF works and there is generally little recognition of these rights. Uganda was absent in the voting on the UNDRIP when it was adopted by the UN General Assembly in 2007. The 1995 Constitution offers no expressed protection for indigenous peoples but Article 32 places a mandatory duty on the state to take affirmative action in favour of groups who have been historically disadvantaged and discriminated against. This provision is the basic legal source of affirmative action for indigenous peoples in Uganda.<sup>3</sup> The Land Act of 1998 and the National Environment Statute of 1995 protect customary interests in land and traditional uses of forests. However, these laws also authorize the government to exclude human activities in any forest area by declaring it a protected forest, thus nullifying the customary land rights of indigenous peoples. Kenya abstained from the vote when UNDRIP was adopted. The country has no specific legislation governing indigenous peoples. However, the Indigenous Peoples’ Planning Framework, designed and implemented in 2006 by the Office of the President, in collaboration with the World Bank, provides a basis for free, prior and informed consultation. The Constitution of 2010 specifically includes minorities and marginalized communities as a

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<sup>4</sup> Adopted in 1989



result of various historical processes, with specific reference to indigenous peoples. This has, however, not deterred Kenyan authorities from forcibly relocating indigenous communities from their lands. Nepal has ratified the ILO Convention 169 and voted in favour of the UNDRIP. The 2007 interim constitution of Nepal focuses on promoting cultural diversity and talks about enhancing the skills, knowledge and rights of indigenous peoples. The indigenous peoples of Nepal are waiting to see how these intentions will be made concrete in the new constitution, which is in the process of being promulgated. Indonesia is a signatory to UNDRIP but government officials argue that the concept of indigenous peoples is not applicable, as almost all Indonesians are indigenous - the same argument is often presented in African countries - and thus entitled to the same rights. Consequently, the government has rejected calls for special treatment by groups identifying themselves as indigenous. However, the third amendment to the Indonesian Constitution recognizes indigenous peoples' rights and in more recent legislation, there is an implicit, though conditional, recognition of some rights of 'indigenous peoples'.

### **3. Indigenous peoples and natural resource management**

Indigenous peoples are known to have a close relation to and knowledge of the natural environment in which they live. Because of this vast knowledge of and historic connection with their environment they are increasingly viewed in a conservation context as important allies in sustainable management of these resources. There is a wide array of reports and working papers addressing indigenous peoples and natural resource management (NRM). IWGIA (The International Working Group for Indigenous Affairs) has published a manual *Understanding Community Based REDD+*. The guidelines from WWF et al on *Integrating Indigenous and Gender Aspects in Natural Resource Management*<sup>5</sup> are also useful. Both provide insights on how to integrate indigenous peoples concerns with natural resource management, conservation and gender. Indigenous peoples living in tropical forests to a high extent depend on the forest and its resources for their daily use – food, building materials, medicines, and trade. Forests are also valuable for cultural and spiritual reasons and they provide opportunities for alternative incomes that can be combined with sustainable forest management, such as Non Timber Forest Products (NTFP).

Where development practitioners and government officials often go wrong is when they equate indigenous peoples with poor vulnerable people generally. Most of them are in fact poor and vulnerable but they also have a specific identity that is often reflected in their mostly communal ownership to the land they inhabit (or lost), their culture and religion, their social structure and gender roles and in some cases their claim to self-determination. Another common mistake is to regard indigenous communities as homogenous entities and thus to fail to address gender, power structures and other facts of life that have great impact both on people's livelihoods, their relation to the environment, their dealing with changes and capacity to be involved.

The protection of ecosystems almost always entails some level of conflict and indigenous peoples are often particularly affected. Development and/or nature

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<sup>5</sup> Copenhagen 2005

conservation activities often restrict peoples' access to livelihood resources in order to protect biodiversity. Conflicts also arise when some affected communities receive benefits that others do not or think that they do not receive. Enforced relocation is another common cause of conflict. However, development and ecosystem restoration are not only causes of conflict and impacted by conflicts but may also provide opportunities for conflict resolution and cooperation. Awareness raising and training is important, participatory monitoring and response systems in affected communities useful. Important steps in a conflict situation may include consultation, dialogue, negotiation and mediation where a third party helps identify possible solutions. Apart from the strict application of free, prior and informed consent there are a number of mitigation measures that have proven successful. A first important step is to integrate conflict sensitivity into planning and implementation

#### **4. Free, Prior and Informed Consent**

Free, Prior and Informed Consent (FPIC) is the collective right of indigenous peoples to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: Free, Prior and Informed Consent. FPIC implies informed, non-coercive negotiations between investors (or other implementing agencies) and indigenous peoples prior to the development and establishment of activities on their customary lands. The principle means that those who wish to use customary lands belonging to indigenous peoples must enter into negotiations with them. It is the communities who have the right to decide whether they will agree to an intervention or not, once they have a full and accurate understanding of its implications for them and their land.

The concept of FPIC evolved in relation to indigenous peoples and their respective territories but is also more generally used as a social safeguard that respects the rights of any local community whose livelihoods are affected by an external initiative. In the case of REDD+, the value and need for FPIC has been identified not only for protection of local communities' rights and forest-dependent livelihoods but also for reducing risks on the side of the project proponent through ensuring mutual understanding and agreement between all parties concerned

The application of FPIC will inform the DOF program's interaction with indigenous communities. DOF is well aware that FPIC is not an easily to implement concept in the local contexts in which we work, first and foremost because the indigenous peoples' rights to their traditional territories are often not recognized. Some of them - as the Batwa in Echuya in Uganda - have been excluded from their lands. However, the FPIC process also offers important opportunities for advancing knowledge and capacity on indigenous peoples' rights and for genuinely involving them. Implementation is a process that requires 5 major steps:

1. Training of partners/ staff and other key stakeholders;
2. Information to and consultations with local communities;

3. Documentation of community decisions and participatory evaluation of process;
4. Planning and implementation;
5. Monitoring and evaluation

### *Training*

The training provides basic understanding of legal instruments, particularly UNDRIP and of relevant national laws, e.g. on forests, that support or are contrary to indigenous peoples' rights. It also builds knowledge on how to mainstream FPIC into the program. The training and capacity building is a process that provides stakeholders with an understanding of the specific rights and situation of local indigenous communities and on how to operationalize FPIC

### *Information to and consultations with local communities*

Local indigenous communities receive all necessary information and facts about the program and its long and short term objectives. They know about their own and other stakeholders' roles, rights and responsibilities and the current and potential benefits for the communities. They are also fully informed about the FPIC process. The information is accurate, transparent and complete and is provided in a manner and a language that is understood by everybody in the community. In the following consultation process the freedom of communities to undertake their own internal and collective decision making processes is recognized and respected. The whole community, including women, have an equal right to participate in consultations. Other stakeholders may be invited to support the process.

### *Documentation of community decisions and participatory evaluation of process*

The consultations and the negotiation process are genuinely free and participatory and involve the whole community or elected representatives of that community. The process is well documented and includes documentation on contrary opinions, and challenges (e.g. community versus program priorities or conflicting views within a community). If negotiation fails, an independent party can be invited to mediate. Final decisions and agreements on cooperation are signed and documented, possibly in the presence of a legal advisor. All parties that are signatories to agreements shall adhere to these agreements. The agreements are based on the prior consultations processes and are fair, voluntary and understood by all. All parties evaluate the process and plan on how to monitor future implementation of the joint agreements in a participatory manner, and on how to deal with potential conflicts and other problems or opportunities, that may arise.

### *Implementation of agreements*

The BirdLife partner and staff work with key stakeholders to formulate activities to be implemented as part of the program for the benefit and inclusion of local indigenous communities. There may be a need for studies to provide information and

data on e.g. indigenous knowledge on biodiversity and management practices. Capacity building and advocacy are specifically addressed.

### *Monitoring and evaluation*

Genuine participatory monitoring of the FPIC process, agreements and other activities will be a regular activity that makes all involved able to measure and compare progress and results. There may be a need for revisions of some of the decisions taken. Ideally, though, the prior process of informing and consulting leads to common consent that is not contested by either party. All agreements are based on sound knowledge of the economic and other implications they may have. Once an agreement has been signed as a result of a FPIC process all parties follow the agreement for a specific period of time, as noted in the agreement in order to allow for time to monitor the decisions. Social, economic, political and other transformation which is incurred both by the program and external actors and events demand an adaptive approach when dealing with indigenous peoples and local communities who are themselves affected by this transformation. On-going communication and consultation between parties will allow for continuous improvement.

## **5. Goals, results and strategic steps**

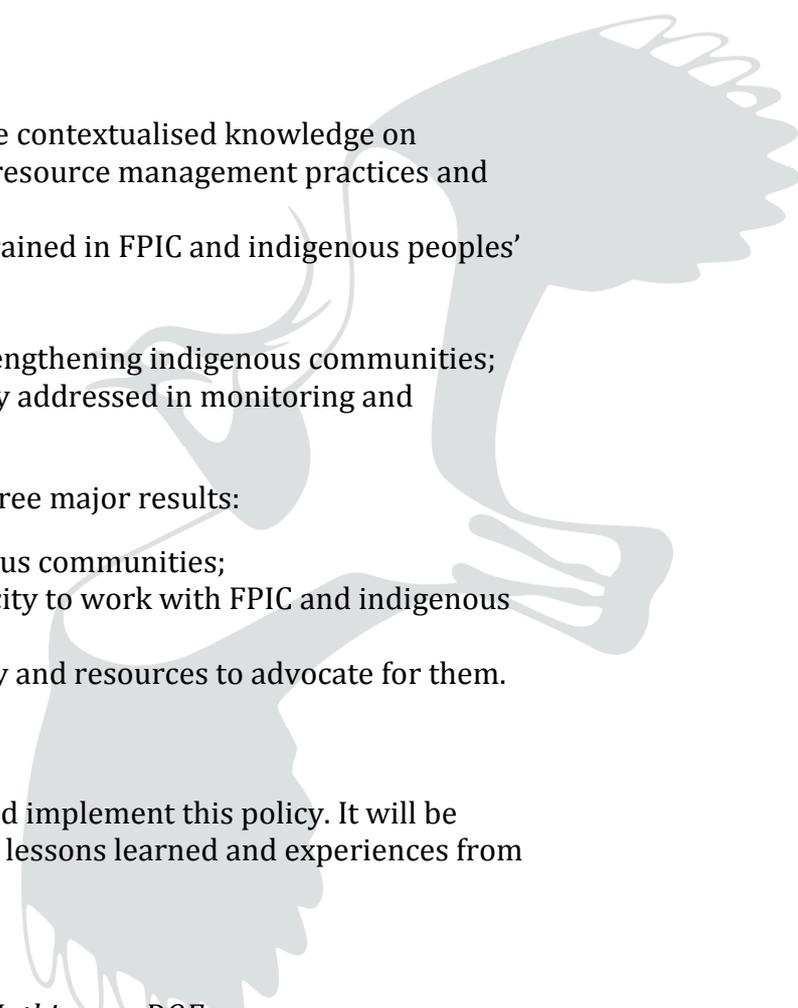
DOF's programmatic focus on biodiversity conservation, sustainable natural resource management, improved livelihoods of local communities, strengthened civil society and advocacy is highly relevant for our interaction with local indigenous communities. Our goal is to support these in freely exercising their rights in relation to the sustainable management of natural resources in their traditional areas and to help them fight poverty, marginalisation and discrimination. We primarily focus on those aspects that can achieve reachable goals within the program:

We aim to ensure that indigenous communities

- are recognized by other stakeholders as having specific customary rights and identity and are respected on an equal footing;
- participate fully in program benefits;
- are adequately represented in stakeholder consultations, trainings etc.;
- have access to capacity building for advocacy, networking, organisational and technical skills;
- can contribute to the program with their traditional natural resource management practices and knowledge;
- have resources and capacity to advocate for their role and rights in natural resource management.

DOF envisages a number of steps taken to address indigenous communities:

1. Indigenous peoples are specifically addressed in program development, and activities to empower and involve indigenous communities are reflected in the budget, outputs and indicators;

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2. Analytical baseline studies provide contextualised knowledge on indigenous communities' natural resource management practices and traditional knowledge;
  3. Staff and other stakeholders are trained in FPIC and indigenous peoples' rights;
  4. A FPIC manual is produced;
  5. FPIC and specific activities for strengthening indigenous communities;
  6. Indigenous peoples are specifically addressed in monitoring and evaluation

The steps are expected to produce at least three major results:

- X number of activities target indigenous communities;
- Partners and stakeholders have capacity to work with FPIC and indigenous peoples' rights;
- IP know their rights and have capacity and resources to advocate for them.

## **7. Conclusions**

DOF commits itself to share with partners and implement this policy. It will be reviewed and possibly revised based on new lessons learned and experiences from the program.

*The policy paper was prepared by Charlotte Mathiassen, DOF*