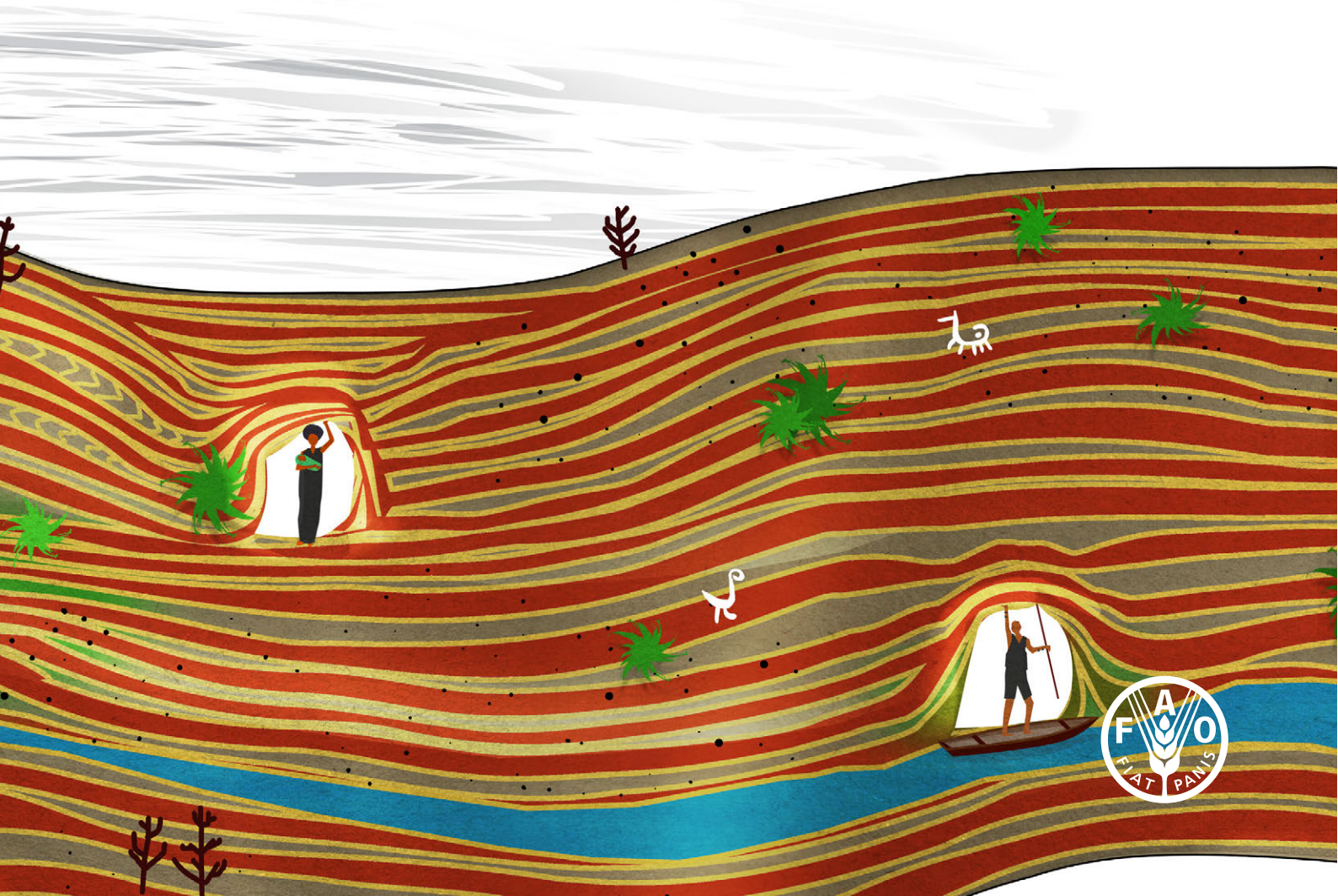


Respecting free, prior *and* informed consent

Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition



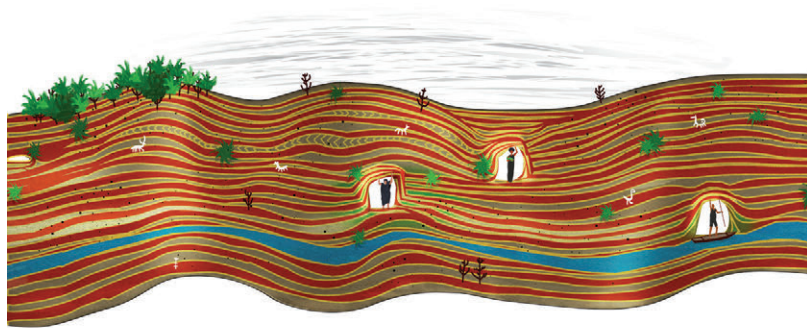
The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors. They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: www.fao.org/nr/tenure

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This publication is intended to support the use of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of states in their implementation.

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Foreword

Tenure and its governance are crucial elements in determining if and how people, communities and others are able to acquire rights to use and control land and other natural resources. Responsible governance of tenure promotes sustainable social and economic development that can help eradicate poverty and food insecurity and encourages responsible investments. Improving governance of tenure is the objective of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (Guidelines), which serve as a reference and set out principles and internationally accepted standards for responsible practices.

Weak governance of land and natural resources, coupled with lack of secure tenure, in the context of rising global populations, increasing living standards, rising commodity prices, global trade and the use of food crops such as agro-fuels, are placing heavy pressure on farmlands and forests. Ill-regulated land acquisition has become a major problem especially in sub-Saharan Africa and Southeast Asia, posing threats to food security, local livelihoods and sustainable natural resource management, and triggering land conflicts and human rights abuse. Particularly at risk are marginalized social groups, including indigenous peoples, other customary landowners, women, lower-caste people and ethnic minorities.

Concern about the long-term social and environmental implications of accelerated land acquisition has grown, and international human rights and standard-setting bodies have begun to explore and apply new norms and procedures designed to help regulate this process. The aim is not to discourage investment and prevent the development of new farmlands, but rather to ensure that such expansion occurs in ways that respect rights, secure favourable and sustainable livelihoods, and divert pressure away from areas that are crucial to local livelihoods and have high conservation value.

The Guidelines state that responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights.

This technical guide on *Respecting free, prior and informed consent* (FPIC) sets out practical actions for government agencies to respect and protect FPIC and for civil society organizations, land users and private investors globally to comply with their responsibilities in relation to FPIC, as endorsed by the Guidelines.

Maria Helena Semedo
Deputy Director-General
Coordinator Natural Resources

Contents

Acknowledgments	III
Foreword	IV

Introduction

Why you might need this Practical Guide	3
Duties and responsibilities	7
From whom should FPIC be obtained?.	9
Benefits of FPIC	10

Practical guidance

Laying the ground for implementation	13
How prior is 'prior'?	16
Identifying rights-holders	16
How should this be implemented?	17
Ascertaining the legal status of the land	19
How should this be implemented?	20
Mapping claims to and uses of land	22
How should this be implemented?	22
What to consider	24
Completing the mapping process	25
Identifying decision-making institutions and representatives	25
How should this be implemented?	26
Carrying out iterative consultations and information-sharing	28
How should this be implemented?	28
Providing access to independent sources of information and advice	33
How should this be implemented?	33
Reaching agreement and making it effective	34
How should this be implemented?	34
Monitoring and verifying agreements	35
How should this be implemented?	36
Establishing a grievance process	36
How should this be implemented?	37

Providing access to remedy and conflict resolution	37
How should this be implemented?	38

Annexes

Annex I: Suggested steps in the process of respecting FPIC	40
Annex II: Useful questions	41
Questions to ask yourself: indigenous peoples and local communities	41
Questions to ask yourself: companies and investors	44
Questions to ask yourself: government officials	45
Questions to ask yourself: NGOs, civil society organizations and indigenous peoples' organizations	46
Annex III: References and further reading	48

Text boxes

FPIC and the Guidelines	4
Elements of free, prior and informed consent	5
The Indigenous Peoples Rights Act (IPRA) in the Philippines	7
FPIC is about results as well as process	10
Factors affecting time and resources necessary to respect FPIC	16
What are customary rights?	18
The Guidelines on the cultural value of land and natural resources	20
The Guidelines on accessibility of information and non-discrimination	30
The Guidelines on food and livelihood security	33
Informed consent	35
Tenure and shareholder options	36
Fundamentals of effective negotiation	37
The Guidelines on grievances, remedy and conflict resolution	38
The right to remedy	40



Introduction



Introduction

Why you might need this Practical Guide

Large-scale investments in land are spreading faster than ever before across the global south. Often these investments target lands governed by customary rights that are not adequately recognized and protected under national laws, or sites where governments lack the capacity to enforce the law. Land deals that change the use of land and natural resources have wide implications for indigenous peoples and local communities who depend primarily on these resources for their livelihoods, welfare and cultural identity. Ill-regulated land acquisition has become a major problem, especially in sub-Saharan Africa and Southeast Asia, where it threatens food security, local livelihoods and sustainable natural resource management, and has triggered land conflicts and human rights abuse. Marginalized social groups are particularly at risk, including indigenous peoples, other customary landowners, women, lower-caste people and ethnic minorities.

In May 2012, the Committee on World Food Security (CFS) endorsed the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (hereafter referred to as the Guidelines). The Guidelines provide practical guidance to states, civil society and the private sector on responsible governance of tenure and constitute a framework for policies, legislation and programmes. In particular, the Guidelines encourage respect for rights, good governance and equitable outcomes that secure local people's livelihoods and promote long-term community-based development.

This paper is a technical guide on free, prior and informed consent (FPIC). It sets out practical actions for government agencies to respect and protect FPIC and for civil society organizations, land users and private investors globally to comply with their responsibilities in relation to FPIC, as endorsed by the Guidelines in Section 9.9. The guide also describes how consultation and participation can be carried out with those rights-holders affected by land-use changes, in line with paragraph 3B.6 of the Guidelines (see "FPIC and the Guidelines").

FPIC and the Guidelines

Source: FAO, 2012.

The Guidelines lay out responsibilities in relation to FPIC in the following sections:

- 3B.6** Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.
- 9.9** States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. Consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust. The principles of consultation and participation as set out in paragraph 3B.6 should be applied in the case of other communities described in this section.
- 12.7** In the case of indigenous peoples and their communities, States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples. States and other parties should hold good faith consultation with indigenous peoples before initiating any investment project affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with members of indigenous peoples as described in paragraph 9.9. The principles of consultation and participation of these Guidelines should be applied for investments that use the resources of other communities.

What is free, prior and informed consent?

FPIC has emerged as an international human rights standard that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. For the purposes of this guide it should be considered as a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.

It is thus not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms. FPIC has been described as a standard that supplements and is a means of effectuating these substantive rights.¹ It thus needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories. Not only

¹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. A/HRC/21/47 (6 July 2012), at para. 51. Likewise, The Inter-American Commission on Human Rights explains, "The requirement of consent must be interpreted as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights, in relation to the execution of development or investment plans that affect the basic content of said rights. The duty to obtain consent responds, therefore, to a logic of proportionality in relation to the right to indigenous property and other connected rights." *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, at para. 333.

should FPIC be respected, but in addition, no measure should undermine indigenous peoples' enjoyment of human rights, even in instances where their FPIC has been obtained.

The *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) makes clear that states have a duty to obtain the FPIC of indigenous peoples for measures that may require removal of indigenous peoples (art.10) or the storage of hazardous materials on indigenous lands (art. 29 (2)). Furthermore, bearing in mind the principle of self-determination and the provisions of the UNDRIP as a whole, states should obtain consent on matters of fundamental importance for the rights, survival, dignity and well-being of indigenous peoples. FPIC should be applied in conjunction with all decisions that may affect their rights, and this duty is bound to the state's duty to respect indigenous peoples' wider rights to be represented through their own institutions; to exercise customary law; to the ownership of the lands, territories and natural resources that they traditionally own, occupy or otherwise use; to self-identification; to manifest their cultures; and, more fundamentally, to self-determination.

FPIC also relates to and includes the right to participation as well as other rights contained in legally binding documents, including the following:

- International Covenant on Civil and Political Rights (**ICCPR**)
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**)
- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**)
- Convention Concerning Indigenous and Tribal Peoples in Independent Countries (**ILO** convention 169)
- American Convention on Human Rights
- African Charter on Human and Peoples' Rights (**ACHPR**)
- Convention on Biological Diversity (**CBD**)

Both the ICCPR and ICESCR protect peoples' right to self-determination. While these universally binding instruments do not explicitly mention the principle of FPIC, the Human Rights Committee that monitors compliance with the ICCPR and the Committee on Economic, Social and Cultural Rights that monitors compliance with the ICESCR

Elements of free, prior and informed consent

Source: UNPFII, 2005; EMRIP, 2011.

Free implies no coercion, intimidation or manipulation.

Prior implies consent is sought far enough in advance of any authorization or commencement of activities, and the time requirements of indigenous consultation and consensus processes are respected.

Informed implies that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples. Relevant information includes:

1. the nature, size, pace, duration, reversibility and scope of any proposed project;
2. the reason(s) or purpose of the project;
3. the location of areas that will be affected;
4. a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits;
5. personnel likely to be involved in the implementation of the project;
6. procedures that the project may entail.

Consent implies that indigenous peoples have agreed to the activity that is the subject of the consultation. Indigenous peoples also have the prerogative to withhold consent or to offer it with conditions. Consultation and participation are key elements of a consent-seeking process. Consultation must be undertaken in good faith, which, among other things, requires that indigenous views are accommodated in the process or objective justifications are provided as to why such accommodation is not possible. The parties must establish a dialogue allowing them to identify appropriate and workable solutions in an atmosphere of mutual respect and full and equitable participation, with ample time to reach decisions. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions. The participation of women, youth and children is preferable where appropriate.

have frequently interpreted these covenants as requiring FPIC as an expression of self-determination.² The Committee on the Elimination of Racial Discrimination that monitors compliance with the ICERD has also been vocal in relation to indigenous peoples' rights to lands and has repeatedly called upon states to recognize and protect these rights and to apply FPIC.³ ILO 169 prohibits the removal and/or relocation of indigenous and tribal populations from their territories without their free and informed consent. The standard of 'approval and involvement' in the CBD has also been equated with FPIC, and affirmed in the CBD's Akwé: Kon voluntary guidelines.

In addition, these instruments require respect for indigenous peoples' customs and traditions, including indigenous institutions and modes of representation that pertain to decision-making processes such as FPIC. Therefore, the precise manner in which decision-making processes relating to FPIC that take place will likely vary depending on the customs and traditions of the affected people or community.

² See *inter alia* Angela Poma Poma v. Peru, CCPR/C/95/D/1457/2006, 24 April 2009; Concluding observations of the Human Rights Committee, Togo: CCPR/C/TGO/CO/4, 11 March 2011, at para.21; Concluding observations of the Human Rights Committee, Colombia: CCPR/C/COL/CO/6, 4 August 2010, at para. 25; Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), of the International Covenant on Economic, Social and Cultural Rights), adopted at the Committee's 43rd session, 2–20 November 2009, UN Doc. E/C.12/GC/21, 21 December 2009, at para. 36-7.

³ See e.g. General Recommendation XXIII on Indigenous Peoples, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, para. 4(d); Australia: CERD/C/AUS/CO/14, 14 April 2005, para. 11; Guyana: CERD/C/GUY/CO/14, 4 April 2006, para. 19; Cambodia: CERD/C/304/Add.54, 31 March 1998, para. 13, 19; Guatemala: CERD/C/GTM/CO/11, 15 May 2006, para. 19; Suriname: Decision 1(67), CERD/C/DEC/SUR/4, 18 August 2005, para. 3.

Duties and responsibilities

As members of the United Nations and of other regional treaties, and in accordance with the human rights instruments to which they have committed, it is the duty of governments to ensure that human rights of indigenous peoples are respected, protected and fulfilled. They likewise have a duty to ensure that other actors, including, in particular, the private sector, respect such rights by actively protecting them where necessary. It is thus incumbent on governments to review and, where necessary, revise national laws and establish or maintain effective judicial and other remedies by which those rights may be enforced, so that they give effect to these rights and ensure that companies also respect them. For the purposes of this guide, this means that governments must ensure that national laws recognize communities' and indigenous peoples' customary rights to their lands and territories, provide legal personality for their self-chosen representative bodies, provide judicial and other effective remedies to enforce those and other rights, and require that both government agents and companies obtain their free and informed consent prior to imposing measures that may affect their rights.

In the private sector, recent years have seen a proliferation of voluntary standard-setting initiatives that recognize the importance of protecting customary rights to land and other natural resources. At the same time, the United Nations Guiding Principles on Business and Human Rights emphasize that while it is primarily the obligation of governments to uphold human rights, it is also a responsibility of businesses to respect human rights, and this responsibility exists independently of states' abilities and/or willingness to fulfil their own human rights obligations. Many of the voluntary standards in the private sector require that companies obtain the FPIC of both indigenous peoples and local communities prior to proposed developments, as good practice based on the recognition that companies have moral and ethical obligations that go beyond the minimal requirements of national law.⁴

In addition, the operational policies of a number of international financial institutions call for obtaining the FPIC of indigenous peoples for financial projects that may impact their lands and resources.⁵ FPIC is also a core 'principle and right' of indigenous peoples under the *FAO's Policy on Indigenous and Tribal Peoples* (FAO,

The Indigenous Peoples' Rights Act (IPRA) in the Philippines

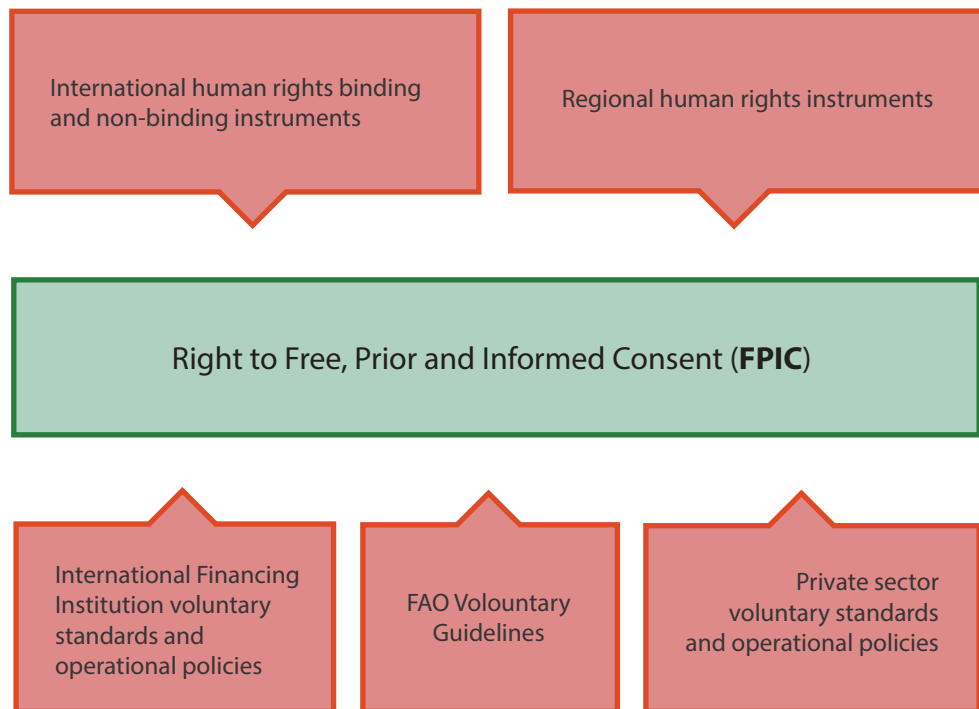
Many countries have national laws meant to ensure just processes of land transfer, consistent with a requirement to obtain FPIC, but few have yet adopted national laws that explicitly mention an FPIC obligation. A notable exception is the Philippines, where the Indigenous Peoples' Rights Act requires FPIC for any activity that may affect indigenous peoples' lands and resource rights. Procedures for observance of this duty are overseen by the Philippines National Commission on Indigenous Peoples, which has deployed and reviewed several versions of regulations that set out the required process for FPIC. The key lessons from this experience are that procedures for respecting FPIC must give full scope for indigenous peoples to exercise their customary law and represent themselves as they freely choose, and that government decisions must be transparent and accountable.

⁴ Examples include the World Commission on Dams (WCD), the Extractive Industries Review (EIR), the Forest Stewardship Council (FSC), the Roundtable on Sustainable Palm Oil (RSPO), the Round Table on Responsible Soy Association (RTRS) and the Roundtable on Sustainable Biomaterials (RSB).

⁵ These include the International Finance Corporation (IFC), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), the Inter-American Development Bank (IADB) and the International Fund for Agricultural Development (IFAD). In January 2012, many of the world's leading commercial banks that adhere to the Equator Principles agreed to apply the IFC's updated Performance Standards to their project lending, thus explicitly endorsing the right to FPIC. The World Bank has embarked on a two-year process of updating and consolidating its environmental and social safeguard policies to give further prominence to respect for the right to FPIC.

2010), thus guiding the organization's interaction with and effective involvement of indigenous peoples in development activities that may affect them.

In the practical implementation of FPIC, indigenous peoples and local communities themselves, as the rights-holders, should shape the form, pace and participants in the process by which states and other actors respect FPIC. In order to satisfy the FPIC standard, efforts must be made to understand the particular customary or other freely identified decision-making processes used by the affected peoples or communities.



From whom should FPIC be obtained?

FPIC is most clearly articulated in relation to indigenous peoples' rights. At present, international law is much less clear about the land and resource rights of other individuals or groups who may not recognize themselves as 'tribal' or 'indigenous' but who nevertheless gain access to lands and resources through customary law, traditional inheritance or other informal processes. The Guidelines require active, free, effective, meaningful and informed consultation and participation with all those affected, including indigenous peoples and other communities with customary tenure, as set out in paragraph **3B.6**, and in addition require respect for FPIC in dealing with indigenous peoples.

There is no internationally agreed definition of indigenous peoples, but international law already makes clear that the notion extends to those commonly referred to as 'tribal' peoples, and international agencies apply the term widely to ethnically distinct groups with close ties to their ancestral lands. Common characteristics used to identify such peoples are:

- self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- customary cultural, economic, social or political institutions that are separate from those of the dominant society and culture;
- an indigenous language, often different from the official language of the country or region (World Bank, 2005).

Understood as an expression of the right to self-determination, FPIC can fairly be interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia, and by many rural Afro-American societies.

Governments and companies also need to be mindful that, where it is determined that rural communities are not indigenous in this wider sense, planned developments on the lands of such people do not arbitrarily deprive them of their wider rights. These include rights to life, property and an adequate standard of living, including food, water and adequate housing. All land acquisition should only be undertaken in accordance with lawful procedures that secure people's rights, preceded by processes of consultation and participation aimed at securing their support. Some voluntary certification schemes will not certify projects developed on community lands that have been allocated to third parties through exercise of the state's power to expropriate land.

Benefits of FPIC

Ultimately, respecting FPIC benefits both the state and companies in the long term by minimizing the risk of disputes escalating into conflict. This prevents the loss of investment opportunities that could disappear if investors choose to target other countries where they feel their investments are more secure. Respecting FPIC thus benefits all parties involved, protecting the livelihoods of local communities, strengthening the practical and financial viability and sustainability of business operations, and therefore increasing the investment potential and opportunities of developing countries.

“The duty of the state to obtain indigenous peoples’ free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes.”⁶

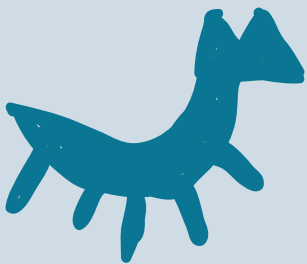
**FPIC is about
results as well
as process**

FPIC requires ensuring that communities can meaningfully participate in decision-making processes and that their concerns, priorities and preferences are accommodated in project designs, indicators and outcomes. In short, and as stated by the United Nations Expert Mechanism on the Rights of Indigenous Peoples: “The duty of the State to obtain indigenous peoples’ free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes.” FPIC thus additionally requires that communities can negotiate fair and enforceable outcomes and withhold their consent to a project if their needs, priorities and concerns are not adequately addressed. Consultations and negotiations that do not resolve a community’s reasons for opposition or achieve consent will provide little assurance against potentially costly and disruptive conflict.

⁶ Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Final report on the study on indigenous peoples and the right to participate in decision-making. Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making, UN Doc. A/HRC/18/42, 17 August 2011, at para. 21.



Practical guidance



Practical guidance

The recommended actions outlined below provide practical guidance on how to respect FPIC and include advice for governments, companies, indigenous peoples and local communities, and NGOs. Relevant sections of the Guidelines are footnoted. Steps for particular actors are highlighted where appropriate.

These suggested steps should not be understood as constituting a one-off ‘tick-the-box’ procedure. Rather, they are part of an iterative and ongoing process in which particular actions may need to be repeated, prolonged or repositioned within the broader process, and in which the diversity of actors and perspectives involved must be taken into account. Information at all stages must be made transparent and accessible to the parties involved. The specific sequence of actions required is not fixed; it will vary depending on the social, economic, legal and policy contexts in which rights to land are acquired for different types of projects. Following each action, documentation should be widely disseminated and feedback should be sought from all actors so that the ensuing steps of the process can be jointly developed.

Laying the ground for implementation

Prior to implementing a process to seek FPIC, the following elements must be considered:

Process. As the requirement to obtain FPIC is not a stand-alone right, it should not be reduced to a linear ‘tick-the-box’ process that ends with the community signing an agreement. Respect for FPIC guarantees indigenous peoples and local communities a voice at every stage of development planning and implementation for projects that may affect their wider rights. This includes the right of indigenous peoples and local communities to determine what type of consultation and decision-making process is appropriate for them. Obtaining initial consent may be only the first step; throughout the project’s operation, the ongoing participation of communities, participatory monitoring and robust verification are required for FPIC to be upheld.

**Factors
affecting time
and resources
necessary to
respect FPIC**

Source: Anderson, 2011

- the number of actors and interest groups involved in negotiation and decision-making;
- their geographic spread and accessibility;
- the effectiveness of existing leadership and social cohesion;
- the representativeness of existing leadership and access to decision-making by women and other vulnerable groups;
- who is responsible for informing the broader community beyond representative leaders;
- the effectiveness of the process and level of disagreement within the community towards the proposed project;
- available informational processes and technologies ;
- levels of literacy and education;
- time constraints to attend meetings/access informational events;
- levels of interest in participating to become sufficiently informed;
- availability and effectiveness of intermediaries;
- availability of independent facilitation/advice and its quality;
- the degree of complexity of land rights issues and overlapping claims;
- the scale, design and impacts of the project in question.

Resources. In addition to time, the availability of material and human resources is critical to a strong and verifiable process of respecting FPIC. This includes investment in people, communication materials and strategies, capacity-building activities, independent verification, and technical and legal advice. Rights-holders will also need adequate resources to build up their capacity to consider the proposed project or programme. Where rights-holders are interested in being involved in project design and implementation, additional resources will be needed for appropriate training and skills development. Project proponents should understand that respect for FPIC is as an inherent and necessary cost of project development. Where appropriate, developers should find open and accountable ways to channel funds to communities to maintain the integrity of the process and the independence of the community's role.

Time. Throughout the entire process of respecting FPIC, indigenous peoples and local communities must be consulted as a whole group for however long is necessary for them to understand, consider and analyse the proposals. The more time that is invested in establishing good communications at the beginning of a negotiation

process, the more likely it is that negotiations can proceed in an agreed way thereafter. A rushed process will prevent communities from building general consensus before final decisions are made. This can trigger disputes between and within communities, and with the company and government. The legitimacy of the agreement may be questioned, and the process may need to restart from the point where dissatisfaction arises. In the end, this requires more time and resources from all parties involved, and the disputes that arise from a rushed process may lead to a breakdown in the mutual trust and accountability critical to obtaining and sustaining

consent. Being prepared to invest time and resources in the process substantially diminishes the risk of conflicts and disputes at later stages of the project operations, and is key to the longer-term sustainability of these operations. Early identification of communities' rejection of projects can help developers focus their efforts on available lands.

Wide participation. Striving for the widest possible participation of communities in decision-making – including, in particular, women, youth, the poor, migrants and the landless – can reduce the chance that decisions made will subsequently be challenged or cause grievances within the community. The inclusion of these groups will also better reflect the range of values, uses and resources that need to be taken into consideration in project implementation. It should be kept in mind that communities are not homogeneous and decisions can vary from one to the other based on different needs.

Accessibility. For indigenous peoples and local communities to make informed decisions and give informed consent, all materials and documentation of activities must be made available to them. This means providing materials openly, in good time and in forms and languages accessible and intelligible to them, preferably in their mother-tongue, with the assistance of translators. Logistical issues, such as the cost and means of transportation and communications, must also be taken into account in the organization of consultations, so that local communities are not disadvantaged in terms of participation.

Trust. At the heart of respecting FPIC lies the process of building relationships of mutual trust and understanding through transparent, two-way information sharing, proven accountability, wide-ranging discussion, repeated negotiation and good-faith engagement. In this process, the company agrees to respect communities' wider rights, engages in dialogue, explores options and provides information, acts respectfully, agrees to back off where requested, enters into negotiations where this is agreed to, and accepts and abides by decisions that are reached. In this way, long-term peaceful interaction and harmonious coexistence can be sustained and solutions to points of disagreement reached in an amicable and respectful manner. Flexibility, informality, time and opportunities to get to know each other more personally are important ways of building mutual respect and open-mindedness. It is important that representatives of the government, company and local communities have clear authority to speak for, and make binding commitments on behalf of, their institution.

Cultural sensitivity. Cultural norms and expectations will shape how indigenous peoples and local communities approach and participate in decision-making processes. These may affect modes of representation, decision-making mechanisms, time requirements, how agreements are made binding and what constitutes the negotiation process itself. Acknowledging these needs is necessary to achieving robust and legitimate outcomes, satisfactory to both parties. Where indigenous peoples are not recognized or registered as citizens, or where the rule of law is absent and the independence of the judiciary in question, it is all the more important to respect customary laws and honour customary systems for making decisions and achieving consent.

Respect for the right to say 'no'. Companies and governments engaging in good-faith negotiations with communities must recognize that even when a thorough information and negotiation process has been carried out, indigenous peoples and local communities have the right to say 'no' to development or to a project on their customary lands. The specific implications of an indigenous decision to say 'no' vary according to the circumstances. In general, any project that has a direct, significant impact on the lives and fundamental rights of indigenous peoples should not go forward if they withhold consent. In particular, no relocation of indigenous peoples and local communities, and no the storage or disposal of hazardous materials on their lands should take place without FPIC. In deciding to say 'yes', indigenous peoples and local communities can negotiate the terms under which they may agree to a proposed development on their lands. Agreement at any one stage of the process does not automatically imply consent as the final outcome.

How prior is ‘prior’?

Given that governments have the primary duty to ensure that FPIC is respected, they must take measures as early as possible in land use and project planning to involve affected peoples. No decision to allocate lands to a third party should be made without first informing the peoples concerned and securing their consent through the procedures set out below. Governments have a vital duty to ensure that lands are not allocated to companies – through sales, leases, concessions or rental – in ways that violate rights or are likely to generate disputes.

For companies, the situation may be more ambiguous. They may find that lands they have acquired from the government (or through land transfers) are encumbered with customary rights that have been overlooked or ignored by government agencies. In such cases, companies should engage directly with the communities in good faith, explaining the situation. They should then carry out the procedures outlined below and communicate that they will not clear lands or pursue their investment objectives without first recognizing the full extent of customary rights and securing FPIC for their plans from the relevant rights-holders.

It does need to be recognized, however, that such situations place affected communities in a position of considerable disadvantage. Once their lands have been allocated to a third party without their consent, the leverage of communities in any subsequent negotiations with the company is substantially weakened.

Identifying rights-holders⁷

The purpose of this step is to identify, in a participatory process, who are the existing rights-holders and land users in the targeted project area. This will help determine how local communities make use of the land, as well as what kinds of claims different groups may have to the targeted land and the natural resources therein, and who has the right to be consulted and to give or withhold consent to the project. Rights-holders should be identified throughout all parts of the targeted project area as well as bordering areas. Bordering communities may have claims to land within the project area or resources affected by the activities therein (e.g. water), or they may make seasonal use of these resources or have other forms of tenure relationships with people living inside the targeted project area.

What are customary rights?

Customary rights derive from customary law, a set of usually unwritten rules that draw their authority from ‘tradition’. Customary laws govern a wide range of issues, including family relations, property law, and use and ownership of land and natural resources. Customary land tenure refers to the systems that many rural communities use to express and regulate ownership, management, use, access and transfer of land and the natural resources therein. Customary tenure is often intricately bound with local conceptions of kinship, generational descent and broader social definitions of the role and rights of individuals and groups within the community.

⁷ Identifying rights-holders: See Guidelines *inter alia* 3A.1.1; 4.5; 7.1–7.6; 8.2; 8.4; 8.6; 8.7; 9.5; 9.8; 11.5; 12.9; 12.10; Section 17.1–17.5.

Customary laws and rights derive from the community rather than the state (statutory law), and although on the ground the two systems frequently overlap, customary rights are not always recognized or given equal weight by the state. Customary rights may be informal (without formal state recognition), or they may be formal where they are given the force of law by ratified international treaties, by national constitutions, by statutory laws and ordinances, or through court decisions. Customary land rights vary significantly across communities depending on their locations, social organization and modes of livelihood. In some communities, land and natural resources may be collectively owned, used and managed on an egalitarian basis (sometimes referred to as the 'commons' of customary tenure). Frequently, rights are 'nested' – for example, where individual or family farmlands are held within wider communal territories. Lands and natural resources also have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems.

How should this be implemented?

Carry out interviews, consultations and focus group discussions, complemented or accompanied by questionnaires, to identify:

- the individuals, families, villages, clans and other social entities in the project area and its border zones;
- the nature of existing relationships between these groups. These can consist of kin relations, but also wider socio-economic ties such as commercial, political, economic or cultural ties;
- the geographic locations and total populations of the different groups identified. Maps and global positioning systems (GPS) can be used to pinpoint locations. Bear in mind that some communities may be mobile, migrating seasonally across a territory depending on their mode of livelihood. Examples may include hunter-gatherers, pastoralists, shifting agriculturalists and temporary labourers;
- the administrative units in which the communities live and exercise rights (e.g. region, district or province);
- the nature of relations between the communities and the state in terms of governance and administration, exercise of customary law and recognition of land rights, especially based on customary rights;
- the history of land occupation and use by local communities; how they relate to the land; their customary system of land tenure, governance and inheritance; and how land transfers are customarily regulated, both among and within communities, and with outsiders. If there are multiple ethnicities, seek to understand how the peoples relate to each other and regulate relations with respect to land and natural resources;
- how communities justify their claims to land and land use. This may include customary law, ancestry, inheritance, purchase, lease or state-sponsored settlement programmes. Bear in mind that rights-holders and land users may not always be the same individuals or communities;
- possible historical factors that have shaped and changed existing populations and their relationship with and use of the land. These may include past or ongoing civil wars, internally displaced persons (IDPs), patterns of migration, or urban and agricultural development;

The Guidelines on the cultural value of land and natural resources

Source: FAO, 2012.

9.1 State and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems.

- the demographic characteristics of communities. These may include age groups, gender ratios, and groups of locals and migrants;
- the status and role of women within communities. These may include their role in the division of labour, their rights to and use of land, their decision-making authority and how they are represented;⁸
- the types of livelihoods in the communities and the resources they depend on to sustain their livelihoods. These may include permanent or seasonal agriculture, herding, fishing, hunting and gathering, or a combination of the above;
- local systems of natural resource management and use. These may include the management and use of water from rivers and seas, land, forests, crops and livestock. Most rural people have mixed economies and make very diverse use of lands and resources;
- local forms of social organization, including, but not restricted to: individuals and institutions responsible for decision-making; the enforcement of customary laws; religious practices; economic activities; inter- and intra-community relations; political authority; and natural resource use and management;
- local literacy levels. Where local communities, including their leaders, are illiterate or semi-literate, it will be important to ensure that all information transmitted to them is available in intelligible and appropriate forms and languages, and that all proceedings are audio-recorded for their reference. The use of diagrams, pictures and videos, in addition to face-to-face interaction, may also help make information accessible;
- the cultural value of land and natural resources to communities. This may include economic, social, spiritual/religious, political, historical and family ties to the land;⁹
- any past and/or ongoing conflicts or disputes between and within communities over land and natural resources, and their causes. Being aware of existing frictions helps in avoiding the conflation of different groups and allows for a better understanding of the different interests and perspectives at stake;
- any past and/or ongoing conflicts or disputes between communities and companies or state agencies in the area, their causes, and how they have been or are being resolved. The violation of communities' rights by previous project operators or managers, or outstanding commitments by previous project operators to communities, will have to be addressed and remedied;
- linguistic differences between local and official terms, and any relevant locally-specific terms. These may include the denomination of social groups and the terms used to describe rights, practices, decision-making structures and political organization. Keeping definitions clear helps avoid misunderstandings and is considerate towards local systems of knowledge and terminologies. Make sure interpreters have the ability to capture and convey nuances and local terms.

⁸ Gender: See Guidelines *inter alia* 3B.3; 3B.4; 4.4; 4.6; 4.7; 5.3; 5.4; 5.5; 6.1; 7.1; 7.4; 8.9; 8.11; 9.2; 9.6; 9.10; 10.1; 10.3; 12.11; 13.5; 13.6; 14.4; 15.3; 15.5; 15.6; 15.9; 15.10; 17.3; 20.2; 20.3; 21.1; 23.2; 25.3; 25.4; 25.5; 26.2. For guidance on gender-equitable land governance, see FAO 2013.

⁹ Cultural value of land and natural resources: See Guidelines *inter alia* 4.8; 5.3; 5.9; 9.1; 9.7; 11.2; 16.2; 18.2.

Carry out a census based on a questionnaire by means of field visits and consultations with all communities in the targeted project area and its borders. In consultations, clearly explain to all parties whom you represent why you are carrying out the census, and ask for their consent to be consulted and to provide information for the questionnaire. Communities have the right to withhold their consent at this (or any other) stage, in which case the project cannot go ahead.

Keep the consultations and questionnaire relatively open-ended. The census-taking process should allow for consideration of any other relevant issues and concerns raised by communities, as these may not have been anticipated in the drafting of the questionnaire.

Consult other sources. Consultations with communities should be complemented by consultations with relevant local or provincial government bodies and relevant local, national and international NGOs, to further identify:

- the status of the potentially affected communities and individuals, and their customary tenure rights in local and national law;
- whether and how communities are distinguished in state legislation from other social groups and the dominant societal group;
- possible censuses taken in recent years and whether the communities are reflected in them;
- any additional relevant disaggregated data.

Make the documented findings available to all interest groups in forms and languages that are accessible to them.¹⁰

Ascertaining the legal status of the land

In any process of land acquisition, a crucial first step in respecting FPIC is to clarify the extent of indigenous peoples' rights over lands and other resources, and where possible to secure these rights. In expressing or withholding their FPIC to proposed agricultural investments, the peoples concerned need to be assured that the full extent of their customary rights and current system of land use are recognized and respected. Exactly because the legal systems of many countries do not formally recognize customary rights, communities' right to give or withhold consent for what happens on their lands is all the more vital.

The purpose of this step is thus to determine who has rights over the targeted project land, both in state laws and under customary law; how the legal status of the land will change if a company acquires it; and what effect this has on rights-holders. As tenure policies and practices will differ from country to country, and as social stability and coexistence can depend largely on the nature of existing tenure regimes, it is critical that these specificities be taken into account. This is particularly important in countries where customary rights are not effectively recognized or protected by national laws and where there are multiple rights-holders (both formal and informal)

¹⁰ Documentation: See Guidelines *inter alia* 9.8; 12.1.1; 25.4. Accessibility of information: See Guidelines *inter alia* 3B.7; 3B.8; 5.8; 6.4; 8.9; 9.4; 10.4; 11.3; 14.4; 17.4.

with claims to the same land. The legal status should be examined for all parts of the targeted project area as well as bordering zones.

Often customary lands are classed as state lands under statutory laws. Consistent with international law, however, the Guidelines require state agencies and investors to ensure that legitimate tenure rights, including customary rights, are respected and the FPIC of the indigenous peoples is obtained for any investment project affecting such rights. The resulting legal complications also need to be addressed. For example, in many common-law jurisdictions, lands held under customary law, sometimes known as 'native title', can only be ceded to the state. This may also be required where the state assumes fiduciary responsibility to ensure the welfare of indigenous peoples. Moreover, because in many indigenous areas land markets have often been absent, the terms on which lands should be fairly transferred from customary owners to investors – whether by rental, lease or sale – are unclear. In such circumstances, government agencies have a major responsibility to ensure fair play and to protect the interests of communities with weak or unsecured rights.

How should this be implemented?

Engage a consultant or lawyer to carry out a thorough review of existing national legal, institutional and policy frameworks. Ideally, the consultant should employ innovative and interdisciplinary investigation methods, as well as a participatory and collaborative approach throughout the research process.

The review should include:

- the laws, institutions and policies that set the framework for land acquisition in the particular country in question;
- the land rights of citizens, women, indigenous peoples and minority groups;
- the current formal legal status of the land under national laws. The land may be designated as state land; public land; private land; customary land; state, public, private, community, industrial or conservation forest; protected reserves; concessions; and so forth. Also identify any overlaps in the formal classification of the land;
- the relevant jurisdictions and state bodies responsible for the land, its management and its allocation. These may be national and/or provincial authorities; ministries of environment, land and/or agriculture; forestry departments; or other specialized institutions. Also identify any overlaps in jurisdiction over the targeted project area;
- whether and how customary land rights of local communities are recognized in national laws and policies, and how this affects the particular communities in the targeted area. Relevant information includes constitutional rights and rights under various laws such as land laws, environmental laws and forestry laws. Where recognized, tenure rights may consist of titles, deeds, leasehold, ownership, possession, use/benefit rights or, native title, and may be qualified by sharecropping arrangements and easements. In many countries, these rights must be formally documented to be recognized (which may be prohibitively

expensive), but in some countries customary rights are acknowledged in the absence of formal registration;

- the status of the land from the point of view of the communities and their customary law, whether this customary law is formal or informal;
- whether state laws and policies recognize and protect the communities' collective and customary rights to land, and on what basis;
- the legal process through which the company and/or the state will acquire the land, and all relevant government bodies that will need to be approached.
- changes in the legal status of the land if acquired by the company;
- possible consequences for local communities resulting from the change in legal status of the land, in terms of access and rights to the land in the short, medium and long term. This may depend on the nature and duration of the project or the legal status of tenure (e.g. leasehold, outright sale or renewable contract). Also identify the status of community rights after the lease expires. For example, will the land revert to the communities, or will it be reclassified as state-owned land? This has to be made clear to communities in ensuing negotiations;
- the legislated consultation process, where consultations for land acquisition are required under national laws or international commitments, and precedents in the implementation of this process for other land acquisitions;
- previous project operators on the targeted land, and any obligations of these operators towards local communities that have or have not been met. These may include different forms of compensation, land restitution, community relocation, employment opportunities, infrastructural development or social and economic welfare projects.

Compare the findings with the data obtained through the rights-holder identification process (see previous section) to corroborate them or identify contradictions between the legal status of the land and tenure traditions practised by customary rights-holders.

Share and corroborate the findings by holding consultations with the relevant government bodies and local communities.

Possible sources of information for this step include: government agencies, development agencies, tenure specialists and legal advisors, official maps and surveys, land cadastres, land tax records, land-use planning and land management maps, ethnographic surveys, academic research, laws and regulations, court verdicts, company records and NGO publications.

Mapping claims to and uses of land¹¹

The purpose of this step is to establish the extent of the lands and resources over which existing inhabitants of the targeted project area have both formal and informal rights and/or use. The maps should cover all parts of the targeted project area as well as bordering zones.

Local communities, through their representatives, should play a central role in mapping activities. The maps must be made with the full awareness and agreement of, and under the control of, the communities and other parties involved. They must also be verified with neighbouring communities to avoid exacerbating or triggering land disputes.

Access to the maps for all parties is critical at all stages of the process, and they should be seen as a means of communication and information-sharing between interest groups. Mapping should be a community-driven process, facilitated and supported by the company and/or the government, possibly with the support of NGOs. Consider the maps to be a tool in this process, rather than an end in themselves.

How should this be implemented?

Identify rights-holders before starting. The prior identification of land users and rights-holders, as well as an established understanding of customary tenure and local sociocultural systems, will significantly help the mapping of customary lands.

Consult with communities. Explain:

- the nature of the project for which lands and resources are being mapped, and possible implications for rights and livelihoods;
- the purpose of the mapping activity and its importance for safeguarding customary rights and discretionary authority over future use of land and resources;
- what the mapping process will entail in terms of resources, time, participation and costs, and who will cover these costs;
- that the communities have the right to decide who will participate in the mapping process, both directly and indirectly;
- Any compensation offered for time and resources invested in the mapping process;
- the independent parties who have the expertise and experience to support the communities in their mapping process (e.g. NGOs);
- that communities have the right to withhold their consent at this stage, in which case the project will not go ahead.

Agree on participation. If the community agrees to engage in a participatory mapping activity, they should agree on who will take part from the communities, taking as much time as they need to make a decision. All representatives should be freely

¹¹ Mapping: See Guidelines 7.4. For documented field experiences with participatory mapping, see Tanner *et al.* 2009, Nelson 2007.

chosen by their own community or institution. Communities have the right to decide who else, if anyone, should be involved in the mapping activities.

Offer communities independent support. Communities should be offered a wide range of options for independent parties who can support them to organize and carry out the mapping activity. These could be local NGOs, familiar with the area and with the technology required for participatory mapping. Communities have the right to choose which bodies will support them in the mapping, and under what conditions, once they have been fully informed of the available options.

Seek diverse representation. Ideally, a representative range of rights-holders, including women, youth, poor families and elders, should be involved in the mapping, as this will reflect the range of values, uses and resources that need to be included in the maps. For example, elders are often the most knowledgeable about sites of historical and cultural importance. Men and women may use lands and resources differently. The maps should reflect all these values and uses. Where community members are not directly part of the mapping team, it is strongly recommended that they be consulted throughout the process to make sure the map represents their understanding and use of the land and natural resources.

Allow for multiple maps. Support organizations involved in the mapping should bear in mind that where there are different communities, these may want to engage in separate mapping activities. This can occur if the groups lay claim to different zones or if they have overlapping claims or unequal levels of tenure security on the same land. Each community must be given equal opportunity to take part in mapping processes if they wish to be involved. Where various communities share rights to an area, asserting the rights of only one group is likely to lead to conflict. Neighbouring communities should be involved in mapping boundaries to build consensus about demarcation and to clarify rights holders.

Compare and confirm the information gathered with other sources, where possible. Compare information both within and between communities to better understand the overall situation on the ground. The maps produced should also be compared with any existing maps produced by government bodies, NGOs and other private sector companies that have operated in or near the targeted project area.

Train on accessible technology. Support organizations should train the mapping team members in the use of geomatic technologies such as GPS and geographic information systems (GIS) as a relatively cheap, quick and easy way to clarify the extent of customary and other rights. Where literacy levels are low, use iconic or pictogram-based GPS systems with pictures and colour codes rather than text, so that community members are not disadvantaged in the mapping process. Smartphone applications provide a widely available and cheap way of recording and mapping data simultaneously. Some smartphone software can also be used to track time-stamped and personalized chains of activities (such as location, individuals involved, purpose of activity, outcome of activity and so forth).

Play a steering role in mapping. Once the team members feel they have the capacity to carry out the mapping themselves, the support organization should play a steering role rather than a determining role in the mapping process, allowing communities the agency and initiative to carry out mapping activities as they see fit. Where power differentials are likely to marginalize certain groups of rights-holders or land users,

NGOs or other neutral parties can be active in mediating the process of comparing information across groups.

Invest sufficient time and resources for the map to fully reflect the value of the land to potentially affected communities, families and individuals. Such a map will suggest whether and how land acquisition can be carried out in a way that respects people's rights and secures their livelihoods, and will indicate the likely effects of acquisition.

What to consider

Local communities should be able to choose what goes into the maps and what does not. They should select the map legend according to their own needs and wishes.

The following information is worth considering in the mapping process, and can be incorporated into the map itself or included as a description to complement the map:

- the types of land and resources that communities use and depend on, and the local terms for different land uses, natural relief and resources, and vegetation. These may include forests, rivers, clearings, mountains and pastures. Resource use may include hunting and gathering, fishing, agricultural cultivation, herding, medicinal plant gathering and so forth;
- possible overlapping and/or conflicting claims to land by different communities or within communities, and how these are customarily managed and accommodated;
- agricultural practices such as rotational farming, seasonal use of land and seasonal migration of communities. For example, seemingly empty lands may be a critical part of communities' livelihoods where long-range seasonal pastoralism is the basis of their livelihoods;
- common resource areas, such as hunting grounds, pastureland, rivers and forests. In particular, points of access to water resources should be mapped, as well as the communities who depend on them;
- sites of cultural, historic and spiritual value to the local communities. These may include graveyards; sacred forests, mountains and rivers; ritual grounds; and places of worship;
- the value of certain areas for particular land users within communities. These may include areas primarily used by women, children, cultivators, seasonal migrants, herders, hunters and trappers, riverine communities and so forth. Remember that some areas may not be used constantly by the communities, but may still hold important cultural or economic value to them. For example, the Maasai people of East Africa are mainly involved in herding cattle on the plains, but they use forests as an integral part of their initiation rites;
- any areas containing globally, regionally or nationally significant concentrations of biodiversity (e.g. primary and secondary forest, mangroves or conservation areas);
- any man-made improvements and properties on the lands in question. These may include settlements, crops and trees, irrigation systems, bridges, buildings

- and roads, sacred sites and graveyards;
- customary land boundaries and markers. These may include natural boundaries such as riverbanks, vegetation, forest land or other such geographical features;
 - landmarks seen as evidence of historical occupation by local communities. These may include planted trees, old burial sites, ruins of former villages and so forth;
 - areas that provide some services of nature, such as watershed protection, streamflow regulation, water catchments, erosion and destructive fire control;
 - any private sector operations and conservation areas adjacent to the targeted project site. These may include logging, mining or plantation concessions, as well as protected forests and national parks. Also take note of any overlaps between these areas and the targeted project area.

Completing the mapping process

Ensure the mapping team consults with the wider community on the near-final version of the map to make sure that all relevant information has been included. The map should be in forms and languages accessible to the communities. Use of diagrams and three-dimensional models can be particularly helpful in visualizing what the map represents.

Make the maps known to all actors, and make them available where requested in accessible forms and languages.

Formalize map ownership and access. Agree with communities to formalize the ownership of the maps by the communities who have produced them, through either a signed document or any other form acceptable to the communities. Agree on procedures through which the maps can be accessed by other parties.

Carry out additional environmental and social impact assessments and high conservation value assessments, where required or advised. The process should be similar to that described above, with the full and effective participation of communities, due consideration for their customary uses of the land and the natural resources therein, and in forms and languages that are readily accessible to them.

Identifying decision-making institutions and representatives

The purpose of this step is to ensure that rights-holders are represented through individuals and institutions of their own choice, and who are accountable and legitimate to those they represent, in consultation, negotiation, decision-making and consent-seeking. This representation avoids misunderstandings and agreements that do not reflect the views of the community, which, in turn, may result in disputes. The government and the company need to be informed of the community representatives with whom they will interact in ensuing negotiations.

Local communities may request and benefit from the support of NGOs and independent advisors in deciding among themselves what bodies or individuals will most adequately represent them, without interference from the government and company. Consultations to decide on representatives should be widely attended and open to all community members. They should take place in the territory of the communities consulted, where they may feel safer and more able to express themselves than in an unfamiliar place, and where they have the support of their community to discuss issues.

How should this be implemented?

Visit the communities. Clearly explain to them who you represent, the nature of the proposed development project, the intention of the developer to respect FPIC in relations with the community, and a timeline of the steps that could lead from consultation to negotiation to agreement, if the community so wishes. Communities have the right to withhold their consent to further discussions with the project even at this early stage, and this decision must be respected.

Plan consultations. If the community decides to consider the project, agree with them on the most convenient time and place for consultations. Allow ample time for discussion and negotiation within the community so they can decide who will represent them in ensuing stages of the process.

Communicate rights. It should be made clear to communities that:

- They have the right to be represented by institutions and individuals of their own choosing, and can decide on the minimum number of representatives necessary for a decision to be valid. Representation may be through a customary institution, a chief or elder, a cooperative, a local administrative body, a religious body or figure, a novel or hybrid institution, a local NGO, a rotational system of representation or a combination of the above.
- They have the right to independent facilitation assistance if required and requested.
- They have the right to develop representative bodies that they think will best accommodate their cultural practices and the demands of decision-making.
- They can insist where they so choose on checks and balances within their own community if they feel there is a risk of exclusion in decision-making or abuse of power.

Discuss representation and responsibilities. NGOs can help prepare local communities to choose their representatives by highlighting the responsibilities of a representative (e.g. to negotiate options for the people as a whole, rather than to make unilateral decisions) and the possible risks for a representative (e.g. influence and/or pressure from other parties, personal interests overriding group interests, being co-opted, or failing to share information with the wider community as the negotiation process becomes more technical and specialized). NGOs will need safeguards to avoid deviating from their agreed responsibilities and involvement, or unduly influencing local communities' decision-making processes.

Encourage broad input. Where the chosen mode of representation excludes women, youth, the poor or other marginalized groups, the government agencies or project developer can suggest and encourage broader community participation prior to each stage of negotiation and consultation. Separate consultations can be requested with particular groups (e.g. women, youth or migrants), but do not assume these groups or their views are homogeneous.¹²

Allow for differing representation. Remember that distinct communities or groups within communities may choose to be represented by different entities. In this case, it may be necessary to consider establishing a committee of community representatives who will meet periodically to agree on overarching matters affecting all rights-holders. Where there are doubts or mixed messages over who gives consent, the best advice is to include more parties rather than unilaterally select fewer.

Formalize representation. Agree with the community to formalize the community's decision on its chosen representative individual(s) or body, in a form that is agreed upon by all parties. This could be a written document, a ritual ceremony, a contract signed by all parties in the presence of an independent witness, or a combination of the above. In all cases, communities have the right to make the agreement binding according to their customary practices, should they so wish.

The agreement should clarify at least, but not only, the following:

- who the chosen representatives are;
- their role in the community;
- how they were chosen;
- their responsibility and role as representatives;
- how they can be contacted;
- the best way to communicate with the representatives (language spoken, level of literacy, any etiquette to be followed in the case of an elder or religious figure);
- how the representatives will ensure that they speak for the community as a whole, taking into consideration possibly marginalized groups such as women, youth, the rural poor, the landless and migrants;
- the limits on decision-making by the representatives, and under what conditions they must bring negotiation options to a community forum for a decision;
- how the dialogue will be shared with constituents and their inputs solicited for decisions in progress;
- logistical arrangements for multiparty consultations (time, place, frequency, participants, additional costs and transport);
- what process the community or other actors can engage in if the representatives prove inadequate in their role;
- what happens if the representatives fail in their role, or if the community chooses to replace them.

¹² Diversity of perspectives from different rights-holders: See Guidelines *inter alia* 3B.3 and references for gender sensitivity in footnote 8.

Document the proceedings and outcomes of the consultation and make these available to all parties.

Ensure legitimacy. Where there is doubt as to the legitimacy and interests of chosen representatives, as expressed by the communities or other parties, further randomized consultations should be carried out with samples of the community. Preferably these should be fully confidential and reflect the views of women, the elderly and young people.

Carrying out iterative consultations and information-sharing

The purpose of iterative consultation is to share, in a multi-directional process, all relevant information pertaining to the projected development with relevant actors and rights-holders. With this information, communities are better placed to decide whether a project should or should not go ahead, and to discuss any modifications necessary to secure their consent.

Consultation begins with the identification of rights-holders and land users, and should take place for each of the ensuing steps. Consultations should occur at the location and with the frequency necessary for all parties to feel comfortable and confident participating actively, meaningfully and freely. Information should be communicated widely, transparently, freely, a good deal of time prior to action or decision-taking, in a non-discriminatory information-sharing process that uses appropriate and accessible forms and languages.¹³ Throughout the process, remember that the company and the government should respect the right of the communities to give or withhold their consent as active agents in the process.

The Guidelines on accessibility of information and non-discrimination

Source: FAO, 2012.

12.11 Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should ensure that the agreements are documented and understood by all who are affected. The negotiation process should be non-discriminatory and gender sensitive.

How should this be implemented?

The process

Plan local meetings. Agree with the communities, well in advance, the time, duration, location, participants and purpose of each consecutive consultation. Ideally, consultations should take place in the territory of the communities consulted. Accessibility is key to effective participation at all steps of the process; consultations in distant cities may be expensive and impractical for local communities to participate fully and confidently. Communities may also feel that their representatives are more

¹³ Non-discrimination: See Guidelines *inter alia* 3B.1.2; 4.4; 4.6; 4.7; 5.3; 6.3; 9.10; 11.3; 12.11; 17.3; 21.3; 21.6; 25.3; 25.5; 25.7. Consultation and participation in decision-making processes: See Guidelines *inter alia* 3B.6; 6.4; 8.6; 8.9; 9.2; 9.7; 9.9; 9.12; 10.3; 11.2; 12.5; 15.7; 12.9–12.11, 16.2. Transparency and accountability: See Guidelines *inter alia* 3B.8; 3B.9; 5.8; 6.9; 8.6; 8.9; 10.5; 11.1–11.4; 12.3; 12.5; 12.13; 16.2.

accurately conveying their views if the representatives are not physically distanced from their constituents.

Carry out participatory social and environmental impact assessments and share the findings with the affected communities. When done sensitively, with engagement from affected communities and respect for their rights, such assessments provide valuable information. They tell communities the costs and benefits of the planned development, the implications for their livelihoods and the measures that need to be taken to avoid or mitigate undesired impacts. Impact assessments are also crucial to provide the baseline data against which implementation and compliance can later be measured. The Convention on Biological Diversity has developed detailed guidance for carrying out such impact assessments in indigenous peoples' lands (CBD, 2004).

Communicate accessibly. Convey all information in forms and languages that are accessible and relevant to all parties. These can include written and recorded media, diagrams, pictures, videos, role-playing and so forth. Customary modes of communication and norms of interaction may vary in different communities, and should be respected.

Involve facilitators in consultations – preferably independent ones – to ensure that all parties have equal space to voice their views. The facilitator could be an NGO representative or other third party acceptable to the communities.

Help communities create a plan of action. NGOs or other support organizations, backed by relevant and enforceable safeguards, can play a valuable role in helping local communities create a plan of action that conveys their specific needs, concerns and demands. This can build consensus within the communities prior to negotiations. Advance planning is particularly relevant where communities are not familiar with the kind of development being proposed or are likely to need further support to organize and represent themselves in the face of unprecedented changes that may affect them.

Involve as many communities in the consultation as necessary, bearing in mind that different communities, and different groups within the communities, may have different views and needs. Remember that certain community members based outside the local villages may also want a say in the discussions, and the communities should seek to inform them about the negotiations and solicit feedback on decisions in progress.

Invest the necessary time and resources to convey information clearly, accurately and fully, address questions and concerns, and clarify or revisit issues where necessary. Much of the information shared will be new to various parties involved, and time is essential for them to digest and respond properly to this information. Allow frequent breaks in the consultation for parties to review, analyse and discuss among themselves the information provided to them, and come back with questions or clarifications. Make it clear that everyone involved is both a learner and an information-sharer on an equal footing, but that FPIC is an expression of the wider rights of the communities, and the state and the company have responsibilities to respect these human rights, including through respecting FPIC.

Convey the right to say ‘no’ or ‘we don’t know’. From the very start, the communities should be adequately informed that they are not obliged to make a decision if they are not completely sure. They should also be told that they can accept, reject, partially accept, partially reject or choose not to give an opinion on a proposal, and can request as much time as they need to decide what is best for them. Postpone consultations when interest groups feel they need more time or information from other sources to make decisions.

Make it clear who in each party can be approached for queries to ensure fluid communication. Each actor should know who to turn to with concerns and requests for information, and who has the capacity to make decisions.

Protect freedom and safety. All consultations and any ensuing decisions must be non-coercive, open, transparent and free from any other forms of manipulation, bribery, intimidation or duress. All participants should be offered anonymity to protect informants if they feel it is necessary. Communities have the right to privacy in negotiations and consultations where they feel that the presence of the government or the company restricts their ability to discuss and decide freely.

Hire interpreters with adequate skills and experience to ensure that information is accurately and fully conveyed to all parties where multiple languages are involved.

The content

Make use of the maps created in the participatory mapping process. These should be used for reference during the negotiations.

Allow flexibility in the content of the consultation process, and make sure the agenda covers the critical points raised by all parties.

Meetings should cover *at least* the following issues.

Companies should provide information about, but not limited to, the following:

- the company’s name, history and operational track record;
- its organizational structure and hierarchy;
- the location of its headquarters and operations;
- the number of staff and projects in operation;
- the nature of the projects in operation;
- the main investors in the company (including international financial institutions);
- any existing FPIC policies of the company;
- any applicable voluntary standards to which the company has committed itself, and related obligations of the company;
- any applicable international financing institution standards that the company is required to respect;
- the details of key contacts within the company;
- the nature, scale, purpose, location, duration and reversibility of the proposed project;

- the type of permit being sought;
- findings and recommendations from social and environmental impact assessments;
- findings and recommendations from high conservation value assessments.
- a balanced assessment of the potential environmental and social long- and short-term impacts of the project;
- the potential risks and benefits of the proposed project for affected parties;
- any existing or planned mechanisms for resolving and remedying disputes;
- any existing or planned participatory monitoring, verification and evaluation processes;
- personnel likely to be involved in the implementation of the project;
- employment opportunities offered to communities by the project, the employment terms and conditions, benefits and requirements, the total number of skilled and unskilled jobs anticipated, the extent of external hiring anticipated, and implications for the number of jobs sourced locally;
- procedures that the project may entail;
- forms of compensation and mitigation measures to protect the livelihoods of the communities;
- how the food and water security of local communities will be ensured;¹⁴
- options, procedures and compensation for eventual relocation of local communities, should they agree to it;¹⁵
- which aspects of the project are still open to modification based on inputs, and which are not.

The government should provide information about, but not limited to, the following:

- the legal status of the communities;
- the rights of communities under national and international law, and related obligations of the state. These may include, but not be limited to, the provision of health services; education; electrification; communications; transport; roads; markets; administrative, fiscal and social security arrangements; and so forth. They may also cover the obligation of states to respect individuals' right to development, health, the enjoyment of the environment, property, privacy, effective remedy, fair trial, non-discrimination, compensation in cases of miscarriages of justice, and so forth;
- the legal status of the targeted project area;
- the legal implications of the land use change for the rights of communities;

The Guidelines on food and livelihood security

12.10 When investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, states should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment. States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers. This process should be conducted through consultation with all affected parties consistent with the principles of consultation and participation of these Guidelines. States should ensure that existing legitimate tenure rights are not compromised by such investments.

¹⁴ Food and livelihood security: See Guidelines *inter alia* 1.1; 4.1; 8.11; 12.1; 12.2; 12.6; 12.8; 12.10; 12.12; 12.15; 13.1; 26.2; 26.4.

¹⁵ Restitution: See Guidelines 4.1–14.4. Compensation and expropriation: See Guidelines *inter alia* 3A.1.4; 4.9; 16.1–16.9. Eviction: See Guidelines *inter alia* 3A.1.2; 4.4; 4.5; 7.6; 9.5; 10.6; 16.7–16.9.

- the jurisdictions of relevant state institutions, and their relevance to communities;
- any existing or planned mechanisms for resolving and remedying disputes;
- any existing or planned participatory monitoring, verification and evaluation processes;
- the details of key contacts within the government;
- what state services will be affected by the project;
- what state services will be improved by the project;
- what remedies or mitigation the government will require from the company to offset any negative impacts resulting from the project;
- what recourse mechanisms the government will offer communities in the case of infractions by the company.

Local communities should provide information about, but not limited to, the following:

- customary rights and uses of land and natural resources;
- the cultural and historical value of the land and natural resources;
- areas of particularly great importance within the targeted project area, and how these must be preserved;
- local modes of livelihood and other forms of dependence on land and natural resources. These can include access to food and water, natural resource management and a range of economic activities;
- any previous experiences with private sector land acquisition on their customary lands, and any grievances that have arisen;
- local decision-making and negotiation processes, including agreed mechanisms for local representation;
- concerns caused by the project;
- expectations about compensation for damages or losses caused by the project, should consent be granted;
- opportunities identified in the project (e.g. rural development, social welfare, infrastructure or alternative livelihoods);
- expectations about the business model to be employed, and the nature and level of benefits they anticipate;
- nature of past experiences of interaction with the state, and any grievances;
- suggestions as to how the project can be modified to suit their needs.

Providing access to independent sources of information and advice

Communities have the right to access independent sources of information throughout the process of respecting FPIC, including during the process of reaching consent and, in particular, prior to decision-making and agreement. The purpose of this is to allow communities to make informed decisions based on a comprehensive range of information of their own choice – including information on alternatives to the proposed development – independently of the project proponents' interests. Governments and companies should facilitate local communities' access to independent sources of information, and local NGOs can play an important role in communicating independent information and/or advice.

How should this be implemented?

Inform communities that they have the right to access independent sources of information throughout the process, as well as the right to seek advice from other indigenous peoples and from indigenous or non-indigenous organizations, as they see fit. Where necessary, help identify these sources and groups, and facilitate access to them.

Provide a choice of facilitators. Communities requesting assistance should be offered a choice of facilitators, including any suggested by the community themselves.

Support the use of advisors. Communities also have the right to invite advisors, including but not limited to lawyers, legal advisors or other allies, to observe or participate in facilitation and to provide useful and innovative recommendations. The government and/or the project developer should provide adequate financial and logistical assistance for communities to access this kind of support. Ideally, however, financial and logistical support should not come directly from the project developer; communities have the right to access funding and services that are not under the exclusive control of the developer.

Informed consent

Source: UN-REDD Programme, 2013.

Information provided to all parties must:

- be accessible, clear, consistent, accurate and transparent;
- be delivered in appropriate language and format (including radio, video, graphics, documentaries, photos);
- be objective, covering both the positive and negative potential of the project activities and consequences of giving or withholding consent;
- be complete, covering the spectrum of potential social, financial, political, cultural, environmental impacts, including scientific information with access to original sources in appropriate language;
- be delivered in a manner that strengthens and does not erode indigenous or local cultures;
- be delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
- be delivered with sufficient time to be understood and verified;
- reach the most remote, rural communities, women and marginalised groups;
- be provided on an ongoing and continuous basis throughout the FPIC process.

Adopting a 'presumption in favour of disclosure' means being forthcoming with information whenever possible, especially if there is no compelling reason not to share it. Remember that a lack of information can lead to the spread of misinformation about a project that can be damaging to the negotiation process and undermine efforts to engage in an informed dialogue with all rights-holders. Transparency and ready access to information also testifies to your accountability and good faith engagement in the process of respecting the right to FPIC.

Reaching agreement and making it effective

It is essential that the consent-seeking process is free of manipulation, that agreements reached are mutual and recognized by all parties, and that further steps can be introduced where consent is withheld, if this is agreed to by the local communities. Consent from all parties is necessary for completion of each step of the process, even where these steps are repeated. Moreover, even in a case where consent has been obtained from indigenous peoples and local communities, it must not result in the undermining of their human rights.

How should this be implemented?

Tenure and shareholder options

Agree on how to agree. In consultations with the community, agree with them on how agreement will be reached and expressed, taking into consideration customary modes of decision-making and consensus-seeking. These may include votes, a show of hands, the signing of a document witnessed by a third party, performing a ritual ceremony that makes the agreement binding, and so forth. Decide on the requirements for reaching a valid decision. For example, validity may depend on the proportion of the community that was present for the decision, the number of votes or the extent of representation from different groups within the community (such as women, youth, the rural poor or migrants). In all cases, communities have the right to make the agreements binding according to their own customary practices, should they so wish.

It is important for all parties to be open to alternative tenure and production patterns in discussing how the project should be carried out. This may mean modifications to the size and location of the targeted land and the pattern of land use. It may also mean different options in terms of cultivation patterns: mixed crop versus monocrop, smallholder models, estate models, high-yield intensive cultivation over small areas (the 'land-sparing' model) or lower-yield but larger-scale cultivation (the 'land-sharing' model) (Phalan *et al.* 2011). Other options may include joint business ventures, shared equity, joint management, or the contracting or subcontracting of community enterprises.

The status of communities in relation to the outside company or investor should also be discussed so that their rights are respected and protected. Possible options are temporary or permanent employees, shareholders or even business partners. In addition, the terms of the lease contract should be agreed to by all parties, including its duration, renewal conditions, requirements and related sanctions.

Know the facilitator's role. Facilitators should provide, among other things, constructive criticism, emotional security and intellectual support in consultations. It can be useful to assign an independent third party the role of the 'critic' who questions every decision, so that each stage of the consultation is thoroughly reviewed and approved by the whole consultation group before they move on to another topic.

Approach negotiations cooperatively. Negotiation is not about winning or losing – it is about cooperating so that all parties can achieve at least some of their objectives. Make other parties see the negotiation as part of a long-term relationship and dialogue. Try to separate facts from values: conflicting facts can be resolved through research, but where conflicting values cannot be resolved, parties should respectfully 'agree to disagree' while keeping negotiations relatively amicable. Give other participants credit for good ideas and graceful exits for bad ones. Listen carefully and actively to what everyone else is saying. If information is unclear or too technical, ask for it to be repeated or rephrased.

Be flexible. When a community is opposed to certain parts of a project, try to establish which parts are acceptable to the community and which parts need to be adapted or abandoned. Be open to modifying original projects and objectives so they are more satisfactory to all parties.

Be prepared in case of stalemate. Agree in advance what steps will be taken if negotiations fail to produce an agreement and reach a stalemate. These may include procedures to appeal to an independent mediator, a time-out period prior to renegotiation, procedures for re-establishing negotiations, and so forth.

Where consent is withheld, establish the causes, the conditions that would need to be met for the communities to give their consent, whether the community will consider renegotiation, and the terms and timing of eventual renegotiation. The company should respect the right of communities to refuse any renegotiation should they so wish.

The content of the agreement can include:

- signatory parties;
- mutually agreed substantive evidence of consent;
- agreement details (e.g. costs, benefits, requirements, rules and restrictions), ensuring all expectations are voiced and vetted, and the resulting agreements are committed and agreed to by all;
- project duration;
- arrangements for making agreements binding;
- grievance process;
- monitoring and evaluation plan;
- terms for withdrawal of consent;
- agreed next point for consent to be sought;
- independent verification provisions;
- sanctions for violation of the agreement.

Document the process in forms and languages accessible to all parties, and provide for stakeholder review and authentication.

Fundamentals of effective negotiation

Source: Barsh and Bastien, 1997.

- inform and involve the community;
- clearly identify your needs, and agree on priorities;
- identify the needs of all other parties;
- demonstrate your credibility and capacity to deliver;
- develop relationships ('rapport') with other negotiators;
- find ways to reconcile other parties' needs with your own;
- make proposals that are specific and achievable;
- leave personal anger, pride and self-doubt at home.

Monitoring and verifying agreements¹⁶

Once consent has been reached, it is important to ensure that agreements made through the consultation process are respected in their practical implementation. If agreements are not respected, sanctions and/or mechanisms of redress need to be activated.

Modes of monitoring and verifying agreements should be jointly defined before an agreement is finalized, and the monitoring and verification procedures should be described in the agreement. The monitoring and verifying activities themselves should be carried out once consent has been given for the project to begin operating, and independent periodic reviews should be commissioned at intervals satisfactory to all interest groups.

¹⁶ Monitoring and verification: See Guidelines *inter alia* 3B.10; 5.8; 6.7; 12.14, 26.1–26.5.

**The Guidelines
on grievances,
remedy and
conflict resolution**

Source: FAO, 2012.

21.1 States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies and a right to appeal. Such remedies should be promptly enforced. States should make the mechanisms to avoid or resolve potential disputes available to all at the preliminary stage, either within the implementing agency or externally. Dispute resolution services should be accessible to all women and men, in terms of location, language and procedures.

How should this be implemented?

Design monitoring jointly with the communities. The communities involved in a project agreement should also be involved in joint monitoring of project implementation. This includes community input on the design of the monitoring approach, the activities to be monitored, the monitoring methods, how diverse views will be solicited and how results will be recorded and shared with the wider community. Communities should be in agreement about the methods for participatory monitoring and feedback, with full knowledge of the human and financial resources required and available.

Use independent monitors. The verification process should be implemented by independent parties acceptable to all parties.

Include diverse voices. The verification team should carry out interviews across the spectrum of rights-holders and land users, including marginalized groups such as women, the poor, the landless and youth, to ensure their rights are equally respected.

Offer respondents anonymity and maintain anonymity of inputs where requested.

Solicit feedback on findings. Public sessions can be held to share and discuss the findings of the verification process. This gives community members an opportunity to confirm or contest the findings and to request that a different verification team repeat the process, if necessary.

Know how you will address any problems. Agree with the community at what stage grievance processes will be triggered, should problems emerge during monitoring. Agree on conditions under which the consent process can be reinitiated and the agreement renegotiated.

Establishing a grievance process¹⁷

It is important to establish an independent mechanism for parties to raise concerns that may arise throughout the project's lifetime. The grievance mechanism should allow consent to be re-established through a more accessible and local alternative to external dispute resolution processes.

The mechanism should be discussed and developed early on rather than left until disputes or breakdowns of consent occur. Thus, deciding on the form of the grievance process should be part of the consultation and consent-seeking process. The process should be available for use during preagreement stages and should be included in any agreements that are reached.

¹⁷ Grievances, remedy and conflict resolution: See Guidelines *inter alia* 3A.1.4; 3A.1.5; 3A.2; 3.2; 4.9; 6.3; 6.6; 6.7; 9.11; 12.14; 25.1–25.7; 21.1–21.6.

How should this be implemented?

Agree with the community on how to receive and register grievances. This could be through a panel or committee of key representatives and independent advisors, periodic interviews with community members by independent entities, a collection box for written and anonymous feedback, and so forth. Where customary grievance mechanisms exist and the communities choose to follow them, this should be respected by the other parties. Drawing from customary grievance processes to inform the grievance mechanism will make it relevant and meaningful to the communities.

Agree with the community on how to review and investigate grievances. This should include grievance tracking and response systems, and relevant time frames for the grievance-resolution process.

Agree on resolution options satisfactory to all parties. These may include forms of compensation, sanctions or restitution.

Agree on how grievance resolution will be monitored, evaluated and agreed to by all parties.

Inform communities about government adjudication processes and access to justice, in case the grievances cannot be resolved without outside assistance.

Formalize, document and publicize the grievance process. Agree with the community on how the grievance mechanism can be formalized according to customary norms, and/or through its declaration and registration at an official institution (e.g. a regional or local government office). Document the grievance process in forms and languages accessible to all parties, and publicize it.

Providing access to remedy and conflict resolution

Providing access to conflict resolution mechanisms is essential to fulfil the right to remedy for actors who feel other parties have violated their rights. As with anticipating and establishing grievance mechanisms, conflict resolution mechanisms should be discussed and developed early on rather than left until disputes occur or consent breaks down.

Consultations with local communities should be informed by any outstanding obligations of previous operators that have been documented, and forms of remedy should be discussed in the consent- and agreement-reaching stages. The outstanding obligations should be fulfilled once consent has been given for the project to go ahead.

The right to remedy

Source: MacKay, 2002.

Under international law, violation of a human right gives rise to a right of reparation for the victim(s). Reparation is intended to relieve the suffering of and afford justice to victims “by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations”. In human rights law, the availability of effective remedies is a right in and of itself that complements other recognized rights. Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

How should this be implemented?

Engage a professional mediator, conflict resolution expert or ombudsman to mediate the process. The mediator needs to have no conflicts of interest and be acceptable to all parties.

Allow ample time and resources for the process to achieve fair outcomes.

Follow the steps of the FPIC process, which may involve participatory mapping, land rights and land use identification, reassessment of processes of representation and the creation of mechanisms for compensation payment.

Suspend operations. Companies can help rebuild mutual trust by suspending all operations in the project area for the duration of the dispute resolution and remedy-seeking process. This can mean halting land negotiations and/or ceasing intrusions on the land in question. Suspension of operations during disputes should be included as a clause within the final project agreement.

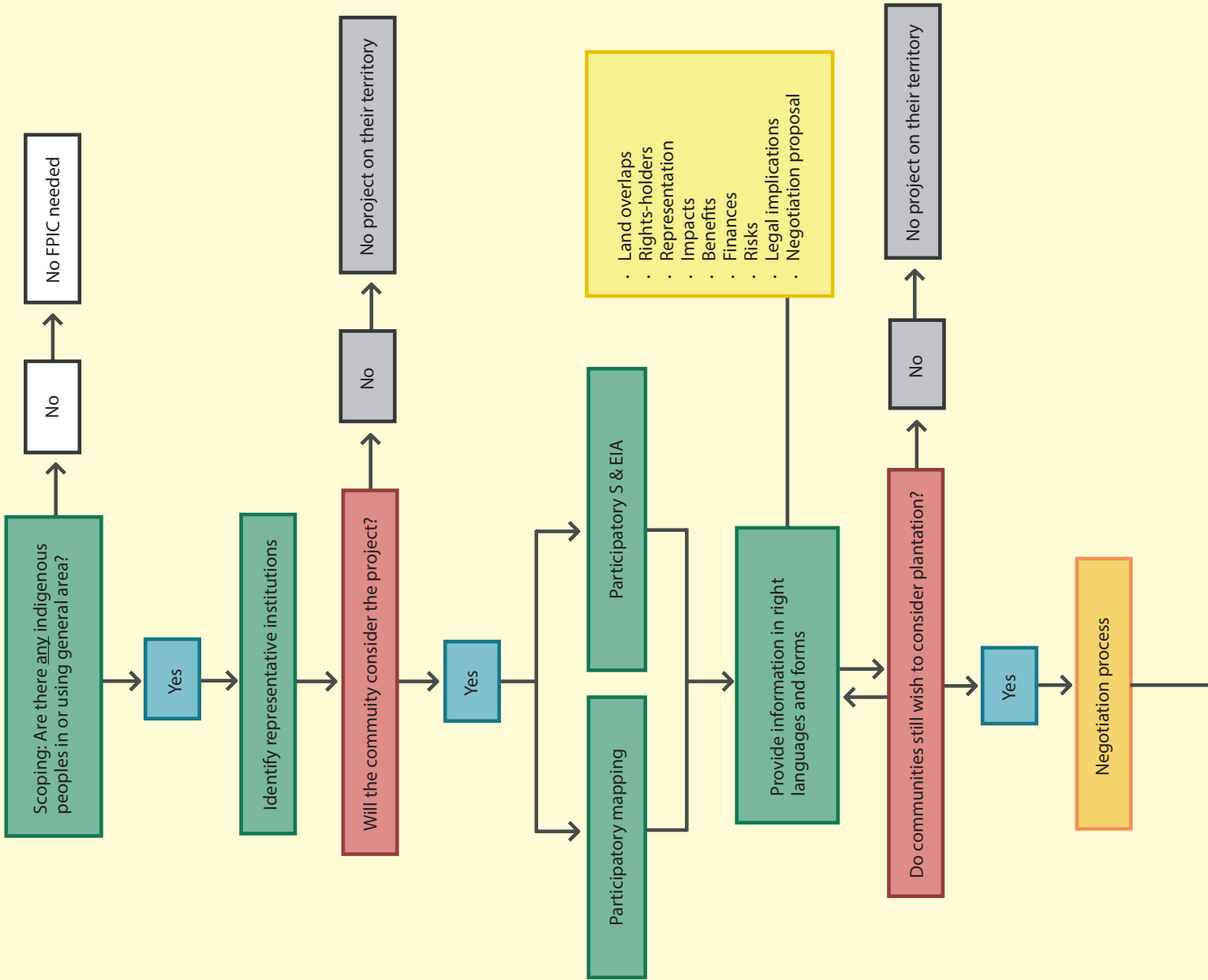
Possible forms of remedy include:

- return or restitution of lands, territories and resources, and other property and intangible resources, taken or affected without the consent of communities;
- restoration of damaged ecosystems and/or resources;
- payment for the relinquishment of rights;
- improved benefits for smallholders and workers;
- payment in cash or kind for ceded lands or use of lands;
- compensation for damages and infringements of rights;
- compensation for losses of livelihood and income;
- compensation for losses of intangible heritage;
- payment of the costs of securing reparations, engaging in negotiations and seeking advice;
- agreement either to permanently suspend operations in the disputed area and/or proceed with a newly negotiated agreement involving all the requirements of an FPIC process;
- formal guarantees of non-repetition;
- formal procedures and sanctions in the case of repetition.

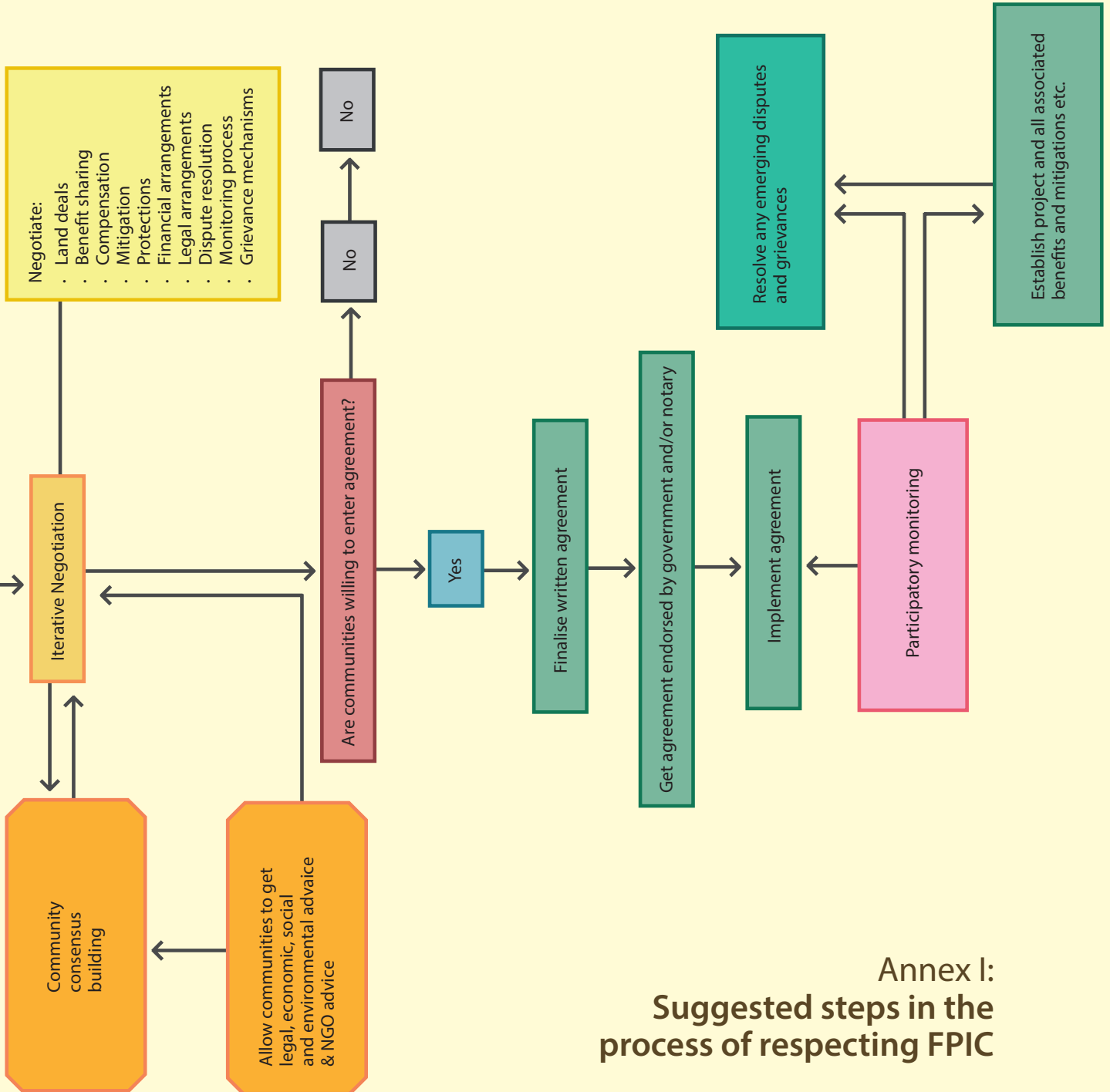
Document the remedy process in forms and languages accessible to all parties.



Annexes



Adapted from FPP, 2008 and Anderson, P. 2011.



Annex I:
Suggested steps in the process of respecting FPIC

Annex II: Useful questions

Questions to ask yourself: **indigenous peoples and local communities**

- What is the project, how big is it, and when and where will it be established?
- Has the developer been in communication with you about the proposed developments?
- With which community institutions is the developer in communication?
- Did the communities have the freedom to choose for themselves their representative organizations, or were these nominated by the government, or chosen by intermediaries or the company?
- Has the developer made an assessment of the extent of your land rights as defined by law or by custom?
- Does the developer understand and respect your land rights or land claims?
- Has participatory mapping been carried out under the direction of the local communities to identify the extent of your rights?
- Have agreements been reached with the local communities about the extent and boundaries of customary rights areas?
- Do these customary rights areas overlap with the areas being held by the developer?
- Have you seen the social and environmental impact assessments?
- Did your community participate in the social and environmental impact assessments?
- Do you agree with the findings? If not, what are your concerns with the findings?
- Does the impact assessment make clear how the legal status of your lands may change during the lease or concession, the possible length of the lease or operation, and the legal status after the expiry of the lease or concession?
- Have you seen the high conservation value assessments?
- Did your community participate in the high conservation value assessments?
- Do you agree with the findings? Do you feel that sufficient areas are being set aside (i.e. not planted or cleared) for the protection of environmental services such as fresh water? For areas important to you such as religious sites, graveyards and sacred areas? For your basic needs for food and other critical parts of your livelihoods?
- What information has been made available to the community members? Is it in a language and form appropriate for you to understand?
- What do you know about your rights, including FPIC? Do you feel you could benefit from more information on your legal rights?
- Were there discussions with the local communities about mitigation, monitoring, benefit-sharing and compensation arrangements?

- What measures are in place to ensure that communities can consider proposed developments on their lands without coercion or duress?
- Were meetings held in places chosen by the communities? Did people feel free to speak their own minds in these meetings?
- Were communities asked whether or not they agreed with a development prior to the company making a decision to invest and acquiring permits from the government?
- In negotiations with the company for the establishment of the plantation, was time and scope given for the community representatives to make decisions in accordance with their own preferred or customary systems of decision-making?
- Were you free to consult among your community members about the details, to ensure consensus could be achieved? Did a legally binding negotiated agreement result?
- Was the community free to obtain legal advice or involve local NGOs of their choosing?
- Did the community agree to the use of their lands for the project?
- Do you have a copy of that agreement? If not, does someone you trust have a copy?
- If agreements have been reached, does everyone see them as fair? Do the agreements enjoy the full support of all the affected families, households and the community?
- Have people been fairly compensated, paid or provided benefits in line with any agreements?
- Is there any dissent among community members? If there are members of the community who do not support the agreements, why is this? (Special care should be taken here to secure the anonymity of respondents if they request this).
- Are there unresolved land conflicts between communities? Between local people or communities and the company or government?
- Are there mechanisms in place to resolve such conflicts?
- Are these mechanisms acceptable to all concerned parties, and have they been effective?
- What will your community gain from the project?
- What will your community lose from the project?
- Where benefits are promised, are these temporary or permanent, and do you have proof?
- What happens to your customary lands once the company leaves?
- Will you have to relocate because of the project, and if so, how and where?
- What impact will the project have on your access to food and livelihood?
- Why is the land you use important to you?
- How will the environment around you be affected by the project?
- What are your customary rights and uses of land and natural resources?

- What are your needs as a community? Which needs are the most important, and which are less important?
- Who gives consent from your community, and do you feel that your representatives are accountable?
- Will the project developer conduct human rights, environmental, gender and social impact assessments? Do you have an opportunity to participate in these assessments?
- What opportunities do you have to provide input into project design and management?
- Who is responsible for and/or involved in the project? (This could include local or foreign governments, local or transnational companies, local authorities, and banks or international finance institutions).
- What do you know about the history and reputation of the developer?
- Do you know whom to bring your concerns to in the government and in the company?
- Where can you find independent information about the project?
- Do you feel you have access to enough information, and is this information presented in ways that are meaningful and useful to you?
- Do you feel that you are given enough time to make decisions?
- Do you feel that you are sufficiently involved in negotiations and decision-making?
- What will you ask for compensation if your lands are lost?
- What do you see as appropriate compensation for damage to your cultural heritage, such as sacred sites and traditional practices?
- Do you have access to independent sources of information?
- Has your community experienced development projects in the past? What lessons were learned from this?
- Do you feel that you understand your rights under the laws of your country?
- What decision-making and negotiation structures exist in your community?
- What can you do if agreements you reach are broken by the company, government authorities or members of your community?
- What happens if you decide against the project in 10 or 20 years' time?

Questions to ask yourself: **companies and investors**

- Are there people living in the targeted project area? If so, what claims, rights and uses do these people have over the land?
- What is the historical and political context of the country? How may this have affected and continue to affect local communities and their relation to land?
- What is the legal status of the land, and how will this status change once you acquire it?
- Do you feel you have a clear understanding of national laws pertaining to land acquisition?
- To what extent do national laws support voluntary standards of your industry, and how aware are government authorities of these voluntary standards?
- What international human rights laws have been signed, endorsed and/or ratified by the country you operate in?
- What can you learn from other companies' implementation of an FPIC process, or from the lack thereof?
- What forms of compensation and mitigation measures will be considered to protect the livelihoods of local communities?
- Will employment opportunities be offered to local communities, and if so, on what terms?
- Does your company have a clear and binding FPIC policy or procedure? How does it provide for an ongoing, iterative process of communication and negotiation throughout the entire planning and project cycles?
- What languages and dialects are spoken in the country and by the local communities? How will information be conveyed and recorded if the communities are illiterate?
- How will customary modes of decision-making, negotiation and consent-seeking be taken into account in the FPIC process?
- Is a social and environmental assessment planned, and if so, how will local communities be able to participate in it?
- How will you ensure that information is made readily available in suitable forms and languages for local communities and NGOs, where requested?
- Who is responsible for monitoring and evaluating agreements made between you and the communities?
- What resources and how much time are you prepared to invest in the FPIC process?
- Who are the community representatives you will interact with, and who has chosen them?
- What support, financial or other, are you prepared to give local communities to help them access independent sources of information?
- Have you consulted local and national NGOs with expertise in customary rights and land tenure?

- How will you ensure that communities are fully informed of the nature of your project and its short and long-term impacts, both positive and negative?
- What training is made available to your field personnel on the FPIC process and the voluntary standards of your industry?
- If disputes arise, how will they be resolved, and by whom?

Questions to ask yourself: **government officials**

- Who is living in the targeted project area, and what are their formal and informal statuses and rights under national laws and international law?
- What is the track record of the company involved, and what voluntary standards must they abide by?
- What international instruments has your country signed, endorsed or ratified, and how are they made consistent with or incorporated into national laws?
- Who represents the local communities, and how are these representatives chosen?
- For how long prior to contract signing are local communities involved in and informed about negotiations and decision-making processes?
- What is the legal status of the targeted project area, and under whose jurisdiction does it fall?
- What happens to the land once the lease terminates? Has this been made clear to the local communities?
- What benefits will the project bring to the local communities?
- What risks do the local communities run by giving their consent to the project? How will they be compensated?
- How will you seek to make information about the project readily available to local communities and NGOs, in appropriate forms and languages?
- What voluntary standards must the company abide by, and how can these be accommodated by existing national laws?
- What criteria and procedures exist, or need to be developed, to clarify how governments should implement FPIC?
- How can you ensure that the benefits of the project accrue to local communities in an equitable, corruption-free way?
- To what extent do the relevant bodies and individuals have the human, physical, financial and knowledge capacities to perform their responsibilities?
- To what extent are local communities aware of and able to access formal judicial mechanisms, should they wish to make complaints?
- What maps are available of the targeted project area, and how far do they represent customary land claims and uses?
- What measures will be undertaken if the project results in relocation of local communities?

- How can local and national NGOs inform official actions, and what role can they play in the FPIC process?
- What sanctions are in place, or need to be put into place, to ensure that operations respect the rights of local communities?
- What is the government doing to facilitate or allow the company to comply with international norms and voluntary standards?
- How do state laws or policies assist or create obstacles to respect for FPIC?

Questions to ask yourself: **NGOs, civil society organizations and indigenous peoples' organizations**

- What makes your experience and objectives relevant and appropriate to participation in the FPIC process?
- How can you ensure that adequate information is being communicated to local communities in the appropriate forms, including information on alternatives to the proposed development, and information critical of the proposed development?
- How accessible do you make information to other parties, such as the government and companies?
- Is there a network of NGOs in your region or country to support the sharing of experiences and lessons learned across local communities?
- What capacity-building activities can you offer to local communities to help them voice their views and make use of political space?
- How can the objectivity, transparency and accountability of your activities and motives be ascertained by other actors?
- How can vigilance and independent oversight by your organization be ascertained?
- What role can you play as mediator or facilitator in the FPIC process?
- How can you support government officials and companies in implementing the FPIC process?
- How can you support local communities in establishing and accessing grievance mechanisms?
- How far do you feel the media accurately conveys information to actors and the wider public in your country?
- Beyond the FPIC process, what legal reforms and standard-setting procedures do you feel need to be developed in your country?
- How will you seek to ensure that consent given or withheld reflects the wider view of the community in question?
- What role will you assume in consultations and negotiations?
- How informed do you think local communities are, and how can partial information be remedied?

- Is consent being given freely by the local communities, and if not, how can this be ascertained?
- What do you know of the company's track record in its other operations, and what voluntary standards does the company abide by?
- To what extent are local communities aware of their rights under national and international law, and what training activities can be carried out to enhance this awareness, including their understanding of FPIC?

Annex III: References and further reading

- Amazon Watch.** 2011. *The right to decide: the importance of respecting free, prior and informed consent.* San Francisco & Washington, DC.
- Anderson, P.** 2011. *Free, prior, and informed consent: principles and approaches for policy and project development.* Bangkok, The Center for People and Forests (RECOFTC) & Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).
- Barsh, R.L. & Bastien, K.** 1997. *Effective negotiation by indigenous peoples: an action guide with special reference to North America.* Geneva, International Labour Organization.
- CBD.** 2004. *Akwe: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.* Montreal, Secretariat of the Convention on Biological Diversity.
- Colchester, M.** 2010. *Free, prior and informed consent: making FPIC work for forests and peoples.* The Forests Dialogue, Research Paper No. 11. New Haven, Connecticut, USA, Yale.
- Edwards, K., Triraganon, R., Silori, C. & Stephenson, J.** 2012. *A training manual: putting free, prior, and informed consent into practice in REDD+ initiatives.* The Center for People and Forests (RECOFTC), the Institute for Global Environmental Strategies (IGES) and the Norwegian Agency for Development Cooperation (Norad).
- EMRIP.** 2011. *Expert Mechanism advice no. 2 (2011): indigenous peoples and the right to participate in decision-making.* Geneva, The Expert Mechanism on the Rights of Indigenous Peoples.
- FAO.** 2009. *Participatory land delimitation: an innovative development model based upon securing rights acquired through customary and other forms of occupation,* by C. Tanner, P. de Wit and S. Norfolk. Land Tenure Working Paper 13. Rome.
- FAO.** 2010. *FAO Policy on Indigenous and Tribal Peoples.* Rome.
- FAO.** 2012. *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security.* Rome.
- FAO.** 2013. *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure.* Governance of tenure technical guide No. 1. Rome.
- Forest Carbon Partnership Facility & UN-REDD Programme.** 2011. *Draft guidelines on stakeholder engagement in REDD+ readiness with a focus on the participation of indigenous peoples and other forest-dependent communities.*
- Forest Peoples Programme.** 2008. *Free, prior and informed consent and the roundtable on sustainable palm oil: a guide for companies.* Moreton-in-Marsh, UK, Forest Peoples Programme.
- Herbertson, K., Ballesteros, A.R., Goodland, R. & Munilla, I.** 2009. *Breaking ground: engaging communities in extractive and infrastructure projects.* Washington, DC, World Resources Institute.
- Hill, C., Lillywhite, S. & Simon, S.** 2005. *Guide to free, prior and informed consent.* Carlton, Victoria, Australia, Oxfam Australia.
- IFC.** 2007. *Stakeholder engagement: a good practice handbook for companies doing business in emerging markets.* Washington, DC, International Finance Corporation.
- MacKay, F.** 2002. *Addressing past wrongs: indigenous peoples and protected areas: the right to restitution of lands and resources.* Moreton-in-Marsh, Forest Peoples Programme.
- Martin, S.** 2007. *Free, prior and informed consent: the role of mining companies.* Carlton, Victoria, Australia, Oxfam Australia.

- Mehta, L & Stankovich, M.** 2000. *Operationalisation of free prior informed consent*. Brighton, UK, Institute of Development Studies.
- Nelson, J.** 2007. *An overview of community mapping with FPP in Cameroon*. Moreton-in-Marsh, UK, Forest Peoples Programme.
- Phalan, B., Onial, M., Balmford, A. & Green, R.E.** 2011. *Reconciling food production and biodiversity conservation: Land sharing and land sparing compared*. *Science* 333(6047):1289–1291
- Puño, J.D. & Gutiérrez Laya, O.** 2007. *Starting point: self-determination – a Peruvian case study*. Moreton-in-Marsh, UK, Forest Peoples Programme.
- RSB.** 2011. *RSB guidelines for land rights: respecting rights, identifying risks, avoiding and resolving disputes and acquiring lands through free, prior and informed consent*. Geneva, Roundtable on Sustainable Biofuels.
- Sohn, J. (ed.)** 2007. *Development without conflict: the business case for community consent*. Washington, DC, World Resources Institute.
- UN Permanent Forum on Indigenous Issues (UNPFII).** 2005: *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*. Document E/C.19/2005/3, submitted to the Fourth Session of the UNPFII, 16 – 17 May.
- UN-REDD Programme.** 2013. *UN-REDD Programme guidelines on free, prior and informed consent*. Geneva.
- World Bank.** 2005. Operational Policy 4.10: Indigenous Peoples. Washington, DC.
- World Commission on Dams.** 2000. *Dams and development: a new framework. The report of the World Commission on Dams*. London, Earthscan.

Governance of tenure **technical guides**

FAO. 2013. *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure.* Governance of tenure technical guide No. 1. Rome.

FAO. 2013. *Improving governance of forest tenure: a practical guide.* Governance of tenure technical guide No. 2. Rome.

Ill-regulated land acquisition has become a major problem, especially in sub-Saharan Africa and Southeast Asia, where it threatens food security, local livelihoods and sustainable natural resource management, and has triggered land conflicts and human rights abuse.

Marginalized social groups are particularly at risk, including indigenous peoples, other

customary landowners, women, lower-caste people and ethnic minorities.

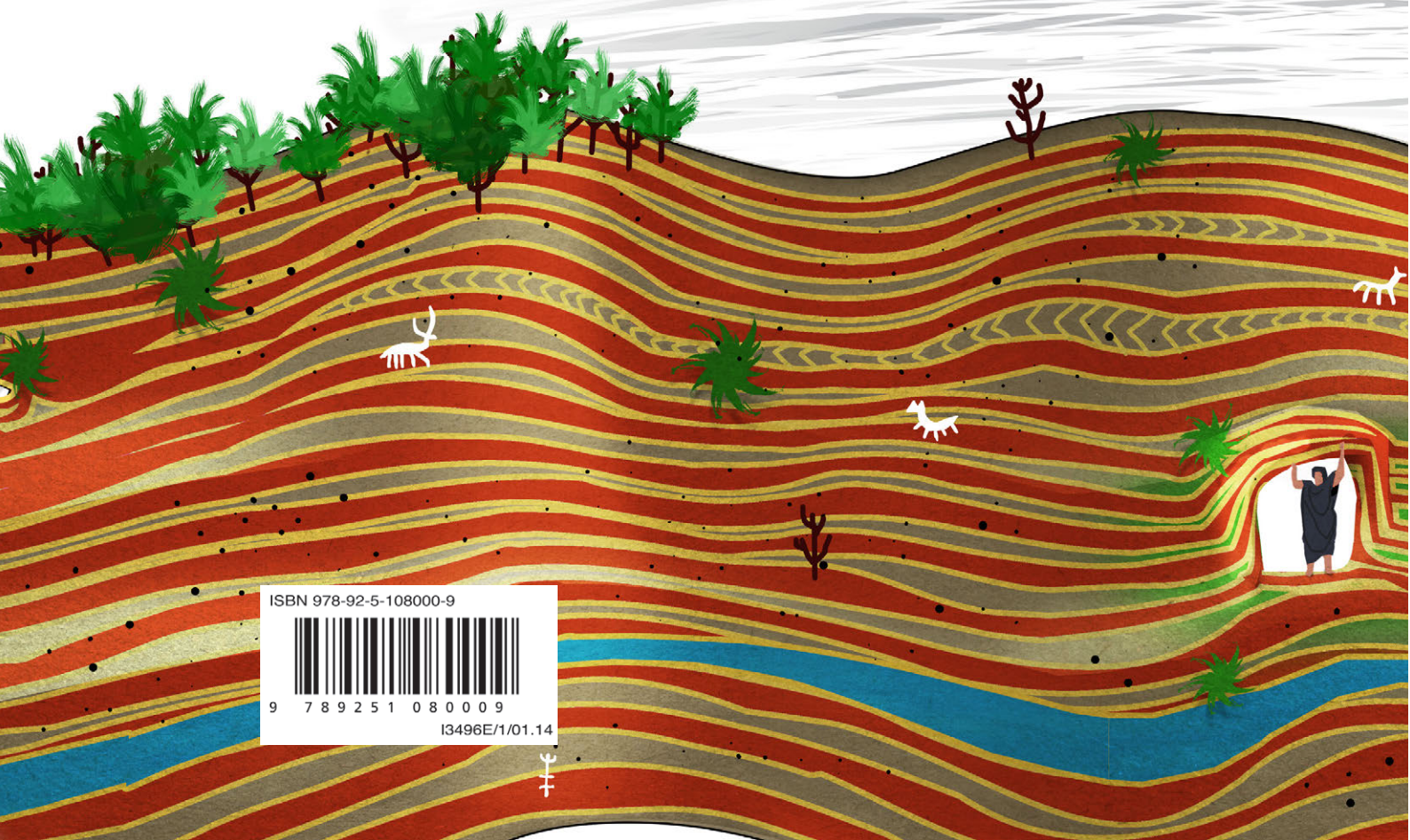
This technical guide on Respecting free, prior and informed consent (FPIC) sets out practical actions for government agencies to respect and protect FPIC and for civil society organizations, land users and private investors globally to comply with their responsibilities in relation to FPIC.

Contact

Food and Agriculture Organization
of the United Nations (FAO)

Viale delle Terme di Caracalla
00153 Rome, Italy

VG-Tenure@fao.org



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