



Fauna & Flora International's position on free, prior and informed consent

CONSERVATION, LIVELIHOODS & GOVERNANCE PROGRAMME

This paper outlines FFI's position on free, prior and informed consent (FPIC) and offers guidance on how to implement a FPIC process. The guidance is based on internationally recognised good practice in the human rights, business and conservation sectors.

FFI recognises that biodiversity conservation and sustainable natural resource use are inextricably linked to people's rights to secure their livelihoods and live in dignity. We believe that the maintenance of ecosystem goods and services can contribute positively to the realisation of many human rights. At the same time, secure rights – e.g. land tenure and participation in decision-making – can enable more effective environmental stewardship. However, we also acknowledge conservation activities can have negative impacts on local people. Therefore, FFI has made an organisational commitment to respect human rights and to ensure that our activities do not disadvantage poor, vulnerable or marginalised people dependent upon natural resources¹.

FFI'S POSITION ON LIVELIHOODS AND GOVERNANCE

FFI endeavours to ensure that its conservation activities do not disadvantage or undermine poor, vulnerable or marginalised people who are dependent upon or live adjacent to natural resources, and wherever possible seeks to conserve biodiversity in ways that enhance local well-being and social equity². We are committed to respecting human rights, promoting their protection and realisation within our conservation programmes, and supporting the governance systems that can secure those rights³.

FFI seeks to uphold this position in all of its partnerships, including with government departments, the corporate sector and civil society organisations. In keeping with this position, FFI commits not to support, contribute to, or participate in projects or activities that would violate the principle of free, prior and informed consent as described in this position paper.

¹ FFI's position and approach to conservation, livelihoods and governance is available at https://api.fauna-flora.org/wp-content/uploads/2017/11/FFI_2013_FFI-position-and-approach-to-conservation-livelihoods-and-governance.pdf

² This position statement was approved by FFI Council in 2005.

³ FFI is one of the founding members of the Conservation Initiative on Human Rights (<http://www.thecihr.org>), a consortium of international conservation NGOs that seek to improve the practice of conservation by promoting the integration of human rights in conservation policy and practice.



WHAT IS FREE, PRIOR AND INFORMED CONSENT?

Free, prior and informed consent (FPIC), as it most commonly applies to conservation projects, is the principle that a community has the right to give or withhold its consent to proposed activities that are likely to affect the lands and natural resources it customarily owns, occupies or otherwise uses⁴. FPIC is derived from a number of binding international human rights law instruments and has been enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

(UNDRIP)⁵ since 2007. Although originally developed as a protection for indigenous peoples, FPIC is increasingly being extended in both law and practice to include the statutory and customary rights of other traditional and local communities to their lands, territories and resources.

The right to FPIC arises whenever a project is likely to have a material impact, direct or indirect, on a community's lands, territories or resources. This includes impacts on the community's access and use thereof. Examples include: negative environmental effects of activities directly on – or in the vicinity of – their territories; proposed restrictions on access to or use of lands or natural resources⁶.

Under FPIC, negotiations between companies, governments or other project proponents (including conservation NGOs such as FFI) and local communities must be **free** from force, intimidation or other pressure. Consent must be sought from communities **prior** to authorisation by other bodies (e.g. government issuing of licences) and before any activities are undertaken that may affect them. The form of the **consent** will be context specific and should be sought at various stages of a project, rather than as a one-off. Communities must be given sufficient time to decide whether they will agree to the project or not. They need to have a full and accurate understanding of the implications for them and their lands so that they can make an **informed** decision according to the decision-making process of their choice.

Information provided by project proponents should cover at least the following aspects⁷:

- The nature, size, pace, reversibility and scope of any proposed project activity.
- The purpose and duration of the activity.
- The location of the areas that will be affected.
- A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks, and proposals for fair and equitable benefit sharing, respecting the precautionary principle. This should include assessment of the potential differential impact of project activities on different social groups such as women, indigenous groups, the elderly, the poor etc.
- Personnel likely to be involved in the execution of the proposed project including private sector staff, research institutions, government employees, community members and others.
- Procedures that the project may entail such as valuation and expropriation of land, administrative procedures, processes to secure permits or licences.

⁴ The principle also applies to the protection of other rights such as ownership and use of traditional knowledge or genetic resources. See, for example the Nagoya Protocol <https://www.cbd.int/abs/about/>

⁵ *United Nations Declaration on the Rights of Indigenous Peoples* (2008) United Nations

⁶ For more information on FFI's position on access and use restrictions, loss of lands or forced displacement see https://api.fauna-flora.org/wp-content/uploads/2017/11/FFI_2016_Displacement-and-restrictions-on-access-to-resources.pdf

⁷ *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent* E/C.19/2005/3, United Nations Economic and Social Council <http://undesadspd.org/IndigenousPeoples/MeetingsandWorkshops/InternationalWorkshoponFPIC.aspx>



HOW DOES FPIC RELATE TO CONSULTATION, NEGOTIATION AND PARTICIPATION?

There are many steps on the hierarchy, or ladder, of participation. Awareness-raising or providing information to stakeholders is the lowest step. The next step up is consultation - a process to inform and receive feedback from people about a proposal or project. Consultation in itself does not usually imply that those consulted have a say in the final decisions. The 'consent' element of FPIC is additional to consultation and defines the right of community stakeholders to make decisions i.e. to either withhold or give their consent, with or without agreed conditions.

It is likely that consultations and consent will be needed at several points in a project cycle. If consent is not obtained on the basis of initial proposals, project proponents can enter into negotiations with communities to try to establish under what conditions agreement may be reached. Negotiation is where conditions are proposed and compromises are made by the different parties involved. Even if a negotiation process is entered into, consent still remains the point at which affected communities have the power to say 'yes' or 'no'. Provision of objective and balanced information, consultation, negotiation and participatory engagement with communities are therefore the means by which consent is sought.

In addition to the legal, ethical and funding requirements, there is a very practical reason why conservation practitioners should respect the right to FPIC. The regular, face-to-face communication and engagement that a FPIC process requires, where project teams enter into discussions with communities in good faith, is fundamentally important to build the mutual trust and respect that is crucial for the success of any conservation project.

WHEN AND HOW DO WE START AN FPIC PROCESS?

Respecting the right to FPIC cannot be reduced to a 'tick-box' exercise. For indigenous and other peoples, the right to give or withhold their consent to developments on their lands and territories is part of their collective right to self-determination. This includes the right to determine the process by which consultation and decision-making take place. In all cases, communities should be able to participate through their own freely chosen representatives and customary or other institutions.

FFI recognises that women and other marginalised groups may not always be well represented in either traditional or modern decision-making institutions and processes in many rural communities. Given the importance of respecting the equal rights of women and men, FFI will make extra efforts to address the barriers to women's participation in culturally appropriate ways. This, in itself, may require a negotiation process based on mutual trust and respect⁸.

One of the first steps of a FPIC process is therefore coming to an **agreement with the community on the process** itself. Given the diversity in the range of histories, institutions and resource management approaches among different indigenous and local communities, the specific details of the process that they agree to are likely to vary from one community to another.

A **preliminary stakeholder analysis** is needed to identify who is affected by the project and who has the right to FPIC. This should be followed by development of an in-depth understanding of the different social or ethnic groups in and around the proposed project area. We need to get to know the communities we hope to be working with through formal and/or informal **socio-economic research**. This includes gaining an understanding of local

⁸ See FFI papers on gender.



and cultural norms, social differentiation and diversity, natural resource use and dependency, and customary and modern-day institutions. Permission needs to be secured to undertake this research and engagement with clear information provided on why it is being undertaken.

Socio-economic research should pay attention to the different roles, responsibilities, knowledge and aspirations of women and men, as well as of different resource user groups, ethnic or religious groups, elders and youth. It is also important to ensure that the particular circumstances of the poorest and most vulnerable people in a community are not overlooked. This analysis informs the development of a context-specific FPIC process and provides invaluable data to inform project design and social impact assessment⁹.

FPIC is a right. **It is not a linear process that ends with the signing of a single binding agreement with a community.** FPIC recognises the rights of indigenous and local communities to be treated as the rightful managers of their customary territory and therefore guarantees them a voice in decisions at every stage of the planning and implementation of projects that affect them. FPIC should therefore be understood as a right that requires an on-going process of communication and engagement with consent being sought at key stages in the process:

- Consent to discuss the idea of a project that will affect people's lands and resources.
- Consent to participate in developing a detailed plan for the project.
- Consent to project implementation, including resource management and benefit-sharing arrangements.

HOW CAN WE FULFIL THE RIGHT TO FPIC IN PRACTICE?

There are some very practical steps needed to take to fulfil the elements of free, prior and informed consent. Many of these are equally applicable to any empowering engagement with communities but those *highlighted* are additionally fundamental for FPIC¹⁰.

Free:

- Discussions with community members are held at an agreed time and location.
- Meetings do not include participants that are considered to be coercive or intimidating.
- *Project proponents state their commitment not to proceed with the next stage of a project without consent from the community.*
- *Communities are made aware of their right to withhold their consent and to negotiate the conditions under which they would give their consent. Project proponents have to accept that project plans may have to change – or withdrawn completely – if communities do not agree.*
- Communities have enough time to consider the information provided in consultations and negotiations. We cannot always expect agreement at the end of a meeting. Project proponents need to give communities sufficient time to undertake their own decision-making processes; both parties should respect agreed deadlines.
- Those facilitating the process should provide full disclosure of their own interests in the project, sources of funding etc.
- *Independent verification confirms that the process was free from coercion.*
- *If negotiations break down, access is provided to a third party to provide additional information and help mediate resolution. This may include legal advice, if necessary.*

⁹ See FFI paper on Social Impact Assessment.

¹⁰ Adapted from Anderson (2011) *Free, Prior and Informed Consent in REDD+* and informed by FFI project teams' experience.



Prior:

- *The first stage of consent is sought at the project identification stage (i.e. during concept development) and subsequently at agreed points in the project development process before proceeding to the next stage.*
- *Information should be provided well enough in advance to enable communities to reach consensus according to their own decision-making processes.*

Informed: Who is informed and how?

- The wider community, not just community leaders, are informed about all aspects of project development. It cannot be assumed that leaders will communicate with the rest of the community, particularly the poorest members, or that male participants will discuss issues with female community members.
- Particular efforts are taken to remove the barriers to the participation of marginalised community members such as women, youth and poor and vulnerable groups.
- All information is provided, and all meetings held, in local languages.
- Face-to-face meetings are important and community meetings should include use of creative, visual and interactive methods (such as use of graphics, PRA techniques, role play), particularly where there are high levels of illiteracy.
- Effectiveness of communication methods – and people's understanding of technical information and agreements – should be assessed on a regular basis and adjustments made if levels of understanding are low.

Informed: What information needs to be collected, provided and discussed?

- *Information on the right to FPIC should be widely disseminated and include details on the stages at which consent should be sought, as well as agreed decision-making processes.*
- *Potential negative as well as positive impacts of the project, as identified by both parties, should be discussed. This must include both direct and opportunity costs, possible alternatives and the likely outcomes of different scenarios.*
- *There must be public disclosure of the details of agreements provided in accessible formats (local languages, graphically where literacy is low).*
- *Information on grievance mechanisms¹¹ and the right to legal advice if required.*
- *At all stages of the FPIC process indigenous and local communities have the right to independent and objective advice and information, which can include independent legal advice.*
- Community participation in monitoring project implementation helps to increase understanding of project impacts and implications and to inform adaptive (co)management. This should include involvement in analysis i.e. discussing what data collected means, not just being paid to collect it.

Engaging community members in the development of a Theory of Change as part of a Social Impact Assessment¹² process can be particularly helpful to enable mutual understanding of potential costs, risks and benefits. This in turn helps inform both project design and the consent process itself.

¹¹ See FFI paper on grievance mechanisms.

¹² See FFI paper on Social Impact Assessment.



Consent: Who gives consent?

Consent in FPIC doesn't mean that every single person within a community must agree. Rather, consent is a **collective right** based on the community's own (often customary) processes of dialogue, deliberation and decision-making. An essential early step is therefore **participatory resource, stakeholder and institutional mapping** and analysis. This enables identification of the 'rights-holders' – those who have either statutory and customary claims to lands and resources and from whom consent must be sought - and of the community institutions considered to be able to legitimately enter into negotiation with project proponents.

The following points are key to these mapping processes:

- It is good practice to recognise the rights of both indigenous and non-indigenous peoples. This can help to identify and mitigate latent and potential future conflicts.
- Where there are multiple groups with different claims, there may also be differential rights. In such cases, FPIC may only apply to those with the strongest customary, historical or legally supported claims. Other community stakeholders (such as recent in-migrants without land title) with an interest in the project area because their livelihoods are dependent on local resources, might only have the right to be consulted but not the right for their consent to be sought or the right to stop a project by withholding consent.
- Communities' preferred decision-making institutions for FPIC may be existing traditional or modern, formal institutions (e.g. state sanctioned village committees). In some cases, communities may decide to form a new institution specifically to manage the decision-making process in order to ensure inclusive representation.
- In many cases decision-making institutions are likely to need considerable capacity-building support in order both to understand the implications of a project and to effectively represent all their constituents, including women, youth and other marginalised groups.

Consent: How is consent given and maintained?

- Identify communities' procedures for giving consent and what form that will take – written, oral, video, formal ceremony etc. Written consent may be a requirement in some instances but may not always be the most culturally appropriate so the form of consent needs to be negotiated and agreed.
- There may be different forms of consent for different stages of a project. For example, those agreements which have major implications for the wider community, such as changes to the management of community land or common pool resources, and benefit-sharing arrangement, are likely to need broad-based community consent.
- Consent to each stage needs to be documented and to include information on the next stage at which consent will be sought.
- To maintain consent, a locally appropriate grievance and dispute resolution mechanism needs to be agreed¹³.

¹³ See FFI paper on grievance mechanisms.



WHAT CHALLENGES DO WE FACE AND HOW CAN WE ADDRESS THEM?

Frequently, community representatives do not represent their constituencies effectively. There is often a need for **leadership training** for community representatives and **strengthening of local institutions** as part of the FPIC process. We need to be aware of the potential for elite capture and take measures to deal with it including helping the wider community to understand how to ensure decision-making and resource allocation is transparent and how to hold their leaders and representatives to account. We also need to create an environment where people can express their opinions. Sometimes this will mean that we need to meet with individuals or different stakeholder groups separately – such as holding separate meetings at appropriate times for women or young people.

For those community stakeholders, such as recent in-migrants without land title, who have the right to consultation but not to FPIC, early and active engagement is still important. This can help identify any potential issues and enable measures to be taken to address them. Such stakeholders may still be key to the success of the project, particularly if they are likely to be affected by project activities or are in a position to undermine the project's objectives. In addition, they are also entitled to have their internationally recognised universal basic human rights respected.

Accurate information is key to FPIC. It can be difficult to get the right balance between being open and transparent about the project without raising false expectations or confusing people. It is better to **admit where uncertainties lie** rather than provide inaccurate information or make commitments that cannot be guaranteed. In addition there are often language difficulties so it is important to use information tools in local languages and in formats relevant to local communities.

It is a challenge to carry out FPIC when the details of the conservation interventions are not known from the start. Understanding that securing the right to FPIC is a process to move step-by-step can help us identify the key points where we will need to seek consent. We need to keep coming back to the question 'are community rights affected or potentially affected?'

Tenure security and opportunities for **livelihoods** enhancement and diversification are often key issues. Land and resource use mapping¹⁴ is therefore often a very important component of an FPIC process. Addressing overlapping claims by different groups makes FPIC very challenging.

Participatory land and resource mapping processes are an important part of addressing these challenges. Often they cannot be resolved quickly.

It is important to **document each stage**, including ideas, questions and concerns raised, as well as outcomes of meetings and agreements reached so that it is possible to review the whole process in the event a grievance or dispute arises. However, documenting sensitive issues can be difficult. The rights-holders should be asked what is sensitive and what is not, and what it is permissible to document. It is likely that there will be a series of small agreements developed over time with community representatives and reference will often need to be made to previous agreements. Wherever possible, if it is culturally acceptable, we should ask workshop attendees to validate the meeting notes and to sign minutes of any decisions reached. Sometimes it is useful to video record significant meeting outcomes, again with the permission of the participants.

¹⁴ See FFI paper on tenure and resource use rights.



FPIC takes time and resources – budgets and work plans need to allow for flexibility and uncertainty. Socio-economic expertise needs to be structured in to all levels of project management (field teams, project managers, technical advisers).

Building a relationship of mutual trust and respect between project proponents, other project collaborators (e.g. government agencies, donors, other NGOs) and communities takes time, but is critical for project success. Partnerships with local organisations with existing relationships with local communities can be invaluable as they often have an in-depth understanding of the local context – but this cannot be taken for granted. It is helpful if at least some project staff spend significant periods of time in the field in order to be as accessible as possible to the communities.

KEY REFERENCES

B Anderson, P (2011) *Free, Prior, and Informed Consent in REDD+* RECOFTC and GIZ.
Download at

http://theredddesk.org/sites/default/files/resources/pdf/2011/free_prior_consent.pdf.

FAO (2014) *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* <http://www.fao.org/3/a-i3496e.pdf>.

This position paper builds on FFI's 2014 document "Free, Prior and Informed Consent: lessons learnt from REDD+ and other conservation strategies".

Other FFI documents referred here can be found in the Conservation, Livelihoods and Governance section of FFI's website at <https://www.fauna-flora.org/approaches/livelihoods-governance>.