

The Accountability Framework

Operational Guidance on Free, Prior and Informed Consent

DRAFT FOR WORKSHOPPING
December 2018

DECEMBER 2018 DRAFT FOR 'WORKSHOPPING' WITH STAKEHOLDERS

The Accountability Framework initiative (AFi) is developing a common framework to guide the setting, implementation, and monitoring of supply chain commitments. As part of the Accountability Framework, this draft document represents a working consensus of the AFi partners as well as input from prior consultations involving stakeholders from the private sector, civil society, and government. The partners are sharing this draft publicly and inviting feedback from all interested parties to further build and refine the Framework in a way that reflects the needs and perspectives of those working to bring about responsible supply chains and positive outcomes for people and nature. Based on this consultative process, version 1.0 of the Accountability Framework will be published in early 2019.

For more information, or to provide input during the present workshoping process, please visit <https://accountability-framework.org> or send an email to contact@accountability-framework.org

DISCLAIMER: This work product is intended to be advisory only and is not intended to serve as a legal opinion or legal advice on the matters treated. The reader is encouraged to engage counsel to the extent required.

PURPOSE & SUMMARY

This guidance outlines requirements, best practices, and practical considerations for companies to fulfill their obligation to secure the Free, Prior and Informed Consent (FPIC) of Indigenous Peoples and Local Communities (IP/LC) in relation to their own operations and supply chains. Specifically, the guidance elaborates upon [Core Principle B1](#), which states that companies must:

“[e]nsure that, prior to any activity that may affect indigenous peoples’ and local communities’ rights, land, resources, territories, livelihoods, and food security, their free, prior and informed consent (FPIC) is secured. This is done in a culturally appropriate manner, in accordance with the traditions, norms, and values of these peoples and communities, and through the representatives and institutions they choose.”

This Core Principle is consistent with numerous binding international instruments affirming FPIC as a legal norm.ⁱ It also aligns with myriad voluntary standards, initiatives, and frameworks for responsible supply chains.ⁱⁱ This Operational Guidance references and builds upon this existing body of material to distill essential and common elements of FPIC while helping to clarify how companies can approach key challenges in the implementation of FPIC. The document provides a concise and practical overview of FPIC by addressing:

- What FPIC is and what are its key elements
- When the responsibility to secure FPIC arises
- What companies can do to demonstrate respect for the right to FPIC
- How companies may relate to the government with regard to FPIC and associated consultations
- How companies can act in good faith to address a range of common challenges related to the implementation of FPIC

1. FPIC definition and overview

Free, Prior and Informed Consent (FPIC) is a collective human right of Indigenous Peoples and Local Communities (IP/LC) to give or withhold their consent prior to the commencement of any activity that may affect their rights, land, resources, territories, livelihoods, and food security. This right is exercised through representatives of their own choosing and in a manner consistent with their own customs, values, and norms. FPIC exists to promote, protect and safeguard the full enjoyment and exercise of numerous underlying, fundamental human rights, including the rights to property, culture, and self-determination. For further elaboration on definitions and explanations of IP/LC, see the *Terms and Definitions* as well as *Operational Guidance on Rights of Indigenous Peoples and Local Communities*.

Understanding the terminology associated with FPIC can help companies to effectively contribute to, facilitate, lead and assess FPIC processes.

- *Free*: Consent is given by the affected IP/LC voluntarily without coercion, duress, and intimidation.
- *Prior*: The consent is given *before* the specified activity is authorized or commenced.
- *Informed*: The consent is given after the IP/LC has received the relevant, timely and culturally appropriate information necessary to make a fully informed decision.
- *Consent*: The IP/LC take a collective decision to grant or withhold approval of the specified activity.ⁱⁱⁱ

FPIC is both a process and an outcome. As a process, FPIC is a series of discovery, consultation, and negotiation steps conducted to seek consent from the affected IP/LC prior to implementing a given set of activities. This process may result in unqualified consent or consent with conditions for the proposed activities (or for a modified proposal), or it may result in the absence of consent. At the end of this process, the FPIC outcome is a written document that specifies what was or was not agreed to.

When the IP/LC provides consent, the written document further elaborates the terms of this consent, including the nature of the agreed activities, conditions placed on its implementation, monitoring plans, grievance mechanisms, and other terms or processes to ensure that agreed plans are duly enacted.

Not all FPIC processes lead to consent, and it is the right of the affected IP/LC to withhold consent. If this is the outcome, then the company needs to accept that the specified activity cannot proceed as planned. However, if appropriate – and only if the IP/LC invites continued dialogue – then a modified proposal could then be developed and subject to further community engagement through the FPIC process.

1.1 Relationship between consultation and FPIC

Consultation with stakeholders (including IP/LC) is an ongoing process that companies should engage in throughout the life of company operations and across supply chains to exchange information, identify and resolve challenges and problems, and thereby improve relations and outcomes for both the company and its stakeholders. Consultations with IP/LC are always required to ensure the right of meaningful and effective participation in the matters that may affect these groups. Consultation processes carried out in good faith should aim to reach agreement between the company and its stakeholders on the subject topics.

Good faith consultations largely share the same characteristics as an FPIC process. FPIC is realized through a good faith consultation process that:

- is triggered by particular circumstances (see Section 2);
- possesses certain characteristics (see Section 3) to help ensure that decisions truly reflect the principles of “free,” “prior,” “informed,” and “consent” as defined above; and
- has a discrete endpoint – the granting or withholding of consent – which is documented as the outcome of the FPIC process.

2. When FPIC is required

Consistent with the interpretations and application of binding international treaties and covenants to date,^{iv} as well as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to which company activities will conform,^v [Core Principle B1.3](#), calls for FPIC to be secured prior to any activity that may affect IP/LC rights, land, resources, territories, livelihoods, and food security.

As a general rule, companies should assume that if IP/LC are in the area of production or processing operations, then FPIC will be required.^{vi} FPIC is also likely to be required when IP/LC are susceptible to be affected by such operations, even if the operations themselves lie outside of the IP/LC territory. The three most common circumstances when FPIC is required in the context of supply chain operations are:

1. **New acquisitions, developments, or operations:** FPIC is required prior to initiating activities that may impinge on IP/LC rights, lands, resources, territories, livelihoods, or food security. These activities may include new production, processing, or conservation uses, or significant expansions of these, as well as the preceding steps of land use planning or land and resource allocation, acquisition, or licensing.
2. **Remediation of past harms:** Where a company has caused or contributed to appropriation of, or harm to, the lands, territories or resources of IP/LC without first securing FPIC, a remediation process is required to address these past harms. An FPIC process should be conducted to reach agreement on the appropriate remediation measures (see *Operational Guidance on Remedy and Remediation*).
3. **Ongoing land conflict:** Where there is land conflict between an IP/LC and an external party such as a company or government, the company is required to halt any efforts to acquire or gain control of land, resources or territories related to the conflicts until they are addressed through an FPIC process. Where

the ongoing conflict is between two or more IP/LC (e.g., if they have overlapping claims), the company is still required to wait until the matter is settled. However, the FPIC process outlined in this Operational Guidance is generally not suited to fostering agreements that are only between or among IP/LC (i.e., without an external party). In such cases, if the IP/LC parties agree, the company could finance and technically support the parties' efforts to resolve the conflict according to a method that the parties mutually agree, such as a local dispute resolution mechanism.

As specified by the UNDRIP, whenever an FPIC process is required, it should be conducted and concluded prior to the enactment of any projects approvals or legislative or administrative measures enabling the proposed activities, such as the issuance of licenses or interests in land or resources.^{vii}

3. Key elements of an effective FPIC process

The FPIC process begins after stakeholder mapping has taken place. Through company due diligence and stakeholder engagement, specific supply chain trade and production activities are identified as requiring FPIC from *identified* potentially affected IP/LC parties (or party). There is growing consensus about the minimum elements and characteristics of a proper FPIC process. This section provides an overview of these key minimum elements, as distilled from numerous laws, voluntary standards, initiatives, guidelines and frameworks on FPIC, human rights, and responsible supply chains. For more detail about these elements and how they might be applied in specific contexts, readers are encouraged to consult the lengthier FPIC manuals and guidelines listed in Box 1.

The 13 elements outlined below are generally carried out sequentially, although iterations in the process may sometimes be required to accommodate the particular circumstances of a given situation. The first nine elements are typically agreed to in advance in what has come to be known as a 'pre-consultation' phase during which the key parameters of the FPIC process are defined and agreed upon by the parties.^{viii} This advance agreement sets the foundation for a successful process by building trust between the parties and enhancing the credibility, reliability, and predictability of the process.^{ix} The pre-consultation steps also enable the company to identify potential risks and challenges that may arise during the FPIC process and to adopt mitigation measures to avoid these. For example, during pre-consultation talks it might be revealed that local IP/LC customs marginalize indigenous women from decision-making and participation in benefit sharing, thereby risking company commitments to respect the human rights of women. Or, it may be discovered that internal conflicts regarding which entities govern or claim to represent the IP/LC in question, if left unaddressed, could jeopardize the legitimacy of any consent secured. See Annex 1 for guidance on how to address challenges such as these.

Key Elements of an Effective FPIC Process	
1. Identify the decision-makers and parties to the negotiation	Each party (company, IP/LC, government) identifies who will advise them, who has the authority to negotiate on their behalf, who has the authority to make final decisions, who they may ask to observe the FPIC process, and who has the right to speak and participate in deliberations.
2. Specify the decision-making processes of the respective parties	Each party shares its decision-making methods. For example, IP/LC explain their customs, values and norms for decision-making (i.e., only elders over age 70 make final decisions and only after two village general assembly deliberations). Similarly, the company explains its by-laws and internal regulations for decision-making (i.e., the role of the board, or the role of a certain person in having the authority to make the final decision). The parties might also discuss what amount of time and type of information is needed for each to make such a decision.
3. Reach initial agreements on the role of outside counsel or advisors (including the use of mediators or facilitators)	Properly used, advisors, mediators and facilitators can help to address capacity issues and power imbalances in FPIC processes. Each party has the right to have their own technical or legal advisors. It also may be decided that an advisor can serve both parties. The identity and role of these individuals should be shared among the parties. Also, the parties should agree if any facilitation or mediation will be used, and if so, who will play that role. Care should be taken in selections, however, as an improperly prepared and ill-experienced mediator or facilitator can call into question the legitimacy of the FPIC process.
4. Discuss and seek to reach common understanding about the applicable law and any other principles that will guide the FPIC process and inform negotiations about the interests and rights in question	<p>The parties should discuss and seek to reach mutual understanding of the laws and foundational principles that will apply to the negotiations. This discussion should be informed by an Applicable Law Assessment (see <i>Operational Guidance on Applicable Law Assessment</i>) that is made available to both parties. The goal is to develop shared agreement on key matters such as land tenure and community versus state rights, as well as key tenets and formats for the negotiation process. For example, upon initiation of the discussions, the company may perceive that negotiations should be based on a national law that states the land in question is public land and owned by the state, while the IP/LC might perceive that negotiations should be based on an international law that affirms that lands traditionally held or used by indigenous peoples are ancestral lands, not state lands. As another example, an IP/LC may say that women participate in meetings, but are not part of the leadership that makes the final decisions, while the company may want to ensure respect for the rights of women to participate equitably in decisions that may affect them.</p> <p>Any diverging perspectives should be discussed and reconciled to the extent possible. Also, other principles and formats of negotiations can be agreed to early on, such as the confidentiality (or not) of discussions; mutual commitments to avoid coercion or to address imbalances of power; location, neutrality and security of meeting locations; formats for documenting deliberations; and when decision-making authorities need to be present in meetings.</p>
5. Agree on time periods and negotiation scheduling	The parties should agree on reasonable timelines and deadlines for the different phases of the consultation and negotiation processes. Predictability, fairness, and reasonableness are beneficial to all parties. However, the establishment of mutually agreed anticipated timelines does not prejudice or override the need to respect the IP/LC decision-making process, which in some cases could require flexibility in timelines and scheduling.

<p>6. Identify IP/LC customs and protocols that the process should respect</p>	<p>IP/LC customs and rules need to be identified and respected during the process, and, once identified by the IP/LC, not unreasonably changed. For example, community customs may dictate that FPIC negotiations cease during a specific religious period, that all meetings are opened with a blessing, or that all company delegation entrances into the territory must be cleared first through a council.</p>
<p>7. Agree on measures to create an environment without coercion or duress</p>	<p>The parties should discuss and agree on measures to avoid coercion or duress in the FPIC process. This typically includes specifying the types of engagements, offers and inducements that may not occur during negotiations. For example, the parties may agree that the company can pay to transport people to a meeting but cannot pay any financial awards to individual leaders. Parties typically agree to the absence of military, police, or company security during negotiations. Parties also typically prohibit assertions or threats that more land will be lost if consent is not given to rights over a smaller parcel. Avoiding coercion and duress also requires measures to ensure that community members are not threatened in any way (e.g., with violence, hateful speech, or retaliatory litigation).</p>
<p>8. Determine how the affected IP/LC will participate in the analysis of impacts and risks</p>	<p>A critical part of FPIC is ensuring that the affected IP/LC are well informed of all potential impacts and risks of the proposed activities and can participate in decisions about how to avoid or mitigate them. These requirements are usually addressed by conducting a Social and Environmental Impact Assessment (SEIA) or similar structured process. The parties to the FPIC process should mutually agree on how this impact assessment process will be implemented, including the participatory process that will be used, the period for IP/LC review and comment on draft findings, assistance of technical advisors, and measures to ensure that the process is culturally appropriate and inclusive, especially with respect to gender and marginalized populations.</p>
<p>9. Determine formats and protocols for sharing information</p>	<p>Effective FPIC processes require constant exchanges of information between the parties, with relevant information shared before decision-making in a timely and culturally appropriate format and distributed widely, especially among women and vulnerable groups. Processes should also ensure that comments and concerns are received and responded to, and that this dialogue is documented. To ensure these practices are followed, the parties should agree on timeframes for sharing documents (e.g., no less than two weeks before a meeting) methods for how materials are to be distributed (e.g. designated recipients, oral and written formats, media used, logistics), languages and translations, protocols confidentiality, and how information-sharing will be funded.</p>
<p>10. Document FPIC outcomes and their binding nature</p>	<p>The concrete outcome of an FPIC process should be documented in a written agreement, filed with the appropriate authorities, and enforceable in courts of law and other dispute resolution fora stipulated by the parties. The outcome document will likely reflect one of three outcomes: 1) consent to the activity proposed; 2) a consent with conditions, such as modification of the activity or agreement to a benefit sharing package; or 3) no consent at all. In most cases when consent is granted, it is conditional upon certain terms or demands, which may come from both sides. Even when agreement is not reached, documentation of the outcome of the FPIC process is critical, and all relevant parties should receive a copy of it.</p> <p>In addition to stating the decision, the outcome document should include all terms and conditions of the agreement. These may include, for instance, agreements regarding:</p> <ul style="list-style-type: none"> • employment of community members in the new operations; • terms of use of indigenous knowledge;

	<ul style="list-style-type: none"> • restrictions on access to designated areas of religious or cultural significance; • time period for rights of use granted to the company; • equitable benefit sharing arrangements with the IP/LC, such as royalties, community infrastructure improvements, technical support for community economic activities, or education assistance; • remediation for past or potential future harms; • triggers and protocols for future engagement or consent processes (see item 11, below); • provisions for monitoring and verification (see item 12, below); • mechanisms or processes to resolve potential future disputes (see item 13, below); and • what the company may request of the community in return for the consent.
<p>11. Identify other company activities or circumstances that would trigger additional consent processes in the future</p>	<p>FPIC processes are iterative, and changes in fundamental circumstances can occur, particularly when company activities may be extensive and dynamic over time (e.g., new plantings that were not part of a previous FPIC negotiation). As a result of the dialogue between IP/LC and companies, it is common in FPIC processes for the parties to anticipate the possibility of future activities that would require FPIC. The parties should identify these situations in the outcome document when known.</p>
<p>12. Define participatory monitoring and verification mechanisms</p>	<p>During negotiations and then in the written outcome agreement, the parties should outline how adherence to the agreement will be monitored and verified. The parties should also clarify the role of the affected IP/LC in defining monitoring and verification mechanisms and participating in their application. The parties will need to decide whether and how they work together to define performance indicators, when monitoring will take place, whether both parties will participate in the monitoring, how it will be financed, and whether third-party verification will be used to oversee compliance (see <i>Operational Guidance on Monitoring & Verification</i> for further elaboration).</p>
<p>13. Specify how the parties will resolve any future disputes</p>	<p>In the outcome document, the parties should identify the mechanisms available to resolve future disputes, including breaches of the agreements reached, differences of opinions regarding the interpretation of the FPIC agreements, and any future adverse impacts to the IP/LC that may result from the agreed activities. These could take an escalatory approach, starting with amicable talks, and then moving to mediation, independent arbitration, and adjudication or international fora for grievances, if necessary. If there is an established company Grievance Mechanism in place (see <i>Operational Guidance on Remediation and Access to Remedy</i>), the parties should specify the relationship between that mechanism and those identified in the FPIC agreement.</p>

Box 1: Resources for additional guidance on implementing effective FPIC processes

- FPIC Guide for RSPO members RSPO-GUI-P02-001 V1.0 (2015)
- UN-REDD Guidelines on Free, Prior and Informed Consent (2013)
- UNDP, Social and Environmental Standards #6, Indigenous Peoples Guideline (2017)
- UN Special Rapporteur on Indigenous Peoples' report on Costa Rica describing an FPIC process based on international law^x
- FAO guide on Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition (2014)
- Key Elements to the Initiation, Performance and Maintenance of Good Faith Consultations and Negotiations with Indigenous and Tribal Peoples and Communities (2008)

4. Company policies and practices to respect the right to FPIC

Companies should establish adequate policies and practices, with adequate resourcing and staff training, to ensure that situations requiring FPIC are identified at an early stage and addressed through effective FPIC processes to safeguard the rights of IP/LC. This includes internal company policies and practices as well as responsible engagement with government when appropriate, as detailed below.

4.1 Internal company policies and practices

Companies should enact policies and implement practices, commensurate with their position in the supply chain, to help ensure that they respect the right to FPIC.

Companies directly authorizing or conducting activities that trigger an FPIC requirement such as new acquisitions and plantings (typically upstream companies such as producers and primary processors) are expected to have defined policies, practices, allocated resources, trained staff, and stakeholder engagement plans to effectively conduct FPIC processes and identify in advance where FPIC is needed prior to commencing a particular activity. This should be informed by the studies and assessments conducted during the company's required due diligence (as discussed further in the *Operational Guidance on Respecting the Rights of Indigenous Peoples and Local Communities* and the *Operational Guidance on Supply Chain Management*).

Downstream companies (such as manufacturers and retailers) should also have corporate policies and practices that recognize FPIC as an important safeguard to fulfilling their commitments to respecting human rights. These companies should have mechanisms to help ensure that their upstream suppliers are conducting FPIC processes where required. This includes adequate due diligence and gap assessment processes to identify potential risks in their sourcing portfolio, measures to incorporate human rights and FPIC terms in their supplier contracts, training of relevant staff that would have visibility on whether FPIC processes have been triggered and implemented, monitoring or auditing of their suppliers to ascertain adequate FPIC and actions taken to address deficiencies where identified. The key elements chart in Section 3 above can be converted into a workable set of indicators and thresholds to help assess whether an FPIC process was conducted properly.

In addition, all companies should:

1. Have a documented policy and procedure on FPIC that conforms to the Core Principles and additional details outlined above
2. Ensure that key staff in all relevant departments (e.g., contracting, procurement, and compliance) are aware that the company should take no actions that may affect the existence or value of the lands, resources and territories of IP/LC until FPIC is secured

3. Train staff about the right to the meaningful and effective participation of IP/LC through good faith consultation and FPIC processes, and more specifically, about the purpose, objective, key elements, characteristics and tools for implementing effective FPIC processes
4. Establish a mechanism --with a commensurate budget, experienced personnel, and a written policy-- to not only initiate and conclude one or more FPIC processes (as needed) with an affected IP/LC, but also to continually identify and act upon future activities that may require FPIC. Where downstream companies are not in a position to do these things directly, they should use their influence and provide support as needed to ensure that these processes take place within their supply base
5. Implement and keep up-to-date stakeholder mapping in order to ensure that potentially impacted IP/LC are identified and then regularly engaged going forward in a culturally appropriate and inclusive manner (see the Social Baseline Assessment described in the *Operational Guidance on Respecting the Rights of Indigenous Peoples and Local Communities*)
6. Examine, retroactively if necessary, the prior activities of the company to determine if actions were taken without the required FPIC and consequently, what changes to company operations going forward are deemed necessary, as well as possible remediation^{xi}

These policies and practices can typically be incorporated into other aspects of companies' responsible production and sourcing programs, including integrated site planning processes and the development of an IP/LC Plan (see *Operational Guidance on Respecting the Rights of Indigenous Peoples and Local Communities*).

4.2 Company engagement with government to fulfill FPIC requirements

According to international human rights law, governments have a duty and obligation to "respect, promote and protect" human rights, including the right to FPIC. However, companies are also obliged to respect this and other human rights. Failure to secure FPIC may therefore result in grievances against both the state and any implicated companies. Many governments lack national laws that adequately address their duties and obligations related to the right to FPIC; where such laws do exist, there may be poor enforcement, lack of institutional capacity or limited political will to implement them. These limitations can pose risks to companies: if the state fails to fulfil its duties and obligations related to FPIC, the remedy to fix these violations could undo business deals, require restitution of lands to affected IP/LC previously granted or promised to a company or their suppliers, and significantly alter the financial outlook of the company's operations. If the government calls upon a company to play a substantial role in securing FPIC on its behalf, the success or failure of such mechanisms can further expose the company.

For companies to demonstrate respect for the right to FPIC, while also respecting the government's duties and obligations on the same, they must be prepared to:

1. Contribute effectively to consultations and FPIC processes led by governments, for instance by engaging stakeholders regularly, investing in staff capacity to effectively implement FPIC, and disclosing all relevant information about company operations in a culturally appropriate manner
2. Facilitate and/or lead good faith consultation and FPIC processes. The company may need to play this role either at the request of the government or if the government fails to meet its own obligations and duties. If the latter situation arises, it is prudent for the company to make reasonable efforts to continue to include the government in the process and, at a minimum, keep them regularly informed of the process
3. Work with civil society organizations to help the company ensure that good faith consultation and FPIC processes are carried out when applicable
4. Where the government is not already leading the process, provide copies of all negotiated outcomes of FPIC processes to the state

5. Assess the legitimacy of FPIC processes carried out by the government that result in benefits to the company. For instance, if the company is granted license to operate in a traditional territory of indigenous peoples and the government asserts that FPIC has been attained, prior to finalizing and agreeing to the license, the company should conduct its own due diligence to ensure that FPIC was secured according to a legitimate process. Assessments can be against the 13 key elements charted in Section 3
6. Abstain from production and sourcing operations that may affect IP/LC rights, land, resources, territories, livelihoods, and food security where a proper FPIC has not been secured by the government^{xii}, and commence operations only once FPIC is properly secured
7. Where ongoing production and sourcing operations were commenced without prior FPIC secured by the government, consider the risks associated with continuing such operations unless and until an agreement on a remedy has been reached with the affected IP/LC

DRAFT

ANNEX 1: Addressing common challenges associated with FPIC

There are some common challenges that may arise even where companies are fully committed to carrying out good faith consultation and FPIC processes. This Annex identifies some of these challenges and how companies might address them. For more background on these issues, please refer to the *Operational Guidance on the Rights of Indigenous Peoples and Local Communities*.

1. **Challenge:** Applicable laws may hinder effective implementation of FPIC processes because they are either (a) not consistent with company FPIC commitments, or (b) poorly administered and enforced.

Company response: The limitations of applicable law or government implementation of such law does not absolve the company of its obligations to respect internationally recognized human rights. In such circumstances:

- The company should generally decline to receive state grants, licenses and other economic opportunities or benefits made possible because of rights violations, including failure to undergo a proper FPIC process.
- The company can apply the most progressive interpretation of applicable laws that permit fulfillment of its FPIC obligations.
- The company can seek waivers to compliance with laws that are inconsistent with its commitments and may result in adverse impacts due to the absence or improper implementation of FPIC.
- In the case of weak administration or enforcement of laws, the company can seek to assist the government and/or engage civil society organizations in strengthening FPIC processes by offering technical and financial support or by advocating for stronger FPIC processes in local, national and international fora. Offering to take a lead in facilitation of FPIC processes may afford opportunities to ensure the processes are completed, inclusive, transparent and culturally appropriate.

2. **Challenge:** IP/LC governance structures may not always be compatible with the state's legal framework. For instance, it is not uncommon for multiple governing institutions, associations, or councils to argue that they represent the will of the IP/LC in question, but in most cases only one is recognized by national law as the legal representative of the affected population. In such cases, a local governance structure imposed on IP/LC and their lands by the state's legal framework may consent to a company operation on behalf of the affected IP/LC. However, many IPs/LC may still reject the legitimacy of this consent because they are allied with a competing governing institution (i.e., a traditional structure such a Council of Elders). This often arises where there is national legislation that creates and recognizes one governing structure over an indigenous territory, leaving its own traditional indigenous structures outside of the recognized legal framework. This also often leads to sharp divisions within the IP/LC and uncertainty for the company if one governing entity is supportive of the company operations while the other is not.

Company response: Consultation and FPIC processes should be conducted with the representatives designated by the potentially affected IP/LC in accordance with their norms, values, and customs. This means the company may have to take steps during its due diligence and pre-consultations to understand the origins of these different governance structures, their representativeness of the will of the affected peoples, their inclusiveness of members of the IP/LC, and their respective relationships with the government. In consultation with the affected IP/LC, the company may need to find mutually agreed mechanisms to accommodate the views of all or work with the IP/LC to facilitate their arrival at a joint solution. This may lengthen the process, but it will also strengthen the legitimacy and durability of the outcomes. As with all the challenges described in this annex, where these measures do not fully mitigate governance ambiguities or disagreements, the company must assess the risks of moving forward.

3. **Challenge:** Some IP/LC have weak traditional governance structures under which the designated leaders or representatives may be unable to carry out their responsibilities during FPIC processes and ensure that FPIC processes and the resulting agreements are respected throughout the community and over time. For instance, participation of IP/LC representatives or community members may differ or be minimal at meetings, the participants may act inconsistently from meeting to meeting, or they might not know about agreements or materials from previous meetings, or not respect prior decisions. These scenarios can result from a lack of financial resources to build consensus, limited sharing of information, or insufficient mechanisms in place to ensure that prior decisions are known and respected when leadership transitions to new representatives. Regardless of cause, these challenges can complicate negotiations.

Company response: Patience and understanding is needed as to why the IP/LC governance structures may be weak. This is often the result of years of discrimination, marginalization, and government erosion of their respective rights to control their natural resources and establish and maintain their own governing institutions. Sometimes the solution is simply an infusion of financial resources so that leaders can make and distribute relevant materials throughout the community and store them appropriately for future governing representatives, or so that members have transportation to all relevant meetings (including both internal meetings and those with the company and government). Other times it may also require that mechanisms are put in place to ensure that meetings are scheduled at times that allow for maximal participation (i.e., times that accommodate women with child rearing obligations during the day, or farmers with harvesting obligations during certain seasons, or that do not conflict with religious observances), and every consultation concludes with a written summary (“minutes”) knowingly endorsed by participants and made known to all relevant parties.

4. **Challenge:** Independent facilitators of FPIC processes are ineffective in their roles.

Company response: If agreed by the IP/LC that are party to the FPIC process, the company can hire an independent facilitator with appropriate experience, knowledge, and cultural sensitivities. To avoid bias or the perception of bias, the parties can agree in advance on the terms of reference for the facilitator; they can jointly select the facilitator; and they can specify that the facilitator is answerable to both parties (irrespective of who pays for the services).

5. **Challenge:** Company staff participating in FPIC processes are ineffective in their roles. This may stem from multiple factors, including a lack of training or experience in how to guide such processes effectively, respectfully, in a culturally appropriate manner and consistent with applicable law.

Company response: To be able to participate in and support FPIC processes, company staff need advance training in topics such as the elements of effective consultation and FPIC processes, human rights, cultural sensitivities, inclusivity, and gender equity. Independent experts and corporate social responsibility advisors are available to support this type of capacity building.

6. **Challenge:** Companies initiate or participate in consultation or FPIC processes with critical misconceptions – for instance that IP/LC decisions will be taken by broad consensus or by the majority community members, and that consent will always be forthcoming.^{xiii}

Company response: First, FPIC includes the right to not agree with a proposed company activity. While the company must ensure there is IP/LC consent, there is no corresponding duty of the IP/LC to provide that consent. Companies need to prepare for this eventuality through exploration of possible alternatives. For more information on this topic, see sub-section 3.2(8) of the *Operational Guidance on the Rights of Indigenous Peoples and Local Communities*.

Second, international law requires that IP/LC decisions per FPIC processes are made according to the customs, values and norms of the affected IP/LC and carried out in a culturally appropriate manner. The customary system may mean that the final decision is made solely by a group of elders, or by select women, or by a single Chief after consulting with his/her people. While this may seem irregular to the company, it is not necessarily incongruent with internationally recognized human rights.

Conducting the pre-consultations (see Section 3) and reaching understandings about the applicable customs and norms for decision-making will avoid surprises and misunderstandings around these matters while also identifying potential rights violations. A pre-consultation, for example, can affirm what constitutes a quorum for decision-making in a community assembly, if there is a super-majority or consensus requirement, whether a community member has to be a certain age to vote, who makes decisions for a given IP/LC, and on what decision-makers base their decisions. The pre-consultation can also help confirm the role of women in deliberations and decision-making, as well as the potential access the company will have to the voices of vulnerable or often marginalized groups such as the young or elderly.

International law prohibits discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and recognizes the rights of women (including indigenous women and those pertaining to other local communities) to participate equitably in community life and the decisions that affect them. Consequently, discussions among the parties may need to address whether particular customs and practices may put the company at risk of not fulfilling its non-discrimination commitment. Companies are encouraged to take measures to pursue inclusive consultations and rights-based FPIC processes. This may involve a delicate balancing of rights, and will require transparent and frank discussions between the parties. If necessary, a company may ultimately need to decide whether appropriate mitigation measures are enough to fulfill its commitments.

- 7. Challenge: Conflicts may arise around who is eligible to participate in consultations – specifically, who are considered “members” of the people or community. For example, an IP may assert that only members of their people or community residing in the territory can participate in decisions affecting that territory, while others residing in their territory and members living outside of the territory cannot participate. Those who feel marginalized may express objections to their exclusion.**

Company response: Per international law, only the IP/LC in question can determine who is a member of their people or community. Like governments that decide who can participate in local and national elections or hearings, it is the IP/LC that also determine who is eligible to participate in consultation and FPIC processes. For instance, an IP/LC may limit participation to members of a certain age or members who have lived in the territory for a given length of time, or they may choose to exclude non-member residents living in their territory. This is their right. It is the role of the IP/LC to inform the company about the community norms, values and customs by which consultation or FPIC processes should be conducted, including who is eligible to participate. The pre-consultation can help to establish these parameters so there are no surprises.^{xiv}

Also, while consent processes may be triggered with respect to a specific IP/LC, this does not mean that the company cannot or should not engage other stakeholders in separate fora. Indeed, companies should separately engage other potentially affected stakeholders (i.e., a separate group of gold miners or non-IP/LC smallholders) that are not considered part of the FPIC process for a specific affected IP/LC. This is part of the company’s general obligation to respect the rights of meaningful and effective participation of those that may be affected by its operations.

8. **Challenges:** Relevant information about company operations is not readily accessible to the affected IP/LC and its members due to challenges such as language and cultural barriers as well as impediments to wide distribution, such as remote location of affected parties and poor infrastructure and communications.

Company response: During the pre-consultations, understandings can be reached between the parties on how best to prepare and deliver information that is necessary for making an informed decision. Consideration should be given to language preference and means of communication (e.g., orally, written, pictorial, or via radio, church postings, SMS/Whatsapp, or CSO networks). The FPIC guidance and references provided in this Operational Guidance offer instructions on the kinds of information that should be shared to ensure informed decision-making. Consultation calendars should strive to accommodate the customs, celebrations, and livelihood obligations of the peoples concerned as well as impediments of geography and weather. If there is an agreement that all information will be shared at least two weeks in advance of all meetings, special measures may be needed during the rainy season when roads are not passable, or when rivers are too high to navigate safely. If community members have difficulty processing information, company representatives may need to provide additional support by highlighting key issues in advance of a meeting and allowing time for IP/LC advisors to explain the material to the affected populations.

DRAFT

ENDNOTES

ⁱ For a non-exhaustive but extensive compilation of this jurisprudence and foundational instruments, see Legal Companion to the UN-REDD Programme Guidelines on FPIC *available at*: <https://www.unredd.net/documents/un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648/legal-companion-to-fpic-guidelines-2655/8792-legal-companion-to-the-un-redd-programme-guidelines-on-fpic-8792.html>.

ⁱⁱ RSPO Principles and Criteria for the Production of Sustainable Palm Oil (2013), principle 2.2, 2.3, 5.2, 7.5, 7.6 and Annex 1; “Social Requirements for Conserving High Carbon Stock Forests in Oil Palm Development” (2017), Principle 7; Roundtable on Sustainable Biomaterials Principles & Criteria (2016), Principles 2b, 9a, 12a & 12b; Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), § 9.9; Malaysia Sustainable Palm Oil (2013), Principle 3, Criterion 3, Indicator 3 & Criterion 2, Indicator 4; Rainforest Alliance Sustainable Agriculture Standard (2017), *Criteria 4.46 – 4.47*; Equator Principles (2013), Principle 6; FSC Principles and Criteria for Forest Stewardship (2015), 3.2 & 3.3; FA 2020 African Palm Oil Initiative: Marrakesh Declaration (2016), para. J; IFC Performance Standard #7, Indigenous Peoples (2012), paras, 10m 13-17; Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector, Step 4.B, Table 6 & Annex B “Engaging with Indigenous Peoples.

ⁱⁱⁱ Source: “Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent,” endorsed by the UN Permanent Forum on Indigenous Peoples, 2005. See workshop methodology at E/C.19/2005/3, adopted at the UNPFII at its Fourth Session in 2005

^{iv} Special Rapporteurs, international tribunals, commissions and committees charged with interpreting and examining binding international treaties and conventions, as well as UN Special Rapporteurs, international financial institution social and environmental standards and operational policies have affirmed that the right of indigenous peoples and local communities to good faith consultations and FPIC in multiple contexts. Confirming the FPIC commitments expressed in the Core Principles, FPIC is required: when IP/LC rights may be affected, as well as in connection with specific activities related to their right in land and matters affecting their food security and livelihoods, including but not limited to circumstances involving logging, mining and oil and gas operations; the establishment of protected areas; dams; agro-industrial plantations; whole or partial physical resettlement and economic displacement; in cases of use of traditional knowledge and intellectual property, in the event of compulsory takings; and other decisions affecting the status of a peoples’/communities’ land rights (i.e demarcation and titling decisions). See *supra* note 1.

^v See Core Principles B1.1 calling upon Companies to “conform its activities” to UNDRIP. UNDRIP has no less than seven provisions affirming the requirement of FPIC prior to activities that could be said to affect the rights, lands, resources, territories, livelihoods and securities of IPs/LCs. These activities include takings of cultural, intellectual, religious and spiritual property, as well as any damages, takings, occupation, confiscation or uses of lands, territories and resources.

^{vi} Special Rapporteurs, international tribunals, commissions and committees seized with interpreting and examining binding international treaties and conventions, as well as UN Special Rapporteurs, international financial institution social and environmental standards and operational policies have affirmed that the right of indigenous peoples and local communities to good faith consultations and FPIC in multiple contexts. Confirming the FPIC commitments expressed in the Core Principles, FPIC is required: when their rights may be affected, as well as in connection with specific activities related to their right in land and matters affecting their food security and livelihoods, including but not limited to circumstances involving logging, mining and oil and gas operations; the establishment of protected areas; dams; agro-industrial plantations; whole or partial physical resettlement and economic displacement; in cases of use of traditional knowledge and intellectual property, in the event of compulsory takings; and other decisions affecting the status of a peoples’/communities’ land rights (i.e demarcation and titling decisions). See *supra* note 1.

^{vii} Guidelines on Free, Prior and Informed Consent, p. 14 (UN REDD, FAO 2013).

^{viii} Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, the situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica, A/HRC/18/35/Add.8, Part II.A.4 “Defining Consultations on Consultations”, parrs. 30-33 (11 July 2011). This “pre-consult” phase is similar to what companies may already engaged in with other non-IP/LC parties. It is not uncommon, before engaging in substantial negotiations, Companies may have preliminary discussions with the representatives of other parties (foreign governments and future business partners etc.) to reach prior agreements as to how those negotiations will be conducted going forward: based on what fundamental

principles, what documentation will be shared between the parties, with the presence of what level of management/authorities, and with what objectives and time lines, etc.

^{ix} Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, the situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica, A/HRC/18/35/Add.8, Part II.A.4 “Defining Consultations on Consultations”, parrs. 30-33 (11 July 2011).

^x Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, the situation of the indigenous peoples affected by the El Diquís hydroelectric project in Costa Rica, A/HRC/18/35/Add.8, Part II.A “The need for adequate consultations”, parrs. 10-40 (11 July 2011).

^{xi} Going forward, the lessons learned from a company operational level grievance mechanism also can facilitate identifying when this retroactive process may be needed as well as the scenarios in which a company should have been, and therefore should be, conducting FPIC processes.

^{xii} A reference to FPIC secured by the Government might also include FPIC secured by a private party that must be verified by the Government (given that ultimately the duty and obligation under international law falls on the Government).

^{xiii} A related challenge is where a Company has a commitment to advance women’s rights but is face with an FPIC requirement in a community where women seem marginalized from all decision-making processes.

^{xiv} Of course, if there are internal conflicts over what local government represents the affected peoples and therefore makes these decisions, this challenge is further complicated. See Challenge and Response 2 above for further guidance.