



Led by the Environment Protection Agency and the Forestry Development Authority of the Government of Liberia, with Support from The World Bank.

# Development of National Guidelines on Free, Prior and Informed Consent (FPIC)

Project Report  
June 2019



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Norad

Funded by the Government of Norway, as part of the Liberian Forest Sector Project.



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# Table of Contents

Acronyms.....	iv
Definition of Key Terms .....	vi
Executive Summary.....	vii
1 Introduction .....	1
2 FPIC in Law .....	3
2.1 FPIC in International Law .....	4
2.2 FPIC Under Liberian Law .....	8
2.3 Gaps in the Liberian Regulatory Framework .....	11
2.4 Key Points on the Legal Framework for FPIC in Liberia .....	13
2.5 Defining the Elements of FPIC .....	13
3 FPIC in Practice: Liberian and International Examples .....	16
3.1 FPIC Practices in Liberia .....	16
3.2 Practices in the Oversight and Verification of FPIC .....	19
3.3 Learning from International FPIC Practices .....	23
3.4 Synthesis of FPIC Approach .....	24
4 Scope of FPIC Guidelines for Liberia .....	26
4.1 Sectors and Natural Resources .....	26
4.2 Land Use Activities Covered .....	28
4.3 Communities .....	29
4.4 FPIC Guidelines for Regulatory Agencies .....	29
5 Lessons Learned on the Development of National FPIC Guidelines .....	30
5.1 Multi-Sector Engagement with Stakeholders is Necessary .....	30
5.2 Liberia has a Strong Legal Basis for FPIC .....	31
5.3 Effective implementation is very challenging .....	31
Annexes .....	33
Annex 1: National Guidelines on FPIC .....	33
Annex 2: Toolkit for Practitioners of FPIC .....	33
Annex 3: Implementation Plan for the Regulation of FPIC by the Government of Liberia .....	33
Annex 4: Report on the Testing and Validation of National FPIC Guidelines .....	33

# Acronyms

Acronym	Full Text
ACPHR	The African Commission on Human and Peoples Rights
AFDB	African Development Bank
CBD	Convention on Biological Diversity
CFDC	Community Forestry Development Committees
CFMA	Community Forestry Management Agreement
CFMB	Community Forestry Management Bodies
CFWG	Community Forest Working Group
CIMS	Concession Information Management System
CLDMCs	Community Land Development and Management Committees
CRL	Community Right Law (for Forest land)
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
E/SIA	Environmental Impact Assessment
EMPL	Environmental Management and Protection Law
EPA	Environmental Protection Agency
EPO	Equatorial Palm Oil
E/SIAs	Environmental and Social Impact Assessments
EU	European Union
FAO	Food and Agricultural Organization
FCPF	Forest Carbon Partnership Facility
FDA	Forestry Development Authority
FGD	Focus Group Discussion
FLEGT VPA	Liberia Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA )
FMC	Forest Management Contract
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GOL	Government of Liberia
GVL	Golden Veroleum Liberia
HCV	High Conservation Value
HRC	Human Rights Commission
ILO	International Labour Organization
ICMM	International Council on Mining and Minerals
IPs	Indigenous Peoples
KIIs	Key Informant Interviews
LEITI	Liberia Extractive Industries Transparency Initiative
LFSP	Liberian Forest Sector Project
LLA	Liberia Land Authority

LRA	Land Rights Act
LTS	LTS International
LVD	Legality Verification Department
MDA	Minerals Development Agreement
MIA	Ministry of Internal Affairs
MME	Ministry of Mines and Energy
MoA	Ministry of Agriculture
MoJ	Ministry of Justice
MoU	Memorandum of Understanding
NBC	National Bureau of Concessions
NFRL	National Forestry Reform Law
NGCCFR	Developing National Guidelines on Community Consultation Involving Forestry Resources
NGOs	Non-Governmental Organizations
NIC	National Investment Commission
NICFI	Norwegian International Climate and Forest Initiative
NTFPs	Non-Timber Forest Products
PA	Protected Area
PAC	Project Affected Communities
PPA	Proposed Protected Areas
PPCC	Public Procurement & Concessions Commission
RECOFT	The Center for People and Forests
REDD+	Reducing Emissions from Degradation and Deforestation
RSPO	Roundtable on Sustainable Palm Oil
SIA	Social Impact Assessment
SIDA	Swedish Government Development Agency
SOPs	Standard Operating Procedures
ToR	Terms of Reference
TSC	Timber Sales Contract
UN	United Nations
UNDRIP	United Nations Convention on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
UNPFII	United Nations Permanent Forum on Indigenous Issues
UN-REDD	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation
USAID	U.S. Agency for International Development
VPA	Voluntary Partnership Agreement (for Forest Law Enforcement, Governance and Trade)
WWF	World Wide Fund for Nature

# Definition of Key Terms

**Community Rights:** The rights under various Liberian laws that determine local communities' rights to be involved in decisions or determine how their customary lands are utilized, managed and/or developed.

**Consent:** The collective decision made by the rights-holders. Consent must be sought and granted or withheld according to the formal and informal political-administrative process of each community.

**Customary Land:** Defined as *'Land, including forest land, owned by individuals, groups, families, or communities through longstanding rules recognized by the community. To be recognized as customary land, it is not necessary for the land to have been registered under statutory entitlements'* (Community Rights Law) or: *'the land owned by a Community and used or managed in accordance with customary practices and norms, and which include, but is not limited to residential land, farmland, communal forestlands, and fallow lands.'* (Land Rights Act).

**Forest:** A minimum of one hectare, with at least 30% canopy cover and a minimum height at maturity of five metres, excluding industrial agricultural plantations. (Adopted by consent amongst participants at the FDA-organised 'forest definitions' conference in Lofa County, Liberia, January 25-29, 2016.)

**Free:** Consent given voluntarily and absent of force, intimidation, bribery and manipulation.

**Indicators:** Indicators are the information required to show that appropriate actions have been taken to establish Free, Prior and Informed Consent (FPIC).

**Informed:** Informed refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

**Prior:** 'Consent is sought sufficiently in advance of any authorization or commencement of activities.' Prior refers to a period of time in advance of an activity or process when consent should be sought, as well as the period between when consent is sought and when consent is given or withheld. Prior means at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community.

**Toolkit:** A package of information and sources that is aimed at practitioners; companies, non-governmental organizations and communities who are carrying out FPIC.

**Verifiers:** Verifiers are the evidence that can be used to judge whether the requirement for Free, Prior, Informed and Consent have been met.



# Executive Summary

Free, Prior and Informed Consent (FPIC) is established in Liberian law and practice. It is a way to protect the rights of communities by involving them in decisions about developments that affects land or resources where they live.

This is a report on the development of National Guidelines for FPIC, under contract to the Environmental Protection Agency and under the auspices of the Liberian Forestry Sector Project, run by the Forestry Development Authority with support from The World Bank and funding from the Government of Norway.

FPIC is most prominent and defined in the forestry sector, but it has a wider purpose as a means of protecting community rights and upholding the participation of Liberian citizens in decisions about the use of land and resources. As Liberia goes down the path of strengthening community rights to land and resources, the right of communities to give or withhold consent to developments that affect their assets will expand and with it the importance of FPIC as a process for reaching agreements between developers and communities.

FPIC has a firm legal basis in Liberian laws and regulations, although this is limited to certain sectors and activities. The Guidelines developed in this report are grounded in these laws and give clarity to the FPIC requirements in forestry, environment and land rights legislation. But the aim is also to develop Guidelines that will be suitable for the wider application of FPIC that is introduced by the recent Liberian Land Rights Act and is likely to arise from future developments of national law and regulation. The Government and non-government bodies that contributed to the development of the guidelines at consultation meetings were clear that FPIC was relevant across sectors, and across government. 'FPIC is everyone's business', as one participant said.

Communities, companies, Non-Governmental Organizations (NGOs) and government bodies in Liberia have considerable practical experience of carrying out FPIC. There is also international practice to learn from. Examples from home and abroad are reviewed in this report and used to develop Guidelines for Liberia that reflect good practices.

The appropriate scope for national guidelines is examined, with the conclusion that the greatest need is for guidelines that clarify how government expects the national legal requirements for FPIC to be implemented, and how it will check compliance. This in turn will provide clarity to developers and communities on their rights and responsibilities with regard to FPIC.

The guidelines that are attached to this report describe the legal basis for FPIC. They explain what kind of developments require FPIC under current law and regulations. They give a set of indicators and verifiers that regulators can use to check compliance. For communities and developers, the Guidelines give clarity on what their rights and responsibilities are with regard to FPIC.

The Guidelines were developed with valuable insights from community, government and non-government stakeholders. Consultation was done through interviews, a cross-governmental meeting, piloting in a community setting and a national consultation and validation event in 2019.

To support the Guidelines, the project also produced an FPIC Toolkit, aimed at practitioners, and an Implementation Plan for government bodies with a regulatory role in FPIC.

# 1 Introduction

This report describes the detailed work that has gone into the development of national guidelines on community consultation and Free, Prior, Informed Consent (FPIC), on behalf of the Environmental Protection Agency (EPA) and under the auspices of the Liberian Forestry Sector Project, run by the Forestry Development Authority (FDA) with support from The World Bank and funding from the Government of Norway.

Chapter 2 describes the legal basis for FPIC in national and international law. It is found that FPIC already has a strong basis in law in relation to forestry and Reducing Emissions from Deforestation and forest Degradation (REDD+) in Liberia and growing recognition in land rights law. The definitions of Free, Prior, Informed and Consent are explained with reference to laws and international treaties, and gaps in the current regulatory framework in Liberia are identified.

Chapter 3 summarizes a review of how FPIC is currently practiced in Liberia by private companies, government bodies, NGOs and communities. International good practice examples are also included in the review and from this it can be seen how FPIC has been applied in different countries.

Building on the analysis of laws, policies and practices, the scope of guidelines for Liberia is defined in chapter 4. The communities and the land use practices that are subject to FPIC are identified, with a clear distinction made between projects where communities have the right to give or withhold consent, and projects where consultation is expected but consent is not required.

Chapter 5 summarizes the lessons learned during the development of the national guidelines.

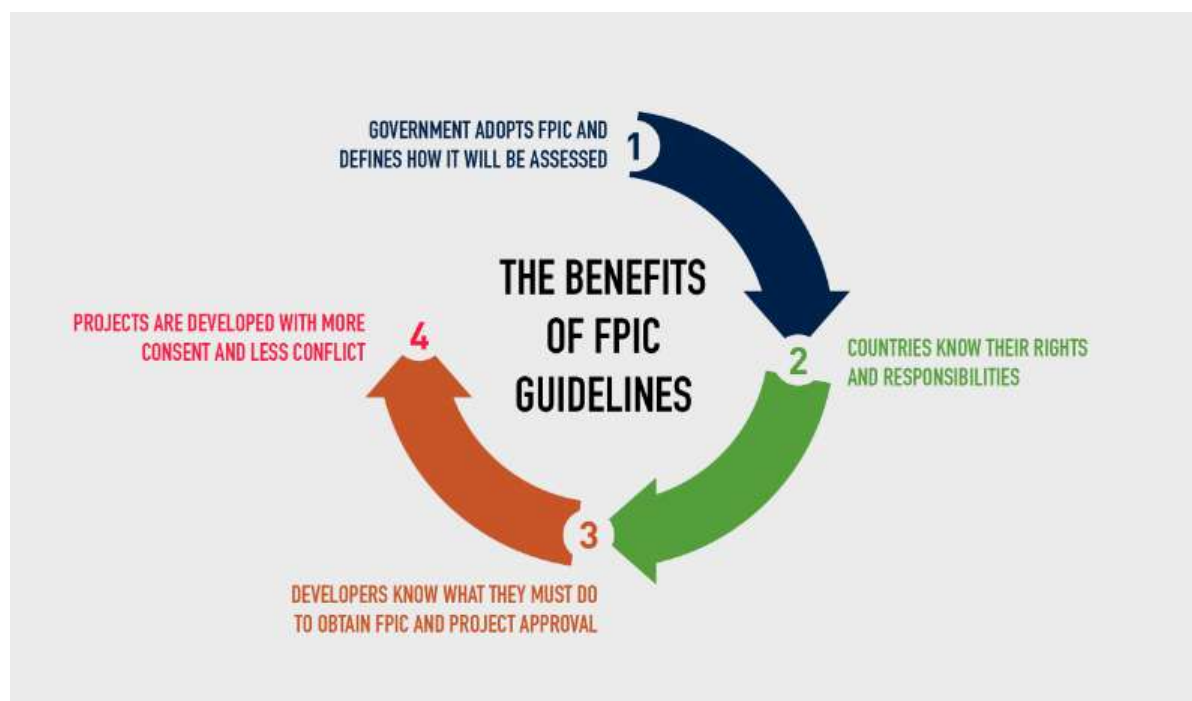


Figure 1: The benefits of FPIC guidelines

The main output from this work is the National FPIC Guidelines that have been developed in consultation with communities, government bodies, Non-Governmental Organizations (NGOs), companies and other stakeholders. This has been produced as a separate, short document so that it can be easily distributed and widely read and used. The Guidelines are supported by several other products that are also annexed to this report:

1. **Guidelines** for complying with FPIC laws and requirements in Liberia;
2. A **Toolkit** with key steps and methods to guide communities and developers on how to conduct FPIC;
3. An **Implementation Strategy and Action Plan** to guide government bodies on the implementation of national FPIC laws and regulations.
4. A **project report** on developing FPIC Guidelines for Liberia, with a detailed guide to the legal basis for FPIC, national and international practices, and stakeholders in the FPIC process.

## 2 FPIC in Law

The right to FPIC has emerged under international and national laws to safeguard the human rights of communities with historical and cultural ties to land and natural resources.

FPIC is defined as a collective right of communities to make decisions through their own freely-chosen representatives and customary or other institutions, and to give or withhold consent prior to approval by the Government, industry or other third party of any activity or project that could impact the land, resources or territories that the community customarily owns, occupies or otherwise traditionally uses.<sup>1</sup>

FPIC is intended to protect the rights of communities, particularly vulnerable communities. It is a process by which communities conduct their own collective and independent decision-making and is thus critical to all resource-dependent communities in Liberia. The FPIC approach is supported by several regional statements and bodies in Africa (see section on 'FPIC in Africa' below).

Liberia has joined the handful of countries that have taken the lead in legislating for the requirement of FPIC at the domestic level. The right to FPIC builds on the right to participation or consultation in environmental decision-making, which is embedded in the Liberia Constitution and which has emerged as a well-accepted principle of international environmental law over the past four decades. The Constitution broadly consists of three 'pillars' – the right to access information, the right to participate in decision-making, and the right to access justice when these other rights or substantive environmental rights are infringed.

This right has been embedded in both domestic legal frameworks and international treaties, in the form of duties to provide prior notification of projects or decisions with potential environmental impacts and the correlating duty to consult with the potentially impacted stakeholders, including communities.

The 'C' in FPIC can mean either consent or consultation. The Liberian legislation, reviewed in this section, that specifically refers to FPIC gives communities the right to consent – i.e. to give or withhold permission for certain kinds of developments that affected them. This right to consent clearly carries more weight than the right to be consulted.

Amongst international treaties on FPIC, the extent to which FPIC requires consultation and whether FPIC requirements trigger a requirement for obtaining communities' consent is variable and contested. So, while the application of FPIC in Liberia can be informed by the international legal requirements under the International Labor Organization (ILO) 169 Convention and other treaties, only certain provisions (for example, those under the Convention on Biological Diversity and United Nations Declaration on the Rights of Indigenous People; UNDRIP) are legally binding in Liberia. In addition, many other conventions and declarations do not explicitly require FPIC but support its application.<sup>2</sup>

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<sup>1</sup> FAO (2014). "Respecting Free, Prior and Informed Consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition." FAO: Rome.

<sup>2</sup> Such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural rights (ICESCR) and the United Nations Guiding Principles on Business and Human Rights (UNGPs).



In order to fully understand Liberia's legal framework for FPIC, and the circumstances under which consent is triggered, it is necessary to focus on Liberian law and unpack the national legal framework surrounding consultation and FPIC. This framework is discussed in the next section, along with a legal assessment of the scope of the application of FPIC under current Liberian law.

Thus, the first two sections in this chapter describe the legal basis for FPIC in national and international law. This includes the Liberian constitution, domestic laws and regulation for key sectors (forestry, mining, oil palm, among others), corporate standards and international treaties. The subsequent two sections go on to define the elements of FPIC, based on the legal framework, and identify gaps in the current regulatory framework for FPIC in Liberia.

## 2.1 FPIC in International Law

### 2.1.1 Regional Law and Declarations

Within Africa, community consent is emerging more broadly as a principle of best practice in sustainable development for natural resource development projects with potentially adverse impacts on local communities, regardless of whether they are defined as 'indigenous'.<sup>3</sup> This approach is supported by several regional statements and bodies in Africa.

The African Commission on Human and Peoples' Rights (ACPHR), for example, notes that the concept of indigeneity in Africa refers to those communities:

- Whose cultures and ways of life differ considerably from the dominant society, and whose cultures are under threat, in some cases to the point of extinction;
- The survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon;
- Who suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society;
- Who live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially;
- Who are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority; and
- Who identify themselves as indigenous.

Since 2009, in addition to the ACPHR, the Economic Community of West African States (ECOWAS), the Pan-African Parliament, and Africa Mining Vision have all endorsed the use of FPIC with local communities facing impacts from mining, extractives, and natural resource projects more generally.<sup>4</sup> The 2009 ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector requires FPIC in its principles for harmonizing regulatory regimes on mining throughout the region: 'Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.' It also directs countries to build capacity of communities to engage effectively in negotiations and disputes.

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<sup>3</sup> Niber, A. et al., *The Right to Decide: Free, Prior and Informed Consent in Ghana*, available at <https://www.oxfamamerica.org/publications/the-right-to-decide-free-prior-informed-consent-in-ghana/>.

<sup>4</sup> Greenspan, E. (2014), "Free Prior and Informed Consent in Africa: An emerging standard for extractive industry projects," Oxfam America Research Backgrounder Series, available at [www.oxfamamerica.org/publications/fpic-in-africa](http://www.oxfamamerica.org/publications/fpic-in-africa).

The ACPHR, in its Resolution on a Human Rights-Based Approach to Natural Resource Governance, calls on States to ensure participation of communities in decision-making on natural resource governance, 'including the free, prior and informed consent of communities'<sup>5</sup>. In doing so, the Commission notes concern over the 'disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and control over various resources, including land, minerals, forestry and fishing.' This clearly links FPIC to a much broader definition of communities who are subject to FPIC in the African context.

Similarly, the Pan African Parliament, noting concern regarding the increase of large-scale land acquisitions throughout the continent, called upon States in 2012 to 'ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior, and informed consent of affected communities.'<sup>6</sup>

Two key points emerge from these regional treaties: In the African – and therefore Liberian – context, the rights accorded to indigenous people under international law should apply equally to rural and resource-dependent communities that share fundamental characteristics with indigenous communities. Secondly, African declarations clearly aspire to have FPIC adopted as an approach across natural resources, including mining and not just limited to environment and forestry.

### 2.1.2 International Laws Ratified by Liberia

The Convention on Biological Diversity (CBD), which Liberia has ratified, requires '[a]ccess to traditional knowledge, innovations 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.' The CBD also requires FPIC in the context of genetic resources and the Conference of the Parties of the Convention have determined that FPIC should be implemented before certain activities related to indigenous knowledge and resettlement, among others.<sup>7</sup>

Liberia is also a signatory to UNDRIP, which requires that: *"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."*<sup>8</sup>

In the context of climate and forestry, the UN Framework Convention on Climate Change (UNFCCC), to which Liberia is also a party, also refers to UNDRIP in its Cancun Agreement, which details the safeguards that countries should promote in undertaking REDD+ activities and programs. It implies that FPIC as required under UNDRIP should also apply in the context of REDD+ and also states that REDD+ must be implemented 'with the full and effective participation of... indigenous peoples and communities.' UN-REDD has followed this with explicit guidance, published in 2012, requiring FPIC. Notably, while the UN-REDD Guidelines specifically state that not all forest-dependent communities meet the threshold for FPIC, they provide that:

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<sup>5</sup> African Commission on Human and Peoples' Rights, 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2012), available at <http://www.achpr.org/sessions/51st/resolutions/224/>.

<sup>6</sup> Sixth Ordinary Session of the Pan-African Parliament, Addis Ababa, Ethiopia, "Recommendations and Resolutions" [Ref: PAP(2)/RECOMS/(VI)] (January 16-20, 2012), available at [http://www.panafricanparliament.org/DocumentsResources\\_DisplayDocument.aspx?Type=Docs&ID=1263](http://www.panafricanparliament.org/DocumentsResources_DisplayDocument.aspx?Type=Docs&ID=1263).

<sup>7</sup> UN Convention on Biological Diversity, Art. 8(j). 1760 UNTS 79; 31 ILM 818 (1992).

<sup>8</sup> United Nations Declaration on the Rights of Indigenous Peoples art. 32 (2007), Article 32, available at [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

*'States should evaluate the circumstances and nature of the forest-dependent community in question, on a case by case basis, through among others a rights-based analysis, and secure FPIC from communities that share common characteristics with indigenous peoples and whose underlying substantive rights are significantly implicated.'*

Taken together with the Liberian specification of FPIC under its national Community Rights Law and the Land Rights Act, this would imply an inclusive definition of 'community' subject to FPIC in the forestry and climate context, as well as to all customarily held land and natural resources. The UN-REDD Guidance also makes clear that affected communities should have the right to withhold consent:

*'While the objective of consultation processes shall be to reach an agreement (consent) between the relevant parties, this does not mean that all FPIC processes will lead to the consent of and approval by the rights-holders in question. At the core of FPIC is the right of the peoples concerned to choose to engage, negotiate and decide to grant or withhold consent, as well as the acknowledgement that under certain circumstances, it must be accepted that the project will not proceed and/or that engagement must be ceased if the affected peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent to the project.'*

### 2.1.3 FPIC in International Investment Requirements and Corporate Standards

#### The World Bank's Environmental and Social Framework

The World Bank's Environmental and Social Policies recognize 'the importance of early and continuing engagement and meaningful consultation with stakeholders,' and defines the communities subject to FPIC under its policies inclusively, specifying that it applies to 'Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities.' In the Sub-Saharan African context, this includes 'historically underserved traditional local communities,' as well as indigenous ethnic minorities, vulnerable and marginalized groups and tribal groups, among others.<sup>9</sup> Thus it would apply to Liberian Communities.

Borrowers from the World Bank are required to obtain FPIC from these communities when projects will have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation; cause relocation of the communities from land and natural resources subject to traditional ownership or customary use or occupation; or have significant impacts on the communities' cultural heritage material to their cultural identity or cultural, spiritual or ceremonial aspects of the affected community(ies).<sup>10</sup> Pursuant to the Bank's requirements, 'the scope and scale of consultation, as well as subsequent project planning and documentation processes, will be proportionate to the scope and scale of the potential risks and impacts as they may affect Indigenous Peoples (IPs)/Sub-Saharan African Historically Underserved Traditional Local Communities.'<sup>11</sup>

#### Corporate Standards

In addition to both international laws and investment requirements, there are corporate standards that are relevant for Liberia's implementation of FPIC. These standards, while not legally enforceable, are often implemented by companies as they constitute the code of practice that

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<sup>9</sup> World Bank (2016), "Environmental and Social Framework," World Bank, Washington, DC.

<sup>10</sup> Id., at ESS7(B) (24).

<sup>11</sup> World Bank, supra n. 13 at ESS7, para. 11.

enables them to be members of corporate sustainability initiatives and networks and to have the public ‘stamp’ of such certification or network affiliation.

In particular, the Roundtable on Sustainable Palm Oil (RSPO) requires FPIC as part of its Social Impact Assessment processes as a prerequisite for certification of member companies. Indicators of implementation include documentation of the FPIC process, including the plan for consultation developed with the community(ies), evidence that the company has respected the communities’ decisions, and evidence that all the legal, social, economic and environmental implications for permitting operations have been understood and accepted by the affected communities.<sup>12</sup> This includes an E/SIA and a management plan that includes mitigation measures developed in consultation with the communities. The RSPO further provides specific guidance on how to meet these and other related indicators to companies. The requirements apply to indigenous peoples and ‘other affected communities.’

The RSPO has also endorsed a ‘Guide for Companies’ drafted by Forest Peoples. This Guide links the RSPO’s requirements and indicators to guidance on implementation, drawing on lessons from Indonesia and Malaysia, in particular. An additional ‘Free, Prior and Informed Consent Guide for RSPO Members’ was published in 2015 by the RSPO Human Rights Working Group.<sup>13</sup> This clearly states that FPIC is not equivalent to consultation, to ‘pushing for yes’ or to a ‘linear, tick-the-box process.’ It provides detailed guidance for each step of the FPIC process, including recommendations of specific documents to share at various points, how to identify and work with representative institutions, common errors, participatory mapping, and so on. A number of ‘best practices’ are highlighted throughout the document.

The International Council on Mining and Minerals (ICMM) published a ‘Good Practice Guide on IPs and Mining’ in 2008 and revised it in 2013 to include a commitment to obtain FPIC of affected indigenous communities.<sup>14</sup> In this updated version, ICMM members commit to:

*‘agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making.’* Where required, this shall include support for building capacity for good faith negotiations on an equitable basis and shall document plans that *‘identifies representatives of potentially impacted indigenous communities and government, agreed consultation processes and protocols, reciprocal responsibilities of parties to the engagement process and agreed avenues of recourse in the event of disagreements or impasses occurring.’*

For the Liberian context, it is important to note that while the ICMM guidelines were initially developed in the context of indigenous rights, it has increasingly been expanded to include the right of all communities and people to their land and territories based on custom and historical connection.

Also important is the fact that some of the corporate standards clearly apply to ‘consent,’ but, most include definitions of FPIC that amount to in-depth consultation. For example, the ICMM clearly states that: *‘Consent processes should focus on reaching agreement on the basis for which a project (or changes to existing projects) should proceed. These processes should neither confer veto rights*

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<sup>12</sup> RSPO (2015), “Free, Prior and Informed Consent (FPIC) Guide for RSPO Members,” (Annex I, Indicators and Guidance).

<sup>13</sup> RSPO (2015). “Free, Prior and Informed Consent Guide for RSPO Members,” available at <https://www.rspo.org/explore?q=FPIC>.

<sup>14</sup> ICMM (2013). “Good Practice Guide on Indigenous Peoples and Mining” (2d ed.), available at <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf>.



to individuals or sub-groups nor require unanimous support from potentially impacted indigenous peoples (unless legally mandated). Consent processes should not require companies to agree to aspects not under their control.’ Similar to the World Bank Environmental and Social Standards, when applied more broadly, it appears FPIC triggers ‘meaningful’ consultation, but not always consent requirements.

## 2.2 FPIC Under Liberian Law

The requirement to obtain FPIC is embedded in the Liberia’s legislative frameworks governing environmental protection, forestry and land rights. None of these laws or their regulations provides a definition of FPIC, although they do provide supportive provisions that could be used to ground FPIC in legally defined procedural rights to access to information, public participation and access to justice for communities and the public. The scope of the requirements for FPIC in each of these laws is explored below.

### 2.2.1 Community Participation in the Constitution

While the Liberian Constitution does not require FPIC, it does specify that:

*‘The Republic shall... manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia.’*

This provision sets the general tone for all subsequent legislation that participation in decision-making and management of natural resources should be as inclusive and extensive as possible.

### 2.2.2 FPIC in Environmental Law and Regulations

The 2002 Environmental Management and Protection Law (EPML) includes the earliest specific requirement for FPIC under Liberian law. Under the EPML, the EPA must ensure that ‘prior informed consent of communities is obtained and is an essential component for any arrangement in bio-prospecting’ (EPML, Sec. 86(1)(b)). The Law also provides a broader mandate to the EPA, to encourage and ensure maximum participation by the people of Liberia in the management and decision making processes of the environment and natural resources (EPML, Sec. 4(2)(g)). This includes a requirement to enable public participation through ‘*freedom of access to environmental information*’ (EPML, Sec. 101). These provisions on transparency and participation provide broad support for informed consultation in all decisions that could impact the environment, but do not trigger the consent requirement that pertains only to bioprospecting.<sup>15</sup>

The Environmental Impact Assessment Guidelines, published in 2006 to guide EPA’s implementation of Environmental Impact Assessments and Environmental Social Impact Assessments (E/SIAs), further defines public participation in the context of impact assessment as:

*‘In keeping with the peoples’ right to know the potential impacts of decisions being made, the information relating to the right of any person to receive effective notice with relevant information and to review and comment on major decisions with such comments being taken into consideration at the decision making stage; and involves*

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<sup>15</sup> “bio-prospecting” is where scientists and companies seek to use genetic resources (plant material, animal, etc.) from forests or land where communities have rights. The inclusion of this specific activity reflects international concern about indigenous knowledge and the misappropriation of genetic resources, at the time the EPML was drafted.

*open, ongoing two-way communication, both formal and informal between decision makers and stakeholders – those interested in or affected by the decisions.'*

This definition has several components of interest to the scope of consultations as applied under the EPML when an E/SIA is required. Effective notice, a right to review and comments on 'major' decisions (not defined), ongoing two-way communications and a broad applicability to all those 'interested in or affected by' the decision. Despite this broad applicability, the guidance actually provided to proponents undertaking impact assessment is limited to a required review of whether participation took place and was documented, without details on the specific levels of consultation, timing or the scope of which stakeholders should be consulted.<sup>16</sup>

### 2.2.3 FPIC in Forestry Law and Regulations

In the forestry sector, FPIC is supported by the 2006 National Forestry Reform Law, which stipulates in Chapter 10 that regulations under this law must establish mechanisms to promote '*informed community participation in forest-related decisions.*' While in Chapter 5, it requires the Forestry Development Authority (FDA) to '*undertake measures to institutionalize the participation of communities in forest management,*' as well as a broad requirement for communities to have access to forest-related information (Sec. 18.15).

FPIC is explicitly required in the Ten Core Regulations to the National Forestry Reform Law : Forestry Regulation No. 102-07 on 'Regulation of Forest Land Use Planning' stipulates that, for proposed commercial forest land use actions in a customarily held area, the Community Forestry Development Committee (CFDC) must have provided 'Free, prior and informed consent' to the commercial use, in writing, on behalf of 'affected communities.' As explored in more detail below, the new Land Rights Act will have a large role to play in defining the scope of the areas to which these regulations apply.

Forestry regulations on commercial contracts and concessions further specify that the Authority:

*'shall not proceed with offering a proposed Forest Management Contract or Timber Sales Contract unless the Authority has obtained free, prior and informed consent, in writing, from Community Forest Development Committees representing all Affected Communities identified under the requirements of the regulation, to negotiate in good faith a social agreement with the winning bidder and subject themselves to independent arbitration should those negotiations not reach a satisfactory conclusion.'*<sup>17</sup>

Further, the regulations governing chain saw milling permits requires that such permits shall only be granted in community forests if the area is identified by the FDA as suitable for commercial use and the permit holder has received '*BOTH (1) written permission from the Authority; and (2) the Free, prior and informed consent of the community in community forest areas or the private land owner.*'<sup>18</sup>

The 2009 Community Rights Law requires FPIC under a much broader set of circumstances in relation to community forests. The Community Rights Law states that:

*'any decision, agreement or activity affecting the status or use of community forest resources shall not proceed without the prior, free, informed consent of the said community.'*<sup>19</sup>

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<sup>16</sup> See Environmental Impact Assessment Guidelines, 2006, Rating Guide, Sec. 19.

<sup>17</sup> Forestry Regulation No. 104-07.

<sup>18</sup> Chain Saw Milling Regulation, No. 115-11 (2012).

<sup>19</sup> Community Rights Law (2009), Sec. 2.2.

This is a broad formulation of FPIC, including ‘consent’ and opening the requirement to all decisions, agreements and activities affecting the status or use of the community forest resources. In other words, FPIC needs to take place *before* communities or other actors make decisions or take actions that impact the way in which community forests are used or managed. This would include the decision to become a Forest Community under the Community Rights Law, during the process of developing agreements and management plans as required under the Community Rights Law, and prior to signing any agreement or contract with a company to commercially exploit forest resources on their land.<sup>20</sup>

It is also worth noting that the Ten Core Regulations under the National Forestry Reform Law also provide detailed requirements for public participation in the development and amendment of laws, regulations, codes and manuals in the forest sector. These regulations include specific parameters for publishing and making publicly available drafts of these key documents, as well as consultation mechanisms, including receiving comments and holding public meetings in the case of laws and regulations.<sup>21</sup> These consultation requirements apply across all stakeholders, and so include affected communities.

#### 2.2.4 FPIC in Land Law

The legal recognition of customary areas, including the community forestry areas that trigger FPIC under the forestry regulations, is changing under the newly passed Land Rights Act. The 2018 Land Rights Act specifies that communities, which have the right to define the area of their ‘customary land’ in keeping with customs, oral or written history and locally-recognized norms, and to own their customary land, including the right to exclude others, transfer the land and portions thereof, manage and improve the land, and to possess and use the land and non-mineral resources thereon (Arts. 33-4).

However, additional clarity on the amount of customary land that will be recognized under the Land Rights Act is still required, and whether customary land will therefore trigger the regulatory FPIC requirements for all proposed commercial forest land use actions, saw pit permitting, and – much more broadly – for decisions and actions that affect ‘the status or use of community forest resources’ on those lands.

The question of what exactly will be covered under the Land Rights Act also applies to a much broader set of land use decisions and actions (i.e. outside community forests), as the Land Rights Act further stipulates that:

*‘Save for Concessions, contracts, permits and other rights previously granted in Customary Land by the Government prior to the Effective Date of this Act, and subject to the Government’s Constitutional right to extract all Mineral Resources found below the surface of the Land, any interference with or use of the surface of Customary Land require the Free, Prior and Informed Consent (FPIC) of the Community.’*

These provisions are expansive and the clear definition of ‘land’ as including natural resources under the Land Rights Act provides a sound basis for protecting the resource-related rights of Liberian communities more comprehensively than ever.

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<sup>20</sup> See, Aldinger, P. (2016). “Policy Brief #10: The Importance of Free, Prior and Informed Consent: Strategies for Realization.” USAID, PROSPER.

<sup>21</sup> Ten Core Regulations, No. 101-07 on Public Participation.

It is notable that the exclusion of sub-surface mineral rights, while legally grounded in the vesting of those rights in the Government, could pose a substantial threat to the integrity of community land rights if not implemented in a way as to protect those rights. The Government is responsible for negotiations with mining companies and actors, and no FPIC or even necessarily consultation requirements apply for communities, even on their own land. Planned revisions to mining regulations are expected to emphasize the need to consult with communities in the planning and licensing of mining activities on their land.<sup>22</sup> However, as with the forestry requirements for FPIC, there is no definition or clear stipulation of the elements of FPIC, leaving it to the implementing agency to determine.

Article 34 also states that each Community has *‘the right and responsibility to identify its members; except that no Community Member of a Community may be excluded from membership of the Community.’* Moreover, all Community members have equal rights to the use and management of the ‘community land,’ regardless of age, gender ethnicity, religion and disability. In order to represent the community in land matters, communities are to establish Community Land Development and Management Committees (CLDMCs), which are democratically elected and have legal personality to enter into contracts with third parties.<sup>23</sup> The CLDMCs have the right to ‘act collectively as the highest decision-making body of the Community’ and can, by a two-third vote, approve the sale, lease or transfer of customary land to third parties, among other transactions.<sup>24</sup> ‘Any decision taken in respect of Customary Land shall be in accordance with the customs, traditions and practices of the Community.’

## 2.3 Gaps in the Liberian Regulatory Framework

Liberia has taken big steps towards adopting FPIC as an instrument for upholding community rights in the management of forests and other natural resources. The regulatory framework will continue to develop, especially through implementation of the Land Rights Act. The main gaps that appear in the current regulatory framework are:

- A clear definition of when, how and to whom FPIC applies in Liberia;
- A consistent approach across sectors; and
- A greater capacity to implement existing and emerging FPIC laws and regulations.

The national guidelines developed through this project do not fill these gaps in the regulatory framework as they are not legally enforceable; they have only advisory status. However, Guidelines can help bridge the gaps by presenting the various laws and regulations on FPIC in one place, clarifying when FPIC is required and when it is not, and advising on how FPIC can be implemented, based on good practice.

### 2.3.1 Definition

The first major gap in the Liberian legislative and regulatory framework for FPIC is the lack of a clear definition of FPIC and how it should be implemented. Such a definition would establish what,

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<sup>22</sup> Aligning the mining consultative requirements with FPIC under other sectoral legislation would also be in line with the International Council on Mining and Metals’ (ICMM’s) statement that “FPIC should be regarded as a ‘principle to be respected to the greatest degree possible in development planning and implementation’ and commitment to implementing FPIC for Indigenous Peoples, including “customary owners or occupants of land or resources.” See <https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>.

<sup>23</sup> Land Rights Act, Art. 35.

<sup>24</sup> Land Rights Act Art. 36



specifically, is required of implementing agencies, companies and other parties, as well as for the Government and communities to be able to verify implementation of FPIC and hold those parties to account.

International standards are fairly clear as to the basic elements of FPIC, as described above, although there is no single universal definition and the process itself is one that must necessarily be tailored to a specific context. Hence the need to ‘domesticate’ or interpret the international understanding of FPIC for Liberia’s particular circumstances.

While national guidelines for Liberia will go a long way to ensuring that all parties understand the elements and requirements of FPIC, new regulations will also be necessary to outline the basic procedural requirements to ensure that parties are accountable to the process and have rights to redress when they are not followed. The Philippines has developed such regulations, and Bolivia has incorporated UNDRIP into its national law in its entirety, but not many other countries have taken these steps. Liberia is on the vanguard of this process and will need to integrate the basic elements of FPIC into regulations to make them enforceable. The Guidelines provide an important first step to articulating the requirements of FPIC as applicable in Liberia and will be an important basis for future regulations.

### **Defining Communities to which FPIC Applies**

A key area requiring definition is the process for identifying what communities meet the threshold definition for FPIC in various sectors as outlined above, and how those are aligned with customary land versus other resource use and ownership rights. There is clearly a broad and cross-cutting requirement for consultation, triggered by E/SIA requirements, detailed by the legislative and regulatory process in the forestry sector, and founded in a constitutional commitment to meaningful participation in environmental decision-making.

FPIC, including the requirement for consent, is triggered on customary lands and in community forests, as well as pursuant to specific decisions under other legislation (i.e., bioprospecting under the EPML). Pursuant to the Community Rights Act and the Land Rights Act, FPIC is the widely applicable standard for consultation for all decisions and activities that are tantamount to ‘interference with or use of’ customary land or ‘affecting the status or use of community forest resources.’ The key to refining the scope of its application will be clearly defining the lands and communities that fall under this legislation.

Another issue is how ‘representative bodies’ of communities will be identified and aligned across sectors. For example, will community forestry management bodies or CLDMCs have the rights to represent communities in FPIC processes? Under international standards for FPIC, it is the community itself who is to determine their own processes and representative institutions. Balancing this requirement with the legal provisions for the ‘Nine Steps’ under the Community Rights Act for forestry communities and the formation of a CLDMC under the Land Rights Act will be important in implementing FPIC on the national level.

### **2.3.2 Cross-Government Coordination**

It will also be beneficial to develop cross-sectoral collaboration in implementation of FPIC, so that communities are able to work with agencies and actors in an integrated manner and not via separate, sectoral processes. FPIC is currently managed by separate sectoral bodies. There is no

universal screening mechanism by which Government of Liberia (GoL) identifies the need for FPIC and triggers the process.

EPA has a mandate that cuts across all sectors where activities create environmental and social impacts. It also has an established regulation and process for E/SIA. This does not explicitly require FPIC, but Guidance could potentially be used in conjunction with the E/SIA process so that the question ‘do communities affected by the development need to give their consent?’ is raised systematically.

National guidelines on FPIC could thus enable EPA and other agencies to trigger FPIC through the E/SIA process. Guidelines are not legally enforceable so would not make this mandatory. To become mandatory, such a development of the role of E/SIA and EPA would have to be embedded in regulations, and it would need to be reconciled with the existing role of the FDA and the new land legislation and emerging mandate of the customary land agencies.

## 2.4 Key Points on the Legal Framework for FPIC in Liberia

- Community consultation and the engagement of communities in decisions about land and resources is well established as a universal principle in the Liberian constitution and in sectoral laws.
- There is a vital distinction to be made between consultation, where communities are informed and may influence a decision, and consent (FPIC) where communities have decisive powers over whether a project goes ahead or not.
- Liberia is relatively advanced in terms of incorporating FPIC – requiring community consent - into domestic laws and regulations.
- FPIC is clearly required for communities on customary land and where the status and use of forest resources is affected by a proposed development.
- National laws and regulations require FPIC but do not define it, leaving it to the implementing agencies to define what FPIC means in the particular circumstances and how it should be achieved. National Guidelines should therefore, firstly, be aimed at guiding implementing agencies on how to fulfill their statutory role by supporting and verifying FPIC.
- Further development of regulations and an ongoing process of establishing community rights is required to define the scope of FPIC application. For example, the location and extent of communal land, where FPIC prevails according to the new Land Rights Act, needs to be defined in regulation and will evolve as the law and regulation is used to demarcate communal land.

## 2.5 Defining the Elements of FPIC

Successful implementation of FPIC in Liberia relies foremost on a common understanding of the elements of the process and how to monitor and verify that it has taken place. This section therefore provides an overview of the international legal origins of FPIC and the ways in which the international community has defined the elements of FPIC to guide Liberia’s implementation process.

Since there is no universal definition of FPIC, it is important to refer to national and international legal frameworks to understand the content and meaning of each of the components of FPIC. In this way,

robust procedures can be developed for Liberian communities that meet legal and regulatory requirements and reflect international good practice.

Below is a brief definition of the components and requirements for meeting FPIC that are used in international instruments, as well as in two African countries – Cameroon and Kenya – that have recently developed national FPIC guidelines. These are in keeping with those endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII)<sup>25</sup> but they have been used as the basis for communities that are not recognized as indigenous, as in the case of Liberia (See Box 1).



Box 1: Elements of FPIC (endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII))

The Food and Agricultural Organization (FAO), for example, expands on the 2005 UN criteria to specify that '**Free**' entails voluntarily given consent through a self-directed process. This must be 'unencumbered by coercion, expectations or timelines that are externally imposed,' and rights-holders are to determine the process, timeline, and decision-making structure, including the formats, times and locations of meetings and decisions.<sup>26</sup> The guidance specifies that freedom from bias and coercion means freedom from bribery, conditions, bias or rewards and that all members must be able to participate regardless of gender, age or social standing.

The FAO Guidelines also elaborate that '**Prior**' means not only 'sufficiently in advance of any authorization or commencement of activities' but specifically that the FPIC process should take place at the very beginning during conceptualization, design, and proposal and continue through evaluation of a project or activity.

<sup>25</sup> United Nations Permanent Forum on Indigenous Issues (UNPFII) Fourth Session in 2005 in its "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples."

<sup>26</sup> FAO (2016). "Free, Prior and Informed Consent: An Indigenous Peoples' Right and Good Practice for Local Communities."

The definition of '**Informed**' builds on the UN's, adding that preliminary assessments should be made available; that the information should be delivered by culturally appropriate personnel; that the information must be accessible to the most remote, rural communities and to all members, including women, youth, elderly, and persons with disabilities; and provided on an ongoing basis throughout the FPIC process 'with a view to enhancing the local communication and decision-making process.

Finally, the FAO Guidelines, specify that '**Consent**' can be a 'yes,' a 'no,' or a 'yes with conditions,' which can include the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges.

In addition to the FAO Guidelines (and an additional set of FAO Guidance related specifically to land acquisition published in 2014), the international business standards on FPIC that apply in Liberia, while not binding, often guide industry members in their implementation of consultation processes and should therefore be reflected in guidelines. Essentially, the elements of FPIC are defined by all of these bodies as building on the initial agreed substance outlined by the UN Expert Group in 2005. Elaborations on good practice can help countries implement these requirements, and many are found across the various guidelines.

One key development has been the evolution of consent as a requirement of the FPIC process. Where initially consent was debated as an untenable goal, given the collective nature of the process, more recent understanding and guidance of FPIC clearly states that the goal of the process should be to achieve consensus or to accept the community's decision when a community withholds consent (or allows consent with conditions) as part of the process. Critical to this process is the 'good faith' aspect of FPIC, in which negotiations are constructed to level the playing field and enable communities to participate in ways that they define and that are meaningful to them, despite the burden this implies of additional time and costliness for the process.

These elements are critical for the creation of meaningful guidance for Liberia, which has joined the handful of countries demonstrating leadership by incorporating FPIC in domestic legislation. The implementation of FPIC at the national level will demand not only the guidance provided here, but also additional regulations to ensure that FPIC is both effective and equitable.



## 3 FPIC in Practice: Liberian and International Examples

### 3.1 FPIC Practices in Liberia

FPIC has already been carried out in Liberia, in a variety of land uses and community settings. Although it is worth noting that while the requirement for consultation is laid down in the constitution, its existence and relevance has gained public attention only relatively recently. Agribusinesses have taken a lead in the development of FPIC as evidenced both by their explicit policy commitments and documentation of their practices, but different companies have slightly different approaches to its implementation.

Implementation of FPIC in the agriculture sector has been limited in scope and mainly focused on land acquisition for new planting as part of the RSPO certification requirements. For example, Golden Veroleum Liberia (GVL) has developed a detailed Standard Operating Procedure on FPIC, which is used during new developments and general operations thereafter.<sup>27</sup> Equatorial Palm Oil (EPO) also commits to respecting the rights of local communities and implementing FPIC during new plantation development. However, following years of investigation the RSPO found both EPO<sup>28</sup> and GVL<sup>29</sup> implementation of FPIC lacking in some respects.

After one year of dialogue and negotiation with the communities and supporting NGOs that alleged EPO did not fully implement FPIC, the communities and the company resolved the issues at the center of the complaint. The company agreed to respect the communities right to say 'No' and documented this in a Memorandum of Understanding (MoU) with the communities.<sup>30</sup> On 4 October 2016, the RSPO formally closed the complaint following the successful conclusion documented in the MoU.<sup>31</sup> On the other hand, following the Appeal Panel's decision against GVL, the company issued a statement on 20 July 2018 announcing its plan to temporarily withdraw from the RSPO to 'focus on community engagement and the implementation of FPIC processes with a view to finalise a memorandums of understanding with communities in disputed areas.'<sup>32</sup>

In the forestry sector, the FDA has developed a Nine Step process that communities must go through to be granted management and community-level regulatory authority over community forest. The FDA uses the Nine Step process in fulfilment of the FPIC requirement in the 2009 Community Rights Law – even though it is not fully compliant with best practice in FPIC implementation. Although the FDA is required by regulation developed in 2007 to implement FPIC prior to granting Forest Management Contracts (FMCs) and Timber Sales Contracts (TSCs), in 2013 an audit of the

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<sup>27</sup> Golden Veroleum Liberia (2013) Free Prior Informed Consent: The GVL FPIC Roadmap.

<sup>28</sup> RSPO Complaint Panel Decision dated 4 March 2015 regarding 'Complaint filed by Sustainable Development Institute of Liberia on 3 October 2013 on behalf of the Jogbahn Clan'

<sup>29</sup> RSPO Appeal Panel's Decision dated 13<sup>th</sup> July 2018 regarding 'Golden Veroleum (Liberia) Inc.'s appeal against the RSPO Complaints Panel's decision dated 13 February 2018'

<sup>30</sup> Memorandum of Understanding Between EPO and complainant communities signed on 2 May 2016.

<sup>31</sup> RSPO Complaint Panel Decision dated 4 October 2016 regarding 'Complaint - Equatorial Palm Oil/Sustainable Development Institute of Liberia- Closure'

<sup>32</sup> Press Release dated 20 July 2018: 'New action plan to review Golden Veroleum's sustainability journey as company voluntarily withdraws from RSPO membership'

award process for FMCs and TSCs granted since the regulation came into force found that the authority did not comply with the requirements of the regulation.<sup>33</sup>

The creation of protected areas has also been characterized by extensive consultation and engagement with would-be affected communities. These consultations and engagements have taken place with, it seems, the intent of securing community participation, involvement and support – but not to seek their consent prior to the creation of the protected area. For example, the law establishing the Gola National Park was approved in September 2016 and was the culmination of six years of work,<sup>34</sup> including extensive consultations and engagement with would-be affected communities and the development of mechanisms to provide for community participation in the management of the park. However, the consultations and engagements were not explicitly for the purpose of seeking community consent considering that the forest area was already a National Forest (i.e. protected by law enforced by the FDA). The fact that the protected areas that are now being gazetted have long been established as state forests complicates the discussion about whether or not FPIC is in fact required or the extent of the rights of would-be affected communities to FPIC.

On the other hand, the mining sector lags behind the agriculture and forestry sectors. Companies have neither explicitly committed to FPIC nor are they required to implement FPIC under Liberian law.

Social and advocacy NGOs active in the forestry and agriculture sectors have been the most vociferous in their advocacy for FPIC implementation. In various reports, they have criticized companies and the FDA for poor or non-compliance with FPIC requirements in Liberian and international laws, and corporate standards such as the RSPO.

It should however be emphasized that the inclusion of requirements for consultation with project-affected communities, specifically in rural areas, has evolved out of broad recognition that marginalization and exclusion of the population contributed to grievances that give rise to the Liberian conflict, which has previously had devastating effects on the country.<sup>35</sup> It is important to emphasize that the Government has been unequivocal in its acknowledgement of the role marginalization and exclusion, especially with regards to natural resource governance, played in fomenting grievances against the state.

Hence the current effort to develop this guideline is one of several steps that the Government of Liberia is taking to address this situation. The inclusion of requirements for FPIC in FDA Regulation 104, the Community Rights Law of 2009, and the land Rights Act of 2018 all demonstrate efforts to formalize and mainstream community participation in local and national decision-making processes, especially regarding forestry and land. Furthermore, the interests of communities and the need for them to have a central role in furthering their own interests during decision-making processes, have been addressed much more clearly than in the past.

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<sup>33</sup> Liberia Extractive Industries Transparency Initiative (2013) Post Award Process Audit Final Report

<sup>34</sup> RSPB news article 'Great News for Liberia's Rainforest'. Available at: <https://www.rspb.org.uk/join-and-donate/donate/appeals/impact/rainforest-guardians/gola-forest-national-park/>

<sup>35</sup> Government of Liberia (2008). Poverty Reduction Strategy, 2008, p.13

## Common Features of FPIC in Liberia

In the absence of a single national standard or guideline for conducting FPIC, conservation NGOs, the FDA, Liberian organizations advocating community rights and companies (especially major agribusinesses) have developed their own approaches to FPIC. Table 1 below presents a comparative analysis of three approaches to FPIC for projects involving forest resources, land acquisition and land use. The case studies are based entirely on the review of the Standard Operation Procedures of three agribusinesses<sup>36</sup> and an FPIC manual co-produced by two Liberian NGOs in collaboration with an international partner<sup>37</sup> (section 3.3 below provides analysis of a comprehensive selection of international FPIC approaches).

These case studies are presented to give insights into how FPIC is already being approached and to use them as starting points for developing national guidelines.

KEY ELEMENTS AND FEATURES OF GOOD PRACTICE IN FPIC*	CONSERVATION NGOS	CSOS	COMPANY
1 Projected-affected community or communities are identified along with their legitimate representative body. Respects community autonomy.	Yes	Yes	Yes
2 Develop a participatory communication plan and facilitate iterative discussions through which project information will be shared with the community.	Yes	Yes	Yes
3 Document geographic and demographic information through participatory mapping.	Yes	Yes	Yes
4 Reach consent. Document the project-affected community's needs to be included into the project and agree on a feedback & complaints mechanism.	Yes	Yes	Yes
5 Conduct participatory monitoring and evaluation of the agreement.	No?	Yes	Yes
6 Document lessons learnt and improve on agreement or its implementation.	No?	Yes	Yes
7 Establish mechanisms for addressing grievances and resolving disputes.	No?	Yes	Yes
8 Enforcement: get government endorsement or notarize agreement to make it binding.	No?	Yes	No

Table 1: Comparison of FPIC Approaches Across Sectors

\* These key features and elements were adapted from the FAO manual 'Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities.

The analysis presented in Table 1 above indicates that the NGOs and agribusinesses developed their approaches to FPIC around the seven themes covered in the FAO FPIC Manual for Practitioners. The NGO approach however went a step further and included the option of getting government endorsement or attestation of the agreement, or notarizing the agreement to make it legally binding or enforceable.

<sup>36</sup> Golden Veroleum Liberia (2013) Free Prior Informed Consent: The GVL FPIC Roadmap; Sime Darby Plantation Berhad (2018) New Planting Policy; and Equatorial Palm Oil (undated) Standard Operating Procedure for FPIC

<sup>37</sup> Social Entrepreneurs for Sustainable Development and Sustainable Development Institute (2015) A Manual on Free, Prior and Informed Consent: Communities in the Driving Seat.

## 3.2 Practices in the Oversight and Verification of FPIC

As described above, a number of Liberian laws and regulations require FPIC. However, the commitment to FPIC in law is not yet matched by the practice of oversight and verification by government or other regulatory bodies. The National Guidelines on FPIC developed under this project (and provided at Annex 1) are intended to help fill this gap by both establishing clear guidance on how developers could implement FPIC (further detailed in Annex 2) and how regulatory agencies could verify compliance. It will also be useful for social and advocacy NGOs that regularly engage with companies and certification bodies such as the RSPO that are committed to upholding FPIC. The main government bodies with statutory duties for implementing or governing FPIC include the FDA, the EPA and the Liberia Land Authority (LLA).

Within the FDA, the Community Forestry Department is responsible for facilitating the processes leading to the allocation of a Community Forestry Management Agreement (CFMA) while the Planning and Development Unit is responsible for concession planning. Both the CFMA and concession planning processes require FPIC.

The EPA does not have an explicit role in FPIC, but community consultation is crucial to the quality of the E/SIA process that it implements and regulates.

The LLA has a very clear mandate for FPIC but is yet to develop the regulations or protocols to ensure compliance with the FPIC requirement under the 2018 Land Rights Act. Liberia's land tenure laws and practices align with the international standard for tenure – the UN Food and Agriculture Organization's Voluntary Guidelines on the Responsible Tenure of Land, Fisheries, Forests in the Context of National Food Security, 2012 (VGGT) – which stipulates that those implementing projects or laws:

*'affecting the resources for which the communities hold rights ... should be based on an effective and meaningful consultation with indigenous peoples ... to obtain their free, prior and informed consent ... The principles of consultation and participation ... [that] should be applied in the case of other communities ... [are] engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions ... and ensuring active, free, effective, meaningful and informed participation ... in associated decision-making processes.'*<sup>38</sup>

Another existing governance mechanism that refers specifically to FPIC is the EU - Liberia Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA). The VPA is a legally-binding mechanism for auditing compliance with Liberian law concerning the export of logs and timber products. Principle 2 of the VPA on Forest Allocation contains Indicator 2.1 that addresses the statutory requirement for FPIC for forestry concessions. The VPA highlights the provisions for FPIC in the existing forest law and provides a systematic means for verifying this, linked to the approval of timber for export. The Legality Verification Department (LVD) is responsible to verify that the export of timber and timber product complies with the FPIC requirement under the VPA.

The following sections contain a more detailed description of the practices of oversight and verification of FPIC in the forestry and oil palm (agriculture) sectors. These sectors were chosen based on the following reasons: (1) The requirement for FPIC is clearly established in the legal

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<sup>38</sup> FAO (2012) Voluntary Guidelines on the Responsible Tenure of Land, Fisheries, Forests in the Context of National Food Security. Available at <http://www.fao.org/3/a-i2801e.pdf>.

framework governing forestry; (2) Requirements for FPIC are already established in the major oil palm companies' policies and the certification systems they subscribe to; (3) Key actors in the oil palm sector are already implementing FPIC – hence there is experience to draw on; and (4) The LLA is yet to develop a regulation, policy or guidance on FPIC for the land sector.

### 3.2.1 Oversight and Verification of FPIC in the Forestry Sector

#### Commercial Forestry

As has been noted previously (refer to section 2.1.3), the Ten Core Regulations to the National Forestry Reform Law explicitly require FPIC both during concession planning and prior to the award of concessions. During the concession planning stage, in order for the FDA to be able to designate an area that is customarily held by a community to commercial use, the community should have granted its consent to the commercial use in writing.<sup>39</sup> After the concession planning process, but prior to the tendering of a concession, the FDA must again seek and be granted FPIC, again in writing, by the would-be affected community – this time committing to and signing a Social Agreement with the winning bidder.<sup>40</sup> A signed Social Agreement between a logging concession holder and an affected community or communities is a major pre-felling requirement, before the forest enterprise can legally extract timber. Both regulations came into effect in 2007 prior to the reopening of the forestry sector after UN sanctions were lifted.

The first batch of logging concessions awarded in 2008 and 2009, after these regulations came into force, included seven Forest Management Contracts covering more than 1 million hectares of forest.<sup>41</sup> However, in 2013, the Liberia Extractive Industries Transparency Initiative (LEITI) commissioned a post-award audit of all natural resource concessions that were granted after the Act that created LEITI came into force in 2009. The post-award audit found that the four Forest Management Contracts that were awarded during the period under review did not comply with the requirements to involve communities during the concession planning process or validation of the planned commercial use.<sup>42</sup> In response to the findings, the FDA accepted that the communities did not provide written consent.<sup>43</sup>

#### Community Forestry

With respect to the processes leading to the award of a CFMA to a community, the Community Forestry Department has the dual role of both supporting and verifying the process of establishing CFMAs. A detailed process for this has been established through the Community Rights Law with Respect to Forest Land and the accompanying regulation, plus the comprehensive guidelines provided in the 'Nine Steps' handbook. The handbook outlines how to support a community through the Nine Step process of establishing a CFMA. Once a CFMA has been approved, a community may then decide on the best use of its forest, which may or may not involve external actors.

To illustrate key decision-making points where good practice would involve FPIC, the CFMA process is summarized in four main segments: pre-engagement with FDA, engagement with FDA, forest management planning, and implementation of the forest management plan:

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<sup>39</sup> FDA regulation 102-07, Section 61(c)(3)

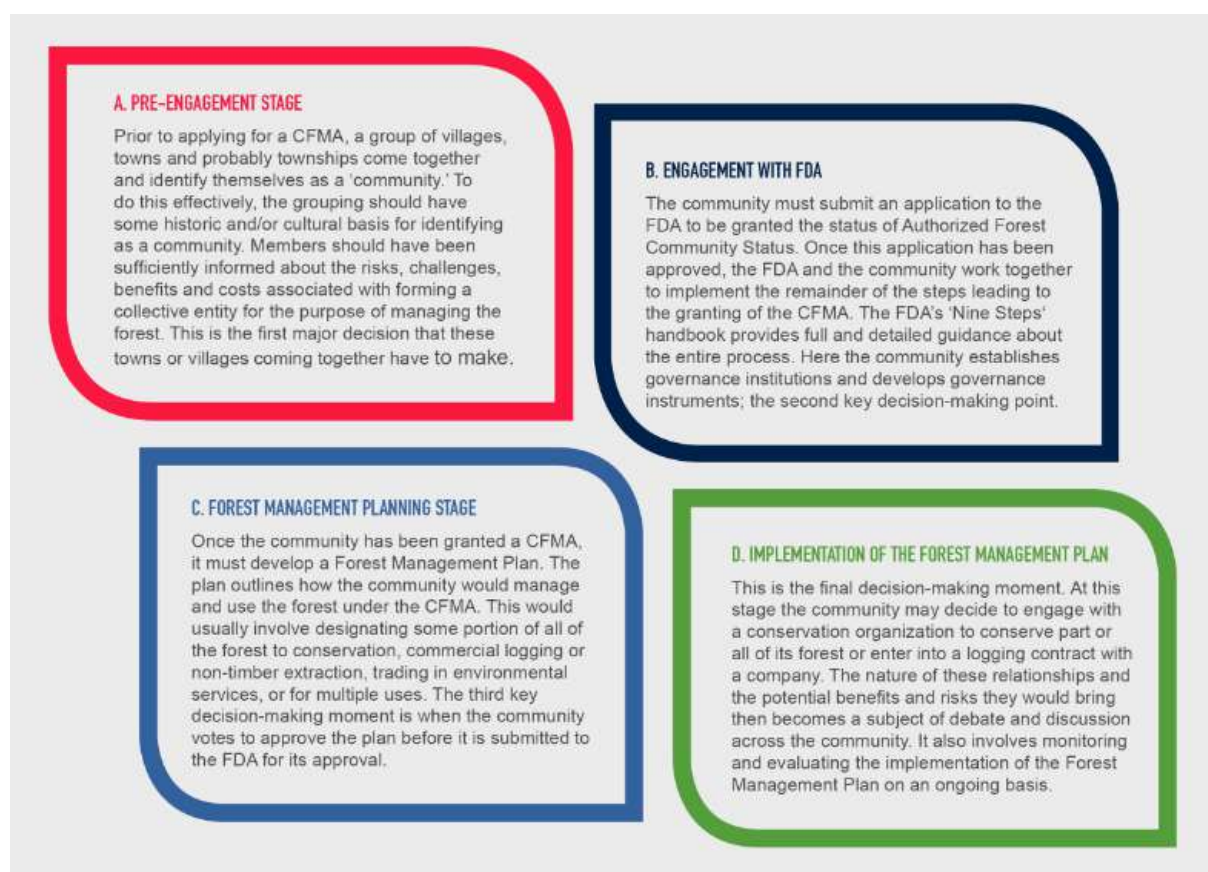
<sup>40</sup> FDA Regulation 104-07, Section 22(j)(1)

<sup>41</sup> SGS Liberia Chain of Custody Financial Update, dated October 29, 2012

<sup>42</sup> LEITI (2013) Post Award Process Audit, Final Report, p.70

<sup>43</sup> LEITI (2013) Post Award Process Audit, Final Report, p.70





Box 2: CFMA Process Summary

A review of the 'Nine Steps' Handbook and a CFMA application and its implementation processes, illustrates that the Community Forestry Department at the FDA has made progress in developing procedures and guidance on how communities may apply for and be granted a CFMA. It also provides critical guidance on developing and implementing a Forest Management Plan.

In terms of FPIC, there are some gaps in the practice that could usefully be addressed. First, the absence of guidance or procedure on how individual towns and villages come together to form a community at the pre-engagement stage raises important questions about the nature of the community that may subsequently make the critical decision about consent. Secondly, the FDA has a joint role as both facilitator of key components of the process and a regulator. The presence of a third party, such as an NGO, to support the community might enable the FDA to focus on compliance with laws and regulations, including those on FPIC. Thirdly, the involvement of logging companies in supporting and developing CFMA applications leads to doubts about whether in fact decisions that the community made were 'free', 'informed' and FPIC-compliant.<sup>44</sup>

### 3.2.2 Oversight and Verification of FPIC in the Oil Palm Sector

There are three important distinctions between the forestry and oil palm sectors regarding the implementation, oversight and verification of FPIC. First, the forestry legal framework explicitly provides for FPIC and mandates the FDA as the regulatory agency, whereas the situation in the oil palm sector is less explicit. Second, in the forestry sector the FDA is the main driver of FPIC

<sup>44</sup> For example, the UK-based NGO Global Witness in a recent report assessing the interaction between logging companies and CFMA-holding communities noted, "there is no opportunity for the terms of the agreement to be openly negotiated so the community is denied the right to scrutinize agreement that give away their forest resources and will impact their livelihoods".

whereas the oil palm companies have made public and voluntary commitments to implementing FPIC prior to plantation development but no government agency is explicitly responsible for verification and oversight – although the Liberian National Bureau of Concession could take potentially take on this role as part of its mandate to monitor compliance with concession agreements. Finally, while the regulation of FPIC in the forestry sector is left almost entirely to the FDA, oil palm companies are required by the RSPO to implement FPIC as a precondition for certifying their crude palm oil.

The EPA has the statutory mandate for regulating projects that may have significant environmental and social impacts. Through the E/SIA regulation and guidelines, the EPA has a well-established process for managing the community impacts and consultation requirements linked to projects covered by the regulation. The scope of the E/SIA regulation and guidelines is broad and covers very diverse projects including projects in the mining, forestry, agriculture, oil and gas, and construction sectors. Although the E/SIA process does not explicitly require FPIC (i.e. consent), it does cover several of the key elements and features of FPIC identified above. To illustrate the limits of EPA's mandate with respect to oversight and verification of FPIC, the application of the E/SIA process in the oil palm sector is considered below.

Prior to commencing a project, in this case establishing an oil palm plantation or related infrastructure, the project proponent is required to submit an application for an environmental permit to the EPA. The application must be submitted along with a project brief that describes the project in detail. The EPA guidelines contain detailed guidance on the content of the brief. The EPA then circulates the brief to relevant government agencies for their review and feedback.<sup>45</sup> Based on the completeness of the project brief, review and feedbacks from the other agencies, and EPA's own internal review, the agency determines whether or not the project requires an E/SIA or (where communities are affected) an E/SIA.

The E/SIA process requires that project-affected communities are identified and engaged from the very beginning of the process. The guidelines notes 'a proponent whose undertaking requires an E/SIA must prepare and publish a Notice of Intent that provides information to enable stakeholders to identify their interest in the proposed project.'<sup>46</sup> As with the application, the guidelines also provide detailed guidance on the content of the Notice of Intent, including specifying the community or communities where the project is likely to have a significant impact.

The next step involves undertaking a scoping or public consultation to identify potential impacts and inform the preparation of a Terms of Reference (ToR) for the preparation of an Environmental Impact Statement. There is also detailed guidance on the content of the scoping report. For example, it must include an overview of the proposed project, describe the environment and the community or communities that will likely be affected. The Terms of Reference must also include the results of the public consultation, including feedback from the community consultation, and be approved by the EPA prior to hiring an EPA-licensed consultant or consultants to carry out the E/SIA.

During the E/SIA process, the project proponent is required to engage and consult with the would-be affected community or communities so that their perspectives and concerns about potential social and environmental impacts are thoroughly documented. For example, this may be the point at which

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<sup>45</sup> Environment Protection Agency (2006) Environmental Impact Assessment Procedural Guidelines

<sup>46</sup> Environment Protection Agency (2006) Environmental Impact Assessment Procedural Guidelines, p.4

the proponent identifies no-go areas including religious or culturally significant sites, forest areas or other areas being reserved for cultural or other reasons.

When the E/SIA is completed, the report must include an Environmental Impact Statement and Environmental Management Plan and be in line with the Terms of Reference the EPA approved. If the report is deemed complete, it is then circulated to the relevant government agencies, other stakeholders and the communities where the project would be located. Based on the feedback from relevant government agencies and other stakeholders, including communities, the EPA may either approve the project without any condition, grant approval with certain conditions attached, request the proponent to conduct further study or provide additional information or reject the application if it determines that the project is likely to cause significant or irreversible environmental damage.

While the extensive engagement and consultation with communities throughout the process provides opportunities for communities to welcome or raise objection to the project, it does not grant communities the right to say yes or no to a project. In other words, the right of the community to give consent is neither explicit in the E/SIA guidelines nor the Environment Protection and Management Law of Liberia (EPML). For example, the EPML provides that at the approval stage the EPA shall 'invite the comments of those persons who are most likely to be affected by the proposed project by specifically drawing their attention to the environmental impact statement'<sup>47</sup> and 'require the County Environment Officer to hold public hearing for persons most likely to be affected by the proposed project or activity if he deems it necessary'<sup>48</sup> but stops short of being explicit about how potential objection would be dealt with.

In practice, various RSPO decisions have been taken on oil palm developments in Liberia, upholding communities' complaints that the companies did not secure their consent prior to implementing project affecting their land and resources. This demonstrates further that the E/SIA process does not require or check for consent and may not provide sufficient checks on the quality of the consultation process in these cases. However, the E/SIA process and guidelines provide a solid foundation on which the FPIC guidelines and toolkit could be built.

### 3.3 Learning from International FPIC Practices

A literature review of relevant FPIC guidelines, principles and criteria was undertaken. The review included documents from intergovernmental organizations, multi-lateral development banks, certification schemes, international NGOs, the private sector, as well as FPIC guidelines developed for Cameroon, the Democratic Republic of Congo (DRC) and Ghana. Annex 2 contains a table summarizing the different processes for undertaking and ensuring FPIC, as described in the key national and international guidance documents available.

The comprehensive analysis of existing guidelines and criteria shows that, while overall, there is general agreement on the types of activities required to ensure FPIC, the processes described in each document vary widely, with different priority given to different parts of the process.

There are guidelines on what FPIC means, which usually give descriptions and indicators for the four elements of FPIC - Free, Prior, Informed and Consent and there are guidelines that emphasize the

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<sup>47</sup> An Act Adopting the Environment Protection and Management Law of the Republic of Liberia (Approved November 26, 2002), Section 16(3)(b)

<sup>48</sup> An Act Adopting the Environment Protection and Management Law of the Republic of Liberia (Approved November 26, 2002), Section 16(3)(c)

process of implementing FPIC, step-by-step. These adopt a fairly common set of steps, although the number of steps varies amongst the different examples. In particular, certification schemes (such as the RSPO and FSC) provide well developed (although fairly complex) guidance on undertaking FPIC. A weakness in most of the guidance available is the process for ensuring the community is sufficiently cohesive or prepared to negotiate effectively on its own behalf. However, a number of Liberia-specific guidance documents have been prepared by NGOs to support communities through this process.

An assessment of these different approaches suggests that a process-based approach to defining community consultation requirements under FPIC is clearest for communities and implementers, while clear means of verification for FPIC requirements at each step of the process are required to enable FPIC evaluation and verification. Presenting indicators for each step of the process also facilitates project or intervention implementers' ability to comply with these requirements, as well as aiding the verification process. Nevertheless, for verification purposes, demonstration of compliance with FPIC requirements is necessary. The evidence required to demonstrate a project or process is compliant with FPIC-related Liberian laws, regulations and corporate standards is therefore also summarized against each of the four FPIC components.

### 3.4 Synthesis of FPIC Approach

Based on available national practices and international best practice, the process for undertaking FPIC-compliant community consultation is summarized as follows:

- **Phase 1: Preparation for Engagement:** The initial phase includes scoping of the proposed intervention, understanding context and who will be affected, community self-identification and formalization and initial engagement with affected communities (often through community leaders);
- **Phase 2: Community Consultation:** The second phase in the FPIC process is the stage at which FPIC compliant community consultation and engagement is undertaken. It is an iterative process that involves community sensitization and engagement, clarification of the intervention impacts and scope, participatory socio-economic and environmental mapping and demarcation of the intervention area, as well as agreeing a fair process for sharing benefits, mitigating risks and monitoring and reviewing the agreement. For processes requiring community consent, the community may choose not to continue with the negotiations at any stage during this phase and the phase only ends once community consent has been achieved and formalized;
- **Phase 3: Implementation:** The final phase in the FPIC process involves implementing the project or land use/tenure changes, including monitoring and evaluation of the FPIC process and agreement, responding to community grievances and reviewing and renegotiating the agreement at regular intervals.

The different examples of FPIC guidelines provide a breakdown of steps and methods that can be followed within these three typical phases. Although these differ, according to the particular purpose or context of the guidance, the process is broadly similar. However, it should be noted that many of existing guidelines favor certain aspects or the process, often omitting certain steps or phases (an example would be the FDA 'Nine Steps' process, which focuses on Phase 2 but assumes Phase 1 and Phase 3 have and will be appropriately followed). Having reviewed national and international

examples, the following steps are proposed as being most applicable to Liberia under the three phases:

- **Step 1: Planning and Scoping:** Where the project or intervention is initiated outside of the community, a planning and scoping step is required to define the objectives of the intervention and identify potential project locations, stakeholders and affected communities.
- **Step 2: Initial Engagement, Stakeholder Identification, Mapping and Validation:** The next stage in the process is to meet with community leaders and get their initial agreement to commence negotiations, as well as undertaking thorough stakeholder and community identification, mapping and validation activities. As part of this step, an appropriate community strategy should also be developed to ensure consultation reaches all members of the community.
- **Step 3: Participatory Socio-Economic, Environmental and Boundary Mapping and Demarcation:** Once an initial agreement to proceed has been reached and consultation plan has been developed, participatory surveys and mapping are required to identify the communities current land and resource uses (including future requirements) and demarcate a suitable project area that enables the community to still meet their cultural and livelihood needs.
- **Step 4: Negotiations and Consent:** The final step in developing the project or intervention is to negotiate how it will work in practice – for example, the exact area covered, timing of activities, mitigation, compensation and benefit sharing mechanisms, as well as approaches to managing grievances or issues in the future. At the end of this negotiation process, the community will give its (conditional or unconditional) consent or decide that it does not agree to the intervention going ahead. This agreement (or not) needs to be written down and best practice requires that the agreement should be formalized by a relevant government agency (although this is not always legally required).
- **Step 5: Monitoring, Evaluation, Review and Grievance Management:** Once an agreement has been reached the project or intervention can go ahead and begin implementing the agreed activities. It is important at this stage to undertake continued participatory monitoring activities, including an evaluation of whether the community consultation process was FPIC compliant. This step also allows for monitoring and managing issues raised by the community or other relevant parties (such as NGOs).

Guidance of how these steps may be taken is set out in the FPIC Toolkit (Annex 2). The Toolkit also provides sources of further information to those carrying out FPIC.



## 4 Scope of FPIC Guidelines for Liberia

This chapter defines the scope of national FPIC Guidelines, in terms of the communities, resources and activities where it applies. It builds on the legal foundations examined above, adding information from policies and practices relevant to FPIC in Liberia and internationally. (The Guidelines itself is provided at Annex 1, including further information on different government roles with regard to FPIC).

### 4.1 Sectors and Natural Resources

#### 4.1.1 Forestry

The FDA is required to consult with communities prior to designating an area for commercial, conservation, community use or a combination of permissible forest uses.<sup>49</sup> With respect to logging, the FDA is required to obtain ‘free, prior, informed consent in writing’ from would-be affected communities through their representative body, notably a Community Forestry Development Committee (CFDC), prior to granting a logging concession in their area.<sup>50</sup> Furthermore, when a logging company has been awarded a Forest Management Contract or Timber Sale Contract, it is required to negotiate and sign a Social Agreement, through which communities explicitly give their consent to the logging operation, with clear terms and conditions under which logging can proceed.<sup>51</sup>

#### 4.1.2 Agriculture

With respect to the agriculture sector, the Government makes clear in the concession agreements with the major oil palm companies (i.e. Sime Darby Plantation Liberia and Golden Veroleum Liberia), that they must comply with all of Liberia’s environmental laws and regulations and with the principles of the RSPO.<sup>52</sup> The principles of the RSPO require companies to secure FPIC from communities prior to new oil palm plantation development on their customary lands. This requirement covers land acquisition, High Conservation Value assessments and participatory mapping prior to land preparation and new planting.

#### 4.1.3 Infrastructure

The situation with mining and infrastructure projects are different from the forestry and agriculture sector in various respects. Firstly, would-be affected communities appear to have always welcomed the construction of roads, hospitals and schools whenever they are proposed and actual instances where communities have opposed public interest projects of these types have been difficult to identify or locate during the review of literature for this project. In fact, projects such as roads and the construction of health facilities and schools have been key factors that influence community acceptance of private sector proposed development projects, even when they are warned about potential risks associated with those projects. Therefore, from a pragmatic standpoint, requiring FPIC

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<sup>49</sup> Government of Liberia, National Forestry Reform Law of 2006, Section 4.5

<sup>50</sup> Forestry Development Authority Regulation No. 104, Regulation on Tender, Award, and Administration of Forest Management Contracts, Timber Sale Contracts, and Major Forest Use Permits, Section 22(j)(1)

<sup>51</sup> *ibid*, Section 33

<sup>52</sup> Concession Agreement Between the Government of Liberia and Golden Veroleum Liberia, Article 16 of GVL agreement, September 2010

prior to these types of public interest infrastructural projects may have limited benefits for community rights overall. Nevertheless, this question could benefit from further consideration as part of future work on community consultation in other sectors.

#### 4.1.4 Mining

With respect to mining, the constitution is explicit that minerals belong to the state. Community consultation during E/SIAs prior to development is primarily concerned with systematically documenting the potential impacts of the project on communities and their management, and not about consent. In practice, E/SIAs in the sector have been more about informing communities about the potential social, environmental and economic impacts, and documenting their perspectives on how mining projects could be designed to maximize benefits for them, how the potential negative impacts could be minimized and how associated risks could be mitigated. Moreover, community interest in the mining sector has traditionally been limited to demands for benefits and concerns about pollution and not necessarily about whether or not they would accept or reject a mining project. Given the current legal framework, which does not require FPIC for mining, FPIC, as it applies to mining, is outside the scope these Guidelines. However, a strong argument could be made that requiring community consent would strengthen community rights in the mining sector and bring it on par with the forestry and agriculture sectors. This question could benefit from further consideration as part of future work on community consultation in other sectors.

The legal basis for communities rejecting a public interest infrastructural or mining project is weak or almost non-existent under the current legal framework, whereas in the forestry and agriculture sectors, the legal basis seems clearer and stronger. Additionally, other natural resource sectors where FPIC could be applied but are not at the stage where the application of the guideline would make a difference are not covered. For example, the current E/SIA requirement covers oil and gas exploration and development (i.e. the petroleum sector) but after few years of a flurry of exploration projects, the sector seems to be on the verge of disappearing.

In defining the scope, a choice was made between developing a national guideline that is broad enough to address all sectors and activities requiring E/SIAs and consequently community consultations, which would necessarily lack specificity on any particular sector versus developing national guidelines that are less broad but targeted in scope and therefore specific enough to support objective verification of compliance. The Guideline adopts the latter approach but still provides useful guidance for the other sectors. As other sectors that have not been covered develop, the Government could work with stakeholders to review the situation and respond accordingly.

In the first instance, the guidelines apply to the forestry sector and forest resources and the extent to which forestry is linked to land. Liberian forests are defined based on the definition adopted in January 2016 in Voinjama, Lofa County, which comes from the narrowest definition of forests under the UNFCCC guidance. Based on this definition, forests are defined as being a minimum of one hectare, with at least 30% canopy cover, a minimum height at maturity of five metres and which exclude industrial agricultural plantations.<sup>53</sup>

In the second instance, the guidelines apply to the agriculture sector, but application is limited to the extent of the sector's interaction with forestry and related land acquisition but does not extend to

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<sup>53</sup> Adopted by consent amongst participants at the FDA-organised 'forest definitions' conference in Lofa County, Liberia, January 25-29, 2016.

agriculture inputs, pest management and livestock – even though E/SIAs for these activities would involve consultation with communities.

Applying the guideline to the agriculture sector is necessary because using the forest definition described above, significant portions of land in the agriculture concessions would qualify as forest and therefore subject to the legal framework governing forestry. Also, where plantation development would affect community forest resources, the 2009 Community Rights Law would be legally triggered because ‘any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without the prior, free informed consent of the said community.’<sup>54</sup> To the extent of this linkage between the forestry and agriculture sectors and, with respect to the acquisition of land that would qualify as forestland, the guidelines would be applicable.

Given this strong link between the forestry and agriculture sectors, it is therefore possible to focus on the forestry sector but consistently refer to the agriculture sector where development in the sector may affect community forest resources. The references to the agriculture sector would however be limited to the extent of its potential impacts on forest resources without broadening the guidelines to the extent that its usefulness is diminished.

Throughout the guidelines, the two sectors will be referenced to ensure clarity and consistency. The guidelines do not specifically address non-forested land, because the LLA will develop regulation in this respect, although it will ultimately be useful as a guide during land acquisition until the LLA has developed its regulation or guidance on FPIC.

## 4.2 Land Use Activities Covered

In defining the activities that the guide would cover, the twenty-five categories of projects that would require an E/SIA, as listed in the Environment Protection and Management Law, were catalogued. The list was then screened to filter out those that fall within the natural resource sectors identified in the section above (i.e. forestry and agriculture). Finally, the list was screened to identify those activities or projects that may directly impact forests, forest resources and the rights of communities. This approach is built on the consideration that although the requirement for an E/SIA is the broad framework within which the guidelines is being developed, the activities to be included in the scope should be limited to those that would directly affect local communities.

Using the framework described above, the following activities were identified:

- Concession planning: pre-tender or award of logging and agriculture concessions.
- Conservation forestry: designation of a forest that imposes restriction on community access and use, with or without their involvement in management, for example creation of national parks and protected area.
- Commercial forestry: logging operations and large-scale extraction of non-timber forest products.
- Community forestry: development of Community Forestry Management Agreement.
- Plantation development: medium and large-scale monoculture projects.
- Other restrictive designations: setting aside High Carbon Stock forest during development or assigning designation to forest that affects communities’ access and use of said forest.
- Implementation of voluntary commitments such as no-deforestation policies to extent of its impacts on communities.

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<sup>54</sup> Government of Liberia (2009). Community Rights Law with Respect to Forest Lands of 2009, Section 2.2 c

## 4.3 Communities

The 2002 Environment Protection and Management Law of Liberia and the 2006 National Forestry Reform Law do not explicitly define community. The forestry law however defines community in the context of Community Forestry as *'a group of local residents who share a common interest in the use and management of Forest Resources, with traditional or formal rights to the land and the forests on it.'*<sup>55</sup>

The Community Rights Law of 2009 With Respect to Forest Lands (Community Rights Law, 2009) defines community as *'a self-identifying and publicly or widely-recognized coherent social group or groups, who share common customs and traditions, irrespective of administrative and social sub-divisions, residing in a particular area of land over which members exercise jurisdiction, communally by agreement, custom, or law. A community may thus be a single village or town, or a group of villages or towns, or chiefdom.'* The definition of community used in the 2009 Community Rights Law will apply throughout the guidelines, given that it is broad and applicable beyond forestry.

Specifically, communities that would be affected by development projects involving forest resources or forestlands and are entitled to FPIC by national laws and regulations or international obligations (i.e. project-affected communities) are the main focus of the guidelines. This category includes social groups such as forest resource gatherers, processors and traders, community-based organizations with direct interest in the forestry sector, and community bodies with specified roles in forest governance processes. Common examples include CFDCs, Community Forestry Management Bodies (CFMB), Community Assemblies and associated Executive Committees, as well as unions that bring these groups together. Furthermore, community governance bodies such as the Community Land Development and Management Committees exercising authority over community forestlands are also included. Communities are not only defined from an inclusive standpoint; the guideline also provide clear guidance on ensuring gender equality in the FPIC process.

In addition to rooting the definition of communities in Liberian law, good practice requires that all project-affected communities/groups and civil society representatives to be included in FPIC related consultation processes at all stages of design, implementation and monitoring of projects.<sup>56</sup>

## 4.4 FPIC Guidelines for Regulatory Agencies

A key finding from the reviews of law and practice is that the Government of Liberia has made substantial progress with embedding FPIC into laws and regulations, but now needs to develop its ability to regulate this requirement. Put another way, the Government has made FPIC a requirement for a growing number of circumstances and now needs to clarify what it expects and how it will perform its oversight and verification function.

The principal target for the Guidelines is therefore the FPIC regulators. Principally the FDA, but also including the Ministry of Agriculture (MoA), the National Bureau of Concessions (NBC) and the LLA. Guidelines to clarify what Government means by FPIC and how it will be verified will in turn benefit developers and communities who will gain through clearer understanding of their rights and responsibilities.

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<sup>55</sup> Government of Liberia (2006). National Forestry Reform Law of 2006, p.7.

<sup>56</sup> FAO (2016). *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities.*

## 5 Lessons Learned on the Development of National FPIC Guidelines

In this section, the main lessons arising from the project to develop national Guidelines on FPIC are summarized.

### 5.1 Multi-Sector Engagement with Stakeholders is Necessary

The process to develop the national FPIC guidelines was based on a five-step method, with a strong focus on stakeholder engagement and validation. Within this was a detailed analysis of the legal basis for FPIC and FPIC practice in Liberia and abroad. Consultation with stakeholders also helped to define the scope of the project in the inception and work planning stage. The draft guidelines were also tested in a community and then put to stakeholders for further consultation and validation at a national conference in May 2019 (refer to Annex 4).

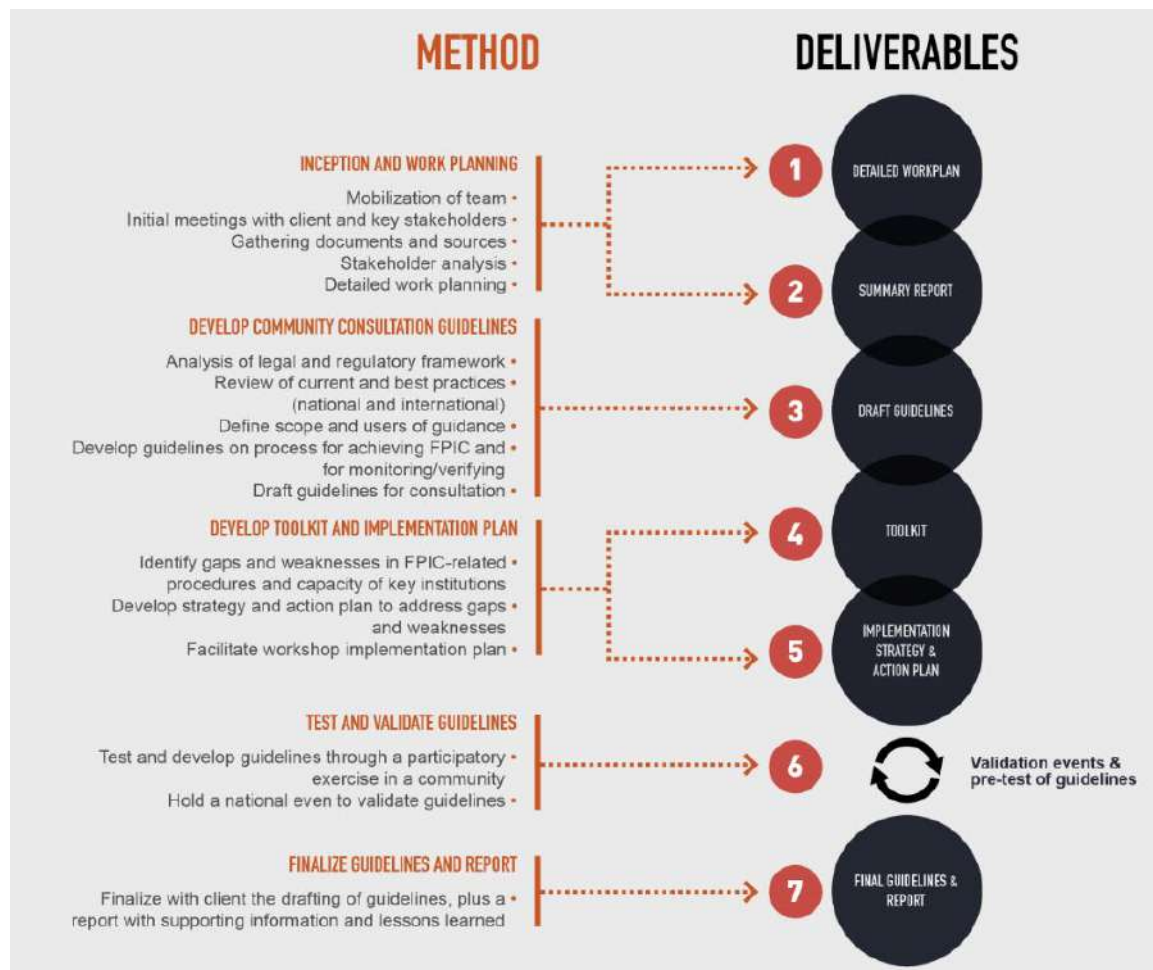


Figure 2: Method and Deliverables



**The breadth of stakeholders and consultation was a strength but also a challenge.**

The stakeholder analysis and broad consultation gave important directions to the project; for example the focus on FPIC the key role of government regulators and the desire for guidelines that were relevant across government, not just to the forestry sector.

However, it also created a challenge in that there was not a single representative body that could review and comment on draft reports from the project. Both the Community Forestry Working Group and the Oil Palm Working Group gave valuable comments, but neither of these groups represent the whole range of interest. Regulatory bodies were brought together for the project but again there was not a standing group that could review drafts and comment from a cross-government perspective. The existing Inter-Ministerial Committee on Concessions was suggested by stakeholders as a possible group to oversee developments in FPIC. In practice, the technical work to develop or approve new regulations or guidelines on FPIC would likely have to be done at a lower level than this group.

The implications for future work to implement FPIC is therefore that cross-government and multi-stakeholder groups will have to be brought together specifically to guide the work.

## **5.2 Liberia has a Strong Legal Basis for FPIC**

The project method included a comprehensive review of national and international laws relevant to FPIC in Liberia. The main lesson from this was that Liberia has a relatively well-developed set of laws that require FPIC. These are best developed in the forestry sector, but there is also law requiring FPIC on all sectors affecting communally owned land.

This meant that the Guidelines could be focussed on presenting and applying the existing laws and regulations. Indeed, the bringing together of the existing framework for FPIC into one document is a new and valuable contribution.

It also meant that the guidelines could be focussed on FPIC and the process of achieving consent, as opposed to community consultation more generally. Liberia has a vast and diverse experience of consultation that would have been very hard to distil into useful guidance. On the other hand, there is sufficient law and practice specifically on FPIC to make it possible and desirable to focus on this.

## **5.3 Effective implementation is very challenging**

Liberia has an impressive amount of experience of applying FPIC in some sectors and by some non-government and government bodies. Several oil palm companies are particularly advanced in terms of having gained several years of attempting to achieve FPIC with communities and developing advanced working practices to do this. Amongst government bodies the FDA Community Forestry Department in particular has built up considerable experience with FPIC through supporting communities through the 'Nine Steps' process of formalizing community forests. Conservation and community-rights NGOs, such as Liberia's Sustainable Development Institute, Fauna & Flora International and Conservation International.

But there remains a very large gap between law, regulation and practice, with FPIC on the ground being very challenging and often contested. In many cases, the problems arise from no FPIC or inadequate FPIC when concessions were initially granted.

The project developed the FPIC Toolkit (Annex 2) as an additional resource for practitioners, but the main focus of the work was on bringing clarity and consistency to the Government position on FPIC

and on how it intends to regulate it. This should improve practice, by making it clearer to communities and developers what is expected and by increasing the level of government guidance and scrutiny.

The implication for further work on FPIC is that progress needs to be made at both **practice** and **policy** levels. Certainly, the methods and the validity of FPIC in practice needs to be improved but so does the law and regulation for those sectors where there are gaps. These gaps are identified in Section 2 of this report (the legal review). Recommendations for next steps to improve both policy and practice arose from the national validation event and other consultations during the project. These are presented in the Report on Testing and Validation that is annexed to this report.

# Annexes

## **Annex 1: National Guidelines on FPIC**

*Attached separately.*

## **Annex 2: Toolkit for Practitioners of FPIC**

*Attached separately.*

## **Annex 3: Implementation Plan for the Regulation of FPIC by the Government of Liberia**

*Attached separately.*

## **Annex 4: Report on the Testing and Validation of National FPIC Guidelines**

*Attached separately.*

