



FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC)

Version 1 | 30 October 2012





Published by:

FSC International Center GmbH,
Charles de Gaulle Strasse 5
53113 Bonn
Germany.

October 2012

These guidelines were prepared by:

Leo van der Vlist (Netherlands Centre for Indigenous Peoples)
Wolfgang Richert (Wolf Consultancy)

With many thanks to:

Rosa Almendares, Luís Astorga, Matthias Baldus, Anders Blom, Estebancio Castro Diaz, Margarida Cespedes, Marcus Colchester, Thomas Colonna, Peter Dam, Hans Djurberg, Hans Joachim Droste, Christina Egenter, Linda Fienberg, Kate Geary, Pina Gervassi, Ana Patricia Gomes, Chris van der Goot, Anton Greeff, Petra Hamers, Emanuel Heuse, Robert Hrubes, Shoana Humphries, Miguel Jofré, Gregory Jean, Loy Jones, Larry Joseph, Edna Kaptoyo, Marion Karmann, Jaime Levy, Vanessa Linforth, Tom van Loon, Alois Mabutho, Gerrit Marais, Maria Ines Miranda, Paula Montenegro, Alistair Monument, Daisuke Naito, Martha Nunez, Mogens Pedersen, Didik Purwanto, Yolanda Ramirez, Ramón Rivero, Richard Robertson, Veronica Salas, Marioldy Sanchez, Eva Schmassmann, Indra Setiadewi, Aisyah Sileuw, Adrien Sinafasi, Alba Solis, Regan Suzuki, Stuart Valentine, Nancy Vallejo, Victor Vargas, Christoph Wiedmer, Bradley Young.

Note:

This is a first version of guidance on a complex topic. FSC believes that practical implementation of this methodology is necessary to produce valuable results and information to feed into a second version, which is scheduled within 1-2 years from the publication of this version.

Please send all comments on the application of this FSC FPIC guidance and suggestions for improvements for the attention of the Social Policy Manager at: policy.standards@fsc.org.



CONTENT

Introduction	6
1. Background.....	6
2. Important considerations in the application of the right to FPIC	8
3. Terminology in this guide	9
4. Readers guide	9
Part 1 The right to free, prior and informed consent	11
Chapter 1 Introduction to the right to free, prior and informed consent.....	11
1.1 Definition of free, prior and informed consent	11
1.2 Clarifying the four elements free, prior, informed and consent	11
1.3 Legal basis for the right to FPIC for indigenous peoples and local communities	13
1.4 Benefits and risks of FPIC: <i>Go slow to go fast</i>	14
Chapter 2 The right to free, prior and informed consent in the revised FSC P&C	16
2.1 FPIC definition within the revised FSC P&C.....	16
2.2 Where to find FPIC in the new FSC P&C?.....	16
2.3 The meaning of ‘prior’	20
2.4 Who has the right to FPIC?	20
2.5 Who determines who has the right to FPIC?	23
2.6 Conflicting rights and governance issues	23
2.7 Which factors determine the level of effort to implement a FPIC process?.....	23
Part 2 FPIC step-by-step	25
Chapter 1 Introduction	25
Chapter 2 Summaries of six steps to implement the right to FPIC.....	28
Chapter 3 Guidance to implement six steps of a FPIC process.....	34
Step 1: Identify rights holders and their representative institutions	34
1.1 Identifying rights holders.....	34
1.2 Examine and record how communities make decisions.....	36



1.3 Agree on decision-making process..... 38

1.4 Inform representative institutions about planned forestry operation..... 39

1.5 Identify if community will consider forest operation 39

Step 2: Prepare for further engagement with identified communities..... 41

2.1 Establish a multi stakeholder working group..... 41

2.2 Establish a specific structure, capacities and train a social team within the Organization 41

2.3 Identify and agree on independent verifier / observer / facilitator 42

2.4 Develop appropriate communication and information strategies..... 43

2.5 Explore host state approaches to FPIC..... 44

2.6 Further define management activities likely to affect indigenous peoples and local communities ..44

2.7 Make realistic and flexible timelines and budgets for the FPIC process..... 45

Step 3: Map rights, resources, lands and territories and assess impacts 47

3.1 Ensure sufficient community capacity for mapping and assessments..... 47

3.2 Participatory mapping..... 48

3.3. Facilitation in case of conflicting claims..... 50

3.4 Re-define proposed management activities and engage in Participatory Impact Assessments..... 51

Step 4: Inform affected indigenous and local community rights holders 54

4.1 Re-define proposed activities and inform communities about the proposed forestry operation..... 54

4.2 The communities decides freely if they want to enter into negotiations..... 54

Step 5: Negotiate and let community decide on negotiated FPIC proposal..... 56

5.1 Ensure agreement on decision-making process and capacity-readiness of the community 56

5.2 Negotiate mitigation, compensation and benefit-sharing 56

5.3 Establish arrangement for complaints, disputes and conflicts..... 57

5.4 Set up a participatory monitoring model 59

5.5 The community decides freely on the proposal..... 59

Step 6: Formalize, verify, implement and monitor the consent agreement..... 62

6.1 Formalize the consent agreement 62

6.2 Verify the FPIC process 63



6.3 Implement and monitor the consent agreement	64
Textbox: FPIC and Community-based Forest Management	65
Textbox: Plantations.....	66
Glossary of Terms – FSC definitions	67
References.....	69
Annex 1: Overview of people who contributed to these guidelines	72
Annex 2: Overview of provisions on FPIC and indigenous peoples.....	74
Annex 3: Overview of tools.....	79
Annex 4: Alternative Dispute Resolution	81



List of abbreviations

CBF: Community-based forestry

CBO: Community-based organization

CF: Community Forestry

CSO: Civil Society Organization

EN (Explanatory Notes): FSC Principles and Criteria for Forest Stewardship; Supplemented by Explanatory Notes and Rationales: FSC-STD-01-001 V5-0 D5-0 EN

FMU: Forest Management Unit

FPIC: free, prior and informed consent

FSC: Forest Stewardship Council

FSC-IC: International Centre of Forest Stewardship Council

FSC P&C: FSC Principle and Criteria for Forest Stewardship: FSC-STD-01-001 V5-0 D5-0 EN

GIS: Geospatial Information Systems

GPS: Global Positioning Systems

HCV: High Conservation Value

ILO: International Labour Organization

IP: Indigenous Peoples

ISO: International Organization for Standardization

LC: Local Community

NGO: Non-Governmental Organization

NTFP: Non-Timber Forest Product

SLIMF: Small and Low Intensity Managed Forests

UN: United Nations

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

UNPFII: United Nations Permanent Forum on Indigenous Issues

UN-REDD: The United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation

WRI: World Resources Institute



Introduction

1. Background

Why this guide?

The right to free, prior and informed consent (FPIC) is seen as one of the key principles of international human rights law to protect indigenous peoples from destruction of their lives, cultures and livelihoods. Increasingly it is also seen as a right for local communities to protect themselves from significant impact on the resources and territories for which they can make a justified claim of long and established use. Obtaining the free, prior and informed consent of indigenous peoples and local communities, before undertaking forestry operations on lands they legally or customarily own and/or use, is therefore an important requirement in the new FSC Principles and Criteria for Forest Management.

Although the right to give or withhold consent has been recognized in the FSC system since its original Principles and Criteria (P&C) were published in 1994, there are not many documented examples of good practices of implementing this right. Moreover, several conflicts arising from disregarding this right have been reported. In other words, there is room and need for improving the way in which the right to FPIC is currently implemented in FSC certified forests and plantations. These guidelines are meant to facilitate that improved implementation.

The new version of the FSC P&C approved in March 2012 have broadened the scope of the right to FPIC and are more specific regarding when consent is needed. Some changes include the more explicit requirement of recognizing and addressing the right to FPIC for local communities whose rights or resources are affected by Organizations, as well as the need for consent to be obtained *prior* to the implementation of management activities which may affect indigenous peoples or local communities. These guidelines are written with the revised P&C in mind but are, to a large extent, also relevant for the current P&C and are therefore meant for immediate use.

To provide a rough idea of how the new P&C will be phased in, the first step is the development of FSC international generic indicators based on the P&C; the indicators are anticipated to be approved at the end of 2013. Then the FSC national standard development groups and certification bodies will have two years to adapt their standards to the new international generic indicators. Once these standards are approved, the certificate holders will have one year before they will be audited to the new standards. This could mean that certificate holders will need to demonstrate compliance with standards based on the new P&C only in late 2016. However, if things happen more simultaneously than linearly, this could also be as soon as by the end of 2014. Further guidance regarding the phase in of the new P&C can be found at: igi.fsc.org.

Who is this guide for?

This FSC guidance on the implementation of FPIC aims to assist all parties involved in FSC certification in safeguarding the rights of forest dependent indigenous peoples and local communities in or near FSC certified operations. The intended users of this guide are:

- The Organization (often a forest company) proposing or planning FSC certified forest activities that will or could affect indigenous peoples or local communities
- Indigenous peoples in or near FSC certified operations
- Local communities in or near FSC certified operations
- Non-Governmental Organizations (NGOs), Civil Society Organizations (CSOs) and other independent experts working to support indigenous peoples, local communities or forest companies
- Certifying bodies and independent observers/verifiers.



Overview of guide

The implementation of the right to FPIC can be very challenging. It requires the identification of all affected indigenous peoples and local communities with legal or customary rights to land or resources in and around the management unit and then, if these rights holders are interested, an extensive and iterative process of engagement. During this process the affected communities must be given enough time and information to be able to give or withhold their consent, free of coercion or manipulation, at various stages of the process. This process entails, among others, communication in ways the communities can understand, agreeing on inclusive decision models, capacity building, participatory mapping and participatory impact assessments and fair negotiations. It may result in a negotiated consent agreement on the proposed forestry operation, or the affected communities may decide to withhold their approval indefinitely, or until certain conditions are met.

Two key questions related to FPIC are:

1. Who has the right to FPIC?
2. How does the Organization go about implementing a process to obtain free, prior, and informed consent from indigenous peoples or local communities?

This document provides general guidance on how to answer the first question, as this depends very much on the specific context of the forest operation. This document provides more extensive guidance for the second question. It is hoped that additional guidance on determining who has the right to FPIC will be developed in the future based on a process of documenting and sharing experiences with this issue within the FSC network.

In summary this guidance provides:

- Extended and practical guidance on how to implement a FPIC process (Part 2)
- Initial guidance on the identification of who has the right to FPIC within the FSC system (Part 1, section 2.4 and Part 2, step 1)
- Background information on the right to FPIC (Part 1, chapter 1)
- Information on the right to FPIC within the FSC system (Part 1, chapter 2)

Methodology of the project to develop this guidance

This guidance was developed through the following process:

1. Advisory Group: At the start, an Advisory Group was composed of key experts on FPIC in the forestry sector (see Annex 1). The Advisory Group provided input for the desk study, stakeholder survey and regional consultations described hereafter, and commented on the first and third draft versions of these guidelines.
2. Desk study: Review of the most relevant literature on FPIC in the forestry sector and some other sectors (see References).
3. Stakeholder survey: The objective of this email survey was to collect experiences and opinions about FPIC from key stakeholders in the forestry sector such as FSC certified companies, auditors and representatives of indigenous peoples and local communities, NGOs and representatives of local governments. Given this objective and the limitations of the assignment this survey was not representative (see Annex 1 for further information on the survey and its respondents).
4. Draft guidelines: The first draft guidelines for the implementation of FPIC in FSC certification was developed based on the information from the desk study and the stakeholder survey. Comments on this first draft from the Advisory Group and from FSC-IC led to a second draft.
5. Consultation in two regional workshops: Consultation of selected key stakeholders in regional consultation workshops, in Lima, Peru and Bogor, Indonesia, about the second draft FPIC guidelines (for list of participants, see Annex 1).
6. Reference Group: The second draft guidelines were also sent for comments to a wide reference group of interested stakeholders of FSC (see Annex 1).
7. Based on the input from the consultations and the reference group a third draft of the FPIC guidelines was made.
8. Final comments by Advisory Group and FSC-IC: This third draft was commented by the Advisory Group and by FSC-IC and based on this feedback the final draft of these FPIC guidelines (version 1) was presented to FSC.



2. Important considerations in the application of the right to FPIC

In addition, there are some very important considerations in the application of the right to FPIC and explanations on how to read this guidance document.

FPIC is a pre-condition for certification

To recognize and uphold the rights of indigenous peoples and local communities to their resources, lands and territories is a requirement for FSC certification, both in the current and the revised P&C. FPIC is now a requirement in 5 criteria and, as such, non-compliance with these criteria could result in the issue of preconditions that preclude the issue of an FSC Certificate.

FPIC ≠ engagement

The right to FPIC includes the right of indigenous peoples and local communities to give, withhold or withdraw consent to those activities that would affect their rights. That is different from an engagement process which gives the Organization the right to take the final decision. Engagement by itself does not include the right to say 'No', whereas a process based on the right to FPIC does.

The right to FPIC does not depend on legal rights

A common misperception is that FPIC only applies when indigenous or local communities have legal rights. In fact, the FSC recognizes customary rights as well. The FSC definition of customary rights is presented in Part 1, section 2.4 and in the Glossary of Terms.

No distinction between state-owned and private land

Regarding the right to FPIC, it makes no difference whether the FMU is situated on state-owned land or on private land.

Who has the right to FPIC?

The identification of indigenous peoples, local communities and traditional peoples can be a complicated task. Determining what is considered a 'fair and legitimate claim' or 'long and established use' can be complicated as well. Part 1, section 2.4 gives some guidance based on an assessment of the revised FSC P&C, and the description of step 1 in Part 2 adds more guidance based on stakeholder input and literature. However many questions related to these issues can only be answered within the local or national context, and by making use of locally available expertise.

As mentioned above, more guidance is needed on the issues of *who has the right to FPIC* and *when do customary rights exist*, as well as *how to establish ownership of traditional knowledge*. It is hoped that this additional guidance can be developed in the future based on documenting and sharing experiences within the FSC network on how the right to FPIC is implemented.

Who determines who has the right to FPIC?

It is the responsibility of the Organization to make a well informed judgment on the identification of rights holders and of their rights. The Organization can seek advice from specialists and local stakeholders, and can ask an independent party to verify its judgment. The judgment of the Organization will then be assessed by its certification body, who will assess whether disputes over claims or rights exist. See also Part 1, section 2.5.

Conflicting rights and governance issues

The FSC recognizes that neither certification nor this guidance document can solve governance issues. If the case arises of a conflict between the FSC requirement for FPIC and the requirement for the Organization to follow all applicable laws (FSC Principle 1), it should be brought to the attention of the certification body who shall evaluate the situation on a case by case basis, in coordination with involved or affected parties. See also Part 1, section 2.6.

The level of effort and its dependence on the type of Organization/operation

A FPIC process is not needed if no rights holders are affected by the planned management operations, or if the Organization decides not to execute any operations that potentially could affect rights holders.



When a FPIC process is needed, the level of effort required from an Organization in order to address the right to FPIC for indigenous and/or local communities will vary based on a number of factors, such as the scale and the intensity of the operation, the number and characteristics (language, education, culture) of affected rights holders, and the Organization's relationship with those rights holders. This guidance addresses all these factors.

This is further explained in Part 1, section 2.7, which provides a brief overview of expected differences for:

- Large operations
- SLIMF operations
- Community-based forestry
- Plantations.

A FPIC process is not isolated from other FSC requirements

It is also important to understand that the implementation of a FPIC process is not isolated from the other FSC requirements. This means that while a FPIC process aims to achieve a FPIC agreement, in doing so the Organization will be working towards a number of other FSC requirements at the same time, e.g., stakeholder consultation, social impact monitoring. See also Part 1, section 2.2.

3. Terminology in this guide

See the *Glossary of Terms* at the end of the Guidelines for an overview of FSC definitions of some key terms used in these guidelines. For example, this guidance document uses the FSC terminology "the Organization" for the person or entity holding or applying for certification and therefore responsible for demonstrating compliance with the requirements upon which FSC certification is based (as it is defined in the revised FSC P&C Glossary of Terms). In many situations the "Organization" may be a 'forest company' or 'individual operator'.

The term "**community**" is not defined by FSC, but is used throughout these guidelines. The revised FSC principles 3 and 4 require FPIC for indigenous peoples and for local communities. In any forest management unit this can be applicable to one or more community/ies of indigenous peoples and/or one or more local community/ies. In order to enhance the readability of this guideline, these terms are used in a flexible manner. When the terms 'community' or 'communities' are used, they may refer to both indigenous peoples and local communities, and can mean a single community or multiple communities.

4. Readers guide

Part 1 of this guidance document is a general introduction to the right to FPIC.

Chapter 1 of Part 1 gives background information on the right to FPIC, its definition, the international legal context and benefits and risks of engaging in a FPIC process.

Chapter 2 of Part 1 gives information on how the right to FPIC is included in the new FSC P&C. It further describes that the requirement for FPIC is not isolated within the FSC P&C and places it in the context of other requirements. Finally, this chapter 2 addresses in more detail important questions such as:

- What is the meaning of 'prior'?
- Who has the right to FPIC?
- Who determines who has the right to FPIC?
- What to do in case of conflicting rights and governance issues?
- Which factors determine the level of effort to implement a FPIC process?

Part 2 gives extensive and practical guidance on how to implement a FPIC process. The FPIC process described in this part consists of six steps, each containing several elements.



Chapter 1 of Part 2 introduces the FPIC process presented in these guidelines and provides a flow chart of this process.

Chapter 2 of Part 2 presents summaries of the six steps of a FPIC process for those readers who want to get a quick overview. Each summary describes the main elements of that step, and then an overview table shows the elements of each step combined with the desired output for each of these elements. This is then followed by a list of questions to check if the step has been implemented.

Chapter 3 of Part 2 provides detailed guidance on all elements of each step in the process for those readers who will actually work to implement a FPIC process. In addition, elements or perspectives that are specifically important for indigenous peoples and local communities are mentioned in chapter 3 in separate text boxes at the end of each step.

At the end of Part 2 two text boxes are provided with additional guidance on the implementation of FPIC in two specific types of forestry operations: **Community-based Forestry** and **Plantations**.

Part 2 is mainly developed from the perspective of the Organization, because this is the entity that has been given the responsibility in the FSC P&C to respect the right of indigenous peoples and local communities to FPIC. The Organization therefore has to initiate and agree upon a proper process to implement FPIC. However, the step-by-step description in both parts is also relevant for all other stakeholders, most importantly indigenous peoples and local communities, as they explain the responsibilities of the Organization towards these rights holders in a FPIC process.

After Part 2 a **Glossary of Terms** and a **List of References** is presented.

Annex 1 gives an overview of people who contributed to the development of these guidelines.

Annex 2 is an addition to section 1.3 in Part 1 on the legal basis of the right to FPIC. This annex gives an overview of provisions on the right to FPIC of indigenous peoples in various international documents.

Annex 3 provides a list of tools, and other resources that can be used for implementing some of the elements of the FPIC process.

Annex 4 about Alternative Dispute Resolution is an addition to the issue of conflict resolution mechanisms as discussed in the description of steps 3.3 and 5.3 in the step-by-step approach in Part 2, chapter 3.

Part 1 The right to free, prior and informed consent

Chapter 1 Introduction to the right to free, prior and informed consent

1.1 Definition of free, prior and informed consent

As of yet, there is no internationally agreed definition of free, prior and informed consent (FPIC). A plain and general description of FPIC is:

The right to participate in decision making and to give, modify, withhold or withdraw consent to an activity affecting the holder of this right. Consent must be freely given, obtained prior to implementation of such activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: free, prior and informed consent.¹

In section 1.2 of this chapter the four elements of FPIC (free, prior, informed, and consent) are further clarified. Section 1.3 of this chapter explains the legal basis for FPIC for indigenous peoples and local communities, to whom FPIC is applicable in the context of the FSC P&C. The definition of FPIC used by FSC is presented in section 2.1 of this chapter.

Is FPIC a right to veto?

A question often asked about FPIC is if this means a right to veto. Although the right to FPIC is widely accepted, including by FSC, as a right to say “Yes” or “No” to a proposed activity, it is important to note that a UN expert on the rights of indigenous peoples stated that it does not accord a general “veto power”:

“The character of the consultation procedure and its object are also shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure. The Declaration [on the Rights of Indigenous Peoples] establishes that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples.”²

It is important to recognize that the emphasis on “establishing consent as the objective of consultations” is to empower communities to protect their rights and to address situations of imbalance of power and capacity between communities and Organizations, but not to encourage communities to extend the right to FPIC beyond fair and reasonable demands or to further political objectives. At the same time a FPIC process serves to ensure that nobody in the community is intentionally excluded from the decision-making process.

1.2 Clarifying the four elements free, prior, informed and consent

In this section more clarification is given on the four elements of FPIC: free, prior, informed and consent, building on the work of the United Nations Permanent Forum on Indigenous Issues (UNPFII) and some other sources.³

Free

‘Free’ refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, manipulation or timelines that are externally imposed:

- Rights holders agree with the process, and decision-making structure

¹ Based on Colchester, M. and MacKay, F. (2004). *In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent*, Forest Peoples Programme, pp. 8-14.

² UN Special Rapporteur on the Rights of Indigenous Peoples, UN Document A/HRC/12/34, 2009, par. 46

³ UN Permanent Forum (2005); Anderson (2011); UN-REDD Programme Draft FPIC Guideline (2011); Loreto Tamayo and Degawan (2011).



- The process is free from coercion, bias, or bribery
- Rights holders have been informed of their right to say “No” and to negotiate conditions and the Organization clearly expresses its commitment not to proceed without consent at all stages where FPIC is required
- Information is transparently and objectively made available as a responsibility of the Organization and at the rights holders' request
- Meetings and decisions take place at locations and times and in languages and formats agreed by the rights holders
- All community members are encouraged to participate regardless of gender, age or standing and this should be considered in setting meetings
- Where negotiations break down, there is access to third party assistance – legal or otherwise – to provide additional sources of information, mediate resolution, or strengthen rights-holders' position
- Where consent is not given, the period before which it can be sought or given again is mutually agreed, as well as the conditions under which consensus reversals can take place.

Prior

'Prior' means 'in advance'. The community must be given the opportunity to form their opinion and make their decision before the proposed activity or project starts, and also before a final decision is taken that such activity or project will be implemented. In the ideal situation, the community must be asked about the initial idea before the project or activity is developed in detail.

The decision-making timeline established by indigenous peoples and/or local communities must be respected and time must be provided to understand, access, and analyze all relevant information on the proposed activity, including its potential impacts and the community's rights.

Informed

'Informed' refers to the type of information that should be provided prior to decision making to ensure that there is clear and confirmed understanding that rights holders are aware of the specific question which they are being asked to consent to. Information should be:

- Objective, covering both the positive and negative potential impacts of both the forest activities and of giving or withholding consent, including the perspectives of the affected people expressed through participatory impact assessments
- Complete, covering the spectrum of potential social, socio-economic, cultural, environmental and human rights impacts
- Accessible, clear, consistent, accurate, and transparent
- Delivered in appropriate language and format (could include radio, video, theatre, graphics, documentaries, photos)
- Delivered by culturally appropriate personnel, ideally independent from the Organization, in culturally appropriate locations, and include capacity building of indigenous or local trainers. Direct communication (face-to-face meetings and other innovative, interactive methods) should be the default method of informing unless high levels of literacy across the community are apparent
- Presented to a proportionate representation of the communities, including from remote, rural communities, men and women, and marginalized members of these affected communities
- Provided on an ongoing and continuous basis throughout the FPIC process and also after consent has been given, and passed on to the affected communities as soon as new information is available.

Consent

'Consent' refers to a freely given collective decision by indigenous peoples or local communities reached through an agreed upon process of dialogue, deliberation, and decision making (e.g. consensus, majority, etc.). The decision may be a "Yes" or a "No" to a proposed plan, including the options to be conditional and/or to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges. Consent must be sought and granted or withheld according to the unique formal or informal political-



administrative dynamic of each community. At the same time it must be ensured, or at least encouraged, that nobody in the community is intentionally excluded from the decision-making process. It is vital that companies are able to provide evidence that communities have gained sufficient understanding of the information to be said to have given their informed consent and to prove that consent has been given without any pressure, intimidation or illegitimate activities. This will often require the participation of an independent third party to observe the process.

Consent is:

- Not the same as engagement or consultation. These are only the necessary means to arrive at a consent decision
- The expression of rights (to self-determination, lands, resources and territories, culture)
- Given or withheld in phases, over specific periods of time for distinct stages or phases of the forest management operation
- Not a one-off decision that gives an everlasting social license to a forest operation. Rather, it is part of an iterative process, described by various indigenous peoples as 'living consent,' which requires continual monitoring, maintenance, and reaffirmation throughout the various stages of a forest operation
- Likewise, decisions to withhold consent are not necessarily forever binding and can also be revisited by rights holders as situations change or become more favourable
- Once consent is given, the community is, however, not able to withdraw consent arbitrarily. The FPIC agreement is a binding agreement for both parties. If the conditions upon which the original consent was based are being met, ongoing consent is implied.

1.3 Legal basis for the right to FPIC for indigenous peoples and local communities

The importance of consent as the basis for relations between states and indigenous peoples was observed as early as 1975 by the International Court of Justice in its advisory opinion in the Western Sahara case. In that case, the Court stated that entry into the territory of an indigenous people required the freely informed consent of that people as evidenced by an agreement.⁴

Today, the duty of states to seek free, prior and informed consent of indigenous peoples on decisions affecting them is referenced throughout the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in relation to particular concerns, and it is affirmed as an overarching principle in article 19 in the UNDRIP. It is also referenced in the ILO Convention 169 and the Convention on Biological Diversity, and increasingly in many other international legal instruments, policies, jurisprudence, as well as in national legal and administrative frameworks and jurisprudence. Additionally, an increasing number of voluntary standards apply this requirement to companies, including the FSC standard. For an overview of some of the main provisions on free, prior and informed consent and indigenous peoples in international legal instruments, policies, jurisprudence and voluntary standards, see Annex 2.

This duty to seek FPIC is based on many universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property. This is acknowledged in statements and decisions of authorities such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Inter-American Court of Human Rights. More fundamentally, the right to FPIC derives from the overarching right of indigenous peoples to self-determination (art.3 of UNDRIP).

Although the legal precedent for FPIC is as a right of indigenous peoples, there is a growing recognition, including by FSC, that all communities should have a meaningful role in making decisions about projects that affect them in a significant way, including the ability to refuse to host projects that do not provide adequate benefits or help them to realize their development goals.⁵ Some human rights conventions have also been

⁴ International Court of Justice, Western Sahara: Advisory Opinion of 16 October 1975, ICJ Reports 1975. See, also, M. Janis, The International Court of Justice: Advisory Opinion on the Western Sahara, 17 Harv. Int'l L.J. 609, 61 (1976).

⁵ World Resources Institute (WRI), United Nations Development Programme, United Nations Environment Programme, and World Bank. 2005. World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty. Washington, DC: WRI, p. 72



interpreted to extend the right to FPIC to other communities in addition to indigenous peoples.⁶ For non-indigenous communities, the case for FPIC is based on (1) the right to meaningful participation in environmental decision making;⁷ (2) the right to control access to their lands and resources;⁸ (3) contemporary standards of public participation as a hallmark of legitimate governance; (4) basic principles of equity and justice;⁹ and (5) the UN Declaration on the Right to Development: “Everyone has the right to development.”¹⁰

1.4 Benefits and risks of FPIC: *Go slow to go fast*

The process to implement FPIC in a meaningful way requires a methodology to develop mutual understanding and to ensure an open, ongoing and equitable relationship between different stakeholders. If implemented properly it is a way to ensure resources are shared fairly, forests are managed equitably and sustainably, and indigenous peoples and local communities are offered an opportunity for fair compensation, sustainable access to resources and, if they wish, a role in forest management. A well-designed FPIC process cannot redress the differential in power between indigenous peoples, local communities and forest companies, but it can create a workable co-existence under which the two parties can benefit from forest resources.

Companies may regard FPIC as being too difficult or ill-defined to implement effectively, or as inconsistent with host country preferences or policies. The World Resources Institute (WRI) however, drawing on four case studies from projects around the world, illustrates how an Organization’s ability to gain the approval of the host community can affect the project’s success. The WRI describes the following types of risks that can arise in extractive and infrastructure projects, and which through effective community engagement can be identified, prevented, mitigated, and/or managed:

- Financing Risk – Financial institutions and investors may delay their financing, require more conditions, or decide not to participate
- Construction Risk – The proponent may not be able to complete the project on time or on budget
- Operational Risk – The proponent may not be able to access necessary inputs, produce sufficient output or sell at a sufficient price, which can disrupt operations
- Reputational Risk – The project may harm the proponent’s or financial institutions’ brand identity, which can translate into loss of market value
- Credit/Corporate Risk – Delays or interruptions to a project may reduce the proponent’s profitability and asset values, decreasing the proponent’s stock value, lowering its credit rating, and raising the cost of borrowing
- Host Government Risk – The host government may withdraw permits and licenses, commence enforcement actions, impose civil or criminal penalties on the proponent, or tighten requirements
- Host Country Political Risk – Political forces in the host country may threaten the project.¹¹

Aside from risk reduction, the authors of the WRI report argue that invoking a successful community consent process can produce significant benefits for the Organization, the region, and the environment. Community support can save time, which can yield significant monetary benefits. A proven track record of harmonious community relations can make future interactions with government regulators much easier, and can help a project sponsor win public contracts for other projects.

In summary, recognizing the right to FPIC and implementing a FPIC process can support the Organization’s *social license to operate* and reduce legal, financial and reputational risks resulting from conflicts, and is likely to create a better and safer working environment.

⁶ Including the Convention on the Elimination of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention on Biological Diversity. See UN-REDD Programme Draft FPIC Guideline (2011), p. 4.

⁷ Rio Declaration on Environment and Development, Principle 10, 31 I.L.M. 874 (1992).

⁸ *Moiwana Village v. Suriname*, Inter-American Court of Human Rights, Judgment of June 15, 2005, pp. 54_55.

⁹ See WRI et al. 2005, p. 72

¹⁰ See Hill et al (2010), p. 4

¹¹ Herz, Steven, Antonio la Viña & Jonathan Sohn. 2007. *Development Without Conflict: The Business Case for Community Consent*. Washington D.C, World Resources Institute, p. 13-15.



However, implementing FPIC is also not without risk. There are many factors that detract from the accountability of decision-making by indigenous leaders, varying from the lack of appreciation of indigenous decision-making by outsiders, purposeful manipulation of indigenous institutions, manipulation of decision-making by self-interested indigenous elites and misunderstanding by indigenous peoples of the legal, social and economic implications of the projects.¹²

Other risks include:¹³

- Mapping of tenure rights through participatory mapping processes may reveal contested claims and lead to conflicts over resources within or between communities
- The mapping of community tenure areas may lead a government to change its position from ignoring a community's use of a particular area to actively denying their rights, and then requiring the community to stop living in or using the area
- Consent may be refused
- FPIC may be seen by different stakeholders as contributing to 'anti-development', "anti-economic" or "anti-capitalistic"
- Governments may withdraw if the Organization provides services to communities which are primarily governmental responsibilities, such as schools and health services, and the community may continue to ask for additional support from the Organization because the government is not fulfilling its responsibilities
- A FPIC implementation process might lead to unrealistically high expectations of indigenous peoples and local populations regarding benefits
- Culture, dynamics and decision procedures of companies and communities are often very different. Companies usually prefer quick processes with long term commitments, whereas communities prefer extensive and participatory processes with outcomes that remain open for adjustments. Hence the slogan 'go slow to go fast'; take time to get to know each other before moving on too fast to avoid hindering the process of building a good relationship.

This document aims to provide guidance on avoiding or addressing such risks while at the same time increasing the opportunities for achieving the many potential benefits of FPIC.

¹² FPIC Working Papers, Forest Peoples Programme, 2007.

¹³ Anderson (2011), p. 28



Chapter 2 The right to free, prior and informed consent in the revised FSC P&C

2.1 FPIC definition within the revised FSC P&C

The revised version of the FSC Principles and Criteria for Forest Stewardship¹⁴ (FSC P&C) significantly strengthens the rights of indigenous peoples and local communities, especially with respect to the right to FPIC. The FSC defines FPIC in the FSC P&C Glossary as follows:

Free, Prior, and Informed Consent: *A legal condition whereby a person or community can be said to have given consent to an action prior to its commencement, based upon a clear appreciation and understanding of the facts, implications and future consequences of that action, and the possession of all relevant facts at the time when consent is given. Free, prior and informed consent includes the right to grant, modify, withhold or withdraw approval.*

In the revised FSC P&C, FPIC applies to indigenous peoples and to local communities.

In the context of indigenous peoples, free, prior and informed consent can be a legal condition in some countries, depending on national legislation, but moreover, it is a right under international law and is an expression of indigenous peoples' collective right to self-determination.

In the context of local communities, FPIC is not a legal condition, nor a right explicitly established in international law, but it is a right acknowledged and supported by the FSC membership. See section 1.3 above for the different positions of indigenous peoples and local communities in international law

The FSC P&C make a relevant distinction between *free, prior and informed consent* on the one hand, and *engagement* on the other hand. The latter is defined as follows:

Engaging or engagement: *The process by which The Organization communicates, consults and/or provides for the participation of interested and/or affected stakeholders ensuring that their concerns, desires, expectations, needs, rights and opportunities are considered in the establishment, implementation and updating of the management plan.*

Engagement is a process which requires the Organization to consider the input of the stakeholders in the management plan and is distinct from the right to FPIC because the decision-making power remains with the Organization.

The revised FSC P&C require engagement with affected stakeholders for various purposes, including for identifying rights holders, for informing them of proposed management activities, for identifying ways in which management plans could potentially affect them, and for monitoring. These are also important elements of a FPIC process, but the difference is that the decision to move forward with the planned management activities is made by the affected communities.

2.2 Where to find FPIC in the new FSC P&C?

The requirement of FPIC is included in the new FSC P&C in five criteria within two principles (information in brackets and the bold emphasis has been added):

3.2 *The Organization shall recognize and uphold the legal and customary rights of indigenous peoples to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources and lands and territories. Delegation by indigenous peoples of control over management activities to third parties requires **Free, Prior and Informed Consent**. ['Third parties' should be understood as any other party besides the affected indigenous peoples or local communities.]*

¹⁴ FSC Principles and Criteria for Forest Stewardship: FSC-STD-01-001 V5-0 EN. This new version was approved by the FSC membership in early 2012.



- 3.3** *In the event of delegation of control over management activities, a binding agreement between The Organization and the indigenous peoples shall be concluded through **Free, Prior and Informed Consent**. The agreement shall define its duration, provisions for renegotiation, renewal, termination, economic conditions and other terms and conditions. The agreement shall make provision for monitoring by indigenous peoples of The Organization's compliance with its terms and conditions.*
- 3.6** *The Organization shall uphold the right of indigenous peoples to protect and utilize their traditional knowledge and shall compensate indigenous peoples for the utilization of such knowledge and their intellectual property. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the indigenous peoples for such utilization through **Free, Prior and Informed Consent** before utilization takes place and shall be consistent with the protection of intellectual property rights.*
- 4.2** *The Organization shall recognize and uphold the legal and customary rights of local communities to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources, lands and territories. Delegation by local communities of control over management activities to third parties requires **Free, Prior and Informed Consent**.*
- 4.8** *The Organization shall uphold the right of local communities to protect and utilize their traditional knowledge and shall compensate local communities for the utilization of such knowledge and their intellectual property. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the local communities for such utilization through **Free, Prior and Informed Consent** before utilization takes place, and shall be consistent with the protection of intellectual property rights.*

In short, these criteria determine that FPIC must be sought from indigenous peoples and local communities in two situations:

1. to determine if the indigenous peoples or local communities whose legal or customary rights to resources or land in or near the management unit may be affected by management activities agree to the proposed operations and the manner in which they are planned
2. to seek authorization from indigenous peoples or local communities if a certified Organization intends to use their traditional knowledge.

While these five criteria need to be fulfilled as such, they are not isolated and must be read and interpreted in the context of the FSC Principles and Criteria.

Context (1): Principle 3 differs from principle 4

The first relevant context is the content of Principle 3 and Principle 4. While Criterion 3.2 is similar to 4.2 and Criterion 3.6 is similar to 4.8, the principles under which they are placed are very different.

Principle 3: Indigenous Peoples' Rights

The Organization shall identify and uphold indigenous peoples' legal and customary rights of ownership, use and management of land, territories and resources affected by management activities.

Principle 4: Community Relations

The Organization shall contribute to maintaining or enhancing the social and economic wellbeing of local communities.

While Principle 3 aims to uphold indigenous peoples' rights, customs & culture, Principle 4 aims to contribute to the wellbeing of local communities. This provides different scopes for the FPIC processes for indigenous peoples and for local communities. However, the Explanatory Notes (EN) to the FSC P&C explain that Criteria 4.3, 4.4, 4.5 and 4.6 under Principle 4 also apply to indigenous peoples, in addition to the criteria mentioned under Principle 3.

Context (2): Other criteria and principles

The implementation of the right to FPIC means that one has to go through a FPIC process, as is further explained in Part 2 of these guidelines. That process involves many elements which are actually required by other criteria of the FSC P&C. So, by going through the FPIC process many requirements of the FSC P&C can be worked on at the same time; this is particularly true for other criteria within Principles 3 and 4, which are presented below.



Criteria in Principle 3	Desired outcome for each criterion
3.1 – Identification of indigenous peoples and their rights	The Organization identifies indigenous peoples within the management unit and affected by management activities. The rights of indigenous peoples applying within the management unit are identified.
3.4 – Recognition and upholding of UNDRIP and ILO Convention 169.	The Organization recognizes and upholds the applicable provisions of the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169.
3.5 – Management and protection of sites of special significance	Sites of special cultural, ecological, economic, religious or spiritual significance to indigenous peoples have been identified and are protected and/or managed as agreed with these indigenous peoples.

Criteria in Principle 4	Desired outcome for each criterion
4.1 – Identification of local communities and their rights	The Organization identifies local communities within the management unit and affected by management activities. The rights of local communities applying within the management unit are identified.
4.3 – Provision of employment, training and other services	The Organization provides opportunities to local communities including contractors and suppliers for employment, training and other services.
4.4 – Social and economic development	The Organization applies additional activities that contribute to the social and economic development of local communities.
4.5 – Negative impacts	Negative social, environmental and economic impacts of management activities on local communities are identified, avoided and mitigated.
4.6 – Grievance resolution and compensation for loss or damage	The Organization has mechanisms agreed with local communities and individuals for resolving grievances and for providing fair compensation regarding the impacts of management activities.
4.7 – Management and protection of sites of special significance	Sites of special cultural, ecological, economic, religious or spiritual significance to local communities have been identified and are protected and/or managed as agreed with these local communities.

As mentioned above, Part 2 of this guidance describe the FPIC process step-by-step. This process starts with the identification of indigenous peoples and local communities that could be affected by the forest operation and of their rights, see step 1.1 in Part 2. This is also required by Criteria 3.1 and 4.1. Other elements of the FPIC process described in these guidelines address: contribution to social and economic development (4.4), avoidance and mitigation of negative impacts (4.5), a grievance resolution mechanism (4.6), potential compensation (4.6) and the protection of sites of special significance (4.7).

In addition, there are several criteria under other principles within the revised FSC P&C that are addressed in the FPIC process described in these guidelines.

Most important are the following:



Criterion	Desired outcome for each criterion
1.2 – Legal status of the Management Unit	Legal status of the Management Unit is confirmed.
1.6 – Resolving disputes out of court	The Organization resolves legal issues out of court as far as possible.
5.3 – Externalities	The positive and negative externalities of operation are included in the management plan.
7.2 – Management planning	The Organization has and implements a management plan that is consistent with the policies and objectives required by Criterion 7.1 and FSC requirements, covering forest and social management planning.
7.5 – Publication of management plan	The Organization publicizes a summary of the management plan. Excluding confidential information other components of the management plan are made available to affected stakeholders if relevant to them.
7.6 – Engagement in management planning	Affected stakeholders are proactively and transparently engaged in management planning and monitoring. Interested stakeholders are engaged upon request.
8.1 – Management plan monitoring	The Organization monitors the implementation of the management plan, its policies and objectives as well as its progress with planned activities and achievement of its targets.
8.2 – Monitoring and evaluation of social and environmental impacts	The Organization monitors and evaluates the environmental and social impacts of its management activities and changes in environmental conditions.
8.3 – Analysis of monitoring and evaluation	The results of monitoring and evaluation are analyzed and fed back into the planning process.
9.1 – Assessment of High Conservation Values	The Organization through engagement with stakeholders has assessed and recorded the presence of High Conservation Values in the Management Unit.
9.4 – Monitoring	Periodic monitoring for assessing changes in the status of High Conservation Values is carried out. When needed, The Organization adapts its management strategies to ensure the effective protection of the High Conservation Values.

This context is important to understand. It shows that FPIC is not an isolated requirement within the revised FSC P&C and that a FPIC process encompasses a large number of other FSC requirements. In other words, a large number of FSC requirements will in many situations be addressed during a well-managed FPIC process. This means that while a FPIC process aims to reach a FPIC agreement, in doing so the Organization has engaged with indigenous peoples and/or local communities in many ways and therefore fulfilled (or at least made progress on) a number of other FSC requirements at the same time.

One example is the requirements regarding sites of special cultural, ecological, economic, spiritual or religious significance, which are the same for both indigenous peoples and local communities. These sites shall be identified through engagement with indigenous peoples/local communities (C. 9.1 and 3.5/4.7). Protection of such sites is agreed through engagement (C. 3.5 / 4.7). Delegation of control over management activities having an impact on such sites are subject to FPIC (C. 3.2/4.2).



2.3 The meaning of 'prior'

The current FSC P&C already recognizes the right to 'free and informed consent' to indigenous peoples and also to local communities with legal or customary tenure or use rights.

Current P&C:

Criterion 2.2. *Local communities with legal or customary tenure or use rights shall maintain control to the extent necessary to protect their rights or resources over forest operations unless they delegate control with free and informed consent to other agencies.*

Criterion 3.1. *Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.*

Therefore only the element 'prior' is a new requirement in the new FSC P&C. This has been added in line with international legal frameworks such as UNDRIP.

For Organizations who have been implementing forest management activities for a while before deciding to pursue FSC certification, the basic rule is that the rights holders relevant to their forest management unit must be identified by the Organization and their rights must be respected from now on. An Organization who already has an established relationship with local communities, certain information available regarding their rights, assessments of impacts already done, and/or structures in place for regular communication can still make use of this guidance document, but will have to determine which steps in the FPIC process are already fulfilled and which still need attention.

In cases where an Organization has been implementing activities that affect indigenous peoples and/or local communities without respecting their right to maintain control over these activities or where the Organization has not received consent from these communities, 'prior' may mean that past and current impacts will have to be taken into account in terms of defining adequate compensation in order to reach consent in the FPIC agreement.

2.4 Who has the right to FPIC?

Indigenous peoples, local communities and traditional peoples have the right to FPIC to the extent necessary to protect their rights, resources, lands and territories. But what exactly does this mean and to whom does this apply? And what rights, resources, lands and territories are meant? These are crucial questions leading to the call for more explicit and practical guidance.

An assessment is made below of the content of the revised FSC P&C regarding who has the right to FPIC, and when and where FPIC is applicable, including some conclusions regarding the need for more guidance to these questions.

Assessment of the revised FSC P&C

A) FPIC applicable to indigenous peoples

FSC definition of Indigenous peoples: *People and groups of people that can be identified or characterized as follows:*

- *The key characteristic or criterion is self identification as indigenous peoples at the individual level and acceptance by the community as their member*
- *Historical continuity with pre-colonial and/or pre-settler societies*
- *Strong link to territories and surrounding natural resources*
- *Distinct social, economic or political systems*
- *Distinct language, culture and beliefs*
- *Form non-dominant groups of society*
- *Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.*



Because self identification is an important element of this definition, the Organization needs to identify indigenous peoples, and their rights, resources, lands and territories through engagement with these peoples, as well as other local actors. More guidance on how to do this is given in Part 2, step 1.

FPIC for indigenous peoples is addressed in principle 3. The main issues related to FPIC in principle 3 are:

- 'Rights to resources, lands and territories' refers to the rights of indigenous peoples to access, use and manage land and resources, and to their rights to consume and sell forest products, as defined under prevailing legislation or customary rights, as identified in Criterion 3.1
- Therefore, the right to FPIC applies not only in the case of legally recognized rights, but explicitly includes customary rights. This also covers situations where indigenous peoples have residual rights of resource access but no longer have formal tenure of the land and territories, such as situations where the State owns the land and has granted licenses/concessions for forest management directly to the Organization
- Claims to these rights must be fair and legitimate, and based on long established use, whether affirmed or not. Since the definition of indigenous peoples already includes elements such as historical continuity and strong links to territories, these requirements might be already addressed in identifying indigenous peoples. In situations where indigenous peoples have been forcibly relocated they may not fulfil the requirement of long established use of the area they were moved to, but their claim may still be fair and legitimate as they had no other options.
- The intent of the P&C is to protect the right of indigenous peoples to control their own resources, lands and territories. 'Delegation of control' is only possible through a FPIC agreement prior to the execution of forest operations that could affect these rights. This protection is implemented through the right to FPIC
- The Organization is encouraged to use a precautionary approach for engaging indigenous peoples whose rights are in dispute by engaging them in FPIC processes; if their rights are not determined to be fair and legitimate (i.e., not based on long and established use) then FPIC is no longer required. However, there are still requirements for engagement
- A FPIC process aims to result in a binding agreement and should result in an ongoing relationship of mutual trust
- A specific set of rights is applicable to indigenous peoples (UN Declaration on the Rights of Indigenous Peoples and in ILO Convention 169)
- Indigenous peoples have the right to protect and utilize their traditional knowledge. If the organization wants to utilize such knowledge, indigenous peoples need to be compensated as part of a binding agreement reached through a FPIC process.

As mentioned above, a common misperception is that FPIC only applies when indigenous or local communities have legally owned lands, but it is important to realize that FSC recognizes customary rights and tenure rights as well. FSC definitions of customary rights and of tenure are therefore very important in this context:

Customary rights: *Rights which result from a long series of habitual or customary actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a law within a geographical or sociological unit.*

Tenure: *Socially defined agreements held by individuals or groups, recognized by legal statutes or customary practice, regarding the 'bundle of rights and duties' of ownership, holding, access and/or usage of a particular land unit or the associated resources there within (such as individual trees, plant species, water, minerals, etc.).*

B) FPIC applicable to local communities

FSC definition of Local communities: *Communities of any size that are in or adjacent to the Management Unit, and also those that are close enough to have a significant impact on the economy or the environmental values of the Management Unit or to have their economies, rights or environments significantly affected by the management activities or the biophysical aspects of the Management Unit.*



In contrast to the definition of indigenous peoples, in the definition of local communities there is no element of self identification and there are no other qualifications that need to be fulfilled other than being a group of people 'of any size' that are in or adjacent to, or close enough to the Management Unit to be significantly affected by its activities. The precise groups or sub-groups who affirm rights, resources, lands, and territories, and who can be recognized as holding these rights should nevertheless also be identified by the Organization through engagement with these communities and other local actors. More practical guidance is given in Part 2, step 1.

FPIC for local communities is addressed in Principle 4. The main issues related to FPIC in Principle 4 are similar to those related to indigenous peoples mentioned above. Some are different:

- Claims to rights must be fair and legitimate and based on long established use, whether affirmed or not. Since the definition of local communities does not include elements such as historical continuity and strong links to territories, the verification of these requirements may still be a significant challenge once the local communities have been identified
- Although a binding agreement is only explicitly required for a FPIC agreement with local communities regarding utilization of their traditional knowledge & intellectual property (C4.8), and not in the event of delegation of control over management activities (C4.2), such a FPIC agreement with local communities should equally be binding for the agreeing parties. Moreover, it is expected that a condition of consent for communities would be that the consent agreement be "binding"
- While Criterion 3.4 requires recognition and upholding of specific rights of indigenous peoples, as stipulated in the UN Declaration on the Rights of Indigenous Peoples and in ILO Convention 169, there is no such criterion for local communities
- As stated in FSC-STD-01-001 Explanatory Notes & Rationales, the rights in Criteria 4.3, 4.4, 4.5 and 4.6 are not mentioned under Principle 3, but are equally applicable for local communities and indigenous peoples. They are as such not subject to FPIC, but will have to be addressed in a FPIC process and agreement if this is a condition for consent by indigenous peoples or local communities.

C) *FPIC applicable to traditional peoples or uncontacted peoples*

FSC definition of Traditional peoples: *Social groups or peoples who do not self-identify as indigenous and who affirm rights to their lands, forests and other resources based on long established custom or traditional occupation and use.*

On one hand, traditional peoples whose rights are not acknowledged in national law as equivalent to those of indigenous peoples in the context of the Management Unit, are treated as local communities for the purpose of the revised FSC Principles and Criteria. On the other hand, traditional peoples, whose rights are acknowledged in national law to be the equivalent of those of indigenous peoples in the context of the Management Unit, are treated as equal to indigenous peoples for the purpose of the FSC Principles and Criteria.

Uncontacted peoples

Next to the above there are indigenous peoples who are uncontacted or who live in voluntary isolation. Those groups are extremely vulnerable and any contact with them must be avoided. See further guidance in Part 2, chapter 3, step 1.1.

Conclusions

If, based on early engagement with indigenous peoples or local communities, an Organization decides to effectively exclude certain activities from certain areas in the management unit or exclude certain areas from management activities altogether and therefore ensures that the peoples'/communities' rights, resources, land and territories are not affected, a FPIC process is not required. Otherwise, a further identification of the rights holders and their rights, and how these may be affected is necessary.

What is considered a 'fair and legitimate claim' or 'long and established use' cannot be defined in general, as situations will vary widely. Therefore, with the FSC P&C in hand, it may still be complicated in reality to identify or recognise these rights holders and their rights. In Part 2 some additional guidance is provided on identifying



rights holders and their rights, but many questions can only be answered within the local or national contexts and by making use of locally available expertise.

More guidance is needed on who has the right to FPIC and how to judge when customary rights exist. The same applies for the question of how to establish ownership of 'traditional knowledge'. The FSC recognizes the need to facilitate discussion of and provide additional guidance on these issues once further experience has been gained & reported.

2.5 Who determines who has the right to FPIC?

It is the responsibility of the Organization to make a well informed judgment on the identification of rights holders and of their rights. The Organization can seek advice from specialists and local stakeholders and can ask an independent party to verify its judgment.

The judgment of the Organization will then be assessed by its certification body. It should be noted that the existence of disputes over claims or rights is an important indicator for the certification body. As the completion of FPIC can be a pre-condition for certification, the certification decision could be negative if the certification body decides that the Organization does not recognize or uphold the rights of indigenous peoples or local communities.

2.6 Conflicting rights and governance issues

The right of local communities to FPIC can still be controversial in situations where recognition of their rights could undermine the rights of indigenous peoples. For example in Sabah, Malaysia, if you live in a place for three years, you can obtain land rights from the government. But this land right may create a conflict with indigenous peoples who have been using that same place longer but whose rights are not recognized by the government. In Africa there are several countries which nationalised land and where the government now allows private ownership or issues long term leases on land that may still be claimed by indigenous peoples or local communities. There may also be situations of mixed ethnicity communities, such as in some Vietnamese villages, where it may be impossible to separate land rights for each ethnicity or too complicated or resource intensive to set up a different FPIC process with each ethnicity if the entire village is involved in a FPIC process.

The FSC does not expect certification nor this guidance document to be able to solve governance issues. The FSC's requirements for FPIC are based on international law and agreement among FSC members that communities' rights to land, resources and territories need to be recognized and protected, even in situations where these rights are not legally recognized. Cases of potential conflicts between the FSC's FPIC requirement and the requirement to follow all laws (in Principle 1), should be brought to the attention of the certification body to be evaluated on a case by case basis, in arrangement with involved or affected parties. (See FSC-STD-20-007, paragraphs 8.20 and 8.21.)

2.7 Which factors determine the level of effort required to implement a FPIC process?

The level of effort required from an Organization in order to address the right to FPIC for indigenous and/or local communities will vary based on a number of factors:

- The scale of the operation
- The intensity of the operation
- The number and size of indigenous and/or local communities that could be affected and the relationship between these groups
- The anticipated impact on their rights, resources, lands or territories
- The existence of past grievances or conflicts related to the management activities with or between affected communities



- The characteristics of affected indigenous and/or local communities, such as: language, culture, dependency on forest, history with forest operations, levels of education, etc.
- The possibilities to get support from NGOs or CSOs or others to assist the communities and build their capacities
- Level of organization: relations, power structures within the communities
- The Organization's relationship with and its attitude towards the affected indigenous and/or local communities: an open and friendly attitude increases the chance to develop a good relationship, and the better the relationship, the less effort the FPIC process will probably take, and the higher the chance to a satisfying outcome.

It is expected that an Organization will implement all of the 6 steps outlined in this guide, but in some situations, only step 1 will be necessary because:

- The identification of indigenous peoples and local communities, their rights, resources, lands and territories may reveal that these rights are not affected
- The Organization may decide to cancel all the elements of its management plan that could potentially affect rights holders.

In all other cases, all steps of a FPIC process need to be fulfilled to the extent applicable or necessary, but the level of effort to implement it depends on the factors mentioned above. The process of reaching a FPIC agreement may be very simple or it may be complicated. An overview of expected differences in effort among some typical types of Organizations is provided below:

Large operations: These guidelines are written to address all possible efforts that are needed for a large scale, intense operation in a complex or conflicting context, with a high impact on several or many communities. But even in large operations not necessarily all the factors contributing to the level of effort will always be in place.

SLIMF operations: In the case of a forestry operation that is small, low intensity, and low risk for social and environmental impacts with one group of potentially affected rights holders living near or adjacent to the FMU, the FPIC process should be much simpler. Basically one should follow the step-by-step approach of this guide, but many steps can be executed in a simple or straight-forward manner. The administrative burden and documentation requirements should also be lower. The need for external experts or facilitators is normally also much lower. But one should also be aware: a low risk operation can indeed have an impact on the rights of a group of indigenous peoples or local communities. It is better to take those potential impacts seriously and engage in an open manner because the right of the affected rights holder to give or withhold consent does not depend on the size of the operation.

Community-based forestry: In case of a community-based SLIMF operation that does not affect other rights holders, a FPIC process should require even less effort. The most important steps in this context are the development of a fair decision-making process within the community, the sharing of the benefits and, potentially, a grievance mechanism. See for further guidance the text box on CBF at the end of Part 2.

Plantations: Plantations are often large and involve high intensity management activities. The conversion of land to plantation forests can have a high impact on holders of rights to land, territories and/or resources. Special attention needs to be given to the element of 'prior' in new plantations operations, as well as in existing operations. See for further guidance the text box on plantations at the end of Part 2 and Part 1, section 2.3 on the meaning of 'prior'.



Part 2 FPIC step-by-step

Chapter 1 Introduction

Part 2 of these guidelines focuses on the implementation of a FPIC process applicable to FSC forest operations by describing a step-by-step approach. It contains six steps, each consisting of several elements. Chapter 2 of Part 2 provides summaries on each of these six steps. Extended guidance on 'How to do this?' is presented in chapter 3 of Part 2 for all elements of the six steps involved. In addition, elements or perspectives that are specifically important for indigenous peoples and local communities are mentioned in separate text boxes at the end of each step. Two additional text boxes are provided at the end of Part 2 with additional guidance on the implementation of FPIC in two specific types of forestry operations: Community-based Forestry and Plantations.

The six steps are:

Step 1: Identify rights holders and their representative institutions

Step 2: Prepare for further engagement with identified communities

Step 3: Map rights, resources, lands and territories and assess impacts

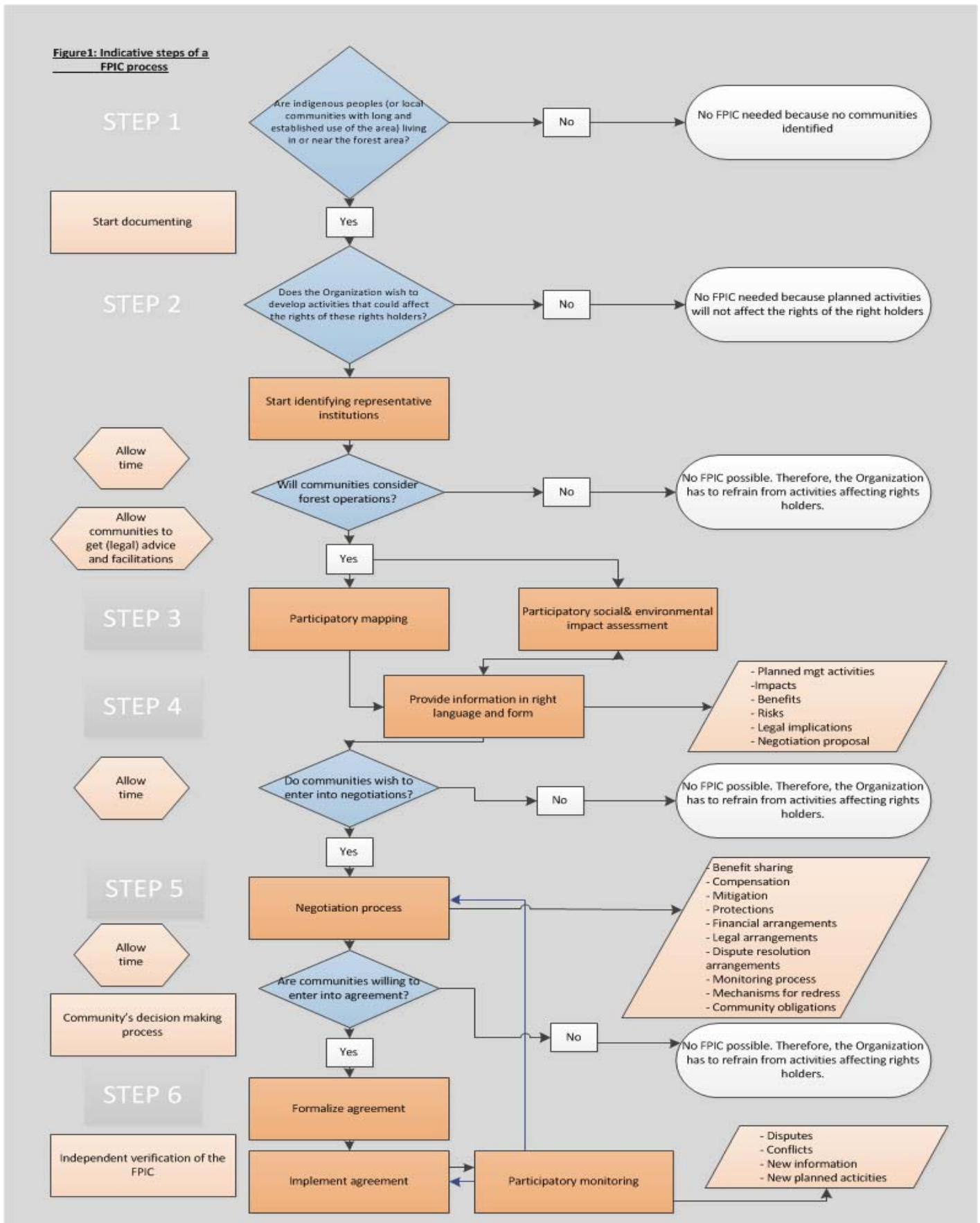
Step 4: Inform affected indigenous and local community rights holders

Step 5: Negotiate and let community decide on negotiated FPIC proposal

Step 6: Formalize, verify, implement and monitor the consent agreement

The flow chart below (figure 1) provides a visual overview of a FPIC process for FSC forest operations, based on the steps presented in this part of the guideline. Although there is an undeniable logic in the sequence of these six steps, it does not mean that this order should always be followed strictly or that all elements and steps are always necessary. It depends on the situation. See for example in Part 1, section 2.7 how the level of effort to implement FPIC may be different in different situations and the remarks about the order of the steps below the flow chart.

Figure 1: Indicative steps of a FPIC process





Some important remarks on the FPIC process:

The order of the steps is not fixed

A FPIC process is designed in agreement with indigenous peoples and local communities, and the consultations with them may lead to other choices with regard to the order in which the FPIC process is implemented. In other words, the order in the steps and activities should be adapted to the specific circumstances of the user of this guide.

FPIC process is continuing and iterative

Most important, a FPIC process is not a one-off decision but a continuing process, aiming at an ongoing good relationship between the Organization and affected communities. Furthermore, some elements, such as capacity building, are part of different steps in the process. Finally, there are also possible loops in the process, for example if the monitoring reveals new information or if new activities are being planned.

Verify the FPIC process

It is a requirement of FPIC that an independent party verifies that the consent of a community has been free, prior, and informed. This independent verification should deliver the evidence needed by the certifying body to assess whether the Organization fulfils its requirements.

It is strongly advised to mutually agree in an early stage of the FPIC process with the communities on:

- Who the independent verifier should be so that all parties trust its findings
- How frequently and at which stages of the process verification will take place or whether this will only take place at the end of the process.

The mutual agreement on the independent verification guards against the manipulation of the FPIC process and enables the Organization and facilitators to demonstrate that they have respected the right to FPIC.

Discussing and planning the independent verification in an early stage of the process is addressed in chapter 3, step 2.3, and making sure that the FPIC process is at least verified independently at the end is addressed in chapter 3, step 6.2.

Document the FPIC process

The FPIC process and outcomes should be well-documented and made publicly available. This is important for the independent verification and for general accountability reasons.

The documentation should give evidence that identification, awareness-raising, mapping, assessments, capacity building and negotiating activities and procedures have been enacted. The Organization should document all meetings, telephone calls, and other steps in the process. The documentation should describe who was present and how decision-making was conducted, as well as the information that was presented. This documentation could be in writing and /or videotaped, depending in part on the literacy level of the communities and whether there are cultural prohibitions regarding being videotaped.

Although some parts of that documentation might be done by an independent facilitator, if such a person is engaged in the process, it is the Organization that needs to keep all the records. The Organization should encourage the community to do the same and monitor to ensure that such documentation occurs.



Chapter 2 Summaries of six steps to implement the right to FPIC

Step 1: Identify rights holders and their representative institutions

Summary

The Organization takes the initiative. The first step is to identify which indigenous peoples and local communities live in or near the forest management unit and whether any of their rights, resources, land or territories could potentially be impacted by the proposed forest operation. Besides engaging with the communities concerned it is advised to consult national, regional or local experts, NGOs or CSOs. Next, the Organization needs to find out if these potentially affected rights holders want to consider the proposed forestry operation. The communities should decide this through their own representative institutions, so the Organization needs to identify how the communities take decisions and agree on a decision making process that includes all members of the communities. The Organization then needs to inform the representative institutions about the proposed forestry operation, its potential impacts on their resources, rights, lands, and territories, and potential benefits for the communities. This should be done in an appropriate language and form. The Organization must also inform them that the communities are free to negotiate about the proposed operation and its conditions and that they are free to say “no” to the proposal. If a community does not want to consider it, the Organization shall refrain from further action that may impact this community. If communities want to consider it, the Organization will have to prepare for further engagement with these communities (see step 2).

Elements of Step 1	Desired output
Identify rights holders	A preliminary overview of rights holders and their territories in the forest area
Examine and record how communities make decisions	Overview of representative institutions
Agree on decision making process	Agreed decision making process
Inform representative institutions about planned forestry operation	Outline of forestry operation in proper language and format
Identify if community will consider forest operation	Decision by representative institutions of affected communities

Checklist

- ✓ Were all affected indigenous peoples and local communities identified by the Organization?
- ✓ Did the Organization determine which communities have a right to FPIC and to which rights, resources, lands or territories this applies?
- ✓ Did the affected communities participate in their identification and in the identification of their rights, resources, lands, and territories?
- ✓ Is it clear how the community takes decisions?
- ✓ Does the agreed decision making model include all members of the community?
- ✓ Did the community decision making representatives understand the proposed forestry operation?
- ✓ Does the community want to consider the proposed forestry operation?



Step 2: Prepare for further engagement with identified communities

Summary

The preparations for further engagement with the communities identified in step 1 require a number of activities. For more local embedding and guidance the Organization should try to establish a small multi stakeholder working group including representatives of indigenous peoples, local communities, NGOs and, if possible, local government. Depending on the number and size of the communities and the level of complexity of the local situation, the Organization will establish an internal structure, capacities and a trained team for appropriate and effective interaction with the communities. The amount of effort that will go into the FPIC process will be determined to a large extent based on the scale, intensity and risk of the proposed forestry operations. To enhance the process and to be able to demonstrate objectively how the FPIC process is implemented it is advised to identify and agree with the communities on a third party facilitator or observer. The Organization needs to develop a communication and information strategy which enables the Organization to dialogue with the communities in an appropriate and effective way. The Organization also needs to find out to what extent the government applied the right to FPIC to the involved communities and if this fulfils the requirements of the FSC P&C. The Organization then knows which additional steps it needs to take to fulfil the FSC requirements, if applicable. In order to be able to inform the involved communities adequately, the Organization has to further define the activities that may have an impact on these communities, taking into account the results of the identification in step 1. Realistic and flexible timelines and budgets have to be planned and allocated.

Elements of Step 2	Desired output
Establish a multi stakeholder working group	Joint agreement on establishment and functioning of multi stakeholder working group
Establish a specific structure, capacities and train a social team within the Organization	Structure and social team established and trained
Identify and agree on an independent verifier / observer / facilitator	Contract with observer/facilitator
Develop appropriate communication and information strategies	Written communication strategy
Explore host state approaches to FPIC	Internal report on FPIC regulations and approaches of government and gap analysis with Organization policy on FPIC
Further define management activities likely to affect indigenous peoples and local communities	Concept of Forest Management Plan includes description of potential impacts
Make realistic and flexible timelines and budgets for the FPIC process	Document with timeline and budget

Checklist

- ✓ Is there a multi stakeholder group established and does it function well?
- ✓ Is there a structure and appropriately trained social team within the Organization that is capable of building good relationships with the affected communities?
- ✓ Did the Organization agree with the affected communities on a third party observer or facilitator and is there an agreement on the role and responsibilities of this person/organization?
- ✓ Is there a communication and information strategy that allows the Organization to communicate in culturally appropriate and effective ways with all members of the affected communities?
- ✓ Is there a gap analysis of the host state approach to FPIC and FSC approach to FPIC?
- ✓ Have the Organization's activities which may have an impact on affected communities been defined?
- ✓ Did the Organization include the needs of the affected communities in the timelines and budgets for the implementation of the FPIC process?



Step 3: Map rights, resources, lands and territories and assess impacts

Summary

In this step the Organization will further engage with the communities identified in step 1 to map their claimed rights, resources, lands and territories and assess the expected positive and negative impacts of the operation on these communities. Participatory mapping and participatory impact assessments are good methods for doing this. Before commencing these exercises the Organization has to ensure that the community members selected to participate in it have the necessary time, knowledge, training and skills to do this. It is important to include all affected communities and members of all segments of the communities (including men, women, elders and youth) to avoid conflicts at a later stage. This cannot prevent that conflicting claims may be identified or arise and the Organization should facilitate the resolution of these conflicts to the extent necessary for a good relationship between the Organization and all involved communities. The Organization should then engage and agree with the communities to adapt the management plan based on the findings of the participatory mapping and resolution of conflicts before it engages in the participatory impact assessments.

Elements of Step 3	Desired outputs
Ensure sufficient community capacity for mapping and assessments	Capacity needs assessment Trained community members
Participatory mapping	Map and/or other type of overview showing: <ul style="list-style-type: none"> - All lands claims and land usage - All HCV's relevant for the communities - Assessment of the rights of communities located in the forest or making use of the forest
Facilitation in case of conflicting claims	Agreement on a way to address these conflicts
Re-define proposed management activities and engage in Participatory Impact Assessments	Agreement on the scope and outcomes of the participatory impact assessments

Checklist

- ✓ Was a capacity needs assessment executed?
- ✓ Do the selected community members for the participatory mapping and assessments agree that they are sufficiently trained and compensated to do this?
- ✓ Did the selected community members participate effectively in identifying the resources, sites of special significance, legal and customary ownership, tenure or use rights they require to be protected and are their locations indicated on maps where appropriate?
- ✓ Are the affected communities satisfied that their concerns have been appropriately recorded (e.g., in writing, maps, videos), made publicly available, are understood by the communities and have been incorporated in the management plan as required?
- ✓ Do the affected communities confirm that there are no outstanding conflicts related to the forestry operation?
- ✓ Did the selected community members participate effectively in identifying all possible positive and negative impacts of the proposed operation on the rights and resources of their communities, including protection, mitigation, benefit sharing and compensation arrangements and did they agree to the outcomes?



Step 4: Inform affected indigenous and local community rights holders

Summary

Based on the outcomes of the participatory impact assessments the Organization may want or need to re-define the proposed activities and adapt the draft of the management plan. Then the time has come to more formally inform the affected communities about the forest management activities the Organization is planning. The Organization provides the affected communities in understandable language and forms, and in timely ways, all information regarding the proposed operation needed to make an informed decision. The communities then decide if they want to enter into negotiations with the Organization about the proposed activities.

Elements of Step 4	Desired output
Re-define proposed activities and inform communities about the proposed forestry operation	Documentation or reporting of the information and communication
The communities decide freely if they want to enter into negotiations	Community decision

Checklist

- ✓ Did all the community members fully understand the potential benefits and costs of the proposed forestry operation for their community?
- ✓ Did the community decide on entering into negotiations with the Organization through the agreed decision making model?



Step 5: Negotiate and let the community decide on negotiated FPIC proposal

Summary

Before starting negotiations with the affected indigenous and local community rights holders the Organization ensures that there is an agreed and inclusive decision making process and that the community's capacity is sufficient to effectively enter into negotiations on the proposed activities that affect them. The Organization and the communities then negotiate mitigation of the negative impacts, compensation of the unavoidable damages, sharing of benefits and other financial or legal arrangements. If this satisfies both parties, grievance mechanisms and monitoring models should be discussed. A consent agreement is made in which all of these elements are addressed. The communities then decide freely and through the agreed decision model if they give or withhold consent or would like to modify the proposal or seek more clarification. Finally this results in a "yes" or a "no" to the proposal.

Elements of Step 5	Desired output
Ensure agreement on decision-making process and capacity readiness of community	Document describing agreed decision making process and fulfilment of benchmarks of capacity readiness of community.
Negotiate mitigation, compensation and benefit-sharing	Written agreement or other documents on mitigation, compensation and benefits
Establish arrangement for complaints, disputes and conflicts	Written agreement on grievance mechanisms
Set up a participatory monitoring model	Established monitoring model
The community decides freely on the proposal	Community decision on Organization's proposal

Checklist

- ✓ Is there an agreed decision making process in the community that ensures that decisions are taken without excluding any of its members?
- ✓ Did the community agree that their capacity is sufficient to enter into negotiations with the Organization?
- ✓ Did the negotiating community members feel comfortable and capable during the negotiations?
- ✓ Did all the community members understand all aspects of the proposed consent agreement?
- ✓ Did all the community members fully understand their rights, including their right to say no to the proposal?
- ✓ Did the communities have enough time to decide on the proposal?
- ✓ Was the decision taken without any coercion and in accordance with the agreed decision making model?



Step 6: Formalize, verify, implement and monitor the consent agreement

Summary

The consent agreement between the Organization and the communities is formalized in an appropriate way (in writing, or also otherwise if that is what the community wants). The outcome of the FPIC process is made publicly available. The implementation of the FPIC process should be independently verified. The consent agreement is implemented and the implementation is monitored in accordance with the stipulations of the agreement. Changing policies or circumstances or new information may re-open negotiations or withdrawal of consent. FPIC remains an iterative process and requires a continuous dialogue between the Organization and the affected rights holders, to manage conflicts and to find solutions.

Elements of Step 6	Desired output
Formalize the consent agreement	Mutually agreed format for a binding agreement
Verify the FPIC process	Independent verification
Implement and monitor the consent agreement	Reports of participatory monitoring

Checklist

- ✓ Was the agreement formalized in a way that satisfies the communities and makes it binding for all involved parties?
- ✓ Is the consent agreement made publicly available in languages that are locally and nationally relevant?
- ✓ Has the independent verification taken place according to the agreed schedule?
- ✓ Do the affected communities participate in the management planning, research and monitoring of the forest management to the extent that this affects them?
- ✓ Is there a positive and collaborative working relationship between the Organization and the affected communities?
- ✓ Are the communities satisfied with the way the agreement is implemented?
- ✓ Are there complaints about the implementation of the consent agreement?
- ✓ Are complaints on the implementation agreement resolved in a way that satisfies all involved parties?



Chapter 3 Guidance to implement six steps of a FPIC process

Step 1: Identify rights holders and their representative institutions

1.1 Identifying rights holders

Identify indigenous peoples and local communities

The first step for the Organization in a FPIC process is to identify if the planned, or ongoing, forestry activities will impact on rights, resources, lands or territories of indigenous peoples, local communities or traditional peoples in or around the management unit. Part 1, section 1.3 Part 1 of this guideline gives some basic guidance on how to determine to whom the right to FPIC is applicable in the FSC P&C and with regard to which rights. It is important to note that the recognition of indigenous peoples or of local communities does not depend on recognition by any particular state or by the way any particular state may define the term.

The FSC principles 3 and 4 require that the Organization shall identify the indigenous peoples and local communities that exist within the Management Unit or are affected by management activities, either inside or outside of the Management Unit (FSC Criteria 3.1, 3.2, 4.1 and 4.2).

With regard to the distinction between indigenous peoples and local communities, see the FSC definitions in Part 1, section 2.4 above. Self-identification as indigenous peoples is considered a fundamental criterion for determining who they are. Article 33 of the UNDRIP refers to the rights of indigenous peoples to decide their own identities and membership procedures. So the first question to ask is if there are peoples identifying themselves as indigenous. The further identification of indigenous peoples must then be undertaken with the full participation of the peoples concerned.

Indigenous peoples and local communities affected by management activities include those neighbouring the management unit, and those that are more distant, who may experience negative impacts as a result of activities within the management unit. In these cases they would be affected stakeholders according to FSC Criterion 7.6, but it would still need to be determined if they have a right to FPIC.

Recognition of the term "indigenous peoples" may be a sensitive issue, particularly in Africa and Asia. Many governments argue that most people in Africa could be considered "indigenous", while in China the government argues that there are no indigenous peoples in the country. However, this ignores the principle of self-identification of indigenous peoples and does not adequately recognise the marginalization of such groups. The Working Group on Indigenous Population/Communities of the African Commission on Human and Peoples' Rights provides the clearest definitions and guidance on this matter in the African context.¹⁵

Communities of special concern may include:

- Uncontacted indigenous peoples or Indigenous peoples living in voluntary isolation. These are extremely vulnerable. It is of utmost importance that every contact – on purpose or accidentally - is avoided. Transmission of illnesses might extinct an entire community. Companies should conduct due diligence, including inquiring with local indigenous communities, or the relevant entities at the national, sub-national and/or local level to identify whether they are operating near indigenous peoples living in voluntary isolation, such as in the Amazon region. If signs exist that isolated people exist, FPIC cannot be achieved, and no management of the area is acceptable. The Organization must withdraw from that area and avoid contact with these communities, including any attempts to contact them for purposes of consultation or obtaining their consent

¹⁵ Report of the African Commission's Working Group on Indigenous Population/Communities, DOC/OS(XXXIV)/345, 2003, p. 77-78. The report can be found at: http://www.achpr.org/english/info/index_WGIP_Under_ent.htm



- Nomadic indigenous peoples (e.g. pastoralists) who also depend on forest goods and services such as water should not be overlooked, and one should be aware that there may be conflicts of interest with other forest dependent communities
- Agricultural groups who have been sharing forest areas with hunter-gatherers for many years and who can both be considered 'indigenous people' (e.g. in certain parts of the Congo Basin)

An extreme example of the challenge to identify indigenous peoples: Transmigrated communities in Kalimantan or Ujamaa villages in Tanzania are well established and exclude the left-over "traditional" people to such an extent, that there are only individuals here and there, and their broader community is quasi invisible. Other communities will not necessarily invite what they see as "outlaws" to the consultations.

This task of identifying indigenous peoples and local communities can be very challenging. Depending on the knowledge of the Organization of the country and the specific area, it is advised to consult national, regional or local experts, NGOs or CSOs. The further identification must then be undertaken with the full participation of the communities concerned.

Identifying indigenous peoples - an indicative list of some practical questions for consideration and reflection as part of any preparatory work in identifying indigenous peoples.

- Are there peoples identifying themselves as indigenous peoples?
- Are there local terms that identify indigenous peoples?
- If so, are they recognized in legislation, such as the Constitution or other laws?
- What term is used in the national policy discourse and mainstream media with regard to these groups of peoples to distinguish them from the dominant societal group? [*Comment: There are a few countries where indigenous peoples are the majority population, for example Bolivia.*]
- Are there provisions in relevant laws regarding these groups' collective rights as peoples/communities or any other specific group rights?
- Who are these groups and what are these provisions?
- What is their general situation compared to the mainstream dominant society?
- Has a census been conducted in recent years in the country?
- If so, are these peoples reflected in the census?
- If so, how are they identified as a specific group of people? By self-identification or other criteria?
- Is any disaggregated data on these specific groups available or can it be generated?

Source: UN-REDD Programme Draft FPIC Guideline (2011), p. 23

Identify claims and rights

The next immediate task is to identify which of these indigenous peoples and local communities have a fair and legitimate claim to rights, resources, land and territories in or near the management unit based on long established use (again, for further explanation see Part 1, section 2.4).

Organizations should start by recording all existing claims of rights, whether these are affirmed or not (due, for example, to a lack of awareness or empowerment). 'Rights to resources, lands and territories' (FSC C. 3.2 and 4.2) refers to the rights of indigenous peoples/local communities to access, use and manage land and resources, and their rights to consume and sell forest products, as defined under prevailing legislation or customary rights, as identified in FSC C. 3.1 and 4.1.

In some regions, there is often no written language or records supporting claims made by indigenous people/local communities with regards to customary rights. In these cases, other culturally acceptable ways for identifying, agreeing and documenting the rights need to be applied, for example, oral and honour systems (see text box below), written accounts, audio and film records, etc. Some indigenous peoples may not own the resources (based on legal title or legal ownership or customary rights), but may continue to have resource



access rights, for example the collective or communal collecting of non-timber forest products not only for economic but also for cultural reasons.

Honour Systems

An honour system is a set of rules or principles governing a community based on a set of rules or ideals that define what constitutes honourable behaviour within that community. The use of an honour code depends on the idea that people (at least within the community) can be trusted to act honourably. Those who are in violation of the honour code can be subject to various sanctions, including expulsion from the community. From: http://en.wikipedia.org/wiki/Honor_code

The nature of the rights in question and the precise groups or sub-groups who affirm these rights, and who can be recognized as holding these rights, are identified and analyzed locally through engagement with the indigenous peoples and the communities. This process may also require the involvement of local institutions, organizations and authorities.

If the Organization identifies indigenous peoples or local communities which could be affected by their planned or ongoing operation, and concludes that their rights, resources, lands or territories are legitimately claimed, the right to FPIC applies and the Organization has to continue to implement a FPIC process.

1.2 Examine and record how communities make decisions

Communities' and peoples' own institutions and processes

A consent-seeking process needs a mutually agreed schedule for all the stages of obtaining consent from initial discussions, information gathering, consideration of impacts, benefits and options, through to negotiating and implementing an agreement. It is important that the process includes the seeking and granting of consent at each significant step, such as the consent in the very early stage from the communities to consider the forest operation in/near their territories.

The UNDRIP (art. 19) and ILO Convention No. 169 (art. 6, para. 1 (a)) require that indigenous peoples' own institutions of representation and decision-making are fully respected. This means that communities or peoples should be represented by institutions of their own choosing. The Organization can only get the consent from the peoples/communities through their representative institutions if it knows how the communities make their decisions. This needs to be identified and agreed upon.

These institutions may be:

- The people's own customary institutions
- Institutions that have been imposed by the State but later accepted by the people
- Novel institutions set up by the people themselves to deal with outsiders.

There is no rule to say which one is the best as circumstances vary too much. The important thing is that the people should themselves choose how they want to be represented and that they don't have to accept the institutions chosen or imposed by others. They can also choose to be represented through several institutions, not just one. Representation is often unclear and can vary from very un-authoritative to very hierarchal. Customary institutions, new IP NGOs, indigenous business groups can all play a role.

To avoid misunderstandings and / or entering into agreements that do not secure the consensus of the communities and thus result in conflict, companies should first work with the communities in an open way to



identify who the communities choose to represent them in negotiations. Where there are doubts or mixed messages the best advice is to include more parties rather than unilaterally select fewer.

In some instances, traditional culture has begun to break down, or members of the community may be in conflict with each other and communal decision-making processes are no longer robust. In such instances, the FPIC process becomes more complex (see Part 1, section 2.7 on factors influencing the level of efforts to implement a FPIC process). In those cases, the community would need time and support in capacity building to revive old decision-making structures or devise new ones, or, in the case of conflicts with each other, support to solve these conflicts. If addressing these issues is deemed too complicated or time and resource intensive an Organization may decide to refrain from seeking FPIC but then must then refrain from any activity impacting this community.

The FPIC process should allow for diverse views to be heard and for internal conflicts to be resolved. For indigenous peoples the end result of the FPIC process is an empowered community.

Make sure process is inclusive

Organizations need to ensure that the traditional decision-making process is not in conflict with internationally recognized human rights, such as non-discrimination. The UNDRIP requires that the functioning of indigenous institutions should be “in accordance with international human rights standards” (art. 34) and calls for particular attention “to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities”, including in the elimination of all forms of discrimination and violence against indigenous children and women (art. 22).¹⁶

For example, women and men can have vastly different needs and priorities with regard to the environment and development, which in turn impacts their rights and empowerment. Women, the majority of subsistence farmers worldwide, rely heavily on their local environments for livelihood and food sources. When their access to land is compromised, they can lose their only source of income, thereby deepening their poverty and social vulnerability. At the same time, women may have a precarious position to non-existent land ownership rights, limited access to technology and credit, often inferior status within households and communities, and lower rates of education. This greatly inhibits their decision-making power. This is particularly the case when external groups engage in an ad hoc way with their communities. Therefore it is particularly important for the forest management to take into account gender issues. In development activities, women tend to be consulted less than men. Companies involved in FSC certification should not make this mistake.

How to do this?

There are several ways that an Organization can respect the right of communities to choose their own representative institutions including the use of traditional decision-making structures while addressing the issue of broader representation in decision-making.

- Usual practice is to seek to facilitate the formation of a representative community structure - a committee that includes representatives of all stakeholder groups (all ethnic groups, women, elders, youth), without alienating the traditional leadership
- Community protocols (developed from a bottom up process) could be used in synthesis with other techniques, such as working with a CBO/NGO (or hired interlocutors) that can ensure a level of independence from the Organization
- Where communities do not have such protocols or guidelines, they may need capacity building on FPIC and time to develop their own FPIC rules internally before they engage with the government and the Organization
- If a multi-stakeholder working group is established (see step 2) this can be helpful as well.

¹⁶ Anaya (2009), p. 17-18.



Points to take into consideration when determining the decision-making process include:¹⁷

- Identify the community's preferred procedures for consent and its actual form (existing or revised), including what constitutes consent for a given rights-holder group
- Are there different levels of consent? The form of consent and who gives it may vary depending on the stage involved
- Determine the form consent takes. There may be a requirement for written consent to satisfy the need for documentation but it may not be the most appropriate form culturally. This will need to be mutually agreed, and the Organization needs to be able to prove that consent has been given
- Ensure that women, youth, other marginalized groups (as identified by rights-holder groups) are satisfied about the way they are represented by the existing decision-making institutions and processes
- Ensure that decision-making institutions function according to broader community expectations
- Sufficient time and support will be needed so that community representatives can consult within their networks and associations
- The effective representation can be gauged by the interest shown by the community in the consultations
- There is a grievance mechanism and the right to legal assistance regarding the consent process if required
- Information on legal services and community costs of engaging those legal services should be provided by the Organization.

Last but not least, in presenting a project proposal to a community, the Organization should describe each of the steps in the process at which they think that community consent will be needed before the planning or implementation can proceed to the next step. A list of key questions/considerations could be developed with the community and used as a checklist for reviewing the design of each project stage in relation to FPIC.

1.3 Agree on decision-making process

In order to achieve a climate of confidence and mutual respect for the FPIC process, the decision-making process itself should be the product of consensus. The agreed decision-making process should be summarized in a written document and signed (or agreed upon in a culturally appropriate manner) by all relevant parties. There must be public disclosure of the process agreed to facilitate consent in ways people can access (writing, audio, video, etc.).

Elements of the agreement on the FPIC decision-making process are:

- Scope: the geographical territory and indigenous peoples and local communities that the decision will cover
- Needs of the communities for capacity-building and information that need to be addressed before the decision-making process can take place
- Who will be representing the parties in the process?
- Likely stages/points of FPIC including timeline
- How agreement will be reached within a community (consensus, voting, or other). The requirements for reaching an agreed decision (percentage of population present, percentage of votes etc.) and methods of verifying the process
- Where and how the consultations will take place, including the appropriate language and media
- Role of others in the process
- Terms and frequency of review
- Description of conflict resolution processes and complaint procedures (see step 5, below).

¹⁷ Anderson (2011), p. 20-23, 39-40; FSC Guidance Document (2006), p. 8; UN-REDD Programme Comments on DRAFT FPIC Guideline (2012), (Comment by FPP), p. 30



Common pitfalls of consent/agreement processes include:¹⁸

- Negotiating with the wrong leaders or in a way that leaves out the interests of important parts of the community
- Thinking that initial consent to discuss a plan means willingness to negotiate or even consent other parts
- Not allowing sufficient time for a community to discuss the development plan or obtain independent information and advice about the plan – going too fast at this stage can lead to serious delay later)
- Representatives and delegations might abuse the power they have and call for inappropriate or unrealistic demands.

Other challenges relate to identifying leaders within indigenous communities including:

- There may not be existing indigenous peoples' representative institutions at the national level
- Certain indigenous peoples' communities are not recognised by authorities
- Village chiefs who are officially recognised may not represent certain indigenous peoples' groups who don't have a clear status, such as pygmy communities, who are recognised only as "camps" not "villages"
- Certain communities may be lacking appointed leaders or representatives.

The more time invested in establishing good communications at the beginning of this process, the more likely it is that later negotiations result in good solutions. This means that the earlier it is examined how the communities make decisions, the better it is. It should be realized however, that developing a mutually agreed process for consent may take considerable time and effort on both sides, and will require the establishment of a climate of mutual respect, openness, and trust. It is quite possible that it is too complicated to work this all out at this stage of the process. The Organization should however get in a very early stage of the FPIC process a fair idea how decisions are taken in the community to identify if the affected community wants to consider the forest operation which would make further investments in engagement with the community relevant. Therefore, the identification of an agreement on the communities' decision making process is a process in itself and can be concluded at a later stage. Rule of thumb; sound, consensus-based decisions emerge from processes that are iterative, inclusive and take time. Be aware of *elite capture*.

1.4 Inform representative institutions about planned forestry operation

When the Organization has been through the steps 1.1 to 1.3 it will have insight about which peoples and communities will be affected by the planned forest operation, which rights are at stake and who are the representative institutions, organizations, or people which take decisions on behalf of these communities. The Organization should now inform these institutions about the planned forestry operation. At this stage the information should be sufficient for the representative institutions to take an informed decision if they are willing to consider the forest operation in /near their territories. This information should be provided in a language and format that is understandable for these institutions and should include:

- Purpose, nature and likely duration of the forest operation
- The areas that will be affected
- Potential benefits and risks for the community.

1.5 Identify if community will consider forest operation

The representative institutions of the indigenous peoples or local communities should be given sufficient time to discuss the information provided among themselves and if they want with their communities and to ask further information if they wish. Let them decide freely if they want to consider the forest operation or not. If not, this decision has to be respected and there can be no forest operation in their territories. If they want to consider it, the Organization can begin to prepare for further engagement with these communities.

¹⁸ See for example Anderson (2011), p. 39-40

Remarks and suggestions for indigenous peoples and local communities

Find out who is planning the forestry operation.

Primarily, it is the responsibility of your government to have your community's consent before any timber concession is given out that may affect your community. In practice, however, this often does not happen or does not happen properly. If a concession has been given to an Organization that wants to be FSC certified, the Organization must seek engagement with your community, maybe with the assistance of a third party. If you know that a forest operation is planned but you are not contacted by the initiators, you may be able to get assistance from other organisations, such as local and international NGOs.

Discuss and define your community protocol for decision-making with the Organization.

Once you are in contact with the Organization that wants to develop the project, you should begin to discuss the project in detail within your community. The whole community should be well informed about the proposed project and its potential negative and positive impacts. Tools such as maps, brochures, posters and videos can be used to inform all community members.

Your community should decide what is important. Then your community representatives can negotiate with the Organization about the procedures. When discussing what you want, use practices acceptable to your community to reach an agreement. It is very important to ensure that all community members, including women, elders and young people, are involved in your decision-making processes. This is because a large-scale project affects everyone differently. Not only you but also the Organization needs to take into account that nobody is excluded from the process.

Some parts of a community may support a project while other parts of a community oppose the project. Some project Organizations might try to divide communities into "for" and "against" groups. Another kind of conflict can be that young people tend to see job opportunities, while old peoples see their culture being threatened. This can undermine the ability of a community to make a collective decision on the project and can lead to ongoing tensions in a community.

➤ In any case, you are allowed to make use of your own customary processes.

Other communities.

Often there are several communities affected by one project. It may be helpful to your community to find out if other communities are affected by the same project. You may be able to work together to negotiate with the forest management Organization or government. You could also ask the Organization to tell you about what agreements have been made with other communities.

➤ You do not have to make any decisions at this stage. Your first decision may be that you want more information from the Organization and support to build your capacity.

Agree on decision-making process.

Communities need to guard against Organizations who might attempt to establish their own imposed processes when traditional decision-making processes already exist.

➤ The project developer should not force you to enter into negotiations before you are ready to do so. Take time for your own community-consultations. The project developers must give you enough time to consider the information, decide how you want to negotiate with the project developers, and finally to make a decision as a community

➤ If forest activities have already started on a project without community involvement or consent, the Organization needs to be told that they are not following acceptable practice. You can still have your say. You may still be able to stop activities, insist that the Organization only proceed if your community grants its free, prior and informed consent, negotiate benefits for your community or change the way that the project operates

➤ Think of giving negotiators limited mandates requiring them to confer back with the community before consenting

➤ Summarize the agreed process in a written agreement.

Decide within your community if you want to consider the forestry operation

➤ You have the right to accept and to refuse to negotiate, during the entire phase of negotiation and realisation of the project

➤ Giving consent is in fact not one decision, but a series of consent decisions. See the flow chart in Part 2, chapter 1.



Step 2: Prepare for further engagement with identified communities

2.1 Establish a multi stakeholder working group

Amongst other forms of engagement, the FSC P&C requires engagement of The Organization with both affected and interested stakeholders in its management planning and monitoring processes. This engagement shall be proactively, transparent and proportionate to scale, intensity and risk of the planned management activities (FSC C. 7.6). This means that The Organization should engage with other involved actors beside the indigenous peoples and / or local communities.

A suggested way of engaging with stakeholders would be to establish a small, multi stakeholder working group, consisting of all stakeholder groups such as business, civil society, including indigenous peoples and community organizations, and if possible, government. The overall aim of such a working group is to support the implementation of the FPIC process and finally to generate broader support for the outcomes of the FPIC process among the various stakeholders and promote better relationships between stakeholders.

This working group:

- Should aim to facilitate and provide guidance regarding the implementation of the FPIC process
- Could work in a confidential setting
- Should be convened and funded by a party that is acceptable to all stakeholders.

‘Engaging’ or ‘engagement’ is defined as the process by which The Organization communicates, consults and/or provides for the participation of interested and/or affected stakeholders, ensuring that the concerns, desires, expectations, needs, rights and opportunities for the stakeholders are considered in the establishment, implementation and updating of the management plan. Informing stakeholders requires that they are aware of their rights for engagement as provided in the Principles and Criteria and when engaging indigenous peoples, culturally appropriate methods should be used.

‘Proactively’ in this context means that The Organization takes the initiative in identifying, informing, reaching out to, and leading the engagement with affected stakeholders concerning the planning and monitoring processes, rather than waiting for the stakeholders to approach The Organization.

2.2 Establish a specific structure, capacities and train a social team within the Organization

For some small scale and low intensity and low risk operations, this element may not be necessary or only to a very limited extent. For others, the Organization has to establish the relevant structures and competences to arrive at agreement with indigenous peoples and local communities based on the right to FPIC and maintain good relationships with all communities. The Organization should at least:

- Establish an internal social team that deals explicitly with indigenous peoples and local communities
- Dedicate sufficient human resources and operative funds to ensure that the social team is able to fulfil its tasks
- Make sure that the social team can directly intervene in the decision making bodies of The Organisation (Board, management, council)
- Make a public statement, where this does not interfere with the national legislation, that The Organisation accepts and respects FPIC as a right of the indigenous peoples and local communities.

In establishing a social team several aspects should be taken into account, including:

Composition of team:

- The leader of the social team should be an expert on social forestry and local society and culture and be able to build cross-cultural communication channels
- The size of the team should be proportional to the difficulty of the task and the size of the population and the operation



- The social team should include staff members who are women and members of ethnic groups represented in the local population.

Training and facilitation of team:

- The team should receive comprehensive orientation on FPIC and be trained in communication with non-literate people and translation of complex legal issues and be encouraged to involve additional expertise from others
- The team needs dedicated materials and equipment (vehicles to visit communities regularly, DVD players, video cameras, information boards, etc.)
- A good coordination with forestry workers and management within the Organization is crucial to avoid misunderstandings.

Main tasks of team:

- Ensure regular and timely information exchange and build good relationship with communities
- Cooperate with the indigenous peoples and local communities in educating others in the care and respect for the forest that is appropriate to the protection of their rights
- Be visible to all the communities and contactable whenever problems appear.

2.3 Identify and agree on independent verifier / observer / facilitator

As mentioned in the introduction to Part 2, it is vital that the Organization is able to provide evidence about the FPIC agreement and the FPIC process. For example, to prove that communities have gained sufficient understanding of the information to have given their informed consent and that consent has been given without any pressure or intimidation. Normally this requires the involvement of an independent third party to verify the FPIC process.

It is advised to decide about an independent verifier in this early stage of the process in agreement with the involved communities. It should be agreed who the verifier will be and at what stages of the FPIC process the verification should take place. This can be at the end of the process only, which would be a typical judgemental verification. In the case of a very complex FPIC processes, one can decide to involve the verifier at several stages throughout the process.

Communities as well as the Organization may also want to invite advisors or allies to observe or participate in the deliberations. Communities may require help identifying organizations that can provide such support. This means that it is advised that the involved parties discuss with each other, for example in the multi-stakeholder working group, the idea of making use of an independent and trusted observer.

Finally, the Organization and/or the affected rights holders may want to make use of an independent facilitator of the FPIC process. This might be especially useful if the FPIC process is either very complex, very long or if the relationship between the involved parties is characterized by distrust.

The need for a facilitator and its role and task will mainly depend on the complexity of the situation and the available expertise within the Organization, i.e. the social team, and the communities. In all cases, it is important that the offer of facilitation is made in the interests of all parties.

Communities requesting assistance should be offered a choice of facilitators, including any suggested by the community themselves. Funding for this facilitation comes from the Organization. In order to maintain transparency and independence, it is important to consider whether the funds for facilitation could be managed by the community. Furthermore, a contract for facilitation services should be agreed to and signed between community leaders and the facilitator, as well as between the facilitator and the Organization.



2.4 Develop appropriate communication and information strategies

Communicating with and informing communities can undeniably be a challenging task. The required form, content and intensity of that communication are highly dependent on local circumstances. There is no one-size-fits-all rule or guidance. At this point it is helpful if a multi stakeholder working group is established to provide guidance.

In many situations a communication plan is needed so that all aspects of the consent process are communicated to members of the indigenous peoples and local communities and to other interested parties, including neighbouring communities, local government, NGOs, and other companies operating in the area. The Organization will take the lead in designing the communication plan and should consider bringing in external communication expertise. The communication plan should also be developed in cooperation with the community, or the multi stakeholder working group, and the community may take on responsibility for implementing certain parts of the plan. Communication should be treated as a two-way exchange of information and views between the Organization and the community, both learning from each other.

Realise that the co-design and implementation of environmental, social, human rights and traditional practices impact assessments (see step 3) provides a particularly effective way to combine informing the community with the process of building a relationship based on trust.

Aspects that should be taken into account in this communication strategy include:

Communicate clearly from the outset:

- That the Organization will not commence specified stages of activity (such as construction or operational stage activities) without free, prior and informed consent
- The offer to assist the community in developing a mutually agreed communication plan to cover all stages of the consent process and the Organization should commit to sharing information on an ongoing basis (including after consent has been agreed)
- If the Organization does not want to compromise confidential commercial information and ensure that it will not disclose information that the indigenous people or local community wants kept confidential. Be clear on what information has to be shared in order to be able to make a good decision, but which cannot become public information. Possibly one can work with nondisclosure agreements.

Communicate in appropriate formats and language

- Communications with each community must be in the language the communities speak and use a medium that they understand (radio, video, songs, storytelling, school dance, local drama groups, notice boards in villages, brochures, comic books, posters or visits by a village delegation to other communities where industrial forestry has occurred). Realise that some words may not exist in indigenous languages and can be difficult to conceptualize. Getting information to communities can be very difficult. In Brazil V-Sat has been developed which allows communities to use internet and phones
- Direct communication (face-to-face meetings, community meetings, house-to-house visits, public discussion between supporters and proponents and other innovative, interactive methods) should be the default method of informing unless high levels of literacy are apparent. Most successful community engagement efforts have used a combination of small group and community-wide information-sharing sessions
- The above can be done in stages, starting from preparing for initial communication with the community on the Organization's interest to develop a sustainable forestry operation.

The communication plan will need:

- To include an analysis of stakeholder information requirements, identify innovative and effective means of communicating information, and earmark appropriate tools to evaluate and verify independently the effectiveness of the plan at all stages
- Adequate resources (financial, human resources, time-wise) for communication sourced by the Organization. (This often will include resources to developing the capacity of communities to understand technical issues)
- To establish roles and responsibilities to ensure all community members (including women, youth and



vulnerable groups) are informed about all aspects of the proposed forestry operation. Companies should not assume that community leaders or elders will always transmit information back to their communities.

2.5 Explore host state approaches to FPIC

The Organization should explore potential host state approaches to the right to FPIC, including whether government's laws or policies conflict directly with FPIC, as well as whether the government already sought consent, and, if so, the process through which it did so. The Organization should follow any national laws that guide how it should consult or seek consent from communities or indigenous peoples.

However, going beyond minimum legal requirements should not be deeply problematic unless seeking support based on the right to FPIC conflicts with national law or regulations, or the state makes it impossible to apply FPIC - for instance, by blocking the Organization's access to the communities, forbidding the company to carry out a consent process, not recognizing agreements between the Organization and the community, or forcibly resettling communities after giving the Organization the concession. **In such instances, the Organization might not be able to seek consent from the communities based on the right to FPIC and will not be able to fulfil the FSC P&C.** In cases of 'conflicts between laws and the Principles and Criteria' FSC-STD-20-007 Forest Management Evaluations, section 8.20 applies.

FSC sets a higher standard than many national laws in dealing with indigenous peoples and local communities. In many countries this goes beyond minimum legal requirements of hosting states. This can be problematic as many governments may still be actively hostile to the concept of indigenous peoples' rights, despite the adoption of the UNDRIP by the General Assembly of the United Nations in 2007. This may also complicate local interpretations of FPIC.

In some countries there may be a duty for the state to consult and accommodate indigenous peoples. This duty has for example been recognized in the courts of Canada leading to the duty of the Crown both federally and provincially to consult and accommodate indigenous peoples (First Nations) about activities in their traditional lands. The duty varies with the circumstances. Such duties in Canada are unique to indigenous peoples and are not a required for local communities. In such situations the Organization should check if the consultation process of the state fulfils the FPIC requirements of the FSC P&C. If that is not the case, the Organization still has to implement its own FPIC process or parts of it.

2.6 Further define management activities likely to affect indigenous peoples and local communities

The FSC Principle 7 requires that an Organization makes a management plan and keeps it up to date. In the context of FPIC this also requires both participation and consent of affected communities to the extent necessary to protect their rights, lands and resources. The planning and procedural documents shall be sufficient to inform affected and interested stakeholders. The Organization shall explain how the plan will meet the FSC certification requirements (including implementing the right to FPIC) and the management plan shall cover forest management planning and social management planning proportionate to scale, intensity and risk of the planned activities (FSC C. 7.2).

In order to inform indigenous peoples and local communities adequately, the Organization now has to define more precisely those activities that are likely to impact them. This is based on initial assessments by the Organization. At a later stage effective participatory assessments will be needed in which indigenous peoples and local communities are fully engaged (see step 3.4 below).

The information on the management activities that are likely to affect the indigenous peoples or local communities should include:

Information on the planned or proposed operation:



- Purpose, scope, reversibility, size, nature and likely duration of the forest operation (including volume, types and economic value of trees the Organization is to fell, policy on use of forestry roads and a time table of key stages and activities)
- The areas that will be affected
- Alternatives to the project and likely outcomes of different scenarios.

Information on potential impacts and safeguards:

- Safeguards and measures to identify, assess, analyze, prevent, avoid, mitigate and remedy actual and potential negative social, human rights, economic, environmental and heritage impacts and a strategy to optimise positive impacts (including sharing of benefits)
- Programs and activities regarding workers' rights, occupational health and safety, gender equality, indigenous peoples, community relations, local economic and social development, land acquisition (if applicable), stakeholder engagement and resolution of grievances, in line with The Organization's policies and objectives for socially beneficial management
- The legal framework that exists (such as Forestry Laws) and the community rights

Information on the management:

- How the activities will be managed, in particular who will make which decisions
- The personnel likely to be involved in the execution of the proposed operation (including indigenous peoples, private sector staff, research institutions, government employees and others)
- Social monitoring systems planned or in place and other procedures the activity probably will involve.

Realise that both specified and as yet unspecified future activities may require a new FPIC process.

2.7 Make realistic and flexible timelines and budgets for the FPIC process

It should be understood that implementing the right to FPIC properly requires time and resources. On the other hand, it is also true that the forest operation may run much smoother if the Organization gains the consent and cooperation of the indigenous peoples and local communities and the Organization could save considerable time and resources in the long run – i.e., the costs of not implementing a FPIC process can be much higher than implementing one.

It is important to realize that the decision-making timeline established by indigenous peoples must be respected, as it reflects the time needed to understand, analyze, and evaluate the activities under consideration.

Some communities may want to have multiple village gatherings to discuss the proposal with time in between to let the matter 'sink in' or to discuss further in family circles ahead of the next village meeting. Other communities have to wait for the proper moment to consult their elders or shamans. Some communities make big decisions only after house-to-house consultations. Maybe there are cases of unexpected deaths or diseases in the village and everyone is busy with the funeral or taking care of family. Or it is the season for planting and everyone is in the fields. People may be away for weeks or even months to take care of their livestock.

Many other variables will impact the time and resources needed, including:

- The scale and design of the forest operation
- The number of rights holders who need to be informed and participate in consensus agreements and their geographic spread and accessibility
- The complexity of land rights issues
- Effectiveness of existing leadership and social cohesion
- Representativeness of existing leadership and access to decision making by women and other vulnerable groups
- Effectiveness of the FPIC process and level of disagreement within / between the community towards the proposed project
- Access to telephones, radio, electronic media and time constraints to attend meetings/access informational events
- Level of literacy and education and levels of interest in participating to become sufficiently informed



- Availability and effectiveness of intermediaries such as NGOs, advisors, independent facilitation and resource people.

Remarks and suggestions for indigenous peoples and local communities

Try to establish a multi stakeholder working group to facilitate the FPIC process.

Your community could discuss with the Organization to involve other stakeholders, such as civil society, and, if possible, government in a working group to guide the FPIC process. This will bring in more knowledge and may lead to better relationships and broader support for the outcome of the process.

Explore your government's approaches to FPIC.

It is important to find out whether the national or local laws and regulations protect your rights to FPIC, or similar processes to FPIC. You may be able to get assistance from other organisations, including local and international NGOs or other independent advisors.

Even where national laws protect community rights to FPIC, things can still go wrong. Corruption, poor or no enforcement, marginalisation or a lack of independence in government agencies responsible for ensuring that FPIC occurs as required by the law, can create problems for communities trying to claim their right to FPIC. Where national laws give no or a weak protection of the right to FPIC or the right to consultation and participation in decision-making processes, these rights can and should still be recognised and implemented by project developers seeking FSC certification.

Ensure you will get all information you need to make an informed decision.

Indigenous peoples and local communities need to know:

- That they can request information about the project in a form and language that is understandable to their communities
- That they have the right to seek independent expert advice on legal, social, economic, and environmental issues
- That project proponents, governments, and private investors are obliged to provide funding and support for accessing this advice.

Develop a community protocol for decision making involving all members of the community.

Set out clear conditions for engagement with the Organization. Your community may have well functioning decision-making procedures. However, companies which seek your engagement may not be satisfied with these procedures if they do not comply with human rights standards, such as the rights for all members of your community to effectively participate in the decision-making, including women, elders and children.

Ensure the Organization respects your right to say "No" to the proposed activity.

The Organization has to state clearly that it will not commence specified stages of the forest operation without your community's consent (in writing in local language and also verbally).

Inform the Organization about your timelines.

You must be given enough time to consider all the information and make a decision.

Identify and agree on a third party verification of the FPIC process with the Organization (to be able to verify independently if there is undue influence during the process).



Step 3: Map rights, resources, lands and territories and assess impacts

3.1 Ensure sufficient community capacity for mapping and assessments

As a core principle of free, prior and informed consent, all sides in a FPIC process must have sufficient access to financial, human and material resources to fully and meaningfully debate any proposed forest operation. Indigenous peoples and local communities are typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education in comparison to the companies, that are their counterparts in the consultations. Companies must duly address the imbalance of power by ensuring arrangements by which indigenous peoples and local communities have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous peoples or local communities positions in the consultations.

Capacity building requires three sub-steps:

- First, an assessment of the capacity building that the communities need,
- Second, an agreement with the communities on the support that will be provided including clear benchmarks for capacity-readiness of the communities
- Third, implementation of the capacity building

Conducting a capacity building needs assessment can be quite technically and resource intensive and the Organization may need to hire external expertise to conduct these.

The capacity-building support should be in proportion to the scale and intensity of operations. For example, within reindeer husbandry Saami communities are today the subject of numerous consultations with the organizations. It is not uncommon that one Saami community yearly has to discuss more than 1,000 objects of forest activities with organizations. This is very time consuming and demands a lot of expertise and resources.

The needs of local communities and the level and extent of efforts required to meet these needs further depend on the socio-economic conditions, and will therefore differ between countries but also between sub-national regions within countries and even between local communities/indigenous peoples within sub-national regions. Socio-economic conditions that will affect the needs and efforts may include, for example, the size of the community, its accessibility and its poverty status.

Ideally, funding and support for the community would be available from third parties, such as home and host governments and international financial institutions. When it is not, communities and companies can develop methods to set aside money so that the Organization provides funding, but communities are able to hire consultants of their choice to conduct the assessment or to conduct trainings based on the assessment, and those consultants do not report to the Organization. This is ideally accomplished by setting up a bank or escrow account (see text box below) for the indigenous community, from which the community transparently reports its use of the funds. The consent agreement should include arrangements for ongoing community capacity building, including financial resources.

Escrow Account

An escrow account is an arrangement made under contractual provisions between transacting parties, whereby an independent trusted third party receives and disburses money and/or documents for the transacting parties, with the timing of such disbursement by the third party dependent on the fulfilment of contractually-agreed conditions by the transacting parties (<http://en.wikipedia.org/wiki/Escrow>). This can be a way to increase transparency and avoid corruption / conflicts within communities.



It should also be noted that capacity building will be needed in various stages of the FPIC process. At this early stage of the process the capacity building could include:

- Resources for the time needed to engage with the Organization in consultations and participatory mapping and impact assessments
- Supporting intercultural dialogue and seeing if information materials can/should be adapted to local contexts
- Training on how to read a map, use Global Positioning Systems (GPS), Geospatial Information Systems (GIS), and topographic maps, and how to overlay community data onto base maps
- Support to understand both the positive and negative impacts of the proposed forestry operations, including training on environmental issues (this is further supported by the participatory mapping and participatory impact assessment further on in the process)
- Support for exchange visits between forest populations in similar situations
- Reporting skills
- Training on legal aid and legal literacy, including familiarity with forest peoples' rights and the law, especially in relation to FPIC.

3.2 Participatory mapping

This step is a follow-up of step 1, above. The right to free, prior and informed consent applies not only in the case of legally recognized rights, but often will include cases where rights of indigenous peoples are unclear or under negotiation. As land claims based on customary rights are often not formally recognized in law, mapping of these claims will require support for a participatory community mapping process to document community-recognized rights over forests. Participatory mapping is the process in which the Organization's representatives jointly with communities identify all those elements relevant for the FPIC process and indicate them on a map.

How to do the mapping?

Mapping the boundaries of communities and the forms of customary land use within these areas can be done using digital technology, such as global positioning systems (GPS), or more simple methods, such as pen and paper. Technologies for digital mapping are becoming less expensive and in fact, some software has been developed specifically for non-literate hunter and gatherer communities for mapping their resource use. This contains visual icons representing different categories and types of ecological and cultural resources such as trees, fishing sites, hunting grounds and sacred places which correspond with the local population's use of the forest. The resource marking in the field should also be carried out by the local population in collaboration with the Organization.

Who should do the mapping?

Representatives of all of the communities located in or adjacent to the FMU (and identified in step 1) should participate in the mapping. Good practice in participatory mapping makes sure that there is participation of different groups from within a community, including women, youth, poor families, as well as established elders and elites. Each group has different values, uses, and resources to include in the maps. The participation of neighbouring communities in the mapping process is essential so that they can confirm boundaries, and include their own access and use rights to the areas represented on the map.

If an agreement is already reached on communities' decision-making structures, as described in step 1.3 above, these structures can be used to choose the members of the mapping team. Otherwise be aware of the following:

- The community member in the mapping exercise should be chosen by the population in a full community meeting, at which the purpose of the exercise is fully discussed
- Sometimes structured group interviews or different mapping teams might be necessary to avoid causing new conflicts during the mapping process



- This approach could avoid as well as surface conflicts within communities as well as between communities and the companies about the resources that have been or should have been protected.

What to map?

Within the FSC P&C, a number of criteria require that the Organization identifies:

- The rights of indigenous peoples and/or local communities regarding tenure, access to and use of forest resources and ecosystem services, customary rights and legal rights and obligations, that apply within the Management Unit or are affected by the forest activities, and areas where these rights are contested (Criteria 3.1 and 4.1.)
- Sites which are of special cultural, ecological, economic, religious or spiritual significance and for which these indigenous peoples and/or local communities hold legal or customary rights (Criteria 3.5, 4.7 and 9.1)
- In addition, the Organization shall demonstrate that the legal status of the Management Unit, including tenure and use rights, and its boundaries, are clearly defined (Criterion 1.2).

After the identification of the FPIC rights holders in step 1.1, these issues further determine the scope of the FPIC process: what are the rights and territories that are subject to FPIC? This can be a major and challenging task for the organization partly because it is important to be accurate and exhaustive, partly because there may be conflicting claims of rights.

Mapping of sites which are of special cultural, ecological, economic, religious or spiritual significance at appropriate scales is needed to ensure that they can be identified and protected from damage before management activities take place. Such sites might be but are not necessarily High Conservation Values (Principle 9). If they are Values of critical importance to indigenous peoples (FSC C. 9.1) these should be conserved even when those indigenous peoples are not now living in or near the management unit.

The mapping should collect and document indigenous peoples' and local communities':

- Current and historical settlement sites,
- Rights of tenure
- Their rights of access to and use of forest resources and ecosystem services
- Their customary rights and legal rights and obligations
- Their rights to manage land and resources
- Their rights to consume and sell forest products
- Sites which are of special cultural, ecological, economic, religious or spiritual significance such as sacred trees, burial grounds and areas rich in medically and culturally important trees
- Trees NOT to be felled on each community's usage zone
- Claims made regarding all the above, including overlapping claims.

The mapping should pay special attention to the following:

- In some cases indigenous communities may not wish to identify precisely on maps the location of sensitive or sacred sites. A common method of adding protection to a site, which ought not to be precisely identified, is to randomise the centroid of a polygon, which contains the location somewhere within
- It is important to recognize the moveable nature of resource use rights. For example, if there is a hunting right for an area, and the game animals in question are mobile, or migrate, managing them would take into account their foraging needs, seasonal needs (if any), migration routes and core habits, and securing areas/timeslot without any disturbances (breeding time of certain species, time when spirits are expected to be active, etc.). If, on the other hand, the right is one of harvesting a particular kind of plant, the range of this plant, including the ecosystems required by this plant, would be taken into account in the management plan
- Sources of information should include existing documentation, local knowledge, and government



- records. The challenge is in weighing up the accuracy and legitimacy of the collected information
- The map should be posted in a public place for an agreed upon amount of time and then re-discussed before it is accepted as the map to move forward with.

Lessons from past experiences

Participatory mapping using GPS and GIS has been widely applied in indigenous peoples' areas since the late 1980s and networks of indigenous organisations and NGOs now exist of people who are practised in the use of this technology. Many lessons have been learned as a result of these experiences.

Other important lessons from the past include:¹⁹

- Record both land uses and boundaries, wherever possible
- Put the indigenous peoples' own location names, land use categories and terms for vegetation types onto the maps
- Neighbouring communities may share an open boundary, whereby certain land use activities of one community are permitted on territory otherwise controlled by the other community and vice versa. In many cases, detailed boundaries have not been established. Mapping efforts should not force a fixed boundary between community lands where one does not exist
- Ensure that draft maps are carefully checked over by community members and neighbouring groups, and revised if necessary, before being used in free, prior and informed consent negotiations
- Take measures to protect the use of the information, so it is not misrepresented or distorted by other interests.

3.3. Facilitation in case of conflicting claims

One should be aware that the creation of maps and images (including sketch maps and GIS maps overlaid on topographic maps, satellite images, and aerial photographs) can catalyze latent conflicts or re-open boundary discussions. In many cases boundaries are vague, overlapping or otherwise disputed. Giving remote forests a 'new' value and seeking to clearly establish parameters can therefore result in tensions and conflicts. These are to be anticipated and mechanisms will need to be planned for conflict management and resolution in advance. Conflicts can emerge when 'solid' boundaries on maps replace porous boundaries and reciprocal relationships between neighbouring communities. In such cases the project may be able to agree to boundaries that function for the purposes of the project only. A good approach may also be that the maps in the first instance might rather be sketches than fairly high-resolution maps. In situations of hunter-gatherer or shifting cultivator groups it is more sensible to map usage zones than customary lands and make use of an independent specialist because these groups' land rights are often not recognised by other communities and the land rights situation is often complex due to resettlement policies.

When the rights of indigenous peoples are contested or cannot be identified, information to be recorded by The Organization may include, for example, the de facto situation with regard to legal and customary rights, the tenure of the rights being contested and the positions of the parties involved. Such recording should be undertaken in collaboration with the relevant indigenous peoples and local communities.

In situations in which indigenous groups present conflicting claims to land, an Organization could suggest and facilitate the peoples involved to discuss it among themselves and resolve the matter, a practice already applied by the mining company De Beers Canada.²⁰ To make it effective, the Organization could propose that the services of a local professional mediator are used. The outcome of the mediation will be a formal agreement between the groups. Where multiple groups are affected with differing claims to land, there is a need to establish whether there are differential rights. FPIC may need to be tiered, starting with those with the most recognized customary or legally supported claim (consent) to those with interests rather than rights (consulted). In instances where a number of groups are affected, some companies have indeed tiered their negotiations, starting with those most directly affected. It would certainly seem wise, however, to devise an extensive

¹⁹ Colchester (2010), p. 18-19

²⁰ Lehr et al (2010), p. 27.



engagement process and develop a benefit-sharing agreement with all the involved communities to prevent competition and resentment between communities.

3.4 Re-define proposed management activities and engage in Participatory Impact Assessments

Re-define proposed forest management activities

Based on the participatory mapping the Organization may want or need to re-define the proposed management activities and adapt the draft of the management plan. This should be done before the Organization engages in participatory impact assessments because the impacts will depend on the planned activities. The communities will have to be informed in appropriate language and forms about the way in which the outcomes of the participatory mapping influenced the development of the management plan. This information will be the basis for the impact assessments.

Participatory Impact Assessment

The key objective of this step is an assessment of all impacts, negative and positive, that the proposed management activities would have on all rights, lands, land uses, resources, resource uses and other so-called externalities.

Impact assessments that are part of an FPIC process should be participatory. Firstly to ensure a continuation of the process of informing the communities of the likely impacts and benefits of the proposed or planned forest management activities. Secondly, to guarantee the assessments include the issues of concern to the affected stakeholders.

Most impact assessments will also include mitigation plans, benefit sharing arrangements and compensation provisions. Also, depending on the scale, intensity and risk of the forest management activities, it may be appropriate to share information about financial arrangements, profitability of production, pricing mechanisms, loans and debt repayments, and/or financial risks. Participatory impact assessments are also required to ensure that forest operations do not affect High Conservation Values.

The scope of the participatory impact assessment as well as the outcomes from it should be mutually agreed upon.

Participatory impact assessment helps to ensure that the 'baseline' against which impacts are being assessed is accurate. Often external assessors are unaware of the valuable resources and landscape features which are important to local livelihoods and cultures and which may be affected by a forest operation. These include forest fallows, hunting grounds, fishing areas, areas important for arts and crafts and other non-timber forest products, and areas of spiritual importance, like burial grounds, sacred sites and historical monuments. Since men and women and the different communities use resources differently it is important that assessments and baseline studies ensure the participation of all.

Many potential positive and negative impacts are explicitly mentioned in various FSC criteria and its explanatory notes:

- Opportunities for employment, training and other services, linked to management activities (FSC C.4.3)
- Contributions to social and economic development, not linked to management activities (FSC C. 4.4)
- Requirement to identify, avoid and mitigate significant negative social, environmental and economic impacts (FSC C.4.5)
- Requirement that positive and negative externalities of the operation are included in the management plan (FSC C. 5.3).



Overview of potential positive and negative impacts for indigenous or local communities

Potential positive impacts	Potential negative impacts
Training opportunities and other services necessary to enable communities to participate fully in forest management activities (FSC C. 4.3)	Loss or damage affecting legal or customary rights, property, or livelihoods of local communities/indigenous peoples (e.g. pressure to move off their land, denied access to land used for food production or cultural practices. Fencing of management units may prevent local people from exercising their 'customary rights' to cross the unit or collect non-timber forest products (FSC C. 4.2).
Support provided to local communities or individuals in managing and certifying their own forests and marketing of their products. (FSC C. 6.3). Local entrepreneurs to develop, process and market products and services as provided by the Management Unit (FSC C. 5.1). Participation in economic and social initiatives of other local players, for example local governments.	Marginalization of other players in the local economy, for example small farmers or local businesses. The export of logs and other products, instead of selling them to local processors may depress industries and employment (FSC C. 4.5).
More jobs for community members (FSC C. 4.3). Contributions to social and economic development activities (improved food production). Use of local processing, local services and value adding (FSC C. 5.4).	The hiring of specialized non-local contractors rather than local contractors where these exist may have a negative effect on local employment (Criterion 4.3). Management activities could result in the establishment of remote local villages. (FSC C. 4.5) Jobs may only be temporary. Out-migration of local people or decline of local skills and labour.
Access roads built by the organization can be used by local communities (FSC C. 4.3). Provision of access to management units for recreational purposes or collection of non-timber forest products (FSC C. 5.1). Transportation is made available to the local community.	Access roads could, for example, also result in invasion, illegal hunting, fishing, trapping, etc or bring damage to rural roads (FSC C. 10.10). Road and industrial accidents. Disturbance of local populations during harvest, if trucks transport logs out of the Management Unit during day and night (FSC C. 4.5).
Protection of High Conservation Values (FSC C.9.1). Reduction or stabilization of soil erosion (FSC C. 10.10). Provision of biodiversity refugia (FSC C. 6.5 and 6.6). Potential restoration of a previously denuded area unrelated to normal forest management (FSC C. 6.8).	Land degradation, for example from soil erosion or extraction of road building materials, which may result in decreased opportunities for such land for forestry or other uses (FSC C. 10.10). Fish, animals or plants disappearing. Loss of species (FSC C. 6.6 and 9.1). Potential impact of new settlements on indigenous peoples, local communities or HCVs.
Investments in community infrastructure, such as roads, health care and services (such as water supply and hygiene systems, new schools, health clinics, houses), etc. Provision of clean water through reduction in nutrient loading by nitrogen and phosphorus (FSC C. 6.7).	Air or water being polluted. Contamination of water courses that result in reduced fishing opportunities, changes in diversity of aquatic fauna and flora, etc. (Criterion 6.7). Tree plantations may substantially decrease the water that is available to neighbouring communities and farmers for domestic and agricultural uses, especially where rainfall is low (Criterion 6.7). Workers coming to the project site create health risks for communities.
Financial benefits.	Increase in violence and social stress.



Remarks and suggestions for indigenous peoples and local communities

Ensure that the capacity of the community is sufficient to effectively engage with the Organization.

Be aware:

- That support is available to you to build your capacity and understanding in relation to the FPIC process, the mapping and the impact assessment
- That if you are given support by the Organization, it is not being abused as leverage to get your agreement
- That your input into the strategy for capacity building is essential as it will guide the capacity building results.

Assess the potential need for community capacity building. Agree on support to build this capacity. Also agree on benchmarks which determine when your community's capacity is sufficient. This includes:

- Resources for time and efforts needed to participate in consultations, mapping and assessments.
- Advice to understand the technical aspects of the project
- Training on environmental issues, visual models, visits to similar sites
- Negotiation skills
- Training to participate in forest management partnerships and joint impact and monitoring assessments.

Ensure that funding for ongoing community capacity building is provided. This should be structured in a transparent manner that preserves community autonomy.

Participatory mapping

Indigenous peoples and local communities need to know that:

- You have a right to map your boundaries and negotiate them to mutual satisfaction
- You have the right to map your use of land and resources
- You have the right to map those sites which are of special cultural, ecological, economic, religious or spiritual significance or to make sure their locations remain hidden on the map
- You have the right to maintain control of maps, and determine what information these contain and who has access to the information
- You have the right to decline participation in transferring your knowledge into a written or recorded form
- People not directly involved in mapping exercises need to be informed about and consent to the boundaries and rights holders identified, especially neighbouring communities.

Conflicting claims

- Try to avoid that mapping creates conflicts over porous boundaries and reciprocal relationships with neighbouring communities
- If conflicts arise over overlapping claims you can ask support and facilitation from the Organization to resolve them.

Co-design and agree on participatory assessments.

It is crucial to engage with a representative delegation of all segments of your community in the assessment of the impacts of the planned forestry operations.

If you think that negative impacts will occur, this is your opportunity to tell and show it. Make sure these are reported.

If you see positive impacts, also make sure they are mentioned and reported. This is also the moment to put on the table which activities the Organization should do in order to achieve more/better positive impacts or reduce negative impacts.



Step 4: Inform affected indigenous and local community rights holders

4.1 Re-define proposed activities and inform communities about the proposed forestry operation

After identifying the rights holders, mapping their rights, resources, lands and territories and assessing all the positive and negative impacts in a participatory way, the time has come to more formally inform the affected communities about the forest management activities that the Organization is planning. In Part 1, section 1.2 of this document a more extensive explanation of the element *informed* of the FPIC requirement was already provided and step 2.4 already addressed the information and communication strategy. This should be carefully taken into account in implementing this step.

Based on the outcomes from the participatory impact assessments (see step 3.4) the Organization may want or need to re-define the proposed activities and adapt the draft of the management plan. This should be done before the Organization begins to inform the communities as the management plan itself needs to be subject to their consent to the extent it affects their rights, lands and resources.

Informed means that the involved indigenous peoples and local communities must receive in understandable language and/or forms, and in timely ways, all information regarding the proposed operation needed to make an informed decision. This information should be non-biased and preferably presented by a mutually trusted person or organization or in the attendance of an agreed third party observer / facilitator who has the explicit role to make sure no relevant information remains hidden. The Organization will need to engage the communities in an iterative and inclusive process of sharing information so that their knowledge base expands sufficiently to understand technical information and interpret the outcomes of all impact assessments. If the community asks for specific additional information, this should be made available to them as soon as possible and reports of the consultation must fairly reflect all opinions.

In addition to the FSC criteria addressing the right to FPIC, there is an additional FSC criterion directly referring to the need to inform communities. FSC Criterion 7.5 requires that *excluding confidential information, other relevant components of the management plan shall be made available to affected stakeholders on request, and at cost of reproduction and handling.*

The reasoning behind this criterion is the recognition that the publicly available summary of the management plan may not provide all the detail on issues relevant to an affected stakeholder. In such cases, the Organization needs to provide this necessary detail to the affected stakeholder, at the cost of reproduction and handling, to ensure fairness for all parties. In combination with the requirement for FPIC in Principles 3 and 4, this means that the level of detail provided to indigenous peoples and local communities needs to be sufficient for them to make informed decisions. In other words, indigenous peoples and local communities must be able to understand what will happen within their lands and territories and what the potential impacts of the operation will be on their rights and well-being. As mentioned above under step 2.4, parties can work with nondisclosure agreements if that is needed for confidentiality reasons.

4.2 The communities decide freely if they want to enter into negotiations

After The Organization has presented its proposal regarding the forest management activities, the communities get to decide whether they want to enter into negotiations or not. Therefore this is one of the crucial steps in the iterative FPIC process.

Based on the information provided, the community should be given sufficient time to take a decision if they want to enter into negotiations with the Organization about the proposed activities. The community decision should be made according to the agreed decision-making process (see step 1.3). If the community decides it does not want to engage in negotiations, the proposed activities impacting their rights, resources, lands or territories must be cancelled. Otherwise, the communities and the Organization can enter into negotiations (see step 5).



Remarks and suggestions for indigenous peoples and local communities

The objective of this step is that the communities receive all the information necessary to be able to take an informed decision and then take the decision to enter into negotiations or not.

Ensure your community understands the project.

You must be given all the relevant information about the project: What is the Organization planning to do? When? Where?

- Do you agree with the description of the impacts to your community as presented by the Organization?

Be critical and make sure that this information is given in a language and form that you can easily understand. This can be in writing but also verbally in meetings if your population is (partly) illiterate. It should be in a manner that reaches the broader community, not only your leadership.

- You are allowed to have access to independent information, not just information from the project developers or your government
- You can also ask for access to experts on law and technical issues.

Free decision.

As explained throughout the whole document, FPIC is a right that entails an iterative process of free and informed decisions at various stages of the process. Your community is now informed about the proposed activities and the potential positive and negative impacts the proposed forestry activities can have on your communities, you learned how the Organization communicates with you, how they respond to your questions or claims and how the Organization proposes to avoid negative impacts and optimizes positive impacts.

- If that process went well and your community comes to the conclusion that the expected positive impacts outweigh the negative ones you should decide to enter into negotiations about mitigation, compensation and benefit-sharing (see step 5 below).

But in the case that, despite your efforts, the process until this point was unsatisfactory or you think the negative impacts outweigh the positive ones for your communities then you may decide to not to enter into negotiations and say 'NO' to the proposed activities.



Step 5: Negotiate and let the community decide on negotiated FPIC proposal

5.1 Ensure agreement on decision-making process and capacity-readiness of the community

Before entering into negotiations it should be ensured that there is an agreement on how the involved peoples and communities decision-making process is structured. The implementation of this element started already in step 1.3, where requirements and points to take into account are listed. If until now no final agreement has been reached this should now first be finalized.

Besides this, further capacity building may be needed to ensure that the community is ready for negotiations (see step 3.1). The needs for further capacity building have to be assessed and an agreement needs to be made on support and benchmarks for capacity readiness of the communities. At this stage capacity building could include:

- All technical aspects of involvement with a forestry operation, such as conflict management, negotiation and mediation skills, advocacy techniques, monitoring and reporting skills, and transportation needs.
- Training in effective participation in forest management partnerships (if applicable).
- Transparent and accountable book keeping and effective means to best use or save funds for the benefit of the whole community.

5.2 Negotiate mitigation, compensation and benefit-sharing

In the past, many conflicts have been created by forest management activities of outsiders provoking negative impacts on communities and lacking to provide any benefits for them. An FPIC process can offer a solution for this problem by negotiating mitigation of the negative impacts, compensation of the unavoidable damages and agreeing on benefit-sharing.

At the end of step 3.4 an overview is given of potential positive and negative impacts of forest operations and possible mitigation measures. These, and other potential issues, should have been addressed in the participatory assessments and all involved parties must have agreed on the outcomes of these assessments. Based on the outcomes of these earlier activities, in this step the Organization and the communities will try to reach an agreement on measures to mitigate the negative and optimize the positive impacts, on compensation for past, current or future losses or damages on benefit-sharing and on safeguards.

Negotiation consists of a two-way dialogue on proposals, interests and concerns. Moments of negotiation and interactive dialogue are likely to be interrupted with periods of time for community leaders and members to freely discuss their concerns and proposals among themselves.

It is critical to ensure that the project brings benefits to all parts of the community, limiting the possibility that grievances and jealousies damage implementation of the project at a later stage. Transparency regarding the agreements that are being made with other communities can help prevent future conflict between communities. FSC recommends developing ways to ensure that multiple agreements are fair. It may be useful to inform the community of other examples of benefit sharing, and if possible to arrange for exchange visits with communities that have developed successful benefit sharing arrangements. One way of organising this is to establish associations in each beneficiary community to ensure that the redistribution of the benefit package is equitable, and that it is used for local development rather than for the personal enrichment of local elites.

When applied retrospectively, the rights-based negotiation approach required to respect FPIC can also help resolve existing land conflicts by allowing renegotiations and the settlement of disputes. Negotiations on existing unresolved conflicts can be undertaken to reach agreements which could include options such as:



- Return of land to the communities
- Rehabilitation of affected lands and forests
- Payment for the relinquishment of rights
- Payments for losses and damages
- Improved benefits in participatory forest management arrangements or for workers
- Compensatory development plans agreed with the communities.

Detailed discussions and inputs from experts and NGOs may be needed on issues such as:

- Exactly which lands, properties, crops, resources or what rights will be ceded and how will payments or rewards for the relinquishment of such rights be allocated to the legitimate rights holders? The economic value of trees to be felled on community usage zones and the nature and extent of any changes to forest use
- What other benefits will be afforded to the communities for cession of their lands, rights and resources? Appropriate compensation on an individual village basis
- How communities will secure and manage anticipated benefits
- What kind of projects would lead to economic independence of the indigenous peoples and local communities from the Organization?
- The roles of communities in forest management
- What obligations will the Organization give to ensure fair pay and conditions for any promised jobs?
- What arrangements will be made to ensure that the negotiated agreement is upheld by any Organization which takes over the operation? (The other way around is equally important: What arrangements will be made to ensure that the negotiated agreement is upheld by the community and all of its members?)
- What arrangements will be made to restore community rights in land after the expiry of the agreement?

5.3 Establish arrangement for complaints, disputes and conflicts

Despite good intentions and optimal efforts the affected rights holders can have complaints or grievances and the Organization and rights holders can have disputes or serious conflicts with each other. It is important that these are being resolved as soon as possible and that disputes or conflicts over the same issues are not being repeated. It has become a good practice that Organizations have clear and satisfactory arrangements regarding how to deal with these situations.

It is not useful here to use rigid definitions for these terms because the reality behind these terms can be very dynamic. A simple complaint or grievance that is not dealt with in a responsible manner can escalate into a serious conflict. And a serious issue such as tenure issues might be solved after a complaint is made and before it escalates into a conflict.

FSC C. 1.6 requires that *The Organization shall identify, prevent and resolve disputes over issues of statutory or customary law, which can be settled out of court in a timely manner, through engagement with affected stakeholders.* With regard to indigenous peoples and local communities FSC C. 4.6 requires The Organization to develop, through engagement with these communities, mechanisms for resolving grievances and providing fair compensation with regard to the impacts of management activities of the Organization.

Two very important issues to realize in this context are:

- Communities may have their own conflict resolving mechanisms and these should be incorporated and respected. The grievance mechanism should also include how to address potential internal conflicts that can affect the agreement. There will be a need to distinguish between issues that can and cannot be dealt with by different mechanisms.
- Where customary rights are not secured in national laws, court decisions may end up bringing companies into non-compliance with FSC P&C. In such a case of potential conflicts between the FPIC requirement and Principle 1, the certification body shall evaluate any conflicts between laws/ regulations



and certification requirements of the applicable Forest Stewardship Standard on a case by case basis, in arrangement with involved or affected parties. See also Part 1, section 2.6.

Depending on the situation, designing and agreeing on a grievance mechanism may be a complicated issue that should be undertaken with professional advice or assistance. Annex 4 provides more information about the choices to be made. For example, be aware that mediation is not the same as arbitration. A mediator stands between the parties, while an arbiter stands above the parties, like a judge.

It is important to make sure that the arrangements are not too rigid or more complicated than necessary. For example, in early stages, grievance mechanisms may be less formalized. Community members could be informed who in the Organization's community engagement team they should contact if they have a concern, or there can be a regularly scheduled meeting in the indigenous community where individuals can raise concerns. A potential mechanism could begin with a panel of community members to whom individuals could report concerns. If the panel is unable to resolve the dispute, it raises the issue to a group composed of both community members and Organization's representatives.

As another approach, one can imagine a process through which the indigenous group and Organization would each suggest several names or organizations, and the other party would choose one of those names to form a dispute resolution committee. Alternatively, if both parties are comfortable with an external mediator that individual could act as a mediator for significant disputes that arise over time.

Some general basic rules for both grievance and dispute resolution mechanisms are:

- No one is forced into a procedure he/she/they did not agree upon. Therefore the grievance/dispute resolution mechanisms themselves must be mutually agreed upon before the FPIC process begins
- Resolving grievances or conflicts through mediation means striving towards satisfying the demands of every party. In other words, a dispute is only settled if both parties agree freely to the agreed settlement
- Stakeholder consultation and mechanisms agreed with stakeholders should be applied as preferred options for preventing and resolving civil disputes
- These might include negotiation processes, mediation and other means of resolving legal disputes, and be based on existing legal frameworks
- In the event that not every party is completely satisfied, an agreement should be reached not to pursue further actions related to that specific grievance
- Fairness is subjective. A neutral third party may be required for mediation
- In many cases, mediation would be a better solution process than arbitration. The latter can be used when mediation failed. Law suits should be revoked only as a last resort.

Some more technical guidance:

- The process should include grievance tracking and response systems, reporting on project progress at monitoring meetings to discuss satisfaction and hear grievances
- The grievance process should include provisions and protocols for withdrawing consent if suitable remedial action is not forthcoming and there is community consensus to withdraw consent to further implementation
- Grievance processes should also be designed to be able to hear and address concerns from members of a community about their exclusion from community decision-making processes related to the agreement with the Organization
- Where local or national laws for resolving grievances and compensation exist, implementation of their provisions might suffice to comply with the FSC criteria, provided it leads to reaching an agreement with the indigenous peoples/local communities. If it does not lead to such an agreement, then additional mechanisms for resolving grievances and compensation with indigenous peoples/local communities are required
- If major conflicts arise a company should be able to prove that it is not active in the area in question as long as the conflict remains unresolved. Further, in such a case the FSC Policy on Association has to be considered. If an Organization is involved in a major conflict, it cannot be certified. It does not matter whether the conflict takes place in certified or uncertified area



- A forest manager should maintain a record of disputes and the status of their resolution, including evidence related to the dispute (whether generated internally, from outside experts or provided by disputants), and documentation of steps taken to resolve the dispute.

The guidance above applies to situations in which affected rights holders, as a group or as individuals, have complaints about the forest management activities of the Organization. Nevertheless, Organizations that have a complaint against the communities can also make use of the agreed dispute settlement mechanism.

Issues of individuals regarding the decision making process within their community as fair/unfair should also be dealt with within the agreed dispute settlement mechanism (see steps 1.3, 2.2 and 5.1).

5.4 Set up a participatory monitoring model

Monitoring is an essential part of responsible forest management and it is equally essential for all parties that the communities that are part of the FPIC process and the FPIC agreement are also part of the monitoring, at least regarding those issues that affect them. During both impact assessments and management planning the consent based participation of communities should have identified the key issues that need monitoring. Monitoring in this context needs to be focussed on assuring that the consent agreement is implemented correctly and the results of the negotiations fulfilled during the course of forest operations.

While the community may wish to carry out its own monitoring independently, the Organization should seek to involve the community in its monitoring of project implementation related to agreements and consent. A key contribution of participatory monitoring of project implementation is that it replaces rumour and misinformation with factual evidence that the community has participated in producing. Joint or community monitoring mechanisms (and jointly run dispute resolution bodies) are emerging best practices.

Requirements of monitoring are addressed in FSC Criterion 9.4, in Principle 8 and in Criterion 7.6 which requires that The Organization engages affected stakeholders in its monitoring processes. Further guidance on consultation processes is provided in FSC-STD-30-010 Controlled Wood Standard for Forest Management Enterprises, Section 1.3. This is also applicable to the implementation of a FPIC process.

Joint monitoring bodies may focus on a variety of issues, including the environmental, social and human rights impacts, cultural heritage, or monitoring the agreement between the Organization and the community. Community implementation of monitoring mechanisms may require ongoing technical or capacity-building support.

Issues that a participatory monitoring mechanism should address include:²¹

- Designing the monitoring approach, including what activities and issues will be monitored.
- What monitoring methods will be used?
- Who will do the monitoring?
- How will the results be recorded and presented to the community and other parties?
- What steps will be followed if monitoring reveals problems in implementation?
- What kind of problems and what level of disagreement can trigger grievance processes?
- What circumstances would re-initiate the consent process and require a re-negotiation of the agreement.

5.5 The community decides freely on the proposal

If the FPIC process is duly implemented, the affected indigenous peoples and local communities have come to the point that they expressed their interest in the operation, participated in mapping and assessments and agreed on their outcomes, agreed on a decision model, agreed about their capacity readiness, and negotiated

²¹ Anderson (2011), p. 51.



the proposal for forestry activities that they will now have to take a decision about without being pushed in any direction.

Decisions will have to be made in accordance with the agreed decision-making model. Decisions may be made collectively, after long discussions, but consensus may not be achieved and disagreement may result. It is therefore important to allow time for discussion on interim agreements, ensure liberty and resources for independent counsel, allow enough time for inclusive engagement, and explicitly allow communities to say no.

It should be reminded that the giving or withholding of consent by a community towards a proposed development is not a one-off process. At this point the communities have been able to give or withhold their consent at various stages of the process and the right to FPIC is ongoing throughout the life cycle of a project and should be based on an ongoing relationship of trust between the stakeholders.

In indigenous societies, traditional decision making is often in the form of consensus. The views of different groups in the community are sought in different ways and not always in a formalized way. The right to FPIC is accorded to indigenous peoples as collectives, it involves not just one or two but all members of the community. Let the community decide when consent is given. Consent can be expressed by use of resolutions, decrees or formal agreements.

There may be disapproval, or acceptance of only certain parts of the process or proposal. It is essential that the right of a community to reject the proposal made by the Organization is respected, and that the Organization does not try to immediately re-negotiate the deal. However, a community can be asked to indicate under what conditions it would be prepared to consider the proposal again. If the community agrees to explain why they withheld consent it may be possible to revise the proposal until it is acceptable. Be aware that the community is not obliged to explain their reasons for withholding consent, but if the negotiations occurred in good faith and in an open and transparent way it is more likely that the reasons will be explained.

The territories and resources of communities that do not provide their consent should not be included in the proposed forest operation. Then the Organization has to reconsider whether forest operations (given this restriction) are still viable. In any case it has to refrain from any activities that could have an impact on the rights, resources or lands of those communities that withheld their consent.

If the Organization decides to re-start the negotiations with the communities based on a new management plan, and the communities agree to re-negotiate, then it is probably not necessary to repeat the whole process. A large number of achievements from the previous FPIC process may still be valid.

Remarks and suggestions for indigenous peoples and local communities**Negotiate mitigation, compensation and benefit-sharing.**

Costs and benefits are likely to fluctuate over time. Your community needs to be aware of how different scenarios would affect you if costs are higher or benefits lower than expected or suggested by the proponent. Proper cost-benefit analyses help to ensure that your community makes the best decision on your sustainable development goals.

- It is important that all members of your community are involved in negotiating mitigation, compensation and benefits and not just a few leaders or “elites”. Guard against “elite capture”
- It might be useful to separate the social political organization from the economic organization of your community, while keeping them connected. This way, there is control by the community but not an involvement in every business decision
- Seek support of an NGO for the negotiation and seek information about benefit-sharing agreements of other communities in the same area
- If the number of consultations increases it can become a problem to find the time to participate for your community. If this is the case compensation for the time you dedicate to the process should be part of the negotiations
- Carefully consider the potential consequences of:
 - Resettlement
 - Impacts affecting the ability to earn a living through your traditional means of livelihood
 - Impacts affecting sites of cultural significance or your continued access to such sites
- Build and empower local community associations to manage benefits at village level.

Establish complaint and dispute settlement mechanisms.

It is recommended to seek professional advice regarding the design of the grievance mechanism. Your community may also wish to establish a permanent community and project developer forum for regular and ongoing communications. This forum could also be used to handle concerns or grievances that your community may have with the operation of the project if the project proceeds.

- The grievance mechanism does not replace your right to take legal action.

Set up a participatory monitoring model.

Your community also needs to monitor the project development if the project proceeds. It is important for your community to keep track of whether the Organization/government is meeting its commitments. The project developer may change through the life of the project. New project developers should uphold commitments made by previous developers - however, you may want to seek independent advice to understand if a new project developer is bound by previous agreements.

- Ask independent agencies to assist with monitoring. That can help to convince the Organization that concerns about the project impacts and commitments are legitimate
- Equally, monitoring is important in showing whether the community fulfils its obligations. This way you can show that you are a trustworthy party for the Organization. That is important because if you are not trustworthy the Organization may choose to end the operation and no benefits will come from it.

Decide freely on the proposal.

If your community decides to say “yes” to a project, your community should make sure that the agreement made with the project developers is recorded in writing. You can write this in your community’s language(s). Realize that this agreement is binding; see next step 6. Deciding can be a very difficult and complex process. It is recommended to ask for technical assistance from a trusted NGO or lawyer.

If consent is not agreed, find out if your community wants to re-negotiate or modify the proposal. If so, re-negotiate the proposal. If not, ensure that the proponent cancels the proposed activity.

- You have the right to withdraw your consent if the new developer does not fulfil its parts of the agreement or if it changes policies, plans or practice that affect you, or if circumstances have changed which justify withdrawal.



Step 6: Formalize, verify, implement and monitor the consent agreement

6.1 Formalize the consent agreement

The right to FPIC gets its meaning because the consent agreement between the parties is binding. The Organization is bound by the agreement but likewise the community also needs to uphold the agreements reached. The agreed monitoring mechanism helps to identify whether all parties hold on to the agreed activities. In case the agreement is not upheld, parties, including the Organization, can make use of the complaint or grievance mechanisms.

A consent agreement between an Organization and a community should set out the conditions under which the community gives its consent to the proposed operation. If these conditions are not met, the community may review and either reaffirm or withdraw consent. The grievance mechanism should allow for this option to be invoked at any stage (see step 5.3).

The outcome of the FPIC process should be well-documented and made publicly available in the language of indigenous peoples involved and affected. It could also be made available in a national language so that other communities can also take note of it.

What does a binding agreement mean?

A 'binding agreement' may be but is not limited to a written agreement. It can also be based on oral and honour systems, to be applied in cases where written agreements are not favoured by indigenous peoples, either for practical reasons or on principle. It should also be noted that any agreement reached remains part of a continuous process of dialogue and negotiation.

Local communities' notions of consent as well as the Organization's notions have to be taken into account as these may differ widely. There might be situations where a binding agreement means a need for continued renegotiation and readjustment of its terms and conditions, for example in case of traditional customs in which no subject or decision is ever regarded as finally closed or where the operational status of a decision is situation-specific.

The community is, however, not able to withdraw consent arbitrarily. The FPIC agreement is a binding agreement for both parties. If the conditions upon which the original consent was based are being met, ongoing consent is implied.

What should be included in the binding agreement?

The agreement must define:

- Its duration, provisions for re-negotiation, renewal, termination and, economic conditions (FSC C3.3)
- Provisions for protecting the rights, resources, land and territories of the indigenous peoples, ownership, use and confidentiality of indigenous knowledge, intellectual property rights, provisions for dispute resolution, identification and protection of sites of special cultural, ecological, economic, spiritual or religious significance
- Provisions for monitoring by indigenous peoples of The Organization's compliance with its terms and conditions (FSC C3.3).

What is an appropriate format for a binding agreement?

It is important to establish a mutually agreed form and format for a binding agreement on consent that both parties recognize. This could be written, oral (audio or video-taped), a traditional ceremony, or perhaps a combination of these. The formal written agreement could be notarised as a legal agreement binding on both parties and, if possible, endorsed by the local government or relevant authority. The Organization must maintain appropriate records of these agreements including written accounts, audio or film records, etc.

Legal and juridical obstacles can arise, however, when indigenous peoples' institutions lack legal personality in national law, or indigenous peoples are not even recognised or registered as citizens. This reinforces the importance of respecting customary laws and honouring customary systems for maintaining agreements.

The format of a consent agreement could include the following:

- Agreed signatory parties
- Mutually agreed substantive evidence of consent (thorough documentation of how the community approved the agreement)
- Description of location/rights holders/resources
- Description of agreement details (according to location in the project cycle). For agreements on project implementation this may include:
 - Costs to be borne by the community
 - Benefits accruing to the community
 - Resource management requirements (e.g. patrolling, data collection, reporting, etc.);
 - Rules and restrictions imposed on the community (such as limiting use of forest products)
 - Forms of capacity-building or technical support to be provided by outside actors to enable communities to fulfil obligations, for example in relation to resource management or distribution of benefits, and
 - Duration/term.
- Arrangements for making agreements binding:
 - Independent verification provisions
 - Recourse mechanism/grievance process
 - Monitoring plan
 - Withdrawal of consent terms
 - Agreed next point for consent to be sought (specify which future project milestones will require the consent of the community).

Appendices such as management plans/details of agreed economic development activities/associated detailed processes for implementation.

6.2 Verify the FPIC process

Some remarks on verification of the FPIC process by an independent party have already been made in the Introduction to Part 2 and in step 2.3. There it is explained that it is a requirement of FPIC that an independent party verifies that the consent of a community has been free, prior, and informed. In an early stage it should have been mutually agreed with the communities who this independent verifier will be so that all parties trust its findings and how frequently and at which stages of the process verification will take place or whether this only takes place at the end of the process.

In this final stage of the FPIC process the independent verifier should be able to finalize its work. His assessment should be seen as important information for the auditor/CB who has to judge whether the Organization can be certified.

By reviewing available or required documentation and by interviewing randomly selected members from the parties involved, independent verifiers can form a view of whether the process pursued was genuinely free, prior and informed and whether consent was given through inclusive engagement, and in ways accepted by the people concerned. In this respect it is interesting to mention that an independent research in the Congo Basin found only one case where the local communities expressed satisfaction with the existing arrangement for forest



management. Surprisingly, this company had no legal document explicitly describing this as consent. By contrast, elsewhere the researchers found signed documents used as proof of consent while many villagers were dissatisfied with the relationship they had with the company exploiting the concession they lived in.²²

If verification identifies deficiencies in the process or the granting of consent, the community has the right to require that this deficiency is addressed, for example by missing information being provided or wider consultations taking place, and that their consent to the project is renegotiated from the consent stage that was identified as inadequate.

6.3 Implement and monitor the consent agreement

Be aware that the relationship between the company and the communities does not end after a consent agreement is reached. Continue to invest in a good relationship by honouring the agreement and applying the tools and lessons learned during the process.

Important new information or changing circumstances or policies have to be shared transparently and discussed if needed.

The agreements reached through a FPIC process are based on trust. This requires that representatives of involved parties must know and respect each other, must be accessible and willing and able to find solutions during and after the initial agreement process.

²² Lewis et al (2008), p.55

Textbox: FPIC and Community-based Forest Management

Community-based Forest Management (CFM) can be developed in several different modalities, each with different potential FPIC implications:

- a. CFM led by community forestry (CF) committee/ users group
- b. CFM initiated by a private company
- c. CFM joint partnership between CF and private company
- d. CFM initiated by an NGO

When CFM is led by the community (option a), one could say that FPIC would be redundant and add an unnecessary burden because the CF committee is to be representative of the community. However, it is advised that in all situations the Organization, also if that is the CF committee, studies the FPIC process and decides which steps are still required in their specific situation. There are at least two steps of the FPIC process, outlined below, that are not necessarily fulfilled in the case of CFM led by the community. Documentation needs to show that they are fulfilled.

- i. Community's decision-making process. Practice shows that one has to be aware of elite capture and less than perfect representation of marginalized groups. FSC's P&C demand protection of those that are weaker or have less power. This includes the protection of the members of a group against their own elite, also in the case of CFM. The requirements regarding community's decision making process are described in Part 2 of the FPIC guideline, mainly in steps 1.3 and 5.1. This process needs to be documented and verified.
- ii. Arrangement for grievances, conflicts and options to withdraw. As FPIC allows for recourse mechanisms, and re-consideration of involvement on the part of affected communities, and the FSC certification would be contractually binding for a period of five years, there needs to be consideration of how conflicts would be resolved should a part of the community wish to opt out of certification during the contract period.

Other communities affected by the community-based forestry?

The above applies to the question whether FPIC is required within a community that is involved in CFM. Besides this, there needs to be awareness of other communities or indigenous peoples who may be affected by the CFM forest operations. If the Organization is a CF committee it still has to recognize and uphold the rights of other potentially affected right holders in or near the management unit. Remember, these other rights holders have the right to say "No".

In the subsequent CFM scenarios a FPIC process would also be needed, but given that financial benefits of CFM certification may be just barely enough to cover the costs, the transaction costs associated with preparing for certification should be kept as low as possible. The FPIC process should therefore be proportionate to scale, intensity and risks of the management activities with regard to its impacts on rights, resources, lands and territories of other communities.

Important for communities:

- In cases of partnerships with companies:
 - What debts or costs will be assumed by community members and what arrangements will be made to ensure that repayments are manageable?
 - How will members of the community be affected by these repayments? Can this be prevented or mitigated?
 - What guarantees and conditions will the company give to ensure fair pay and conditions for forest management partnerships? What will be the benefits for community members? How will the benefit sharing be organized?
 - Communities have to be connected to financial markets, otherwise they remain dependent on the company.
- In the Asian Pacific context community forest titles and associated rights are often insecure and contested. If there are recognized titles, these often involve restrictions on activities such as timber harvesting, particularly for commercial purposes. Potential conflicts with governing authorities should be anticipated.

Textbox: Plantations

Plantations are often large and typically under high intensity management. They require high investments and the impact of the operation is not reversible in the short term. Some aspects of implementing the right to FPIC need special attention in the case of plantations.

- The nature of the impact. In the case that holders of rights to land, territories and/or resources are affected by the conversion of the land into a plantation the impact on these rights is usually very high, it is immediate and it is irreversible, at least in the short term. It is therefore of even more importance that the FPIC agreement is concluded before the plantation is established.
- The financing decision. Although it is even more important in the case of plantations that communities should be able to take a decision prior to any impact of the operation the requirement of providing complete information on the operation is especially challenging for plantations developed by the private sector. In the case of plantations significant investments in concession or property rights are usually done, without checking if there may be other rights holders involved and before plantation lay-out, species composition, road lay-out, labour requirements, rotation periods etc. have been decided on. This entails a risk for the Organization that by the time this information is available the affected communities can still decide to withhold consent. The Organization can minimize this risk by engaging at a very early stage with potentially affected communities to find out their interest in the plantation area.
- The consent agreement. As explained in this document, there are circumstances in which the consent by a community can be withdrawn, for example if the Organization does not fulfil its part of the agreement or if new information becomes available. Then, if a new agreement cannot be renegotiated the operation, or part of the operation that is impacting rights holders must be stopped. This can have a significant impact on the operation as the size of the plantation may no longer be large enough to be profitable while the community may have a considerable claim for compensation because of the irreversible nature of the impact that has already taken place. Therefore, the involved parties have to be very confident that the consent agreement is valid and valuable for the long term.
- Last but not least, rights holders may have moved out of the area and be difficult to identify. Because of the irreversible nature of a plantation, the Organization should be able to demonstrate that it made considerable efforts to try and identify rights holders even if they are not physically present in the area at the time of developing the plantation.

Glossary of Terms – FSC definitions

Definitions developed in the course of the recent Principles and Criteria Review are referenced as FSC 2011. Definitions derived from Version 4-0 of the Principles and Criteria as originally published in November 1994 are referenced as FSC 1994.

Affected stakeholder: Any person, group of persons or entity that is or is likely to be subject to the effects of the activities of a Management Unit. Examples include, but are not restricted to (for example in the case of downstream landowners), persons, groups of persons or entities located in the neighbourhood of the Management Unit. The following are examples of affected stakeholders:

- Local communities
- Indigenous peoples
- Workers
- Forest dwellers
- Neighbours
- Downstream landowners
- Local processors
- Local businesses
- Tenure and use rights holders, including landowners
- Organizations authorized or known to act on behalf of affected stakeholders, for example social and environmental NGOs, labour unions, etc. (Source: FSC 2011).

Customary rights: Rights which result from a long series of habitual or customary actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a law within a geographical or sociological unit (Source: FSC 1994).

Engaging or engagement: The process by which The Organization communicates, consults and/or provides for the participation of interested and/or affected stakeholders ensuring that their concerns, desires, expectations, needs, rights and opportunities are considered in the establishment, implementation and updating of the management plan (Source: FSC 2011).

Free, Prior, and Informed Consent: A legal condition whereby a person or community can be said to have given consent to an action prior to its commencement, based upon a clear appreciation and understanding of the facts, implications and future consequences of that action, and the possession of all relevant facts at the time when consent is given. Free, prior and informed consent includes the right to grant, modify, withhold or withdraw approval (Source: Based on the Preliminary working paper on the principle of free, prior and informed consent of Indigenous Peoples (...) (E/CN.4/Sub.2/AC.4/2004/4 8 July 2004) of the 22nd Session of the United Nations Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, 19–23 July 2004).

Indigenous peoples: People and groups of people that can be identified or characterized as follows:

- The key characteristic or criterion is self identification as indigenous peoples at the individual level and acceptance by the community as their member
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

(Source: Adapted from United Nations Permanent Forum on Indigenous, Factsheet 'Who are indigenous peoples' October 2007; United Nations Development Group, 'Guidelines on Indigenous Peoples' Issues' United Nations 2009, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007).



Intellectual property: Practices as well as knowledge, innovations and other creations of the mind. (Source: Based on the Convention on Biological Diversity, Article 8(j); and World Intellectual Property Organization. What is Intellectual Property? WIPO Publication No. 450(E). No Date.)

Interested stakeholder: Any person, group of persons, or entity that has shown an interest, or is known to have an interest, in the activities of a Management Unit. The following are examples of interested stakeholders.

- Conservation organizations, for example environmental NGOs
- Labour (rights) organizations, for example labour unions
- Human rights organizations, for example social NGOs
- Local development projects
- Local governments
- National government departments functioning in the region
- FSC National Offices
- Experts on particular issues, for example High Conservation Values

(Source: FSC 2011)

Lands and territories (revised): For the purposes of the Principles and Criteria these are lands or territories that indigenous peoples or local communities have traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods. (Source: Based on World Bank safeguard OP 4.10 Indigenous Peoples, section 16 (a). July 2005.)

Local communities: Communities of any size that are in or adjacent to the Management Unit, and also those that are close enough to have a significant impact on the economy or the environmental values of the Management Unit or to have their economies, rights or environments significantly affected by the management activities or the biophysical aspects of the Management Unit (Source: FSC 2011).

The Organization: The person or entity holding or applying for certification and therefore responsible for demonstrating compliance with the requirements upon which FSC certification is based (Source: FSC 2011).

Tenure: Socially defined agreements held by individuals or groups, recognized by legal statutes or customary practice, regarding the 'bundle of rights and duties' of ownership, holding, access and/or usage of a particular land unit or the associated resources there within (such as individual trees, plant species, water, minerals, etc.) (Source: World Conservation Union (IUCN). Glossary definitions as provided on IUCN website).

Traditional peoples: Traditional peoples are social groups or peoples who do not self-identify as indigenous and who affirm rights to their lands, forests and other resources based on long established custom or traditional occupation and use (Source: Forest Peoples Programme (Marcus Colchester, 7 October 2009)).

Use rights: Rights for the use of resources of the Management Unit that can be defined by local custom, mutual agreements, or prescribed by other entities holding access rights. These rights may restrict the use of particular resources to specific levels of consumption or particular harvesting techniques (Source: FSC 2011).



References

List of literature reviewed for developing the FSC FPIC guidelines

Anaya, James. 2009. *Report of Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*. UN Document A/HRC/12/34. Available at: www2.ohchr.org

Anderson, Patrick. 2011. *Free, Prior and Informed Consent in REDD+ Principles and Approaches for Policy and Project Development*. RECOFTC and GIZ. Available at: www.recoftc.org

Colchester, Marcus. 2010. *Free, Prior and Informed Consent – Making FPIC work for forests and peoples*. The Forest Dialogue, New Haven, CT, USA. Available at: www.forestpeoples.org

FSC. 2012. *FSC Principles and Criteria for Forest Stewardship: FSC-STD-01-001 V5-0 EN*. FSC. Available at: www.fsc.org

FSC. 2011. *FSC Standard (Revised) Final Draft, FSC-STD-01-001 V5-0 D5-0 EN*. FSC. Available at: www.fsc.org

FSC. 2006. *FSC Guidance Document FSC Principles 2 and 3: Guidance on Interpretation FSC-GUI-30-004*. FSC. Available at: www.fsc.org

Grainger, Matt and Kate Geary. 2011. *Case study: The New Forests Company and its Uganda plantations*. Oxfam International. Available at: www.oxfam.org

Herz, Steven, Antonio La Viña & Jonathan Sohn. 2007. *Development Without Conflict: The Business Case for Community Consent*. World Resources Institute, Washington, DC. Available at: www.wri.org

Hill, Christina, Serena Lillywhite and Michael Simon. 2010. *Guide to Free, Prior and Informed Consent*. Oxfam Australia, Carlton, Victoria, Australia. Available at: www.oxfam.org.au

Lehr, Amy K., Gare A. Smith. 2010. *Implementing a Corporate Free Prior and Informed Consent Policy; Benefits and Challenges*. Foley Hoag LLP, Boston and Washington, DC. Available at: www.foleyhoag.com

Lewis, J., L. Freeman and S. Borreill. 2008. *Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin. A Feasibility Study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the Operationalisation of FSC Principles 2 and 3 in the Congo Basin*. Intercooperation, Society for Threatened Peoples and Anthroscope. Available at: www.intercooperation.ch

Loreto Tamayo, Ann and Minnie Degawan. 2011. *Handbook on Free, Prior and Informed Consent – For Practical Use by Indigenous Peoples' Communities*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples' Foundation for Education and Environment. Available at: www.international-alliance.org

Round Table on Sustainable Palm Oil 2008. *Free Prior and Informed Consent and the Round Table on Sustainable Palm Oil. A guide for Companies*. RSPO. Available at: www.forestpeoples.org

United Nations Permanent Forum on Indigenous Issues. 2005. *Report of the International Workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples*. United Nations Document E/C.19/2005/3. Available at: www.un.org

UN-REDD Programme. 2011. *Guidelines on Free Prior and Informed Consent, Draft for Comment*. FAO, UNDP and UNEP. Available at: www.unredd.net

UN-REDD Programme. 2010. *Consultation on FPIC and Resource – Latin America and the Caribbean; Workshop Report*. FAO, UNDP and UNEP. Available at: www.unredd.net



UN-REDD Programme. 2010. *Asia Regional Consultation with Indigenous Peoples on FPIC and Resources*. FAO, UNDP and UNEP. Available at: www.unredd.net

UN-REDD Programme. 2011. *Consultation on FPIC and Resource – Africa; Workshop Report*. FAO, UNDP and UNEP. Available at: www.unredd.net

UN-REDD Programme. 2012. *Comments on Draft Guidelines on Free Prior and Informed Consent*. FAO, UNDP and UNEP. Not published.

World Resources Institute (WRI), United Nations Development Programme, United Nations Environment Programme, and World Bank. 2005. *World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty*. Washington, DC. Available at: www.wri.org

World Wildlife Fund. 2011. *Free, Prior, Informed Consent and REDD+: Guidelines and Resources*. WWF Working Paper. WWF. Available at: wwf.panda.org

Additional Literature for further reference

Artist, Maria Josée, Carla Madsian and Grace Watamaleo. 2011. *Case study (Surinam): Engaging on Equal Terms: Asserting Customary Ways of Decision Making in FPIC Process*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples' Foundation for Education and Environment. Available at: www.thai-ips.org

Andreve, Jorge, Estebancio CastroDiaz and Onel Masardule. 2011. *Case study (Panama): Kuna Yala: Self-Governance and FPIC*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples' Foundation for Education and Environment. Available at: www.thai-ips.org

Colchester, Marcus and Ferrari, Maurizio Farhan. 2007. *Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples*. Forest Peoples Programme, Moreton-in-Marsh, UK. Available at: www.forestpeoples.org

Daytec-Yañgot, Cheryl L. 2011. *Case study (Philippines): FPIC: A Shield or Threat to Indigenous Peoples' Rights?* International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples' Foundation for Education and Environment. Available at: www.thai-ips.org

First Peoples Worldwide. *Indigenous Peoples Guidebook on free prior informed consent and corporation standards*, working draft. Available at: www.firstpeoples.org

Forest Peoples Programme. 2008. *Key Elements to the Initiation, Performance and Maintenance of Good Faith Consultations and Negotiations with Indigenous and Tribal Peoples and Communities*. Forest Peoples Programme, Moreton-in-Marsh, UK. Available at: www.forestpeoples.org

FSC. 2009. FSC-PRO-01-008_V1-0_EN *Processing_complaints*. FSC. Available at: www.fsc.org

FSC. 2009. FSC-PRO-01-009_V1-0_EN *Processing_formal_complaints*. FSC. Available at: www.fsc.org

FSC. 2009. FSC-STD-01-005_V1-0_EN *Dispute_resolution_system*[1]. FSC. Available at: www.fsc.org

FSC. 2009. FSC-STD-20-006_V3-0_EN *Stakeholder_Consultation_for_Forest_Evaluation*. FSC. Available at: www.fsc.org

FSC. 2009. FSC-STD-20-007_V3-0_EN *FM_Evaluations*. FSC. Available at: www.fsc.org



- FSC. 2011. *FSC Guidelines for High Conservation Values and Principle 9 – draft of 1 December 2011*. FSC. Not published.
- FSC. 2004. FSC-STD-01-003_V1-0_EN_SLIMF_Eligibility_Criteria. FSC. Available at: www.fsc.org
- FSC. 2009. FSC-STD-20-002_V3-0_EN_Structure_Content_Local_Adaptation_Generic_FSS. FSC. Available at: www.fsc.org
- FSC. 2007. FSC-STD-20-012_V1-1_EN_Evaluation_of_FSC_Controlled_Wood. FSC. Available at: www.fsc.org
- FSC. 2006. FSC-STD-30-010_V2-0_EN_Controlled_Wood_standard_for_FM_enterprises. FSC. Available at: www.fsc.org
- Gibson, Ginger and Ciaran O’Faircheallaigh. 2010. *Negotiation and Implementation of Impact and Benefit Agreements. IBA Community Toolkit*, Walyer & Duncan Gordon Foundation, Toronto. Available at: www.ibacommunitytoolkit.ca
- Morales Garro, Alancay. 2011. *Case study (Costa Rica): FPIC Compliance: More in the Law than in Practice*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples’ Foundation for Education and Environment. Available at: www.thai-ips.org
- Mwarabu, Adam Kuleit Ole. 2011. *Case study (Tanzania): Free, Prior and Informed Consent and Protected Areas; The Experience of Tanzania*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples’ Foundation for Education and Environment. Available at: www.thai-ips.org
- Rubis, Jennifer. 2011. *Case study (Malaysia): Frameworks for and implementation of FPIC over land and knowledge in Sarawak*. International Alliance of Indigenous and Tribal Peoples of the Tropical Forests and The Indigenous Peoples’ Foundation for Education and Environment. Available at: www.thai-ips.org
- Wilson, E. 2009. *Company-led approaches to conflict resolution in the forest sector*. The Forest Dialogue. Available at: www.iied.org
- Zorilla, Carlos, with Arden Buck, Paula Palmer and David Pellow. 2009. *Protecting Your Community Against Mining Companies and Other Extractive Industries – A guide for Community Organizers*. Global Response. Available at: www.culturalsurvival.org



Annex 1: Overview of people who contributed to these guidelines

Members of the Advisory Group:

- Marcus Colchester: Forest Peoples Programme (FPP) (indigenous peoples NGO)
- Christoph Wiedmer/Eva Schmassmann: Society of Threatened Peoples (STP) (indigenous peoples NGO)
- Estebancio Castro Diaz, International Alliance of Indigenous and Tribal Peoples of the Tropical Forest (indigenous peoples' organization)
- Regan Suzuki, RECOFTC (NGO)
- Adrien Sinafasi, Dignité Pigmée (indigenous peoples' organization)
- Larry Joseph (indigenous peoples activist and member of the FSC IP Working Group)
- Anders Blom, Svenska Samernas Riksförbund, SSR (National Union of the Swedish Sami People) (indigenous peoples organization and member of the FSC IP Working Group)
- Ana Patricia Cota Gomes, Imaflora (FSC Certification Body)
- Gerrit Marais, SGS (FSC Certification Body)
- Tom van Loon, Interholco AG (DanzerGroup)(FSC certified company)
- Petra Hamers, Dutch Sustainable Initiative (IDH)/The Amazon Alternative (TAA) (NGO)

Respondents to the Stakeholder Survey:

The objectives of the stakeholder survey were to:

1. Get insight in challenges and opportunities related to:
 - o situations in which FSC forest operations had/have an impact on indigenous peoples or local communities
 - o associated consultations and consent seeking processes
2. Identify relevant documents related to (1)
3. Identify other stakeholders for this survey
4. Identify interest in participating in regional workshops on FPIC guidance

48 invitations to participate in this survey were sent per email to relevant stakeholders agreed upon by FSC-IC. The members of the Advisory Group were also included in the survey. In total 13 stakeholders responded to the survey of which 9 gave answers to the questions.

- Marcus Colchester; Forest Peoples Programme (FPP)
- Christoph Wiedmer; Society of Threatened Peoples (STP)
- Tom Van Loon; Interholco AG (DanzerGroup)
- Regan Suzuki; RECOFTC
- Petra Hamers; IDH The Amazon Alternative
- Kate Geary; Oxfam
- Anders Blom; Svenska Samernas Riksförbund, SSR (National Union of the Swedish Sami People)
- Emanuel Heuse; FLEGT facilitation in DRC
- Gregory Jean; FSC-IC

Participants at the Latin-America regional workshop (Lima, Peru):

- Martha Nunez, Ecuador (Social Chamber member)
- Jaime Levy; Altropico Foundation, Ecuador (indigenous peoples organization, member of FSC IP Working Group)
- Ana Patricia Gomes; Imaflora, Brazil (FSC Certification body)
- Luís Astorga Chile Agrupación Forestales por el Bosque Nativo, (AIFBN), Chile (social NGO)
- Margarida Cespedes; WWF Peru (environmental NGO)
- Maria Ines Miranda; SSC Americas, Chile (Consultant & Auditor)



- Marioldy Sanchez; AIDER, Peru (NGO)
- Miguel Jofré; Tironi Asociados, Chile (Consultant & researcher)
- Nancy Vallejo, Columbia (Researcher, independent consultant, FSC social south chamber)
- Paula Montenegro, Argentina (Local community and forester)
- Pina Gervasi; FSC Latin-America, Peru
- Veronica Salas; Taller de Acción Cultural (TAC), Chile (social NGO, FSC social chamber, local community member)
- Victor Vargas Instituto Forestal (GFA), Chile (Researcher, certifier)
- Yolanda Ramirez; AIDER, Peru (NGO)
- Ramón Rivero; Instituto del Bien comun (IBC), Peru (NGO)
- Rosa Almendares; COATHLAL, Honduras (community member)
- Alba Solis; FSC Peru
- Shoana Humphries; FSC-IC

Participants at the Asia-Pacific regional workshop (Bogor, Indonesia):

- Regan Suzuki; RECOFTC, Thailand (NGO)
- Peter Dam; ForCert (FM Group Scheme)
- Loy Jones; APCS (consultant)
- Daisuke Naito; Research Institute for Humanity and Nature (research institute)
- Linda Fienberg; Faculty of Architecture GO4 University of Sydney (member of social chamber FSC Australia)
- Christina Egenter; WWF Indonesia (NGO)
- Didik Purwanto; Peruhutani (company)
- Aisyah Sileuw; Daemeter Consulting (consultant)
- Indra Setiadewi; LEI (Indonesian certification system for sustainable forest management)
- Vanessa Linforth, Timberwolf Consultants (consultant)
- Shoana Humphries; FSC-IC
- Alistair Monument; FSC Asia-Pacific

Participants in the Reference Group

It is standard procedure for FSC to present draft documents for comments to a wide reference group including non-governmental organizations, indigenous peoples' organizations, companies, consultants, government agencies and universities. In total 89 individuals and all CBs and FSC national offices received the second draft of the FSC FPIC guidelines together with a comment form. From this group the following 10 persons provided their comments:

- Anton Greeff; New Forests Company (company)
- Alois Mabutho; Green Resources (company)
- Stuart Valentine; Forestry Solutions (company)
- Hans Djurberg; SCA Skog AB (company)
- Robert Hrubes; Scientific Certification Systems (CB)
- Chris van der Goot; Stichting ECOHOUT (NGO)
- Bradley Young; National Aboriginal Forestry Association (company)
- Edna Kaptoyo; Indigenous Information Network (indigenous peoples' organization)
- Matthias Baldus; Global Woods AG (company)
- Mogens Pedersen; International Woodland Company (company)



Annex 2: Overview of provisions on FPIC and indigenous peoples

The overview below presents some of the main provisions on free, prior and informed consent and indigenous peoples in international legal instruments, policies, jurisprudence and voluntary standards. Emphasis has been added.

United Nations General Assembly - Declaration on the Rights of Indigenous Peoples (2007)

Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 10 Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 28 Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 29(2) States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 30 (1) Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. **(2)** States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 32(2). States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.



International Labor Organization – Indigenous and Tribal Peoples Convention no. 169 (1989)

Article 4 (1) Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. **(2)** Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

Article 6 (1) In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. **(2)** The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7(1) The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 15 (2) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16 (2) Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

Article 17 (2) The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

Secretariat of the Convention on Biological Diversity - Convention on Biological Diversity (1993)

Article 8(j). Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Conference of the Parties Decision V/16 access to traditional knowledge, innovation and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.

Akwe: Kon Guidelines, para. 8 (e) call on governments or the “proponent of a development proposal” to establish “a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.”



**UN Committee on the Elimination of Racial Discrimination - General Recommendation No. 23
Indigenous Peoples (1997)**

Para. 5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

**UN Committee on Economic, Social and Cultural Rights – Concluding observations on
Ecuador (2004)**

Para. 35. The Committee strongly urges the State party to ensure that indigenous people participate in decisions affecting their lives. The Committee particularly requests that the State party consult and seek the consent of the indigenous people concerned prior to the implementation of natural resources-extracting projects and on public policy affecting them, in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

UN Human Rights Committee - *Ángela Poma Poma v. Peru*, Communication No. 1457/2006 (2009)

Para 7.6. In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

**Inter-American Court of Human Rights - *Saramaka People v. Suriname* Judgment of 28
November 2007**

Para 37. Most importantly, the State has also recognized that the “level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question.” The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.

**African Commission on Human and Peoples’ Rights - *Centre for Minority Rights Development
(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v
Kenya* (2010)**

Para 226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property.



International Finance Corporation - Performance Standard 7, Indigenous Peoples (2012)

Para 11. Affected Communities of Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, in addition to the General Requirements of this Performance Standard, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples in the circumstances described in paragraphs 13–17 of this Performance Standard. FPIC applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous Peoples. When any of these circumstances apply, the client will engage external experts to assist in the identification of the project risks and impacts.

Asian Development Bank - Safeguard Policy Statement (2009)

Indigenous peoples safeguards, Policy Principles, Para 4. Ascertain the consent of affected Indigenous Peoples communities to the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.

European Bank for Reconstruction and Development - Environmental and Social Policy (2008)

Performance Requirement 7 Indigenous Peoples. Para. 4. *Need for free, prior and informed consent.* This PR recognises the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required for the project-related activities identified in paragraphs 31–37, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.

Inter-American Development Bank - Operational Policy document on indigenous peoples (2006)

Par. 4.4 a (iii) For cases of particularly significant potential adverse impacts that carry a high degree of risk to the physical, territorial or cultural integrity of the affected indigenous peoples or groups, the Bank will further require and verify that the project proponent demonstrate that it has, through a good faith negotiation process, obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank's judgment, the sociocultural viability of the operation.

United Nations Development Group - Guidelines on Indigenous Peoples' Issues (2008)

Page 26 The mainstreaming of indigenous peoples' issues should, in general lead to key results such as: [...] Application of the principle of free, prior and informed consent in development planning and programming.



United Nations International Fund for Agricultural Development - Engagement with Indigenous Peoples Policy (2009)

Principles of Engagement: Free, prior and informed consent. In working with Member States on projects targeting or affecting indigenous peoples, IFAD shall support the participation of indigenous peoples' communities in determining priorities and strategies for their own development. When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent. The Fund shall consider this consultation and consent as a criterion for project approval. In appraising such projects the Fund shall verify whether they include measures to: (a) avoid potentially adverse effects on the indigenous peoples' communities; or (b) when avoidance is not feasible, minimize, mitigate or compensate for such effects.

United Nations Food and Agricultural Organization - FAO Policy on Indigenous and Tribal Peoples (2010)

Objectives for Engagement with Indigenous Peoples: FAO will establish measures to collaborate with indigenous peoples and discourage ventures that will have an adverse impact on their communities. When there is a direct impact or relation to indigenous peoples' issues, it will follow the provisions of the UN Declaration on the Rights of Indigenous Peoples that relate to free, prior and informed consent.

Climate, Community and Biodiversity Alliance and CARE International - REDD+ Social and Environmental Standards (2010)

Principle 1: *Rights to lands, territories, and resources are recognized and respected by the REDD+ program*

The REDD+ program requires the free, prior and informed consent of Indigenous Peoples and local communities for any activities affecting their rights to lands, territories and resources.

Roundtable on Sustainable Palm Oil - RSPO Principles and Criteria for Sustainable Palm Oil Production – including indicators and guidance (2007)

Criterion 2.3 Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent.

World Commission on Dams - Dams and Development: A New Framework for Decision-Making (2000)

(p. xxxiv) Decision making processes and mechanisms are used that enable informed participation by all groups of people, and result in the demonstrable acceptance of key decisions. Where projects affect indigenous and tribal peoples, such processes are guided by their free, prior and informed consent.

Annex 3: Overview of tools

This annex presents some resources which can be used when implementing FPIC in general or certain elements of a FPIC process.

Implementing FPIC in general

- RECOFTC. *Putting Free, Prior and Informed Consent into Practice in REDD+ Initiatives – A Training Manual*. Available at: www.recoftc.org

Identifying rights holders (step 1.1)

- UN Permanent Forum on Indigenous Peoples. 2008. *Resource Kit on Indigenous Peoples' Issues*. Available at www.un.org
- UN Development Programme. 2010. *Marginalised Minorities in Development Programming: A Resource Guide and Toolkit*. Available at: www.undp.org
- UN REDD Programme. 2009. *Operational Guidance: Engagement of Indigenous Peoples and Other Forest Dependent Communities*. Available at: www.un-redd.org

Community decision-making processes (iterative; see steps 1.2 and 1.3 and step 5.1)

- Holly Shrumm and Harry Jonas (editors), 2012. *Biocultural Community Protocols: A Toolkit for Community Facilitators*. Natural Justice: Cape Town. Available at: www.community-protocols.org

Establish multi stakeholder working group (step 2.1)

- Daviet, Florence. 2011. *A Draft Framework for Sharing Approaches for Better Multi-Stakeholder Participation Practices*. Available at: www.un-redd.org

Capacity building (step 3.1)

- Wignaraja, Kanni. 2009. *Capacity Development. A UNDP Primer*. Available at: www.undp.org

Participatory mapping (step 3.2)

- Chapin, M. and B. Threlkeld. 2008. *Mapping Indigenous Lands: A Practical Guidebook*. Centre for Support of Native Lands, Environmental Law Institute, Washington, DC. Available at: www.elistore.org
- International Fund for Agricultural Development. 2009. *Good Practices in Participatory Mapping*. Available at: www.ifad.org
- Evans, K. et al, CIFOR, 2006. *Guide to Participatory Tools for Forest Communities*. CIFOR, Bogor, Indonesia. Available at: www.cifor.cgiar.org
- Galudra, G. et al. 2009. *RaTA: A Rapid Land Tenure Assessment Manual for Identifying the Nature of Land Tenure Conflicts*, World Agroforestry Centre (ICRAF), Bogor, Indonesia. Available at: www.worldagroforestrycentre.org
- Mather, R. et al. 1998. *Aerial Photographs and 'Photo-maps' for Community Forestry*. Rural Development Forestry Network (RDFN) paper 23e. ODI, London. Available at: www.odi.org.uk

Participatory Impact Assessments (step 3.4)

- Secretariat of the Convention on Biological Diversity. 2004. *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*. Available at: www.cbd.int

Establish complaint and dispute settlement mechanisms (step 5.3)

- The Office of the Compliance Advisor/Ombudsman for the International Finance Corporation (IFC) Multilateral Investment Guarantee Agency (MIGA). 2008. *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*. Advisory Note. Available at: www.cao-ombudsman.org
- International Finance Corporation. 2009. *Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms*. Good Practice Note, Number 7. Available at: www1.ifc.org
- Corporate Social Responsibility Initiative, John F. Kennedy School of Government, Harvard University. 2008. *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, CSRI Working Paper No. 41, Cambridge MA. Available at: www.hks.harvard.edu
- Post, David and Sanjay Agarwal. *Feedback Matters: Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects Part 1: The Theory of Grievance Redress, and Part 2: The Practice of Grievance Redress*. Available at:

Evaluation and verification (step 6.2)

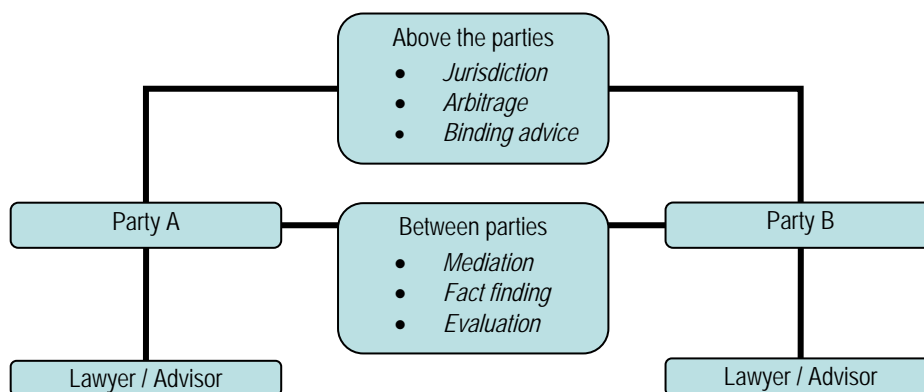
- Quang Tan, Nguyen, et al. 2010. *Evaluation and Verification of the Free, Prior and Informed Consent Process under UN-REDD Programme in Lam Dong Province, Vietnam*. Available at: <http://vietnam-redd.org>
Remark: The UN-REDD global program is piloting an independent verification and evaluation process as part of its approach to FPIC. This latter effort, in partnership with RECOFTC, is intended to lead to the development of a toolkit for evaluators of FPIC processes in the REDD+ context.

Annex 4: Alternative Dispute Resolution

The overall aim of a grievance process should be to gain or restore trust and build consent and should cover three types of disputes: (1) disputes about the process of getting the consent, (2) those relating to the agreement itself and (3) those relating to relations between the project proponent and the communities more generally (issues not covered by the agreement). A grievance mechanism developed with a community has the advantage of a locally based and mutually beneficial way to settle issues within the framework of the agreement between the two parties. An emerging recommended practice is to embed a blueprint for a dispute resolution mechanism in the agreement that embodies consent.²³

An effective grievance process must be accessible to the community, with a designated and respected person from the community and from the forest company to receive grievances, and an agreed process and panel to hear grievances. The designated person from the Organization is a key person and might resolve many problems before they escalate into a larger conflict. The conflict resolution mechanism should include the possibility of independent mediation or arbitration, and recourse to legal or administrative remedies if negotiations break down.

Be aware of the difference between mediation and arbitration. There are many ways to describe this difference, here is one:



ADR: Alternative Dispute Resolution

- A mediator is positioned between the parties. He/she does not judge at all. In theory, the mediator does not even give advice but facilitates the parties to reach a solution that satisfies them both. The mediation results in a binding agreement signed by both parties. If successful, mediations can establish a strong working relationship in addition to resolving the conflict
- An arbiter is positioned above the parties. He/she can facilitate the process in the same way as a mediator but usually an arbiter is chosen in order to give advice. But the key difference is that at the end, if parties do not have a joint solution, it is the arbiter who decides. That decision is binding for the parties involved – just like a legal verdict is. This means that the conflict is not resolved to the satisfaction of both parties and this is a higher risk that the conflict comes back. That is one of the reasons FSC advises to use mediation as a preferred option above arbitration
- Both are fully independent from the conflicting party, are chosen by both parties and have their full trust.

²³ Lehr et al (2010), p. 48



FSC International Center
Charles de Gaulle Str. 5
53113 Bonn
+49 228 367 66 0
fsc@fsc.org

