Kenya Wildlife Conservancies Association
Living nature, Living people

FREE, PRIOR, AND INFORMED CONSENT (FPIC)

A GUIDE FOR CONSERVANCIES IN KENYA



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Production: This edition has been produced by KWCA through technical support by Kimaren Riamit, Advocate of the High Court of Kenya/ Human Rights Practitioner with financial support from USAID under the Kenya Conservation Policy- Local Works Project and The Nature Conservancy.

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USAID FROM THE AMERICAN PEOPLE

The Nature Conservancy

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Abbreviations

AGM	Annual General Meetings
AJS	Alternative Justice Systems
CBOs	Community Based Organizations
CSOs	Civil Society Organizations
CLA	The Community Land Act, 2016
CLC	Community Led Conservation
CLMCs	Community Land Management Committees
EMCA	Environmental Management and Coordination Act, 1999
FPIC	Free Prior and Informed Consent
HRBA	Human Rights Based Approach
IPs	Indigenous Peoples
KWCA	Kenya Wildlife Conservation Association

Definition of Terms

Community Land Management Committees: The committee of seven to fifteen members elected by the Community Assembly under section 15(3) of the Community Land Act, 2016.

Equity: This is a principle that advocates for treating individuals and groups in a way that is free from discrimination, bias, or favoritism, and that considers their unique circumstances and needs. Equity aims to ensure that everyone can achieve their full potential and access resources, benefits, and opportunities on an equal basis, regardless of their background, identity, or circumstances.

Human Rights Based Approaches: This is an approach that places human rights principles at the center of conservation efforts. It seeks to ensure that conservation initiatives respect and protect the rights of indigenous peoples, local communities, and other stakeholders who rely on these resources for their livelihoods.

Indigenous Peoples: The United Nations defines Indigenous Peoples as inheritors and practitioners of unique cultures and ways of relating to people and the environment. The Constitution of Kenya, 2010 in Article 260 considers an indigenous community as a marginalized community that has retained and maintained a traditional lifestyle and livelihood.

Non-State Development Actors: A diverse range of organizations that are not directly affiliated with the government but complement the efforts of governments and intergovernmental organizations in addressing pressing global issues such as poverty, inequality, climate change, and humanitarian crises.

UN Human Rights System: This is a framework of international treaties, organizations and mechanisms established by the United Nations to promote, protect, and monitor human rights around the world.

About This Guide

KWCA upholds the increasing national and global recognition and action towards effective engagement of indigenous peoples and local communities in the conservation and management of lands and natural resources.

KWCA recognizes and respects the right by communities as the primary stewards of land and natural resources, thereby their inherent right to self-determination. KWCA is committed to the principles that safeguard and promote human rights-based approaches to conservation including through Free, Prior and Informed Consent (FPIC).

It's against this background that KWCA, has developed this guide for FREE PRIOR INFROMED CONSENT (FPIC) to promote community safeguards for the benefit of the people and nature.

This guide is designed to inform conservancy members and conservancy stakeholders on what FPIC is all about and how to apply FPIC when developments and investments are occurring in community lands and more so within conservancy context.

The Guide is practical, to facilitate dialogue between the community and project developers, investors and relevant stakeholders from the project proposal, design and implementation.

The Guide provides the circumstances within which FPIC applies for conservancies, the foundational principles within which FPIC is founded, the practical steps on FPIC, and stakeholders who can support communities in the FPIC processes.

1 Introduction

1.0 INTRODUCTION

1.1 The Context

Wildlife conservancies have made significant positive developments in terms of growth in numbers, land size, innovative governance arrangements, social infrastructure, household incomes, in the range of benefits available for stakeholders.

Notwithstanding the developments by conservancies, numerous challenges persist:

- Enforcing equity and respect for rights in land governance;
- Just conflict resolution;
- Fair sharing of benefits;
- Ensuring transparency, responsibility and accountability;
- Achieving sustainable conservation objectives; and,
- Promoting best performance with respect to effective and fair application of rules and laws.

Decision making structures and processes in conservancies vary depending on factors including:

- Who owns the land (private, community)?
- What is the governance and management model?
- How do landowners, community and investors work together?
- How is the decision making by landowners, community and development partners and community support organizations occur?
- How are the landowners organized and benefits shared?

These factors influence the governance structures in-place which then influence the level and degree of representation of communities and landowners on issues that have an impact on their rights to land and natural resources. Often, Annual General Meetings (AGMs) are the platform for collective decision-making in conservancies and the decisions made during these meetings include:

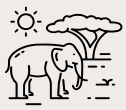
- Conservancy establishment
- Election of the board members
- Conservancy management needs and structures
- Community development
- Selection of business/ investment and partners
- Benefit sharing arrangements

Historically, the community land ownership model within which the community conservancy decision making model is premised, has largely excluded women, youth, marginalized communities, including indigenous people, and Persons With Disabilities (PWDs.) In an effort to find a fine balance between human needs, wildlife survival, ecosystem resilience and need for profits; indigenous peoples & local communities, conservationists, tourism investors and state actors are often on opposite ends of the stick.

1.2. Rationale for FPIC Guidelines in Wildlife Conservation on Community Land

Wildlife conservation and management is encouraged and recognized as a form of land use on public, community and private land, under the Wildlife Act 2013[1].

Over 75% of the wildlife occurs outside State Protected areas, (*National Parks and National Reserves*).



Community lands in Kenya take account of **over 80%** of the Country's landmass, making the communities and indigenous peoples the primary stewards of wildlife among other natural resources. In the past 3 decades, the wildlife conservancy model has developed, both as a land use and institutions of community and private landowners, to facilitate structured conservation, income generation which offsets wildlife conservation costs and enable community development.

The dynamics of wildlife conservation on community land are diverse. Community lands are structured through collective ownership and decision-making, customary rights and interests, multiple land uses, and different needs and priorities of communities. For community conservation to sustainably deliver community and conservation needs, an inclusive participatory development approach is paramount, thereby enabling community owned and driven decisions, and importantly, mitigate against land and resources related conflicts, which in some instances, have generated loss of life and properties, court cases and wastage of resources. The inclusive community participatory approaches should be able to:

- address specific community needs;
- reflect on-the-ground realities;
- respond to the challenges of exclusion of some community members including women and youth, elite capture, corruption and dissatisfaction; and,
- give a voice to the minority community of a community

The rights and special circumstances of indigenous peoples and local communities are increasingly being recognized and promoted through direct representation and engagement; and incorporating their views into policy, legal and development processes.

1 Wildlife Conservation and Management Act, 2013, Section 4(d)

KWCA recognize and advocates for adoption of FPIC, as a process right that enables meaningful engagement of communities, which subsequently enables realization of substantive rights and social justice. The duty to consult and seek for FPIC should be embedded solidly in coherent human rights and governance frameworks of conservancies that respect community's substantial rights. Application of FPIC principles and processes enables operationalization and respect of human rights.

Principles of FPIC are anchored in the Constitution of Kenya 2010 that commits to promote social justice and the realization of the potential of all human beings. The application of FPIC has emerged as a good practice within the policies of the UN Human Rights System[2]; UN Environmental & Conservation Conventions[3]; UN Development Agencies commitment to safeguarding IPs' rights including FPIC principles[4]; International Financial Institutions (IFIs) and Multilateral Development Banks (MDBs)[5]. This is further evidenced through the growing domestication of FPIC within national legislation frameworks and Non-State Development Actors (NSDA).

These FPIC Guidelines are therefore intended to provide comprehensive, but simplified content on the practical and contextualized application of FPIC principles by all conservancy stakeholders for the identified collective actions.

These guidelines are designed to promote community safeguards to the interests and common good of conservancy stakeholders:



i. Protect and respect the rights of affected community members
ii. address concerns of discrimination and gender exclusion of women, youth and persons with disabilities in governance and management
iii. promote the rights of indigenous peoples and local communities to self-determination and to fully participate in the decisions
iv. ensure that communities are consulted regarding any activity and potential impacts
v. strengthen mechanisms for benefit sharing
vi. enhance community engagement and strengthen access to information
vii. ensure that a grievance and redress mechanism exists for reporting human rights abuse.

2 ILO Convention Indigenous and Tribal Peoples in Independent countries - 169/1989; United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) of 2007; Office of Special Rapporteurs on Indigenous Peoples Rights Business and Human Rights - UN Guiding Principles on Business and Human Rights, with response to IPs rights and interests

3 Convention on Climate change (UNFCCC)- Paris Agreement on IPs rights and UNFCCC Cancun safeguards; Convention on Biological Diversity (CBD) – Art. 8(j)

4 International Fund for Agricultural Development; Green Climate Fund (GCF)

5 WB Environmental and Social Standards (ESS7); European Bank for Reconstruction and Development

Indicative Circumstances Requiring FPIC

- In establishing a wildlife conservancy
- Projects, investments or activities with potential Impacts on lands and natural resources subject to customary or communal ownership, use or occupation e.g. tourism facilities, carbon development, exploitation of mineral, water or other resources;
- Relocation of communities from their lands and natural resources subject to traditional ownership or under customary use or occupation.
- Cultural heritage: Where activities supported by an entity including conservancies support organisations may potentially impact cultural heritage, of communities such as cultural and/or spiritual value
- Whenever interventions undertaken present potential serious implications on community's health, territorial integrity collective identity, cultural integrity, livelihoods, social cohesion, and wellbeing.

2

Foundational Guiding Principles of FPIC

Foundational Guiding Principles of FPIC

1. **Recognition of and upholding international human rights and principles.** FPIC is founded on the HRBA that respects the principles & rights set forth in international, regional and national instruments relating to the indigenous peoples and local communities in Kenya.

2. **Respect and recognition of traditional knowledge and livelihood systems.** FPIC recognizes, respects and values indigenous peoples and local communities cultural heritage as well as their traditional knowledge and indigenous ways of ownership and knowledge transmission. It promotes the participation and leadership of traditional knowledge holders in decision making.

3. **Respect for rights in property:** FPIC respects and supports indigenous peoples and local communities' rights related to land and natural resources, resource management systems and practices, occupations and livelihoods, customary institutions, and overall well-being.

4. **Recognition of IPLCs right to self-determination:** FPIC respects for the right of communities to freely pursue their economic, social, and cultural development and their right to self-governance/organize in matters relating to their internal and local affairs, as well as ways and means for financing their decision-making functions.

5. **Right to access to information:** This is a core requirement and central principle in FPIC. Access to information ensures a clear understanding of the full range of potential risks and impacts across the project or investment life cycle, enabling people make informed decisions. Community awareness on the existence or contents of the documents including the documentation of the consultations, negotiations, and ultimate agreements - proper, accessible documentation, and consultations about potential positive and negative impacts of projects or to verify the contents of the agreements themselves – is foundational for FPIC.

   Particular attention should be placed on the range of positive and negative social, economic, environmental and political potential impacts. This information should go beyond short-term concerns to ensure that FPIC consultations clearly explain immediate issues (such as a request for enlisting land for conservation) and

those related to long-term implications. This information should also be given in appropriate languages and should be readily accessible by all community members. The overall goal is to ensure that communities have adequate information to make informed choices in the FPIC process.

6. **Access to independent expert advice:** Communities have the right to receive support to access information directly from an independent unbiased technical external expert/third party advisor. The option of taking advice from independent external specialists is especially necessary where communities face social, economic, and political marginalization. Communities should appoint the external advisor. In the event that the community has limited capacity to appoint the external advisor, then the support to community to appoint should be carried in consultation with the community.

   The information sought by the community from external advisor need to provide on the potential short-term and long-term benefits and risks of proposed investments or project. The expert should help ensure that community members really understand options, air their questions and concerns, discuss differences of opinion and enable the community to come to a consensus without the influence of those proposing the project. They should also help the community compile and use documentation in monitoring processes after any agreements.

7. **Consultation, participation & representations:** The application of FPIC involves effective and meaningful consultations with representatives and representative institutions of indigenous peoples and local communities. This consultation should be through appropriate procedures particularly in activities that affect lands, natural resources, livelihoods and cultures. In undertaking such consultations, efforts should be made to ensure cultural and location sensitivity, openness, comprehensiveness, and transparency

8. **Knowledge transfer:** Every society including the community set-ups is composed of women, men, youth, elderly people, and diverse marginalized groups, all of whom have varying levels of capacity and opportunity to engage in negotiations. This creates power imbalances between private sector, government technocrats, development partners, NGOs and remote rural communities. There is a requirement that consent in the FPIC process is granted by a diverse range of community members, and not only by the educated and leadership elites.

To prevent injustices, FPIC should be designed in a manner that ensures that the full range of community members are informed, involved, understand the issues, and are able to participate meaningfully. This is best achieved by proactively accounting for and responding to inherent internal inequality and inequity within communities in the conservation landscape. FPIC processes should therefore be carefully designed to ensure sufficient representation of all segments of the community to avoid elite capture during consultations and in agreements.

Effective participation by communities in negotiations, decision making, implementation of projects or investments development and benefits from the projects require building their capacities in the following key areas:

- equity in representations
- level of understanding of the projects or investments
- the relevant applicable legal frameworks
- negotiation skills
- documentation to ensure transparency and accountability
- technical competence in monitoring action plans, financial management, overseeing contractors and accountable governance and decision-making processes

3

Unpacking FPIC

Unpacking FPIC

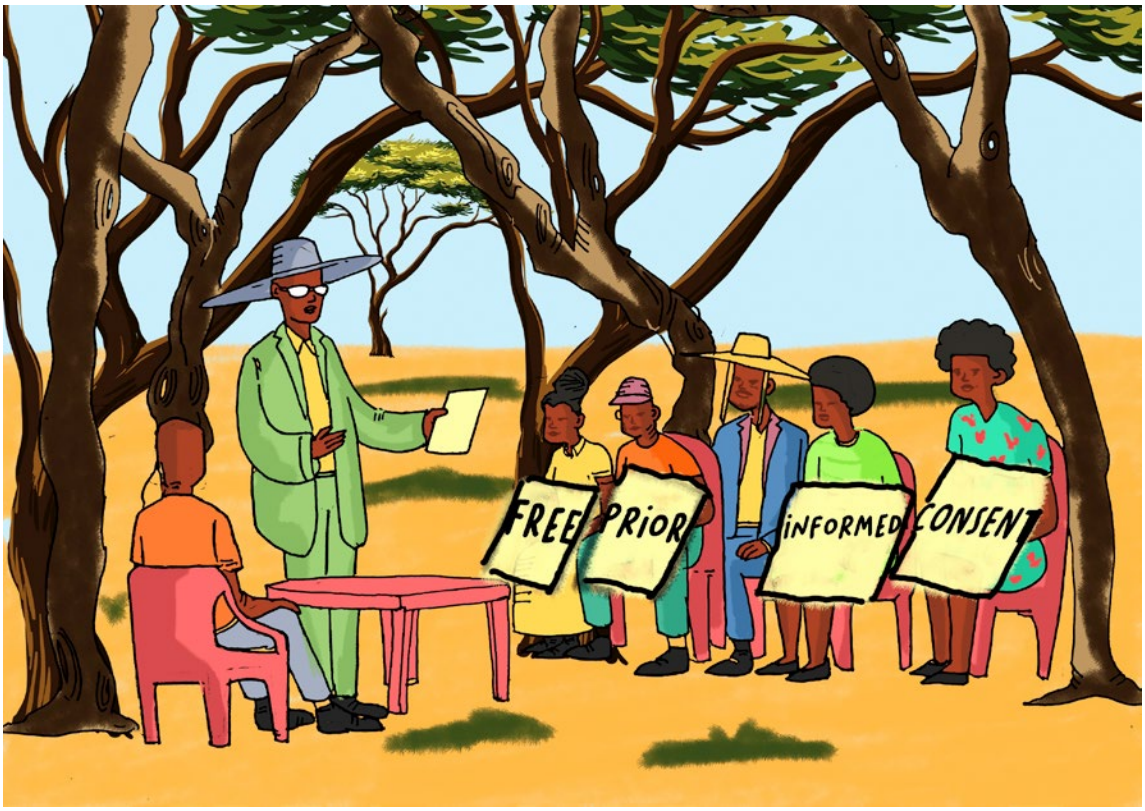


Image 1: FPIC explained

3.1. What is FPIC?

FPIC stands for **FREE, PRIOR** and **INFORMED CONSENT**. It is a mechanism and a process whereby communities undertake their own independent collective decisions on the matters that affect them.

What is FREE? No external interference and pressure on communities from any other groups, bodies, and entities in the decision-making process. It is freedom from any manipulation, bribery, or intimidation.

PRIOR to What? The green-light should be given by communities in advance before the commencement of any activities, projects or investments that affect their rights.

The communities should be given time to understand and analyze the proposed project or investment and secondly to make decisions after analyzing the effects and impacts of the proposed project or investment.

What is INFORMED? Communities likely to be affected by activities have a right of access to information, full disclosure and understanding of the potential project's OR investment impacts.

This includes the freedom of participating communities to secure additional information from other sources, besides those proposing a project and an equal right to change and/or review their decision based on emerging facts.

What is CONSENT? This is a collective decision-making process of indigenous peoples that involves several steps that should be consultative, transparent, inclusive and well-informed. There should also be meaningful and accountable participation of the community representatives in the decision-making process.

3.2. Implementing FPIC

Implementing FPIC is dependent on a number of factors including the nature of the project or investment, the number of people affected, culture of community, diversity of community, decision making structures and processes of community, among others. However, below are the generally acceptable steps when implementing FPIC.



Image 2: Steps in implementing FPIC

Step 1: Stakeholder Identification

Communities affected by the project or investment and their needs are identified. It is necessary to identify them through the already established community structures such as the Community Assembly, community land management committees (CLMCs), council of elders and local administration such as sub-county and ward administrators, or local administrators such as District county commissioners and area chiefs. In most cases, multiple sources will be required for verifications.

Natural resources and land use patterns should also be identified at this stage through participatory mapping and interviews. In majority of community set-ups, natural resources have cultural significance and influence settlement patterns, and have both social and economic impacts. In the case of pastoral communities, projects affect their migratory routes and access to pasture. Neighboring communities likely to be affected by the project must also be identified because of trans-boundary resources.

The above is particularly important in projects that have potential impacts on land and natural resources subject to traditional ownership under customary use or occupation.

Step 2: Information Sharing



Image 3: Meaningful and participatory information sharing sessions

In FPIC, communities need to make their own decisions at their own timings without external influence. Timely information should be provided accurately and in a language that is understandable to all. The positive impacts of the project as well as its negative ones should be shared with the community.

At this stage, information on the environmental, social, and cultural impacts of a project and how such impacts will be managed, need to be shared. The Environmental Management and Coordination Act, 1999 (EMCA)[6], requires that the following conservation projects prepare an Environmental and Social Impact Assessment (ESIA) study report:

(a) creation of national parks, game reserves and buffer zones;

(b) establishment of wilderness areas;

(c) formulation or modification of forest management policies;

(d) formulation or modification of water catchment management policies;

(e) policies for the management of ecosystems, especially by use of fire;

(f) commercial exploitation of natural fauna and flora;

(g) introduction of alien species of fauna and flora into ecosystems.

This ESIA identifies possible negative environmental and social impacts and how they can be avoided, mitigated against, monitored, managed, and/ compensated for.

Local vernacular radio stations and *barazas* are most effective when communicating with local communities, but there should also be flexibility on the channels of communication. The mobility and availability of agro-pastoral communities is also affected by seasons such as planting and harvesting seasons and during drought when they migrate in search of pasture.

Meetings intended for information sharing should therefore be held at times that take these special factors into consideration.

Cultural consideration must be respected at all times. For instance, some communities might request men-only meetings, and women-only meetings before they can jointly share one platform. The proceedings for the meetings must also be documented in the form of minutes and shared with the communities through their representatives.

Step 3: Community Consultations



Image 4: Independent and informed community consultations

The decision on whether a project that affects community rights should go ahead, entirely lies with the community(ies). It is paramount that communities are given adequate time to discuss the project without the presence of the investors or government officials involved in the project, through their own leadership structures. Project developers, investors and relevant stakeholders are therefore required to leave key documents that enable effective decision making with the community for further discussions.

Among the important discussions to be made by the conservancies include the period of the project, whether the project requires land leasing and period of the lease, size of the land required and whether this shall lead to relocations, project's impacts on health, territorial and cultural integrity, collective identity, livelihoods, social cohesion among others.

The community may also decide to consult trusted community-based organizations, non-governmental organizations, technical expert on the proposed project, government institutions or other institutions to guide them in understanding the project better. In the event due dates for decision making by communities are issued, the such timelines should be within reasonable period, factoring all the important elements that affect the nature of the decisions. These include the decision-making structures and processes, the vastness of the community area, and the complexity of the proposed project or investment.

Step 4: Negotiations and Consent



Image 5: Independent and informed community consultations

The community intent or commitment to proceed with the project or investment should be confirmed through:

- Signed resolution and minutes as per the threshold of community decision making
- Highlights of the key terms agreed by the community
- Documentation of adequate reach-out and consultation of the community, to ensure consensus building by majority of the community, through the adopted community structures

The scope of the terms agreed upon by the community and the project developer require to be formally documented and signed in an agreement. The agreement should be drafted in simple language that the community understands, and community confirm the content through its own meeting, in which the investor or project develop is not present. This is to avoid undue influence from the project developers or other interested parties. The agreements should set out mutually agreed and realistic terms rights, roles and obligations and deliverables of project proponents and communities. Conservation related agreements, which are long-term in nature, require flexibility, to accommodate possible re-adjustment over time.



Image 6: Fundamental components of negotiation and consent.

Key considerations for the community and other parties agreements include:

1. Drafting in a language that can be easily interpreted to the community with clear terms that have no ambiguity
2. Capturing major highlights of the project including description of the project and its deliverables, durations of agreement or lease, the size of land required for the project and the actual location of the land (include GPS coordinates and boundaries), the rights and obligations of the community and the project developer and investor, safeguards for community and the environment, review and renewal terms, dispute resolution, handover of project or its resources to community and termination
3. Revenue sharing/royalties; employment and training opportunities; business development opportunities
4. A clear distinction between agreed community benefits for opportunity costs foregone, impact compensation and corporate social responsibility commitments
5. Land access, allowed land uses by community within the areas of the project and recognition of land rights
6. Provide major players and signatories to the agreement
7. Implementation and management plans timelines

8. Contingencies and accountability mechanisms for addressing unmet obligations, and protocols for managing conflicts and grievances
9. Protection of cultural heritage and environmental management;
10. Provision to allocate resources for legal counsel, independent monitors or advisors, or funding/capacity for community
11. Consider access of rights of third parties that may have interest in the community land that is subject of including neighboring communities e.g use of a natural resource such as livestock salt licks, water and pasture access, cultural and spiritual sites

References for developing Agreements between Community with Investors or project developer

1. Community Land Act 2016 & Community Land Regulations 2017 provides for key areas for inclusion in community agreements as highlighted below under Regulation 22
2. Community by-laws- some communities have developed their own by-laws on how to engage with potential investors and partners with the guidance of national legislations including the Community Land Act
3. KWCA guide on Community- Investor Guidebook
4. Regulation 22 of the Community Land Act 2017 Regulations highlighted below.

   (2) In determining whether to allocate land to individuals or partners for investment purposes, the community land management committee shall ensure that-

   a) the land is geo-referenced and planned in line with national and county spatial plans;

   b) public consultations are made by placing a notice in, at least two daily newspapers of nation-wide circulation, one local newspaper and local radio station, where applicable, and affix notices at the County, Sub County and ward offices inviting comments on or objections to the intended reservation of community land containing the following-

      i. a description of the property in issue;

      ii. details of the envisaged investment;

      iii. specify the date, venue and time of the public consultations; and,

      iv. a specified period of at least thirty days period for making the representations.

   c) the investor demonstrates and provides evidence of the accruing benefits of the investment to the community.

Step 5: Feedback and Complaints Mechanisms



Image 7: Feedback

The feedback and complaints mechanism can either be part of the agreement or as a separate mechanism to enable structured feedback on the implementation of the agreement and further facilitate address of complaints or concerns raised in a participatory manner. The compliants and concerns include both internally as a community, with the investor or project developer and with third parties.

The complaints feedback and complaints mechanism should consider customary laws, applicable laws in Kenya and the Alternative Justice Systems (AJS) of the indigenous peoples as appropriate.

The scope, scale and type of feedback and complaints mechanism required for a project or community will be proportional to the nature and scale of the potential risks and impacts of the project or community's operations.

Nevertheless, a good feedback and complaints mechanism will include the following:

1. Publicly communicated procedures, which identifies:
    - the means for submitting grievances,
    - the length of time the persons involved can expect to wait for acknowledgment, response, and resolution of their grievances

- description of the transparency of the procedures
- the governing and decision-making structures and how they are involved in the grievance address and other parties that can be included in the process

2. Provide multiple options for which affected communities can submit their grievances
3. Steps in withdrawing or varying consent
4. Parties involved in investigating and addressing complaints.
5. Takes into account language diversity and limitations.
6. Provision for interpretation/translation to overcome language barriers/limitations.
7. Maintain confidentiality for complainants identified as such especially in instances where the complainants fear retaliation
8. A database where grievances and feedback is registered in writing and maintained as a publicly available. The database should include information about the complaint and the resolution of the complaint, including the remedy provided, taking into consideration that complainants' identities can be kept anonymous if requested.
9. An appeals process to which unsatisfied grievances may be referred when the resolution of grievance has not been achieved
10. Measures to protect complainants from retaliation
11. Provides for mediation (or similar dispute resolution or problem-solving services)
12. Gender sensitive feedback and complaints mechanisms
13. There shall be neither costs nor retribution associated with lodging feedback of complaints

Step 6: Continuous Monitoring and Documentation

Continuous monitoring of the implementation of the project and documenting the lessons learnt is key to ensure whether the project or investment deliverables are realized as per the agreement and implementation plan.

There are various monitoring, evaluation and documentation tools that can be accessed by communities. Such tools require to be flexible enough to address unforeseen circumstances, project modifications and shifts within investors, the community, or environment.

Communities are encouraged to engage independent institutions, experts or institutions supporting the community to be involved in the monitoring.

4

Key Stakeholders: Roles, Coordination & Engagement

Key Stakeholders: Roles, Coordination & Engagement

Conservation agendas go beyond the responsibility of a single actor/stakeholder. They require concerted efforts of multiple stakeholders in order to have the meaningful desired impacts. Robust collaborative approaches on key issues is an important foundation to FPIC.

Issues such as human wildlife conflict, compensation for life and property losses, addressing insecurity, carrying capacities and safeguarding provision of ecosystem services including Carbon sequestration- all call for collaborative multi-stakeholder engagement.

Among the stakeholders central to conservancy processes and which are central to the FPIC processes include: landscape associations, councils of elders, community land management committees, age-set leadership, CBOs/NGOs, Trusts) and, where appropriate, other community members, including indigenous women and youth.

National and county governments have obligations to support the development of local communities, regardless of available external investments, especially in light of marginalized communities as provided under Article 260 of the Constitution.

Governments (*national and county*) also have an obligation to provide oversight and support to communities in areas such as witnessing processes and agreements, monitoring, and overseeing compliance and building community capacity to negotiate.

While CSOs may not have formal roles in negotiations, they nonetheless play critical roles in areas such as helping communities to better access and understand information, facilitate community mobilization & coordination, serving as advocates for community interests, delivering local services and helping to address complex gender and power dynamics within communities. CSOs present in the landscape of interest will remain a critical actor to be engaged by community including the respective landscape associations.

Annex

FPIC Checklist

Annex 1: FPIC Checklist

Guidance to Implement Six Steps of a FPIC Process

This checklist can be used to determine whether conservation managers have effectively obtained free, prior and informed consent (FPIC) from a community before beginning a certain project or activity. You need to obtain FPIC if the project will have any impact on community rights to resources, lands and territories. This includes the rights of local communities to access, use and manage land and resources, and their rights to consume and sell products from the land.

In addition to using this checklist to determine whether FPIC has been effectively sought and obtained, you can use it to develop a standard process for obtaining FPIC. This process should be set down in policy. You can develop that policy by looking at each of these questions, and for each of them, asking yourself, "how will we do this?". Your answers to those questions, written down, will become the standard process for how you obtain FPIC.

Step 1: Identify rights holders and their representative institutions

1.1 Identifying rights holders

- ☐ Are you planning an activity that will impact community rights to resources, lands and territories?
- ☐ Do you have a process for identifying communities who may be affected, and who should be engaged with to obtain FPIC?

1.2 Identify claims and rights

- ☐ Do you have records of all existing claims of rights to resources, lands and territories, of the communities you are working with?

1.3 Examine and record how communities make decisions

1.3.1 Communities' and peoples' own institutions and processes

- ☐ International law requires 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.

- ☐ Do you know how each community ordinarily makes its decisions about issues like the ones you bring to them?

  NB: These decision-making structures may be:

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

- ☐ Does your policy describe the usual decision-making and conflict-resolution processes of the community, and specify that decisions relating to your activities will be made using the same process?

- ☐ Do you have a process in place of ascertaining that the communities chose the people who you are speaking with, to represent them in negotiations?

1.3.2 Make sure process is inclusive

- ☐ International law requires that the functioning of indigenous institutions should be "in accordance with international human rights standards" and calls for particular attention "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities".

- ☐ Do you have a process in place to ensure that while relying on traditional decision-making practices, you are also making sure the voices of women, youth, people with a disability, and any other marginalised group within the community are heard? Eg, you might:

  - *Create a parallel representative community structure - a committee that includes representatives of all stakeholder groups (all ethnic groups, women, elders, youth), and which can feed into or provide its own opinions and decisions to the traditional decision-making structure.*
  - *Consult with local youth, women's and other community-based groups.*

- ☐ Is this process documented in your policy?

Step 2: Provide information

2.1 Compile and publish information in an understandable and easily accessible way

- ☐ You are required to provide community members with access to information about the projects being planned in their communities.
- ☐ Do you circulate information about intended projects carried out in the community conservancies before implementation?
- ☐ Do you undertake Social and Environmental Impact Assessments for new projects?
- ☐ If so, do you communicate the results of these assessments to the community? If not, do you include details about both any benefits, and any infringements on the communities' use of the land, or harms, that the project might cause?
- ☐ Do you invite comments from community members on the project?
- ☐ Do you allow a reasonable time period for the submission of the comments?
- ☐ Do you write reports on how due account was taken of any comments that were received?
- ☐ Do you take action to ensure the information is able to reach, and is understandable to, everyone in the community? For example:
  - *Providing the information in different languages if there are different language groups; or both orally and in writing, if there are different levels of literacy?*
  - *Ensuring the language used is accessible, and technical or legal terms are explained?*
  - *Travelling to different areas to transmit the information?*
- ☐ Do you have a way of determining how far the information has been transmitted?

2.2 Disseminate specific information regarding legal rights, claims, and duties of potentially affected persons

- ☐ Does the information you provide about the projects you are undertaking include a section that specifically informs people about any impact these projects will have on their legal rights, claims or duties?

Step 3: Ensure community participation in decision-making

3.1 Undertake consultations

- ☐ Once you have first provided communities with information about projects that may impact their rights, do you then call them together for a consultation?
- ☐ Do these discussions occur prior to and continue throughout the time the activity is conducted?
- ☐ Do you take action to ensure that everyone who is impacted by the project is able to attend these consultations? For example, do you:
  - *Hold consultations in different languages if there are different language groups?*
  - *Have facilitators or co-facilitators at the consultations who are familiar to and trusted by the communities?*
  - *Travel to different areas to allow everyone to participate?*
- ☐ Do you have a rule that the consultations should be timely, proactive (meaning initiative by you, rather than waiting for the community to request them), transparent, and proportionate to scale, intensity and risk of the project?

3.2 Seek and promote Free, Prior and Informed Consent

- ☐ Do you require that free, prior and informed consent (FPIC) is obtained from communities for projects that will have an impact on their rights and interests?
- ☐ Does your process recognise different levels of consent? Eg:
  - *Consent to enter into conversations or negotiations about beginning a project.*
  - *Consent for part of the project to go ahead.*
  - *Consent for a pilot project.*
  - *Consent for the project in its entirety.*
- ☐ Do communities have the right to withhold consent at decision-making points during the project cycle?
- ☐ Is your FPIC process based on the community's preferred procedures for consent?

- ☐ Have you given community members the opportunity to oppose or propose an alternative consent process?
- ☐ Does your FPIC take into account the opinions of women and marginalised groups, such as youth and people with disabilities? Do you have mechanisms in place to bring these groups into the conversation?
- ☐ Do you have a way of ensuring that women, youth, and other marginalized groups are satisfied with the way they are represented by the existing decision-making institutions and processes?
- ☐ Is sufficient time and support given so that community representatives can consult within their communities?
- ☐ When consent is eventually given, is this recorded, along with any other relevant details of the consultation?

Step 4: Provide conflict resolution mechanisms

4.1 Establish arrangement for complaints, disputes and conflicts

- ☐ Despite good intentions and optimal efforts, the affected rights holders can have complaints or grievances about you or the projects you implement. You should have clear and satisfactory arrangements regarding how to deal with these situations.
- ☐ Do you have in place mechanisms through which community members can complain if they believe FPIC was not adequately sought or obtained?
- ☐ Is the grievance process able to hear and address concerns people have about being excluded from the decision-making process?
- ☐ Were these grievance mechanisms established through engagement and with the input of the community?
- ☐ Do you have a grievance tracking and response system in place?

4.2 Have rules around how to respond to complaints and conflicts

- ☐ Do you make clear to communities how complaints will be responded to?
- ☐ Do you have a process through which feedback will be given to complainants?

- ☐ Does the grievance process include provisions and protocols for withdrawing consent if there is community consensus to do so?
- ☐ Do you have a rule in place that you will not proceed with a project if there are major conflicts that have not been resolved?

Step 5: Take reasoned decisions

- ☐ Do you have a policy requirement that before a decision on whether to make ahead with a project takes place, the decision-makers must ensure that appropriate consultation has taken place, and FPIC has been legitimately obtained?
- ☐ Do you communicate the decision for moving ahead, and the reason for that decision, to all community members? Do you take action to ensure the decision is able to reach, and is understandable to, everyone in the community? For example:
  - Providing *the decision in different languages if there are different language groups; or both orally and in writing, if there are different levels of literacy?*
  - *Ensuring the language used is accessible, and technical or legal terms are explained?*
  - *Travelling to different areas to communicate the decision to people there?*
- ☐ If any community members have indicated that they did not want that decision to be made, do you ensure the communication also includes a justification for why the action is going ahead despite their objections?

Step 6: Monitoring and evaluating the process

- ☐ Do you have a process in place to monitor the impact of decisions subject to FPIC by communities?
- ☐ Does this include a process of engaging with communities, including marginalised community members, to determine their opinions and feelings about both the FPIC process and the projects that have gone ahead?
- ☐ Are the outcomes of evaluation exercises communicated back to the community?



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