

Free, Prior and Informed Consent Primer

Part of the Responsible Investment in Property and Land (RIPL) Guidebook Series

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Introduction

Free, Prior and Informed Consent (FPIC) is the right of indigenous peoples “to give or withhold their consent to a project that may affect them or their territories.”¹ The right is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);² it is also included in other international legal instruments³ and domestic legal frameworks.⁴ Numerous business enterprises have agreed to FPIC as part of their commitments to responsibly invest in land.⁵

The principles of FPIC seek to ensure that indigenous peoples are adequately informed, properly consulted, and given the opportunity to fully participate in negotiations with companies and the government before they consent to a project that affects their land rights and uses. Such projects include but are not limited to a company obtaining or changing the use of land by leasing or purchasing land; expanding or altering company operations, such as enlarging outgrower schemes; or benefitting from a government expropriation. Considering the frequently inequitable bargaining power between communities, business enterprises and governments, FPIC attempts to level the playing field between contracting parties by safeguarding against communities being coerced, forced, intimidated or pressured to sign agreements with companies or the government that unfairly and unjustly disadvantage them.

Although FPIC is technically a right of indigenous peoples, it is often broadly interpreted as best practice to obtain the FPIC of all communities who maintain customary rights to or uses of land and natural resources.⁶ This broader application is advocated for several reasons. First, although indigenous peoples tend to share similar characteristics, there are no universally accepted criteria to determine whether a community is indigenous because of “the diversity between regions and

countries, and the differences in background, culture, history and conditions of indigenous communities.”⁷ In fact, communities enjoy the right to self-determine whether they are indigenous or not, which can be in the absence of the government making such a determination.⁸ Second, the principles of FPIC overlap considerably with the principles of fair and equitable contracting (e.g., contracting parties must be informed of all material information, community consultations must be held to discuss the proposed project, contracting parties cannot be coerced or pressured to enter into an agreement, etc.). And third, communities who maintain customary rights to and uses of land and natural resources, but are not necessarily indigenous, are still likely to possess limited bargaining power in relation to business enterprises and governments. As such, this primer uses the term “communities,” which should be interpreted as all peoples who have rights to and customary uses of land, including indigenous peoples.

The Primer will first describe the four key elements of FPIC, which should be viewed as overarching concepts that guide the manner in which business enterprises and governments enter into agreements with communities. Second, the Primer will detail steps that business enterprises and governments can take to ensure compliance with FPIC. And third, the Primer will list additional resources business enterprises, governments, and communities can consult for further guidance on how to adhere to the principles of FPIC.

Key Elements of FPIC

FPIC is comprised of four key elements, which should be viewed as overarching concepts that guide the manner in which business enterprises and governments enter into agreements with communities. The key elements are:

Free

Communities should not be coerced, forced, intimidated, or otherwise unduly pressured by business enterprises or governments to change the use of, sell, lease, or otherwise dispose of their land and natural resources. To ensure communities freely provide consent, it is critical that the process in which business enterprises and governments receive their consent is “self-directed” by communities and includes the participation of all community groups, including women and other vulnerable groups.⁹ This means that communities define the decision-making processes to ensure that all meetings are held at convenient times, in their preferred language(s), and in a format in line with customs.¹⁰ The consent is invalid if it involves bribes, rewards, conditions, or bias.¹¹ Furthermore, business enterprises

and governments cannot set strict timelines for obtaining communities' consent, as this could result in communities feeling pressured to enter into agreements.¹²

Prior

Business enterprises and governments may only implement a project that involves transferring or changing the use of community land and natural resources *after* obtaining affected communities' explicit consent to the terms of the project.¹³ In other words, business enterprises and governments cannot implement a project and then retroactively seek consent from communities whose land rights and uses are affected. This means that communities must be provided all material information regarding the project well in advance of deciding whether to give their consent. Communities should also be given sufficient time to understand, process, and assess all material information; this timeline must be determined by communities to ensure compliance with their preferred decision-making processes.¹⁴

Informed

Business enterprises and governments must provide communities with all material information needed to make an informed decision about whether to consent to a project that affects their land rights and uses.¹⁵ All material information must be provided in an accessible manner and format, taking into consideration communities' language(s), literacy rates, and customary and preferred means for disseminating information.¹⁶ Although determining whether information is material will depend on the project, examples of the types of information that must be shared include but are not limited to: social, environmental, gender, and human rights impact assessment results; the project timeline; the size and type of land to be obtained, used, or affected; the amount and type of proposed compensation; proposed monitoring and enforcement procedures; and how access to remedy will be provided.

Consent

Communities must explicitly consent to any proposed project that involves transferring or changing the use of their land or natural resources before business enterprises and governments implement projects. This means communities have the right to state that, "yes" they agree or that, "no" they do not agree to terms of projects. Communities also have the right to self-determine how they will provide consent.¹⁷ For example, communities could choose to provide consent through representatives like traditional authorities or elected representatives; communities could also stipulate that consent can only be given by consensus or majority vote.

Regardless of the means, the manner chosen must encompass and take into consideration the rights and interests of all community members affected, including women and other vulnerable groups. Business enterprises and governments should also view the process of obtaining consent as ongoing, as community consent is required before each major phase of a project and when material changes are made to the project.¹⁸

Steps to Ensure Compliance with FPIC

The steps below detail procedures that business enterprises and governments must carry out to ensure compliance with the principles of FPIC. Although business enterprises and governments can follow the steps in the order presented, it is important to note that some steps are ongoing (e.g., consultation and engagement, monitoring and evaluation, etc.). The steps below concisely summarize available guidance on FPIC,¹⁹ as well as incorporate lessons learned from Landesa's RIPL Project²⁰ and its other responsible investment initiatives.

Phase 1: Preparing for Investment

Task 1: Develop and Implement Policies, Commitments and Frameworks

Although international guidelines and standards detail the requirements for compliance with FPIC, it is important to also determine whether the legal framework of the country where the project will be implemented includes requirements relating to FPIC.²¹ If FPIC is enshrined in the domestic legal framework, business enterprises and governments should ensure compliance with any requirements different from or in addition to those detailed in this primer.

Task 2: Conduct Initial Due Diligence

Identify land rights holders and users affected by the proposed project:

- Business enterprises and governments must identify all communities whose land rights or uses will be affected by a proposed project. Identification is necessary in order to determine which communities the business enterprises and governments need to share information with, engage and consult with, negotiate with, and ultimately receive consent from.

- When identifying which communities will be affected by the proposed project, business enterprises and governments must take into consideration the wide spectrum of land rights and uses, which includes but is not limited to: communities with customary and formal ownership rights; communities with customary and informal leases; communities who occupy the land; communities with rights to natural resources held by the land or accessed through the land (e.g., water and grazing rights); and seasonal or other overlapping rights.
- Business enterprises and governments must be especially cognizant of customary land rights holders and users, as a significant percentage of rural communities' land rights and uses are legitimate under customary systems, but not formally documented. Because customary land governance frameworks are based on tradition and custom, and rarely written or codified in formal legal frameworks, business enterprises and governments must identify customary land rights and uses through consulting with communities and engaging in activities like participatory mapping. Business enterprises and governments must be especially cognizant of women's land rights and uses, as women's rights and uses are more likely to be undocumented, unregistered, informal, unrecognized, seen as secondary to men's rights and uses, and contested. Consequently, business enterprises and governments must make special efforts to ensure the inclusion of women in consultations and engagement activities like participatory mapping.

Phase 2: Community Engagement and Assessments

Task 1: Engage and Consult with Community Members

Identify legitimate community decision makers:

- Business enterprises and governments identify legitimate community decision makers who will be responsible for representing communities through consultations and negotiations relating to the proposed project. Communities self-determine how their decision makers are chosen based on respective customs and traditions. For example, community decision makers may take several different forms, which includes but is not limited to institutions (e.g., community or village councils), designated individuals (e.g., traditional authorities), and elected individuals (e.g., community representatives or officers).

- Business enterprises and governments should reach a consensus with communities regarding what institution or who will be its decision maker(s). To ensure community decision makers are legitimate, the following types of information should be requested:
 - How the decision makers were selected or designated.
 - How the decision makers will ensure representation of communities.
 - The decision makers' duties and scope of authority (e.g., authority to represent communities in consultations, negotiations, and contracting; authority to consent to the transferring of land; etc.).
 - How decision makers will communicate with and disseminate information to the communities they represent.
 - How communities can contact and provide input to decision makers.
 - How communities can file grievances when decision makers are not fulfilling their responsibilities, are acting outside their scope of authority, or engaging in self-dealing.
- Regardless of what form community decision makers take, business enterprises and governments must ensure the legitimacy of community decision makers by ensuring the following:
 - Community decision makers solicit and represent the views of women and other vulnerable groups
 - Community decision makers represent all groups within communities to be affected by a proposed project.
 - Community decision makers do not engage in self-dealing or any behavior contrary to the interest of affected communities. If community decision makers are not acting in the interest of the community members, it is incumbent on the business and government to obtain FPIC.

Task 2: Conduct Community Assessments

Provide communities with material project information:

- Before business enterprises and governments consult or negotiate with communities regarding the transfer or change of the use of their land and natural resources, all material information concerning the proposed project must be shared. This is necessary to ensure that communities and their decisions makers are able to engage in consultations and negotiations in an informed manner, and therefore, be able to make an informed decision

whether to consent to the proposed project or not. Material information includes but is not limited to:

- Description of the land acquisition or project size.
- Description of what areas of land and natural resources will be affected by the project.
- Timeline of the land acquisition or project.
- Information about the company (e.g., where it is domiciled, whether it operates elsewhere in the country, who its partners are, project financing, company policies relating to responsible land-based investment, etc.).
- Anticipated project benefits (e.g., employment, infrastructure, etc.).
- Proposed compensation based on appropriate valuation.
- Plans to establish a company-based grievance mechanism.
- All material information must be disseminated in an accessible and understandable manner, taking into consideration the following:
 - Preferred modes of communication based on local customs and traditions (e.g., written form, videos, oral presentations, graphics, photos, etc.)
 - Literacy rates.
 - Local language(s).

Engage the community to create and conduct assessments:

- To inform whether both the business and the community/communities should proceed with the investment, the business is responsible for hiring neutral and experienced third parties to conduct three community assessments. This will involve:
 - Examining the capacity of each community to participate in an assessment;
 - Assessing the actual or potential environmental and social impacts of the investment, including impacts on land uses, land rights, and livelihoods;
 - Valuing the land to determine full and fair compensation.
- The business should ensure that community members are informed about the assessments, can participate meaningfully in them, and have assessment findings communicated to them in a form that they can understand.

Provide sufficient time for communities to consult with third parties:

- Communities must be given sufficient time to consult third parties to obtain independent legal and technical advice regarding the proposed project. Third parties can help communities in the following types of ways:
 - Explain the communities' right to FPIC.
 - Review and explain the proposed project terms.
 - Review and explain impact assessment results.
 - Determine fair and appropriate compensation.
 - Provide training on how to engage in consultations and negotiations.
- Third parties may include but are not limited to:
 - Attorneys
 - Paralegals
 - Land tenure experts
 - Environmentalists
 - Civil society organizations
- If a community does not have access to or the resources needed to consult third parties, business enterprises and governments should provide assistance to enable the community to obtain access to independent third party experts.

Engage and consult with communities:

- Business enterprises and governments must conduct iterative consultations with communities before, during, and after sharing material information about the proposed project. Consultations are critical because they provide an opportunity for all parties to: ask clarifying questions; request additional information; and express interest, concerns, and expectations.
- All consultations must be held at accessible locations and during convenient times. Whether the location is accessible or whether the time is convenient will likely differ by groups within a community; as such, special consideration should be given to accommodate the different preferences of women and men. For example, it is possible that consultations will need to be held at different times and locations to accommodate all community groups.

- Community members must feel comfortable attending consultations, including women and other vulnerable groups. To ensure the participation of all community groups, the following accommodations may need to be made:
 - Separate and safe consultations are held for women and other vulnerable groups to ensure their participation and candidness.
 - Consultation facilitators include both women and men.
 - Land rights holders and users, or their representatives, are allowed to request information, ask questions, and provide input freely.
- Consultations are held in a manner that encourages two-way communication. This is in contrast to business enterprises or governments simply informing communities about the proposed project. To ensure two-way communication, the following conditions must be enforced:
 - Communities are permitted and encouraged to ask questions.
 - Communities are permitted and encouraged to request additional information about the proposed project.
 - Communities are permitted to contest and disagree with the terms of the project.
 - Communities are permitted and encouraged to express their concerns about the project.
 - Communities are permitted and encouraged to express their expectations about the project.
- The number of consultations held and the types of topics discussed during each consultation will vary project to project; however, it is important to ensure that at least the following topics are discussed:
 - The project's anticipated environmental, social, gender, and human rights impacts;
 - Communities' use of the land, including its reliance on the land's natural resources (e.g., firewood, water, etc.);
 - How the communities attach both market and non-market value to land and natural resources;
 - Community demographics (e.g., number of people, average age, gender ratio, literacy rate, language, etc.);
 - Customs and traditions, including gender roles;
 - Community organizational structures and decision-making processes

- How communities prefer to receive information (e.g., written form, video, graphics, etc.);
- Whether communities have ever negotiated or contracted with a company in the past, and if so, whether its past experiences were negative or positive;
- Whether communities are engaged in any ongoing internal or external land or natural resource-related disputes;
- How communities prefer to resolve grievances (i.e., community-based grievance mechanisms, national judicial or non-judicial grievance mechanisms, etc.).

Phase 3: Developing an Equitable and Inclusive Contract

Task 1: Negotiate and Draft the Contract

Negotiate project terms:

- Business enterprises and governments should only begin negotiations after communities have been informed of all material information relating to the project and consultations have been held. Negotiations provide an opportunity for communities to propose informed changes to the project plan to ensure the adverse project impacts are avoided or at least minimized, while community benefits and shared values are maximized.
- Business enterprises and governments should never perceive negotiations as communities as consenting to the project terms or agreeing to consent to the project terms at a later time. Instead, negotiations should be viewed as an opportunity for communities to express their interests and make counteroffers. Business enterprises and governments should ensure that all in/terest expressed and counteroffers proposed are those of the community as a whole, and not just those of individuals or groups in positions of power.
- Business enterprises and governments should be fully prepared to reach a stalemate or for communities to ask to hold off on negotiations until they can receive additional information or consult a third party.
- If parties reach an agreement, the terms of the agreement should accurately capture the interests of both parties as expressed during consultations and negotiations. The agreement terms should be documented in a detailed,

accessible, and clear manner; the agreement terms should also be documented in a manner determined by communities to ensure mutual understanding.

Task 2: Review and Sign the Contract

Receive the communities' informed consent:

- Communities should in no way be coerced, forced, intimidated, or unduly pressured to agree to a project that involves transferring or changing the use of community land and natural resources. This means communities have the freedom to state that, “yes” they agree or that, “no” they do not agree to the terms of the project. Communities also have the right to self-determine how they will provide consent.
- Communities must only be asked to consent to a proposed project *after* all material information regarding the project is disseminated, sufficient time is given to consult third parties, and consultations and negotiations are held.
- Communities must provide their consent before each major phase of a project. Consent should thus be viewed as ongoing, rather than a one-time occurrence prior to project implementation.
- The scope of consent must be clear, based on consensuses reached during negotiations. If the project is carried out in a manner contrary to or different from the information shared, discussions during consultations, or consensuses reached during negotiations, business enterprises and governments must receive communities' FPIC to the changes.

Phase 4: Implementing and Monitoring the Investment

Task 1: Develop and Implement a Plan to Address Land-Related Issues

Ensure access to remedy:

- Business enterprises and governments must ensure that communities have access to grievance mechanisms for instances when conflicts arise between parties. Although the preceding steps help to safeguard against conflicts arising between parties, as they ensure each party has a thorough

understanding of the other party's interests, concerns, and expectations, it is still possible that conflicts will arise throughout the project's lifecycle.

- Agreements must include specific remedies that will become available in the event of breach of contract or other failure to deliver expected benefits. Remedies could include but are not limited to: recession of the contract, a stop-use requirement on the part of the buyer or lessee, or money damages.

Task 2: Develop and Implement an Ongoing Monitoring and Evaluation Plan

Establish monitoring and evaluation procedures:

- Business enterprises and governments should establish monitoring and evaluation procedures to measure whether the project is being implemented in a manner consistent with the terms of the agreement.
- Monitoring and evaluation procedures should be clearly detailed in the agreement, and all monitoring and evaluation results should be shared with communities on a predictable and regular basis.
- If monitoring and evaluation efforts reveal that a party or parties are not in compliance with project terms, all parties must be notified and immediate action must be taken to come into compliance.

Resources

- BSR, *Engaging With Free, Prior, and Informed Consent* (2012), available at https://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf
- Conservation International, *Guidelines for Applying Free, Prior, Informed Consent* (2013), available at http://beta.fplic.info/media/library/resources/directrices-para-la-aplicacion-del-consentimiento-/CI_FPIC-Guidelines-English.pdf
- FAO, *Free Prior and Informed Consent: An Indigenous Peoples' Right a Good Practice for Local Communities* (2016), available at <http://www.fao.org/3/a-i6190e.pdf>.
- FAO, *Respecting Free, Prior, and Informed Consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (2014), available at <http://www.fao.org/3/a-i3496e.pdf>
- Foley Hoag, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (2010), available at <http://www.foleyhoag.com/-/media/files/foley%20hoag/publications/ebooks%20and%20whitepapers/2010/implementing%20a%20corporate%20free%20prior%20and%20informed%20consent%20policy%20benefits%20and%20challenges%200710.ashx>
- The Forest Dialogue, *Towards Consent: Case Studies and Insights on Company-Community Agreements in Forest Landscapes* (2014), available at https://theforestdialogue.org/sites/default/files/tfd_fplicreport_towardsconsent_en_hi-rez.pdf
- The Forest Dialogue, *Free, Prior and Informed Consent: Making FPIC work for forests and peoples* (2010), available at <https://theforestdialogue.org/publication/free-prior-and-informed-consent-making-fpic-work-forests-and-peoples>
- FSC, *Guidelines for the implementation of the right to free, prior and informed consent (FPIC)* (2012), available at <https://ic.fsc.org/en/document-center/id/106>
- Indigenous Rights and Resource Governance Research Group, WWW.FPIC.INFO provides information and resources on FPIC as a tool of self-determination to assist communities in decision making
- Oxfam Australia, *Guide to Free Prior and Informed Consent* (2010), available at https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf

¹ FAO, *Free Prior and Informed Consent: An Indigenous Peoples' Right a Good Practice for Local Communities*, 13, available at <http://www.fao.org/3/a-i6190e.pdf>.

² See UNITED NATIONS, *Declaration on the Rights of Indigenous Peoples*, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

³ See e.g. International Labour Organization Convention 169; the Convention on Biological Diversity; Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security; the Analytical Framework for Land-Based Investments in African Agriculture; voluntary guidelines of 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).

⁴ See e.g., United Nations, Department of Economic and Social Affairs, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005) (detailing how Philippines, Malaysia, Australia, Venezuela, and Peru implemented legislation relating to FPIC).

⁵ See e.g., ⁵ The Coca-Cola Company, *The Coca-Cola Company Commitment: Land Rights and Sugar* (2013), <https://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2013/11/proposal-to-oxfam-on-land-tenure-and-sugar.pdf>; Nestlé, *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains* (2014), http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-commitment-land-rights-agriculture.pdf; PepsiCo, *PepsiCo: Land Rights Policy* (2014), https://www.pepsico.com/Assets/Download/PepsiCo_Land_Policy.pdf; Unilever, "Sustainable Sourcing Strategy," <https://www.unilever.com/sustainable-living/> (last visited Jan. 29, 2016); Illovo, "Illovo Group Guidelines on Land and Land Rights" (2015), available at <http://www.illovosugar.co.za/Group-Governance/Group-Guidelines-on-Land-and-Land-Rights> (last visited Jan. 29, 2016).

⁶ See e.g., FAO, *supra* note 1 (stating it good practice to extend FPIC to local communities, although it is a right of indigenous peoples).

⁷ See FAO, *supra* note 1, at 12.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 16.

¹⁹ See e.g., FAO, *supra* note 1; FAO, *Respecting Free, Prior, and Informed Consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* 2014), available at <http://www.fao.org/3/a-i3496e.pdf>; Oxfam Australia, *Guide to Free Prior and Informed Consent* (2010), available at https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf;

²⁰ www.ripl.landesia.org.

²¹ See e.g., United Nations, Department of Economic and Social Affairs, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005) (detailing how Philippines, Malaysia, Australia, Venezuela, and Peru implemented legislation relating to FPIC).