



Principles and Criteria Review

Briefing Paper on Customary rights of Indigenous Peoples

Bonn, 12 November 2010

This paper was produced by the P&C Review Working Group to explain its approach to and address stakeholder concerns raised in relation customary rights of Indigenous Peoples. The paper will also serve as a basis for further discussions at the P&C Review Workshop on the 15th and 16th of November 2010. The P&C Review Working Group does not pretend that this could be The Last Word on the issue.

Should you have any further questions regarding this issue, please contact Matthias Fecht at m.fecht@fsc.org

In line with its terms of reference, the tasks of the P&C Review Working Group are mainly –

- to clarify the FSC requirements, so as to reduce disparities in evaluations by ASI-accredited conformity assessment bodies;
- to shift the wording of Criteria towards outcomes where practicable; and
- to minimize the variety of interpretations found in national forest stewardship standards and national adaptations of the generic standards developed by the conformity assessment bodies.

What is the issue as perceived by some FSC stakeholders?

In draft D2-0 and D3-0 of the revision of the FSC Principles and Criteria, Principle 1 (Compliance with laws), Explanatory Note 2, the P&C Review Working Group proposed –

“Where customary law is nationally recognized to have legal status alongside statutory and common law, or civil law, such customary laws have the same status in the FSC Principles and Criteria for the purpose of Principle 1. Where customary law is nationally recognized to have legal status but is not equivalent to statutory and common law, its separate jurisprudence is effective with respect to the FSC Principles and Criteria in its own area of legal competence.”

This note was included to address the situation of states where there are parallel or plural jurisdictions: written statutory and case law alongside legal systems which are traditional for and considered legitimate by traditional and Indigenous Peoples (IPs). However, the comments on draft 3-0 indicate that clarification is needed.

Some stakeholders were also concerned about conflict which can arise when The Organization holds a logging concession which has been validly issued by a government agency but without the free, prior and informed consent of the Indigenous People in the same area.



What is the response by the FSC Working Group?

This Briefing Paper is intended to cover legal space between autonomous customary law and formal statutory or government law.

The legal context for The Organization and other stakeholders is clear in countries which work through common law, the combination of statutory or government written law passed by the national legislative body and case law derived from court cases. This legal context is the basis for FSC Principle 1.

For Indigenous Peoples who respect and apply customary law, FSC Principle 3, Criterion 3.4, requires The Organization to recognize and uphold the rights, customs and culture as defined in the ILO Convention 169 (1989) and the UN Declaration on the Rights of Indigenous Peoples (2007). This requirement is regardless of whether the ILO Convention 169 has been ratified by the country where the Management Unit is located. The customary laws may have been written down but often they are unwritten and may not have a fixed form. That is, they evolve continually according to local circumstances and needs of those IPs. Such variation is exemplified in the explanatory notes to proposed Criterion 3.3.

In some countries government or statutory law also incorporates procedures which invoke customary law. For example, in Melanesia, land disputes in traditional areas may be settled with traditional mediation procedures involving recognized village authorities but not involving conventional court procedures. Such mediation is generally accepted by all parties as legitimate and decisions are respected, including by the State.

Many countries have some form of plural jurisdictions. For example, religious courts may rule on religious subjects including marriage and divorce in the context of that religion, when all parties accept that jurisdiction and it does not conflict with statutory or government law. Disputes about land and other natural resources may also be resolved by customary law land courts, again if all parties respect and acknowledge the legitimacy of the customary law process. Such separate jurisprudence (law-giving) may be recognized by national authorities as valid in the defined area or areas of separate competence.

Actors in a dispute who are not Indigenous may still be subject to the customary law. That could include a non-indigenous Organization if the case falls within the competence of customary law as recognized by national authorities and the topic is directly related to a Criterion in the P&C. Contractors and all other persons or organizations permitted by The Organization to operate in the Management Unit are liable in the same way. For example, a dispute may occur over a topic which is not an offence in statute law but is an offence in customary law. The Organization must answer to the customary law court in such a case. This is the substance of the second half of Explanatory Note 2 to Principle 1, quoted above.

In countries which do not recognize the validity of customary law, government agencies may issue legally valid logging concessions in areas where customary law is practiced but without seeking the free, prior and informed consent of the traditional right holders.



Criterion 3.1 requires The Organization to identify the traditional or customary rights of Indigenous Peoples. Criterion 3.2 requires these rights to be upheld by the Organization. Criteria 3.2 and 3.3 specify that delegation by Indigenous Peoples of control over activities must protect their rights, resources, lands and territories. Criterion 3.4 stipulates the international legal framework that underpins these rights (UNDRIP and ILO 169) and describes all potentially applicable provisions under this framework with which an Organization must comply.

If upholding indigenous rights (required by Criterion 3.4) causes a conflict with national law or regulations, then FSC-STD-20-007, section 8.20, applies. If there are conflicts between national laws which prevent the P&C from being applied, The Organization should apply the conflict and grievance resolution procedures required under Principle 1 and seek a mediated solution. If The Organization has tried to obtain a valid legal judgment, and has failed, then the affected Management Unit(s) would be disqualified from certification.