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HANDBOOK



Respecting free,
prior and informed
consent in Mali

A TOOL TO
STRENGTHEN
LOCAL LAND
GOVERNANCE

Respecting free, prior and informed consent in Mali

This guide is the result of a training event on free, prior and informed consent (FPIC) and the sharing of other locally developed tools, which was held on 2 and 3 May 2018 in Kayes, Mali. The training event provided around 50 participants from farmers' associations, women's and youth groups, local government and regional technical services with an opportunity to analyse the FPIC process in the local context to strengthen land governance in Mali.

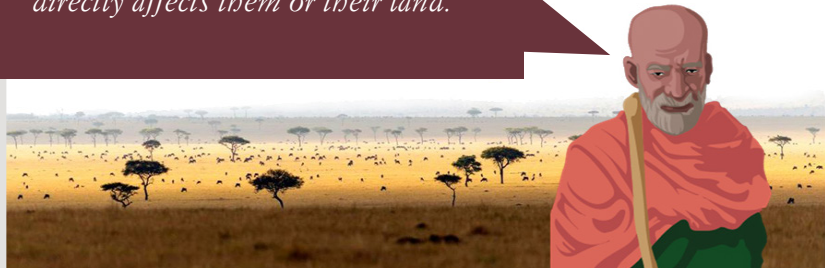
What is free, prior and informed consent?

Free, prior and informed consent (FPIC) is a collective right that belongs to each member of a community. It means that communities have a right to make decisions through their own freely chosen representatives and customary or other institutions, such as local governments and local elected representatives.

What national land frameworks exist to foster participation and consent?

The government bill on agricultural land proposed by the Minister of Agriculture was passed by the Malian parliament in March 2017 in an extraordinary parliamentary session. Civil society made considerable contributions to the bill, which was enacted by the President of the Republic of Mali on 11 April 2017. The resulting legislation (Loi sur le foncier agricole) paves the way for creating rural land tenure security in Mali based on participation and dialogue. "This bill makes land one of the main issues addressed by the country's agricultural policy and will allow the agricultural land issue to be managed through a proactive, consultation- and consensus-based approach to meet the land-management challenge in Mali." said Drissa Tangara, a member of parliament and chair of the National Assembly's Commission for Rural Development and Environment. The law and its implementing orders recognize "**rural community agricultural land**" for the first time. It also introduced village land commissions, which will play a central role in resolving land disputes in rural areas while promoting gender equality in decision-making.

FPIC allows local communities to give consent to any project that directly affects them or their land.



It also allows stakeholders to negotiate the design, implementation, monitoring and evaluation conditions. FPIC therefore requires communities to negotiate a fair and enforceable agreement and to say "no" to any project that does not properly address the community's needs, priorities and concerns. FPIC means that communities have the right to decide their own future.

Free, prior and informed consent (FPIC) is a standard promoted by Mali's Agricultural Land Policy (Politique foncière agricole) and Agricultural Land Law (Loi sur le foncier agricole) and by international treaties adopted by international organizations.

What international standards and frameworks exist?

FPIC is also part of other international standards and best practices that are relevant to Mali, such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

The sixth principle of implementation of the guidelines specifically promotes participatory decision-making:

“Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.”

(VGGT, Part 2 General matters, 3B Principles of implementation, p. 5)

For responsible and peaceful land governance, the *Technical Guide for Land Tenure Governance and FPIC Compliance* emphasizes the importance of putting communities at the center of decision-making processes regarding their rights and interests, and the critical role they play in the outcomes of these processes of peaceful and inclusive dialogue:

“FPIC requires ensuring that communities can meaningfully participate in decision-making processes and that their concerns, priorities and preferences are accommodated in project designs, indicators, implementation and outcomes. FPIC...requires that communities can negotiate fair and enforceable outcomes.”

The technical guide recommends that negotiations take place so that communities' needs, priorities and concerns are adequately addressed. Consultations and negotiations are the best way of ensuring that all stakeholders find durable, consensus-based solutions that clearly take into account the priorities of all stakeholders, especially communities. They prevent potentially costly and destructive conflicts that destabilize ancestral social relations within communities.

(Respecting free, prior and informed consent, Governance of tenure technical guide No. 3, p. 10.)



Interview with Radio Rurale in Kayes during the FPIC training event organized by IPAR and FAO in Kayes, Mali on 2 and 3 May 2018.

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What links are there between the international and national frameworks?

The VGGT are legal documents that constitute the foundations for implementing a coherent policy for managing agricultural land resources in Mali. Mali's Agricultural Land Policy ensures that land markets are properly regulated and supervised by establishing procedures such as community consultation to make transactions more transparent, with the processes approved by the land commission for transactions carried out by agricultural companies. Plans are therefore underway to introduce land registration notices to raise awareness among all stakeholders and ensure they are better informed. This policy is also a guiding principle for the Agricultural Land Law. For example, to ensure the legitimacy and legality of land institutions, an open consultation process is set up under the joint supervision of the local authorities and representatives of central government.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that FPIC must be obtained prior to the implementation of any measures that might involve forcibly relocating indigenous peoples (Article 10) or the approval of any project affecting the lands or territories and other resources of indigenous peoples, including the exploitation of mineral, water or other resources (Article 32). Bearing in mind the principle of self-determination and the provisions of the UNDRIP as a whole, states should obtain consent from communities on matters concerning the rights, survival, dignity and well-being of indigenous peoples. FPIC should therefore be applied to all decisions that may affect their rights, and this duty falls under the state's duty to respect indigenous peoples' wider rights to be represented through their own institutions; to exercise their customary law; to own the lands, territories and natural resources they traditionally own, occupy or use; to self-identify; and to maintain their cultures. FPIC therefore concerns and includes the right to full participation as well as other rights contained in legally binding international treaties, including:

- the United Nations Declaration on the Rights of Indigenous Peoples;
- International Labour Organization Convention No. 169 concerning indigenous and tribal peoples in independent countries;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on Biological Diversity; and
- the African Charter on Human and Peoples' Rights.

Mali is a signatory party to the Universal Declaration of Human Rights of 10 December 1948, the African Charter on Human and Peoples' Rights of 27 June 1981, and the achievement of African unity. It also reaffirms its commitment to the promotion of peace, to regional and international cooperation, and to the peaceful settlement of disputes between states with respect to justice, equality, freedom and the sovereignty of peoples.

In addition, ECOWAS Directive C/DIR.3/05/09, dated 27 May 2009, on the harmonization of guiding principles and policies in the mining sector, affirmed the importance of FPIC. Specifically, Article 16 stipulates: "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."

Mining rights holders must therefore maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.

Ultimately, breaches of FPIC standards can be brought before the African courts (the ECOWAS Court of Justice and the African Court on Human and Peoples' Rights).



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A participant taking notes during a consultation on the governance of pastoral land in the Kayes region, Mali.

Defining FPIC



Consent: The decision made by rights holders after communities' customary decision-making processes have taken place. The communities also have the prerogative to negotiate their consent or to provide it subject to certain conditions. To obtain the consent of the communities, parties must engage in inclusive and peaceful dialogue that allows them to find appropriate solutions in a climate of mutual respect and good faith and on the basis of full and equitable participation, with sufficient time allowed for the decision to be made. The communities can participate through their own, freely chosen representatives and/or through their customary or other institutions. The approach taken should incorporate gender equality, women's participation and, where appropriate, youth participation. It is crucial to verify that stakeholders have understood consent from the perspective of the communities involved in the process.



Prior: Consent is sought and obtained long before the authorization or commencement of activities. This aspect concerns the time requirements for community consultation and consensus processes.



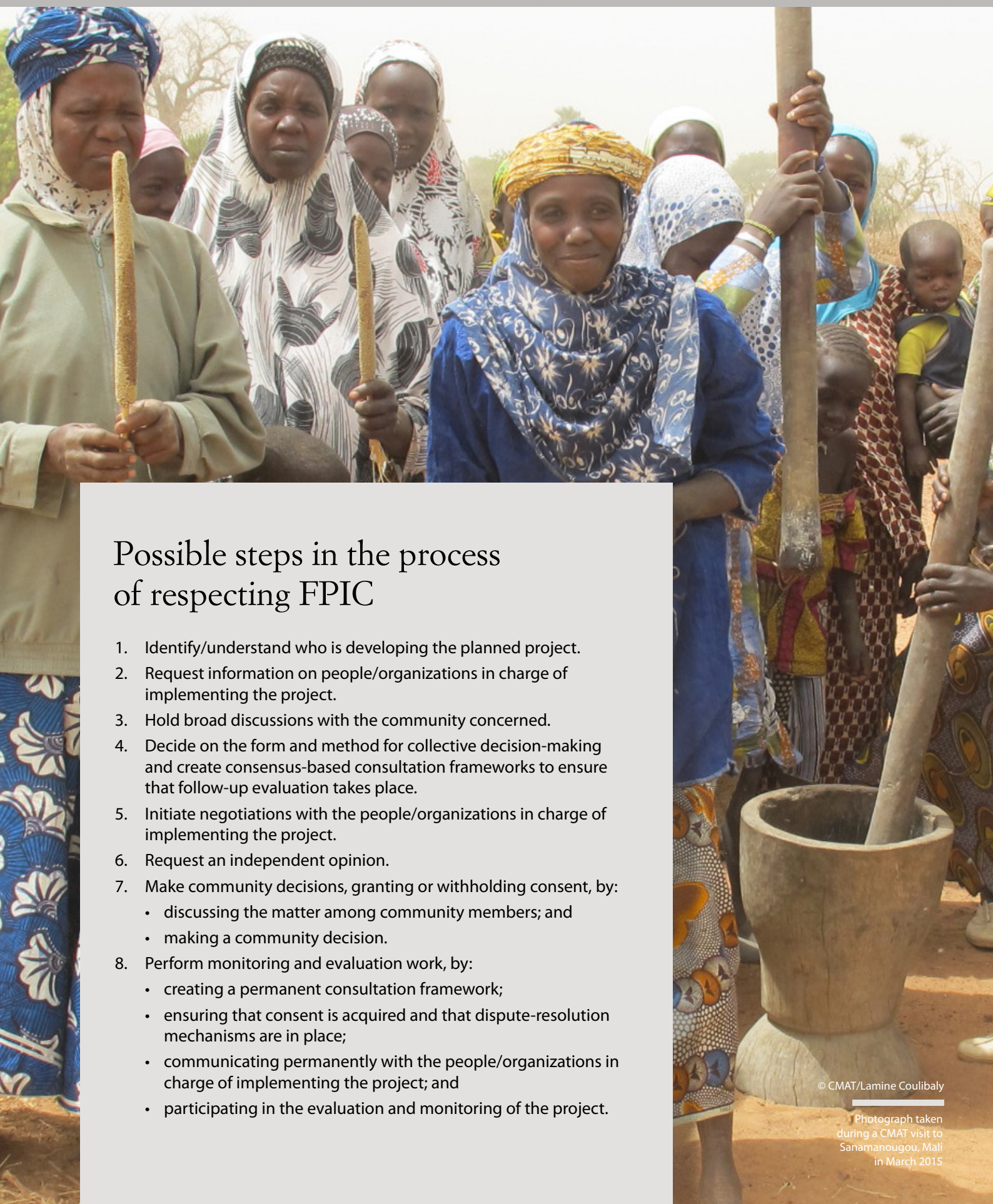
Free: Consent is given voluntarily, with no coercion, intimidation or manipulation, and is the result of inclusive dialogue led by the community and stakeholders.



Informed: Local communities receive information relating to the activity that is objective, accurate, comprehensive and presented in a manner or worded in a way that all members of the community can understand. Relevant information includes:

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

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Possible steps in the process of respecting FPIC

1. Identify/understand who is developing the planned project.
2. Request information on people/organizations in charge of implementing the project.
3. Hold broad discussions with the community concerned.
4. Decide on the form and method for collective decision-making and create consensus-based consultation frameworks to ensure that follow-up evaluation takes place.
5. Initiate negotiations with the people/organizations in charge of implementing the project.
6. Request an independent opinion.
7. Make community decisions, granting or withholding consent, by:
 - discussing the matter among community members; and
 - making a community decision.
8. Perform monitoring and evaluation work, by:
 - creating a permanent consultation framework;
 - ensuring that consent is acquired and that dispute-resolution mechanisms are in place;
 - communicating permanently with the people/organizations in charge of implementing the project; and
 - participating in the evaluation and monitoring of the project.

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Photograph taken during a CMAT visit to Sanamanougou, Mali in March 2015

Roles and responsibilities



Governments

Governments have a duty to protect the public interest while also protecting, and not ignoring, the rights of local communities.

Local communities

Local communities should help determine what shape the FPIC process will take, its pace and who will take part.

NGOs, CSOs, indigenous peoples' organizations

These organizations support local communities and monitor the FPIC process. They can also act as mediators and facilitators.

Companies and investors

Companies and investors have legal and ethical obligations to respect local communities' human rights.

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Case study: a land tenure negotiation in Kalao, in the municipality of Ségala

The installation of a baobab processing plant in Kalao, in the municipality of Ségala

Context: As part of a rural development project, Kayes Regional Council commissioned a diagnostic study to identify promising sub-sectors in agriculture. The study involved all parties that were stakeholders in the region's socio-economic development. The results of the study were presented at an information session chaired by the regional governor, in which the other stakeholders actively participated.

The results were also presented during a special validation session by CROCSAD.¹ The study led to a proposal to open a baobab processing plant in Kalao, in the municipality of Ségala. Led by the regional council and the private sector, with a total cost of XOF 391 412 237 (USD 700 000) over a period of 12 months, the project used a participatory and consultation-based approach.

The vast majority of the stakeholders involved in the project were informed about the various aspects of the project, and the issue of land was raised. Nevertheless, some stakeholders – most notably the project beneficiaries – were not sent some of the information for approval. The site selected was therefore not determined through a participatory approach. To address this shortcoming, a multi-stakeholder mission was set up to seek public consent. The mission was formed by regional agricultural technical services, representatives of farmers' organizations, locally elected representatives and project managers, among others. The mission's specific role involved:

- meeting municipal councillors to garner stronger support for the project document and secure their backing for the rest of the project implementation process; and
- meeting village councils (village chiefs and councillors), landowners and village land commissions in the area, with the support of municipal councillors, to inform them about the project, secure their backing for the choice of site and hear their views to ensure that, moving forward, the project runs smoothly;

- meeting stakeholders in the agricultural value chain (individual people or organizations), such as producers, processors and retailers, in order to:
 - explain the advantages and disadvantages of the project;
 - clarify everyone's roles and responsibilities in implementing the project;
 - identify the additional measures needed to make the project a success; and
 - organize a general assembly attended by representatives of the different stakeholder groups for the results of the various interviews to be reported and approved and to initiate the active implementation of the project.

Analysis of the processes and steps taken by the project has shown that:

1. The principle of "informed" was respected during the first stage of the project. A participatory approach was taken and stakeholders were consulted. All stakeholders were informed about the various aspects of the project.
2. The principle of "prior" was also respected, since stakeholders were involved in designing the project. This gave them easy access to all the necessary information well before the project was implemented.
3. The principle of "free" was respected, too, since no coercion, intimidation or manipulation was observed during the process.
4. The principle of "consent" was partially taken into account. Certain shortcomings were noted in terms of the choice of site, but given the various missions employed by the project team to address the issues and to consult all stakeholders, this extremely important project-implementation principle can be considered to have been respected.

In conclusion, taking these various principles into consideration will help to ensure that the project fosters uptake, cohesion, peace and success.

¹ Regional Committee for Coordination and Monitoring of Development Actions (Comité Régional d'Orientation, de Coordination et de Suivi des Actions de Développement, CROCSAD). There is one committee for each region and one for Bamako District. Their role is to foster synergies between the development actions of different stakeholders operating in the region.

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The River Senegal near
Bafoulabé in Mali's Kayes
region, 400 km north-west of
Bamako.



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Annex

Key aspects for the community to consider when deciding whether to lease or lend its land to a company

Based on all the relevant information and on advice taken from an independent expert (legal or otherwise), the entire population has the right to decide collectively, using their own internal decision-making methods, whether they wish to lease or sell land to a company and what payments or benefits the population will receive in exchange. If a community leases out land that the law recognizes as belonging to it:

1. For how long can the community lease the land to the company?
2. What is the size of the land area that belongs to the community and what portion of that land area does it want to lease to the company?
3. Which zones and natural resources is the community willing to allow the company to use and which zones and natural resources is it not willing to lease?
4. Which land and resource uses will the community authorize and which will it prohibit?
5. What payments and benefits will the community demand from the company in exchange for the use of its land?
6. Will the land-use lease be exclusive to one company, or will it be appropriate to lease the land to more than one company?
7. The community will need to decide who will sign the lease on its behalf. If only a few community representatives are chosen, they must have obtained written authorization signed by the entire community as evidence that they are duly authorized to sign.

Examples of payment types and benefits (combinations of any of the following are possible):

- Rental costs relative to the land area ("lease"), such as a monthly fee that the business pays to the community per hectare of land that it uses. Note that the regular payment of rent is an important legal indication that the land remains the community's property.
- Royalties, usually calculated as a percentage of the company's profits, and therefore variable according to how successful the company is, but with a floor to provide a certain level of income security if the company goes through hard times and profits fall.
- Social welfare benefits, such as contributions to a community development fund or company obligations in terms of building, improving or maintaining infrastructure such as roads, bridges, schools and healthcare facilities.
- Jobs and training, which are often restricted to certain members of the community.
- Dividends paid to shareholders when the community becomes a company shareholder and receives a portion of the company profits.
- Support for new and existing smallholder or outgrower projects, thus helping the community to cultivate its own land. In practice, private companies involved in implementing such systems sometimes require communities to sell their produce exclusively to them, and even if they contribute towards the costs of starting up agricultural production or the running costs, those contributions might be deducted from the profits earmarked for the community.

Other information sources

This manual is based on the work of the Sustainable Development Institute (SID), Social Entrepreneurs for Sustainable Development (SESDev) and the Forest Peoples Programme (FPP) and its partners, and in particular the FPIC Manual developed for communities in Liberia, which has been adapted to the context of Mali.

The following publications may be useful and may provide more information:

1. Law No. 2017-01 of 11 April 2017 on agricultural land tenure (Loi n°2017-01 du 11 avril 2017).
2. A manual on Free, Prior and Informed Consent (FPIC): Communities in the Driving Seat", Sustainable Development Institute, Social Entrepreneurs for Sustainable Development, 2015. [www.forestpeoples.org/sites/fpp/files/training/2016/02/Communities in the Driving Seat.pdf](http://www.forestpeoples.org/sites/fpp/files/training/2016/02/Communities%20in%20the%20Driving%20Seat.pdf)
3. Agricultural Land Policy (Politique foncière agricole), Ministry of Rural Development, Permanent Secretary of the Higher Council for Agriculture, April 2014.
4. Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, Governance of tenure technical guide No. 3. FAO, Rome, 2014. www.fao.org/3/i3496e/i3496e.pdf
5. [_REMOVE THIS DUPLICATE ITEM_]
6. "Note d'information, Le Consentement libre, préalable et éclairé: Un droit fondamental des communautés", Forest Peoples Programme, 2013.
7. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, FAO, Rome, 2012.

Online training

Respecting Free, Prior and Informed Consent

1. www.fao.org/elearning/#/elc/en/course/FPIC



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Group photo during the closing session of the FPIC training event organized by IPAR and FAO in Kayes, Mali on 2 and 3 May 2018.



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