

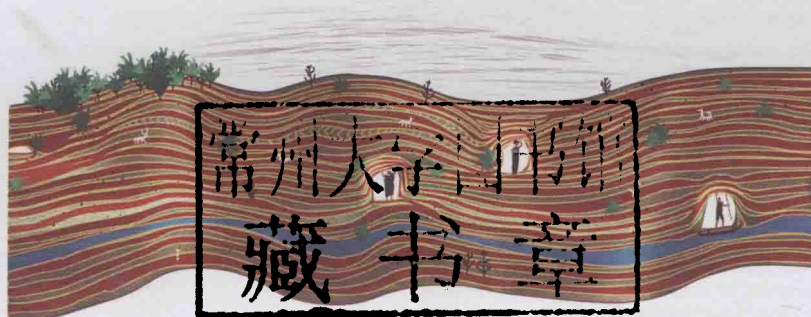
# Respecting free, prior *and* informed consent

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



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



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

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## Foreword

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

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

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

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

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

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## **Introduction**





# Introduction

## Why you might need this Practical Guide

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

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

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

## FPIC and the Guidelines

Source: FAO, 2012.

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

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

## What is free, prior and informed consent?

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

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

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



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

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

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

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

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

### Elements of free, prior and informed consent

Source: UNPFII, 2005; EMRIP, 2011.

**Free** implies no coercion, intimidation or manipulation.

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

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

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

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



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

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

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

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

## Duties and responsibilities

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

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

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

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

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

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

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

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

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





## From whom should FPIC be obtained?

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

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

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

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

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



## Benefits of FPIC

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

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

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

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

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