EQUITABLE ORIGIN

COORDINADORA DE LAS ORGANIZACIONES INDÍGENAS DE LA CUENCA AMAZÓNICA

RSB
Roundtable on Sustainable Biomaterials
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ENABLING FPIC THROUGH VOLUNTARY STANDARDS

An ISEAL Innovations Fund Project

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L LIST OF ABBREVIATIONS

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LIST OF ABBREVIATIONS

ADB	Asia Development Bank
AIPP	Asia Indigenous Peoples Pact
CCCMC	Chinese Chamber of Commerce Minerals Metals and Chemicals
EBRD	European Bank for Reconstruction and Development
EO	Equitable Origin
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GIB	Global Infrastructure Basel
ICMM	International Council on Mining and Metals
IDB	Inter-American Development Bank
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
ILO	International Labour Organization
IRMA	Initiative for Responsible Mining Assurance
ISEAL	International Social and Environmental Accreditation and Labelling Alliance
IWGIA	International Work Group For Indigenous Affairs
NGO	Non-governmental organization
OECD	Organization for Economic Co-operation and Development
PEFC	Programme for the Endorsement of Forest Certification
RJC	Responsible Jewellery Council
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable for Sustainable Palm Oil
SAN	Sustainable Agriculture Network
SuRe standard	Standard for Sustainable and Resilient Infrastructure
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGC	United Nations Global Compact
UNGP	UN Guiding Principles on Business and Human Rights

NOTE ON TERMINOLOGY

In this project, and when used in this report, the term ‘stakeholder’ is defined broadly and refers to any group or individual who can affect or is affected by a process, event or intervention. Some stakeholders are also rights-holders, and in particular it should be noted that Indigenous Peoples can be legitimate rights-holders and in many cases have expressed the importance of their being acknowledged as rights-holders when participating in consultation processes. In this report we refer to stakeholders in natural resource development projects, which very often includes government agencies, the project developer (a private or state-owned business) and communities local to the development, including Indigenous Peoples communities and groups and their interests. We also refer to stakeholders of an FPIC process. Because the applicability of FPIC is restricted to Indigenous Peoples in this project, stakeholders in FPIC processes are less likely to include communities that do not self-determine as Indigenous Peoples.

The term “Indigenous Peoples” is used throughout this study and should be understood to include groups of people who self-identify as such, and who are therefore afforded the same rights under international human rights law, regardless of alternative nomenclature such as “ethnic minorities” or “tribal groups” that some States may use.

Where the term “community” is used, it should be understood as an Indigenous Peoples community, even where not explicitly stated. This project only studies FPIC in the context of Indigenous Peoples’ communities because in this context the right to FPIC is clearly established in international human rights law. Although there is ongoing international debate about whether this right should be extended to communities that are not Indigenous Peoples’ communities, for the purposes of this project we apply it in the context of Indigenous Peoples only.

There may be instances where an FPIC process is conducted with multiple communities at the same time, however, throughout this report, community is referred to as singular rather than plural.

EXECUTIVE SUMMARY

This report presents the methodology and results of a project that was jointly facilitated by Equitable Origin (EO) and the Roundtable on Sustainable Biomaterials (RSB.) The project was funded by the ISEAL Innovations Fund because members of the ISEAL Alliance[1] have identified the need to include Free, Prior and Informed Consent (FPIC) within their standards requirements. Outreach to ISEAL members has revealed that beyond the challenges of FPIC implementation, it is also challenging for assurance providers to verify that FPIC processes have been implemented.

The objective of this project was to draft a tool that will aid assurance providers to monitor and verify that the process is being implemented responsibly. By developing this tool in collaboration with representatives from Indigenous Peoples' communities who have experience with community consultation and FPIC processes, we establish a framework that integrates best practice management requirements with indicators, procedures and protocols that have been constructed with and by Indigenous Peoples.

The report contains seven sections. Section 1 provides the background to the project. Section 2 details the methodology used for approaching the development of the tool, namely via three key project activities: a literature review of the international standards, guidance and recommendations regarding FPIC and its implementation (see Section 3); desktop research of the legislative and regulatory environments of Colombia, Ecuador and Peru, specifically regarding their treatment of FPIC (see Section 4); and a series of three workshops conducted in these three same countries to better understand FPIC from the perspective of Indigenous Peoples (see Section 5). The resulting framework for a monitoring and verification tool is presented in Section 6, and section 7 explains the project's next steps and avenues for contributing or staying up to date with the project's progress.

The literature review conducted in this project revealed that despite the growing body of knowledge, experience and guidance on how FPIC can and should be implemented, there is little guidance on what constitutes acceptable evidence of FPIC processes. Few of the standards and guidance documents analysed provide assurance providers or auditors with possible indicators or verifiers, and there are few resources that define what successful implementation of FPIC is from

[1] The ISEAL Alliance is the global membership association for voluntary sustainability standards. ISEAL members comply with the ISEAL Codes of Good Practice. See: http://www.isealalliance.org/about-iseal

the perspective of affected communities. While this perspective remains unrepresented in the international guidance literature, credible and consistent verification of FPIC will remain problematic. Resources to aid verification must be socially-informed from the ground up if they are to be credible to all project stakeholders, and therefore acceptable as a means of verification. International guidance on FPIC processes makes clear that Indigenous Peoples must be engaged from the outset in a participatory process that allows them to co-design the subsequent stages of the consultation process.

The workshops conducted during the project revealed that while indigenous community representatives may be aware of their rights to an FPIC process, and what it means in theory, they are often lacking the knowledge and capacity to be able to participate meaningfully in FPIC consultation because they are not clear on what the FPIC process should constitute in practice, nor aware of the expectation that they co-lead the process. A successful FPIC process, therefore, cannot be measured by the outcome alone, nor by affirming Indigenous Peoples the right to say yes or no to development, rather it relies on the creation of a space for two-way dialogue that is carried out in good faith with equal participation from communities and project developers. Starting an FPIC process with the appropriate engagement and participation of affected communities is crucial to being able to implement the rest of the process responsibly.

Based on these findings, we developed a draft framework for a monitoring and verification tool for assuring that the correct steps are being taken throughout an FPIC process. We assert that assurance of FPIC processes must go beyond verifying the existence of management systems, to verify the legitimacy and credibility of the process itself. Without this assurance the credibility of the process outcome is open to question. The premise of the tool is to facilitate a two-way dialogue between project developer and community, whereby both actors can participate in data generation in support of the requirements outlined by the framework. Meanwhile, third-party auditors also have access to the data for verification and assurance purposes. Due to regional and project-contextual specificities, it is acknowledged that the resulting resources will, in part, be specific to the Amazonian communities engaged during the course of the project.[2]
The last and final section presents the project's next steps and avenues for contributing or staying up to date with the project's progress.

[2] In the Latin American region, in a manner distinct to the African and Asian regions, there is a historic recognition of Indigenous Peoples which has contributed to increased engagement with, and adoption of, legal mechanisms for addressing their rights, including the manner in which communities articulate these rights vis-à-vis corporate actors. See ASI APIF Fact Sheet 1: Criteria for the Identification of Indigenous Peoples.

1. INTRODUCTION

1.1 Project Relevance

Standard-setting organisations that certify mineral, forest and agriculture and biomass-based resources adjacent to or overlapping with Indigenous Peoples claims to customary land and resource rights have identified the need to include Free Prior and Informed Consent (FPIC) in their Standards'[3] requirements. These organisations include Equitable Origin, the Roundtable on Sustainable Biofuels, the Forest Stewardship Council (FSC), the Roundtable on Sustainable Palm Oil (RSPO), the sustainable sugar initiative Bonsucro, the Sustainable Agriculture Network (SAN), the Responsible Jewellery Council (RJC), the Aluminium Stewardship Initiative, the Initiative for Responsible Mining Assurance (IRMA), Initiative for ResponsibleSteel™, the Bettercoal Code, and Global Infrastructure Basel (GIB)'s Standard for Sustainable and Resilient Infrastructure (SuRe® Standard) . Many of these organisations are full members of the ISEAL Alliance[4] or have joined the ISEAL Community as subscribers. Hereafter, these Standard-setting organisations are referred to as the "Standards."[5]

Standards interviewed reported two broad obstacles to effective FPIC processes. First, project developers face many diverse challenges to the implementation of FPIC including insufficient time and resources, communities with weak institutional and technical capacity, lack of consensus among project stakeholders on what constitutes FPIC and at what stages of a project it is required, and an absence of national legislative and regulatory structures to support consultations aimed at achieving FPIC. Second, the Standards also revealed that verifying this implementation to satisfy conformance with their requirements is challenging. While there are management system indicators that can be used to verify the existence of structures and systems required to implement an FPIC process, there is a lack of verifiable procedures and protocols which can assure effective implementation at the process level.

[3] "Standards" should be understood as sets of criteria defining good social and environmental practices in specific industries or products, that are used by companies, governments, financial institutions and consumers. For more information see ISEAL: https://www.isealalliance.org/credible-sustainability-standards/what-are-credible-sustainability-standards.

[4] The ISEAL Alliance is the global membership association for voluntary sustainability standards. ISEAL members comply with the ISEAL Codes of Good Practice. See: http://www.isealalliance.org/about-iseal

1.2 Problem Statement

There is a growing body of knowledge, experience, case studies and guidance on how FPIC can and should be implemented. There are limited resources however, that define how assurance providers can verify whether FPIC has been achieved. From a project management perspective, the outcome of an FPIC process is required for the project to be able to progress to implementation phase. From a legal perspective, however, there is a need to measure whether the rights of Indigenous Peoples that FPIC serves to safeguard, are being upheld. We assert that the effective safeguarding of these rights is as dependent on the way in which procedures and processes are conducted, as they are on the final outcomes. FPIC processes are founded in two-way dialogues, conducted in good faith and between parties who have the institutional and technical knowledge and capacity to make informed decisions. Beyond verifying the outcome therefore, and the management systems or structures used to achieve that outcome, one of the key challenges to verifying FPIC lies in being able to assure that the process itself is conducted in a manner that actively promotes the rights of Indigenous Peoples and empowers them to participate in, and co-lead the process. Without this assurance the credibility of the process outcome is open to question. This project aims, therefore, to develop a practically-implementable tool to facilitate the verification of an FPIC process for the mutual benefit of affected communities and project developers, by measuring and verifying both the outcome of an FPIC process, but also the process itself.

1.3 What is Free, Prior and Informed Consent?

There is no universal definition for Free, Prior and Informed Consent (FPIC) and it is characterized in different terms according to different sources. For example, among the Standards analysed in the following literature review, some defined FPIC as a 'principle,' others as a 'right', an 'international human rights standard' or a 'legal norm'[6]. Whichever term is employed, it is perhaps most usefully understood as *a normative obligation intended to safeguard Indigenous Peoples' right to self-determination regarding large scale development projects or administrative measures which will potentially affect their land, natural resources, traditional livelihoods, cultural heritage and wellbeing.* This right is protected through consultations that are conducted in a good faith process, and through Indigenous Peoples' own decision-making procedures, where the community is: **free** from coercion, intimidation or

[6] By the Bettercoal Code, Forest Stewardship Council, SAN and REDD+ respectively.

manipulation; consultation begins sufficiently **prior** to start of any proposed activity to allow for the community to come to a decision using customary mechanisms; where the community is fully **informed** of both the nature of the project, including project risks and impacts, and the form and structure of the FPIC process in a culturally-appropriate, accessible and timely manner; and where the community has the right to either grant or withhold **consent**.[7] The outcome of an effective FPIC process therefore is an agreement between the project developer and affected communities regarding whether the proposed project can go ahead, and according to what conditions, such as compliance with certain standards, the conditions of benefit sharing and compensation, required monitoring and evaluation systems and mitigation measures in the event that the agreement is breached.

In the view of James Anaya in his former role as UN Special Rapporteur on the Rights of Indigenous Peoples, the strength of importance of achieving consent should vary according to the interests of the Indigenous Peoples affected.[8] Where consent is not forthcoming, States may still approve that a project go ahead, but this limitation on the rights of Indigenous Peoples is only valid if its pursues a valid public purpose. In other words, it cannot serve only commercial interests and it must comply with the standards of necessity and proportionality.[9] This means that the extent to which Indigenous Peoples' rights are potentially affected by the project and their significance to Indigenous Peoples' survival must be duly considered. the context of large scale development projects in or near Indigenous Peoples' territories, the impacts are almost always potentially significant and human rights bodies have repeatedly asserted that consent should be seen as a requirement since the proportionality standard will not be met.

Once consent has been obtained, and an agreement reached, it needs to be maintained continually. This means having a means for ongoing dialogue to take place between the project developer and affected communities, including an accessible grievance mechanisms and remediation plan that can address situations where there is non-compliance with the conditions of the project as stated in the agreement. Modifications to the original project plan, including in cases where the project changes ownership, may require a new FPIC process[10] and

[7] It may also be the case that the community grants consent on the basis that the project proposal is modified.
[8] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/12/34 (!5 July 2009) para 47.
[9] See UNDRIP, Art. 46
[10] Árran Lule Sami Centre, (2016) "What is Free, Prior and Informed Consent?" Indigenous Peoples And Resource Extraction In The Arctic: Evaluating Ethical Guidelines. December 2016, p. 11.

circumstances such as these should be defined from the outset in agreement with the community involved. If a consultation results in community withholding consent, then the formal documentation of the process should stipulate a minimum period during which no further approaches will be made to the community.[11] FPIC should therefore form a precondition before project developers implement projects that could affect other substantive rights.[12]

FPIC is derived from the recognition that Indigenous Peoples have a right to self-determination including the determination of their own development, a right that initiatives such as the UN Working Group on Indigenous Peoples worked to establish over many decades following human rights-related concerns reported by US Indigenous Peoples groups to the UN Human Rights Committee in the 1970's.[13] The right to self-determination is enshrined in Article 1 of the two primary instruments born out of the Universal Declaration of Human Rights: the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The first international legal instrument calling on states to implement FPIC was the International Labour Organization's Convention No. 169 (1989)[14], which emerged as a response to forced geographic displacement of Indigenous Peoples[15]. ILO 169 requires states to ensure that consultations are carried out in good faith and with the objective of achieving consent to proposed legislative or administrative measures that might affect Indigenous Peoples.[16] Furthermore, ILO 169 requires that in the case of projects or developments where relocation of Indigenous Peoples is considered necessary as an exceptional measure, that consent is obtained in advance from the affected Indigenous Peoples communities.[17] FPIC has since been recognized in a growing number of international human rights instruments and standards, most importantly in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[18], a resolution adopted by the UN General Assembly in 2007 that sets out "the minimum standards for the survival, dignity and wellbeing of Indigenous Peoples". In a wider interpretation of contexts explicitly requiring FPIC, UNDRIP requires endorsing states to seek FPIC prior to *any*

[11] *Ibid.*
[12] UN REDD Programme, (2013) Guidelines *on Free, Prior and Informed Consent*, p. 10.
[13] Colchester, M., (2010) *Free, prior and Informed Consent: Making FPIC work for forests and peoples.* Research paper no.11. The Forests Dialogue: New Haven, p.6
[14] ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (hereafter ILO169.)
[15] Fredericks, C., (2017) *Operationalizing Free, Prior, And Informed Consent*, p.430
[16] ILO 169, Article 6
[17] *ibid.*
[18] UN Declaration on the Rights of Indigenous Peoples, available at: http://www.un.org/esa/socdev/unpfii/en/drip.html

projects that affect indigenous peoples' territories, land, or other resources as well as in the context of resettlement. The international human rights community acknowledges that even where FPIC is not explicitly mentioned it should still serve as a guiding principle for all consultation. Since ILO 169 was first adopted in 1989, significant advancements have been made in international human rights law regarding Indigenous Peoples, now reflected in the jurisprudence of international and human rights bodies. As such, ILO 169 must be interpreted in the light of these advancements in contemporary law.[19] Nevertheless the different treatment of FPIC between these two key texts, specifically regarding when consent is required, has lent itself to varying interpretations by the private sector.

1.4 Who is responsible for FPIC implementation?

Most approaches to FPIC may be considered as falling into one of three broad categories, usefully defined by James Anaya (the former UN Special Rapporteur on the Rights of Indigenous Peoples) and Sergio Puig in their 2016 article[20]: the instrumentalist approach; the consent-veto power approach; and, the minimalistic approach. In summary, Anaya and Puig's "Instrumentalist approach" views the state as the primary stakeholder and approaches the consultation process as a participatory mechanism with a focus on formal procedure. That is, although they may adhere to minimum standards, project developers may not necessarily fulfil the spirit of the legal duty – in this case to safeguard Indigenous Peoples' rights by ensuring their full and equitable participation in consultation processes.[21]

By contrast, their "Consent-Veto Power" approach considers Indigenous Peoples to be the main stakeholder and equates the right to FPIC with indigenous sovereignty. The more problematic implication of this interpretation is that Indigenous Peoples hold an absolute right of veto over proposed projects that may otherwise conflict with the legislative constitution of the host state and its own claim to sovereignty. This argument problematizes the state's responsibility toward Indigenous Peoples and risks placing undue emphasis on protecting the right to give or withhold consent, where attention may be better focused towards improving means of safeguarding Indigenous Peoples' rights.[22]

[19] See Article 35 in General Provisions of ILO Convention 169
[20] Anaya, J., and Puig, S., (2016) "*Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples,"* University of Toronto Law Journal 435..
[21] *Ibid:* 12-13.
[22] *Ibid:* 14-15.

Last, Anaya and Puig define a "Minimalistic approach," which they align with the neoliberal concepts of economic liberalism and deregulation that define a large proportion of extractive development. IN worst case scenarios where project developers favour this approach, a consultation process may be perceived as arbitrary, with the project developer preoccupying themselves with the promotion of capital as opposed to the duty to protect human rights.[23]

Defining these categories serves to illustrate a fourth way: Anaya and Puig advocate that the duty to consult, and therefore the implicit duty to implement FPIC, are better understood within a human rights framework. Practically speaking, this considers the duty to consult as more than a duty to simply inform and listen, as the Instrumentalist approach may advocate, yet neither does it equate it with the absolute right to veto as forwarded by advocates of the Consent-Veto Power approach. Instead, the human rights framework is the theory that human rights serve to mitigate the state-centric global framework. This means that states are required to take affirmative steps to protect the human rights of Indigenous Peoples and that those affirmative steps must comply with a minimum set of requirements to safeguard and, if possible, advance those rights through consultation. This approach views Indigenous Peoples as key stakeholders, and also as rights holders, but also requires that companies, states and other relevant entities participate in the consultation process. Ultimately, this approach seeks to safeguard the rights of Indigenous Peoples, including that to self-determination, without undermining either state sovereignty *or* the human rights of all.[24]

How FPIC is interpreted in relation to ILO 169, is varied, and open to discussion. While being ambiguous in its treatment of FPIC on the one hand, on the other hand it can be argued that given its affirmation of Indigenous Peoples rights and its overall objective, in the context of large-scale development projects that have the potential to infringe on these rights, it contains an implicit requirement to respect the outcome of consultations held with the objective of obtaining consent.[25] Although the right to FPIC is affirmed by international human rights treaty bodies and regional legal mechanisms, including the International Covenant on Civil and Political Rights (ICCPR) the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, there is a lack of clarity for both States and non-State parties about practical

[23] *Ibid:* 15-16
[24] *Ibid:* 19
[25] See Doyle C (2015) 'Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent' (London: Routledge) pp. 91-98.

implementation. While the less ambiguous provisions of the UNDRIP are expected to reach the status of customary law as state and corporate practice improves in relation to respect for Indigenous Peoples' rights, currently many governments fail to adequately enforce Indigenous Peoples' rights and there are few national legislative frameworks that explicitly support FPIC principles.[26]

In his 2010 research paper in The Forests Dialogue series, Indigenous Peoples' rights advocate Marcus Colchester forwards that the proper implementation of FPIC serves to create a 'level playing field' between all proposed project stakeholders, establishing equitable agreements between communities, states and companies where all rights-holders are respected, benefits are shared, and projects achieve a 'social license to operate'.[27] International finance institutions such as the International Finance Corporation (IFC), the World Bank, the Inter-American Development Bank (IADB), the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) require their clients to guarantee the implementation of FPIC processes as an investment prerequisite. Companies too are increasingly integrating FPIC principles and language into their codes of conduct, corporate social responsibility strategies, and Indigenous Peoples policies. Additionally, many international sustainability standards, including almost half of the standard-setting members of ISEAL, have now incorporated FPIC as a requirement for entities seeking conformance or certification.

Although developed initially with respect for the special connection that Indigenous Peoples often have with their land and resources and their distinctive self-determination based collective rights, some of the Standards now extend the application of FPIC to non-indigenous affected communities as well, while acknowledging the specificities of Indigenous Peoples rights and realities.[28]

There is a growing consensus that project developers have an international legal obligation to respect all human rights, regardless of whether the country they are operating in is fulfilling the state duty to protect those rights. This is marked by the adoption of the UN Guiding Principles on Business and Human Rights in 2011 by the UN Human Rights Council. Furthermore, in

[26] Australia, Peru and the Philippines are the only countries who include explicit FPIC provisions within their legal frameworks.
[27] Colchester, M., (2010) *Free, prior and Informed Consent: Making FPIC work for forests and peoples.* Research paper no.11. The Forests Dialogue: New Haven, p.18.
[28] For example, Bonsucro, FSC, RSB, RSPO, SAN. See Table 3, Section 4.4.

consideration of the considerable financial and reputational risks associated with failing to obtain local support for large-scale development projects,[29] [30] there is a strong business case emerging for companies to lead in the progressive implementation of FPIC, whether it is required by law of the host country or whether the host country is meeting its international legal obligations. With FPIC now an accepted core safeguard for Indigenous Peoples' rights and regarded as a most effective measure for mitigating multiple levels of risk at large-scale project development sites, many industry standards and certifications now require respect for FPIC.

Given the lack of a uniform definition of FPIC, and a lack of uniform guidelines for how to implement and verify it, it is useful to approach FPIC from multiple reference points. In the following project we navigate these multiple perspectives through three avenues of research detailed in the following Methodology section.

[29] World Resources Institute (2007) Business without Conflict: the business case for community consent. Washington, DC: World Resources Institute. Available at: http://pdf.wri.org/development_without_conflict_fpic.pdf, accessed 07/10/17

[30] International Alert, (2005) *Conflict-Sensitive Business Practice: Guidance for Extractive Industries*. London: International Alert, p.2. Available at: http://www.international-alert.org/publications/conflict-sensitive-business-practice-guidance-extractive-industries-en, accessed 16/08/17.

2. METHODOLOGY

2.1 Approach

This project comprises three key activities: a literature review, desktop research, and three field workshops. This study has also been guided by and benefited from the knowledge of a Working Group comprised of Indigenous Peoples rights experts, lawyers, academics and representatives of Standard-setting organisations. The short duration of this project necessitated that the first two elements, the literature and desktop reviews, to be conducted between August and October 2017, to inform the methodology used for first workshop in Colombia in late October 2017. The results from this workshop, together with input from the Working Group have informed and further improved the methodology used for the second and third workshops in Peru and Ecuador respectively.

Through these combined methods of research, we sought to address the following question to inform the development of the tool:

"How can project stakeholders achieve a mutual understanding of FPIC that is implementable, verifiable, and that remains relevant throughout the FPIC process?"

2.2 Literature Review

This study is anchored by an analysis of the requirements of the Standards and their accompanying guidance documents for FPIC and is supplemented by further categories of literature that provide recommendations and guidance on the interpretation and implementation of FPIC.

Scope

The analysis encompasses the following categories of literature on FPIC (the Reference Documents) written for different audiences – from the state, to the private sector project developers and companies, Indigenous Peoples, NGOs and other institutions working at the community level:

- International human rights standards
- Requirements of International Financial Institutions

- Third party voluntary ISEAL member Standards and other voluntary Standard schemes and their accompanying guidance procedures and protocols
- Membership commitments and policies of industry-relevant associations e.g. ICMM
- Guidance written by NGOs and think tanks on human rights, Indigenous Peoples' rights and the implementation of FPIC in business contexts

The literature review is organized around the following sub-questions:

1) What standards and guidance exist for the implementation of FPIC for (see Section 4)
    - Companies
    - States
    - Indigenous Peoples' communities
2) What is the state's approach toward FPIC (i.e. regulatory context) in each of the three case study countries -Colombia, Ecuador and Peru? (see Section 5)
3) What are the key areas of agreement and difference on the understanding and requirements of verification of FPIC between these literature sources? (see Section 6)
4) What is lacking in existing guidance in terms of implementation and verification of FPIC?
5) What mechanisms exist to accommodate the participation of Indigenous Peoples within standard- setting systems? (see Table 4.4)

In addition, this analysis has been informed by a review of academic literature on FPIC, which served to identify key issue areas or elements of FPIC that create a framework for comparative analyses of the Reference Documents.

2.3 Desktop Research

As noted in the Introduction, one important factor affecting the degree to which FPIC is successfully implemented is the regulatory environment of the country hosting the development project. This is because while FPIC is recognized within international human rights law as a responsibility of States to uphold, the degree to which it is recognized and protected within national legislative and regulatory frameworks varies greatly. In order to ground the analysis, this study therefore employs a desk-top review to examine the regulatory, legislative and political contexts of three case study countries: Colombia, Ecuador and Peru. The rationale for choosing these countries is the continuing engagement between Equitable Origin (EO) and communities affected by project development in the region. EO maintains full-time team members in both Colombia and Ecuador and has established partnerships and agreements with several

indigenous organizations across the Andes-Amazon region. EO has been actively engaging these groups for close to a decade to promote a more sustainable and equitable development of the natural resource sector in the region. These case studies will help inform three workshops that will be delivered during the life of the project in each of the three countries.

2.4 Field workshops

Empirical data for this project is generated through a series of two-day workshops that took place in the Amazon region in Colombia, Ecuador and Peru between October 2017 and March 2018. In collaboration with the Coordinator of Indigenous Organizations of the Amazon River Basin (COICA), these workshops convened participants from communities that have experience with community consultation and FPIC processes to contribute their perspective on what FPIC implementation looks like in practical terms. In including this perspective, we can establish a verification framework that integrates best practice management requirements with indicators, procedures and protocols that have been constructed with and by Indigenous Peoples' communities. By taking advantage of existing relationships our team is able to workshops to provide this study with real-life perspectives from the ground up.

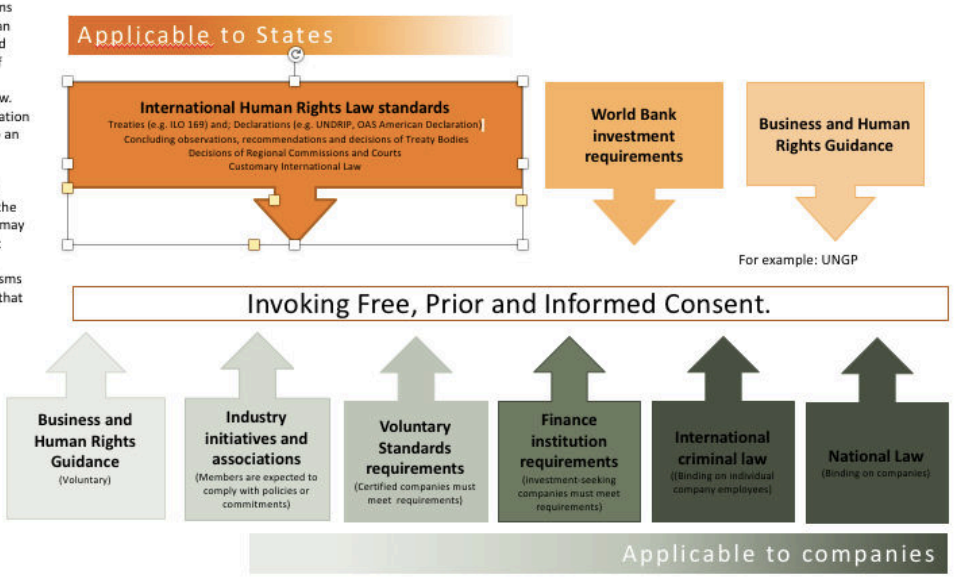
2.5 Project Limitations

The short duration of this project, particularly the time available to conduct field research, means that within the scope of the ISEAL funded project, the tool is presented initially as a draft framework. While it is currently endorsed by COICA, the understanding is that it will be further refined and improved through ongoing pilot-testing and community consultation facilitated by EO and COICA in the Amazon region as part of EO's existing programmes.

3. LITERATURE REVIEW

3.1 An Overview

International legal mechanisms and recommendations have an expectation that states should seek FPIC, and the concept of FPIC is well supported by international human rights law. However, gaps in implementation at a national level have led to an emerging consensus that companies should take responsibility for conducting appropriate due diligence in the context of projects that they may affect them, even where host states do not. This graphic outlines the various mechanisms and guidance regarding FPIC that applies to States and to companies.



This literature review reveals that, despite the growing body of knowledge, experience and guidance on how FPIC can and should be implemented, there are few resources that define what successful implementation of FPIC is from the perspective of affected communities. While it explores a wealth of documents that describe and discuss in depth approaches to FPIC, it also finds little concise guidance on verification of FPIC that is easily and practically implementable for affected communities and assurance providers.

Sections 3.2 to 3.8 each address a different category of literature. Each section features a table that outlines the individual documents reviewed, identifying the audience that they target and two key aspects of how they interpret FPIC:

i) who has the right to FPIC, and?

ii) in what contexts it is deemed a requirement.

3.2 International Human Rights Law standards

This section comprises both international treaties and 'softer' international mechanisms such as the UN Declarations, which, although not legally binding per-se can nevertheless have a legal effect and be invoked within international human rights legal processes. The key international treaty regarding the rights of Indigenous Peoples is the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169,) currently ratified by only 22 states,[31] principally in South America. International treaties are only legally binding on the states that ratify them, although the effect that ratification has on local law, varies from one jurisdiction to another. UN Declarations on the other hand, while not legally binding per se, expect compliance from the states that have endorsed them and they are increasingly referred to by responsible companies to inform their business practices. The key UN Declaration in this context is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007, with 144 states in favour, 4 who voted against and 11 abstentions. The four states that voted against have since affirmed their support for it.[32]

[31] Ratifications of C169 – Indigenous and Tribal Peoples Convention, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314

[32] Australia, Canada, New Zealand and the United States voted against UNDRIP in 2007. See: United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, for further detail, including abstentions: http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295

It is crucial however, that FPIC is understood and implemented within the broader framework of International Human Rights Law, since, when divorced from this framework it risks undermining the very rights that it seeks to protect. Under international human rights law, the requirement for FPIC is derived from the right to self-determination afforded to Indigenous Peoples, affirmed in the International Human Rights Covenants. This affirmation is derived both from the principle of non-discrimination of Indigenous Peoples[33], and from the right to develop and maintain traditional cultures, for example article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR). The decisions made by treaty bodies responsible for supervising these covenants are not legally binding, but they are given great weight by the International Court of Justice. The treaty bodies have increasingly framed the above rights in the light of the right to self-determination, and after the adoption of UNDRIP in 2007 the treaty bodies have increased emphasis on the FPIC requirement in relation to projects impacting on Indigenous Peoples.[34] For example, In the 43rd Session of the UN ICESCR Committee in 2009, FPIC was invoked as follows: "States parties must therefore take measures to recognize and protect the rights of Indigenous Peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their **free and informed consent**, take steps to return these lands and territories."[35]

The standards affirmed under human rights treaties and declarations therefore form part of customary international law, such as provisions addressing the elimination of structural racial discrimination against indigenous peoples or those affirming their customary land and consultation rights. Table 1 details the IHRL standards that include requirements for the achievement of FPIC.

Table 1: International Human Rights Standards

Reference Document	Audience	Who has the right to FPIC?	In what contexts is FPIC required?
ILO Convention on Indigenous and Tribal Peoples in	States	Tribal and Indigenous Peoples	FPIC explicitly applies to cases where relocation may be necessary for extractive projects (Article 16;) or where ownership rights might be jeopardized (Article 17.)

[33] See the 1997 General Recommendation No XXIII on indigenous peoples, by the Committee on the Elimination of Racial Discrimination (CERD).
[34] Doyle, C., and Cariño, J., (2013) *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector.* London Indigenous Peoples Links (PIPLinks), Middlesex University School of Law, The Ecumenical Council for Corporate Responsibility, p.7.
[35] See UN ICESCR Committee, 43rd Session, General Comment No. 21, Right of Everyone to Take Part in Cultural Life, (43rd Session, 2009), E/C.12/GC/21 Paras. 36 -37.

Independent Countries - ILO 169 (1989) *(Relevant section/s: Articles 16 and 17.)*			
UN Convention on Biological Diversity (1992) *(Relevant section/s: Article 15)*	States	Indigenous Peoples	FPIC applies to cases where companies require access to genetic resources, traditional knowledge or protected areas. Where wording requires 'approval' from Indigenous Peoples it has since been understood to mean the same as consent.
UN Declaration on the Rights of Indigenous People - UNDRIP (2008) *(Relevant section/s: Articles 10, 11, 19, 28, 29 and 32.)* American Declaration on the Rights of Indigenous Peoples. *(Relevant section/s: Sections 13.2; 18.3; 23.2; 28.3; 29.4)*	States. Companies.	Indigenous Peoples	FPIC explicitly applies in relation to the relocation of Indigenous Peoples' communities, removal of cultural, intellectual, religious and spiritual property, exploitation of natural resources and legislative or administrative measures that the state may adopt that could affect Indigenous Peoples.
Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry in the Context of National Food Security –VGGT (2012) *(Relevant section/s: Articles 12.7 and 9.9.))*	States. Companies.	Indigenous Peoples	FPIC applies to Consultation around land and forest tenure governance that affects indigenous communities must include FPIC.

ILO 169 is the key international legal instrument that, together with UNDRIP, forms the backbone of many other standards and guidance documents for FPIC implementation. ILO 169 recognizes that indigenous peoples may have customary or traditional rights to land not occupied by them, but to which they require access for the continuation of their livelihoods. It also specifies that particular attention be given to include communities in impact assessments so that potential impacts on spiritual and cultural life are considered together with social and environmental impacts (Article 7.) Where ILO 169 only explicitly requires that FPIC be obtained in the context of projects that may require indigenous communities to be relocated, interpreting the Convention in the light of contemporary international human rights law means that it also contains an implicit requirement for consent to be the objective of *all* consultations, including those in relation to subsoil exploration projects. For example, where ILO 169 does not explicitly require FPIC processes be triggered in relation to resources, as well as to land and cultural heritage rights, it is nevertheless expected that consultations with the objective of achieving consent, are carried out in relation to any activities requiring impact assessments. In accordance with international human rights law therefore, and providing that the consultation process is carried out in good faith, there is an implicit requirement that consent be achieved in the context of projects that will impact on Indigenous Peoples resources.

In this sense UNDRIP defines a much clearer affirmation of the requirement for FPIC, and also contains explicit provisions regarding limitations that can be placed on Indigenous Peoples rights under international law. UNDRIP emphasizes the rights of indigenous peoples to self-determination and calls on endorsing states to consult with indigenous peoples to gain their FPIC "prior to the approval of any project affecting their lands or territories and *other resources*" (Article 32.2) and explicitly states that FPIC should be obtained in connection to any potential removal of intangible property, or community relocation. The most comprehensive affirmation of indigenous peoples' rights to date, including rights to cultural property, identity, health, religion, as well as property and natural resources, UNDRIP also specifically addresses gender, emphasizing that all rights (including FPIC) are equally due to women as they are to men (Article 44) and calls for states to pay particular attention to ensure the rights and needs of marginalized groups, including the elderly, children and the disabled, are met when implementing the Declaration (Article 22.)

These two instruments together have had a significant impact on the constitutional reforms of many countries, including Colombia (1991, 2003) Ecuador (2008) and Peru (1993, 2005).[36]

3.3 Third Party Requirements of International Finance Institutions

Many of the world's major banking and development finance institutions now acknowledge FPIC within their investment requirements, although they differ in terms of the specific contexts in which FPIC must be sought. Following the International Finance Corporation's (IFC) inclusion of an FPIC requirement, the Equator Principles initiative, which requires private financial institutions to conduct social and environmental due diligence of large-scale projects in certain countries followed suit, together with the World Bank's public-sector financing branch. The below table details some of the key International Financial Institutions and their treatment of FPIC.

Table 2: Requirements of International Finance Institutions

Reference Document	Audience	Who has the right to FPIC?	In what contexts is FPIC required?	How does the standard recommend that FPIC be verified?
Asian Development Bank – ADB - Indigenous Peoples Safeguards: A Planning and Implementation Good Practice Sourcebook (Draft Document, 2013) *(Relevant section: Articles 253 – 299)*	States Companies	Indigenous Peoples	FPIC applies to projects that propose: i) commercial development of their cultural resources and knowledge; ii) physical displacement from their traditional or customary lands; and iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define their identity and community.	Appendix 12 provides examples of monitoring indicators to assist verification of FPIC where relevant according to the defined Indigenous Peoples' Plan (IPP.) Listed indicators include both Process and Outcome indicators.
European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy (2008) *(Relevant section: Performance Requirement 7)*	States Companies	Indigenous Peoples	FPIC applies to project activities that are on traditionally used land, projects that may require resettlement of communities, and also to any activities that would affect livelihoods, cultural, ceremonial or spiritual uses, or cultural resources.	Provides extensive requirements, although verifiers or examples of acceptable are not explicit.
Equator Principles (2013)	States Companies	Indigenous Peoples	FPIC applies to projects with adverse impacts on indigenous people, following requirements of	The Principle states that "the client will take account of, and document, the results of the Stakeholder

[36] ECLAC, (2014) *Guaranteeing indigenous peoples rights in Latin America: progress in the past decade and remaining challenges*. United Nations: Santiago, p.14.

(Relevant section: Principle 5)			the IFC's Performance Standard 7.	Engagement process, including any actions agreed resulting from such process."
Inter-American Development Bank - IDB, Operational Policy on Indigenous Peoples and Strategy for Development / Indigenous peoples Policy - IPP (both 2006) (2006) *(Safeguards on Bank Operations)*	States Companies	Indigenous Peoples	FPIC applies explicitly to projects that require resettlement of affected communities, however the IADB has also committed to respecting the jurisprudence of the IACtHR so that by extension FPIC should also apply in the case of large-scale development projects. It should also be noted that the 2006 Policy pre-dates the adoption of UNDRIP.	The Operational Guidelines for this Policy provide process indicators for the verification of the Policy's requirements.
International Finance Corporation (IFC) Performance Standards (2012) *(Relevant section/s: Performance Standards 1, 5 and 7)*	States Companies	Indigenous Peoples	FPIC applies to i) cases of resettlement, ii) when indigenous peoples' knowledge is to be used for commercial purposes, and iii) in other cases of 'significant adverse' impact	Provides extensive requirements, although verifiers or examples of acceptable evidence are not always explicit. PS7 includes recommendations such as: "documentation of (i) the mutually accepted engagement and negotiation process between the client and Affected Communities"; and (ii) evidence of agreement between the parties regarding the outcome of the negotiations." [37] Examples of agreements include a memorandum of understanding, a joint letter of intent, and a joint statement of principles.[38]
World Bank Environmental and Social Framework (2017) *(Relevant section/s: Environmental and Social Standard – ESS - 7)*	States	Indigenous Peoples/ Sub-Saharan African Historically Underserved Traditional Local	FPIC applies to projects that (a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation; b) cause relocation of Indigenous Peoples from land and natural resources subject to	Where Indigenous Peoples are present in, or have a collective attachment to, the proposed project area, the Bank will require the Borrower to undertake a process of meaningful consultation tailored to Indigenous Peoples in

[37] *IFC Guidance Note 7 (2012, to accompany Performance Standard 7) GN35*
[38] *IFC Guidance Note 7 (2012) to accompany Performance Standard 7) GN38*

		Communities	traditional ownership or under customary use or occupation; or (c) have significant impacts on Indigenous Peoples' cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected Indigenous Peoples' lives.	accordance with ESS7. The outcome of the meaningful consultation will be documented.[39]

In 2004, after an independent review of its extractive industries portfolio (the Extractive Industries Review, or EIR)[40], the World Bank included extra requirements for extractive industry projects specifying that they must secure the "broad support" of affected communities through a process of "free, prior, and informed consultation" in order to receive investment support. In 2005, this modification was mirrored in its Indigenous Peoples policy, requiring 'broad community support' from project-affected indigenous communities.[41] Although 'broad community support' may be considered by some to be the equivalent of 'consent,' both the World Bank and the IFC, who employed similar wording, received substantial public criticism for failing to adopt FPIC formulation as a right to consent, rather than to be consulted (WRI, 2007:10.) In 2012, this led the IFC to revise its standards, which also now interpret FPIC as a right to consent. Likewise, the 2017 revised Environmental and Social Framework of the World Bank now includes explicit reference to the requirement of FPIC in project contexts that go far beyond resettlement to consider other kinds of impacts, including intangible aspects of social and cultural life.

International Finance Institutions tend to provide extensive guidelines for the responsible implementation of FPIC within broader stakeholder engagement processes. However, they vary widely in terms of the detail that they provide in defining how these requirements can be verified and what evidence is considered acceptable in support of FPIC implementation. The IFC for example, provides informative Guidance Notes to aid businesses in upholding each of the requirements outlined in IFC Performance Standards. The guidance for Performance Standard 7 provides practical guidance to aid businesses in implementing FPIC and includes examples of verifiers comprised primarily of documented evidence of management processes. This guidance

[39] *World Bank Environmental and Social Standard 7, paragraph 54.*
[40] The World Bank Group and Extractive Industries (2003) *The Final Report of the Extractive Industries Review*, available at: https://www.ifc.org/wps/wcm/connect/294e55004ba934bca5adbd54825436ab/01.0+Volume+I+-+The+World+Bank+and+Extractive+Industries%2C+EI+Review+Report%2C+ENG.pdf?MOD=AJPERES
[41] World Resources Institute, ibid. p. 10.

on FPIC processes also invokes and builds on detailed guidance specifically on Informed Consultation and Participation that is provided in Performance Standard 1. The Asian Development Bank Good Practice Sourcebook for implementing safeguards for Indigenous Peoples provides a set of resources for clients, including checklists, templates and a list of indicators for monitoring progress. This list comprises process indicators to demonstrate implementation of required management systems, but also outcome indicators that require in-depth monitoring of social and cultural factors at the community level, including changes in cultural governance, participation in cultural/religious events and language/s being used in consultation and participatory activities.[42]

3.4 Third Party Requirements of Voluntary ISEAL Member Standards and other Voluntary Standard Schemes

Beyond international and national law, the UN Guiding Principles on Business and Human Rights (UNGP)[43], while making no explicit mention of FPIC, has been instrumental in extrapolating the values held within ILO 169 and UNDRIP to the private companies. The UNGP have helped to clarify responsibility for upholding FPIC by stipulating that it is the State's duty to protect human rights, while private sector companies have a responsibility to respect them.[44] Now supported by the International Council on Human Rights Policy, the UN High Commissioner for Human Rights, the ILO, the Inter-American Court of Human Rights and the UN Human Rights Council, the UNGP provide companies with guidance for assessing and mitigating human rights risks within their operations. These guidelines become particularly important in the context of host countries with poor governance and lack of resources for implementing the national and international measures of protecting human rights that are outlined above. On the other hand, these situations can contribute to further confusion over where responsibility lies and place high expectations on companies in the absence of effective governmental institutions.[45]

[42] Asian Development Bank, (2013) *Indigenous peoples Safeguards: A Planning and Implementation Good Practice Sourcebook*, Draft Working Document, Appendix 12
[43] UNHR, (2011) *Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy Framework.* Geneva: UNHR. Available at: http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf&action=default&DefaultItemOpen=1, accessed 15/07/17.
[44] BSR, (2012) *Engaging with Free, Prior, and Informed Consent*, p. 10-12. Available at: http://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf
[45] *ibid.*

Where national laws do not include FPIC requirements, companies have an international duty to respect the Indigenous Peoples as rights-holders, by applying international standards that go beyond local legislative requirements. A number of corporate voluntary Standards and certification systems now incorporate FPIC requirements to varying degrees of stringency. Theoretically, companies that achieve conformance with or certification against these Standards can credibly demonstrate through independent assurance that they have implemented international human rights principles within their business operations. Providing that there is agreement on how the implementation of these principles should be verified, adherence to Standards is a mechanism whereby companies can meet their international legal obligation to respect human rights, promote best practices in their sector and mitigate risks to their business.[46] Table 3 details a range of Standards, relevant to both extractive industries and forest industries, and their treatment of FPIC.

Table 3: Third party requirements of voluntary Standards

Reference Document *(*Indicates ISEAL Membership)*	Audience	Who has the right to FPIC?	In what contexts is FPIC required?	How does the standard recommend that FPIC be verified?
EXTRACTIVE INDUSTRY STANDARDS				
Aluminium Stewardship Initiative - Performance Standard V2 (2017) *(Relevant section/s: Criteria 9.4)*	Certified or certification-seeking entities	Indigenous Peoples	FPIC applies where projects that may affect their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resource – including sacred sites or other important aspects of cultural heritage.	The Initiative's Assurance Manual (V1, 2017) addresses the audit process, with verification comprising review of objective evidence in the form of documentation, observation and testimonials (e.g. interviews).
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*The Aluminium Stewardship Initiative has convened an Indigenous Peoples Advisory Forum (IPAF), as a standing forum within the Iniative's governance structure. which holds face-to-face meetings at least annually. The IPAF will liaise with both the Board and Standards Committee on matters relating to standards setting, the Complaints Mechanism, and the broader involvement of Indigenous Peoples in the Initiative's programs. Two members of IPAF will also serve on the Standards Committee. IPAF contributed to the Aluminium Stewardship Initiative'sI Performance Standard V2 and accompanying Guidance. Indigenous Peoples' organizations also participated in the development of Performance Standard 1 through consultation in 2015.*			

[46] *ibid.*

Bettercoal Code (2013) *(Relevant section/s: Principle 5.2.3)*	Certified or certification-seeking entities	Indigenous Peoples	FPIC applies to projects that involve (i) significant, direct impacts to ancestral territories of indigenous and tribal peoples and natural resources contained therein, irrespective of recognition by the state; (ii) the involuntary relocation of indigenous communities; and (iii) the destruction of places of indigenous culture and spiritual significance.	Audit guidance is pending development in 2018. Standards guidance asks for the following indicator: "Formally documented process of Free, Prior and Informed Consent." Suggested evidence includes "documentation proving the mutually accepted engagement and negotiation processes between the company and affected Indigenous Peoples; 2) Someone responsible for matters related to Indigenous Peoples; and 3) Interviews with Indigenous Peoples, tribal peoples and their representatives.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*The Bettercoal Code was publicly consulted in key producer countries. The Technical and Advisory Group is open for non-industry stakeholder participation, including indigenous peoples, however they have not been specifically targeted and securing civil society participation is an ongoing challenge in the coal sector. Bettercoal is developing country strategies for identified priority countries, to include the participation of Indigenous Peoples.*			
Equitable Origin EO100™ Standard (2012) *(Relevant section/s: Principle 4)*	Certified entities	Indigenous Peoples	FPIC applies to proposed projects that are on or may affect lands traditionally owned by or under the customary use of Indigenous Peoples.	Verification comprises three elements: 1) Document review: documented evidence of FPIC policy and FPIC processes, in local languages; 2) Management interviews: to verify the FPIC process, including the process for determining what decisions require FPIC and 3) Field interviews: to verify FPIC implementation procedures, including integration with E&P schedule and acquisition due diligence.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*EO's standard-setting process extensively targeted indigenous groups for consultation and EO established partnerships with several Indigenous Peoples' organizations in Latin America. EO conducted over 70 workshops with indigenous groups during the standard consultation phase. EO's Board of Directors has an indigenous representative appointed by COICA (Coordinator of Indigenous Organizations of the Amazon Basin) to ensure the rights and "voice" of Indigenous Peoples are reflected, embodied and respected in EO's standard-*			

	setting processes. EO is now moving to incorporate a dedicated stakeholder category of Indigenous Peoples into its board structure which will allow for more indigenous participation at the leadership level.			
Initiative for Responsible Mining Assurance (IRMA) Draft Standard for Responsible Mining (v.2.0) *(Relevant section/s: Criterion 2.10)*	Certified entities	Indigenous Peoples	FPIC applies to mining-related activities that may: affect indigenous peoples' rights or interests, territories and resources; require the physical relocation of people; cause disruption to traditional livelihoods; impact on critical cultural heritage; or involve the use of cultural heritage for commercial purposes.	Audit guidance is currently under development.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*In June 2016, a desktop field test of the Free, Prior and Informed Consent chapter was conducted with First Nations leaders and technicians and independent auditors in British Columbia. IRMA's current leadership and governing body is the IRMA Steering Committee, which includes representation from each of IRMA's five stakeholder sectors, one of which is "Mining-affected Communities." IRMA Stakeholder Forum is also open to all interested parties who wish to review and comment on the development of the IRMA standard. In 2018, the standing IRMA Steering Committee structure will be dissolved and the formal Board of Directors established. IRMA will transition to a membership organization in which members will be able elect Board representatives for their respective sectors.*			
Responsible Jewellery Council - RJC, (2013)* *(Relevant section/s: Code of Practices (CoP) 31)*	Certified or certification-seeking entities (extractives only)	Indigenous Peoples	FPIC applies to projects that may impact on lands and natural resources subject to traditional ownership or under customary use; relocation of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use; significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives; and use of cultural heritage, including knowledge, innovations or practices of Indigenous Peoples for commercial purposes;	The Self-Assessment handbook asks for the following: • Records of the applicable law (provincial, national and international) on rights of indigenous peoples, including a legal register, legal bulletins from a third party legal service, government guidance documents, legal committee briefings. • Relevant policy statements. •Procedures for getting the support of affected IPs • Records of support given by affected IPs • Documentation of partnerships or programmes to provide benefits and mitigate impacts. • Interviews with affected IPs • Documentation of any new mining facilities (or significant changes

				to existing ones), including information on whether any of the circumstances identified apply. • Procedures for planning and approval, with evidence of agreement by your company, affected IPs and relevant government authorities. • Records of your negotiations and agreements with all stakeholders
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*No reference found of indigenous stakeholder groups as having been targeted for consultation. No reference found of ongoing mechanisms for indigenous participation with standards-setting and governance. While there are two members on the Standards Committee from organizations that represent the interests of ASM, there does not appear to be an explicit structure for ensuring community / indigenous representation within any of the Committees. The Code of Practices undergoes regular consultation by targeted stakeholder groups, as well as public review. The M& E system does not undergo public consultation.*			
SCS Certified Responsible Source for Precious Metals (2012) *(Relevant section/s: Annex A)*	Certified or certification-seeking entities	Indigenous Peoples	FPIC applies to company sourcing policy after the third year of certification, whereby the Company shall demonstrate that it preferentially buys from projects that have obtained FPIC prior to project initiation.	No audit guidance found.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*No reference found of indigenous stakeholder groups as having been targeted for consultation. No reference found of ongoing mechanisms for indigenous participation with standards-setting and governance.*			
FOREST RESOURCE STANDARDS				
Forest Stewardship Council – FSC, Principles and Criteria (2012)* *(Relevant section/s: Principles 3 and 4.)*	Certified entities	All communities with customary rights.	FPIC applies to i) projects that may affect legal or customary rights to resources or land and ii) cases where certified organizations intend to use local traditional knowledge.	FSC provides an extensive guide to FPIC implementation, including a 6-step guide comprising 26 specific requirements, although verifiers or examples of evidence acceptable for audit are not explicit.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*FSC is governed by its members - both organizations and individuals. International members are invited to the general assembly. To ensure that all voices are heard equally, each FSC chamber (Environmental, Social, Economic) holds 33.3 per cent of the vote on all FSC matters. Within each chamber, votes are weighted to ensure that North and South each hold 50 per cent of the vote. The FSC standard has been developed in close cooperation with the Permanent*			

	Indigenous Peoples Committee within FSC (PIPC). [47] *PIPC is a standing committee with the object to support the FS Board of Directors in all issues related to Indigenous Issues. PIPC consists of indigenous leaders from all over the world. PIPC is now building up a secretariat in Panama.*			
REDD+ Social and Environmental Standards (SES) (2012) *(Relevant section/s: Principles 1, 6 and 7.)*	States	Indigenous Peoples and local communities	FPIC applies to i) any activities affecting Indigenous Peoples rights to lands, territories and resources. ii) traditional knowledge, innovations and practices of Indigenous Peoples and local communities and iii) any relocation or displacement	Country-specific verification indicators are developed by a technical working group, with special attention given to Indigenous Peoples issues, among other marginalized groups. Indicators comprise both process and outcome qualifiers. Indicators are approved via consultation with targeted stakeholder groups, including Indigenous Peoples.[48]
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*The REDD+ SES were developed through an inclusive process engaging Indigenous Peoples together with governments, NGOs and other civil society organizations, international policy and research institutions and the private sector. Indigenous Peoples also participate in the International Steering Committee, which represents a balance of interested parties overseeing the initiative at the international level as well as the standards development and processes for their use. The initiative also conducts targeted capacity-building to all relevant stakeholder groups, including Indigenous Peoples, to support their inclusion in activities related to safeguards.*			
UN REDD Programme	States (UN REDD Programme Partner countries)	Indigenous Peoples, and on a case-by-case basis, forest-dependent peoples	FPIC applies in the context of: i) relocation /resettlement/ removal of an indigenous population from their lands. For IPs and forest-dependent peoples it applies in the context of ii) the taking, confiscation, removal or damage of their cultural, intellectual, religious and/or spiritual property iii) any activity that affects their rights, lands, territories and/or resources iv) mining and oil and/or gas operations (extraction of subsurface resources) v) logging or vi) development of agro-industrial plantations on their lands/territories; vii) decisions that will affect the status of their rights to their lands/territories or resources; viii) activities	The Programme has developed an Evaluation and Verification Toolkit[49] for assessing i) how the FPIC process is designed and the team that will facilitate it; ii) how the FPIC process is implemented and iii) how results are interpreted and the process verified. The toolkit provides detailed questions, indicators, and appropriate assessment metrics or evidence. The indicators comprise community feedback as well as documented evidence.

[47] See https://ic.fsc.org/en/what-is-fsc/what-we-do/empowerment-of-people/pipc.
[48] *Guidelines for the use of REDD+ Social & Environmental Standards at country level,* (2012) Sections 5.2, 5.3 and 6.2.
[49] Available at: http://www.unredd.net/

			that involve accessing their traditional knowledge, innovations and practices ix) or that make commercial use of their natural and/or cultural resources on lands subject to traditional ownership and/ or under customary use; x) or that involve decisions regarding benefit-sharing arrangements, when benefits are derived from their lands/territories/ resources, or xi) where the activity will have an impact on the continuance of their relationship with their land or their culture.	
	The Programme's 2016-2020 governance arrangements allow for the full and effective participation of all stakeholders, including Indigenous Peoples. On the Executive Board, Indigenous Peoples are represented by one permanent observer. Indigenous Peoples participate as decision-makers in the National Steering Committees (NSCs) and the Programme Assembly comprises representatives of the national indigenous peoples who are members of NSCs, together with representatives of regional or international indigenous peoples. The Programme Policy Board includes one member seat for Indigenous Peoples and one for the Chair of UN Permanent Forum on Indigenous Issues, together with one regional Indigenous Peoples representative for each of the three UN-REDD Programme regions.			
OTHER RESOURCE STANDARDS				
Bonsucro Production Standard Version 4.2 (2016)* *(Relevant section/s: Principles 1 and 5, criterion 5.8.)*	Certified or certification-seeking entities	Indigenous Peoples and other affected stakeholders (local communities).	FPIC is referenced as an evidence requirement for the operator to demonstrate its statutory or customary land and water rights; for achieving negotiated resolution of land conflicts (potentially including provision of fair compensation); for achieving negotiated agreements for other types of disputes, grievances and conflicts; and as part of the operator's stakeholder consultation process related to its environmental impact and management plan.	Pending.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*No reference found of indigenous stakeholder groups as having been targeted for consultation. No reference found of ongoing mechanisms for indigenous participation with standards-setting and governance.*			

Roundtable on Sustainable Biomaterials – RSB Standard, (2016)* *(Relevant section/s: Principle 2, criterion 2b[50]; Principle 12.[51])*	Certified or certification-seeking entities	Indigenous Peoples and all local communities impacted by the operations.	Principle 2: FPIC applies to all stakeholder consultation processes. Principle 12: FPIC applies to all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for operations.	Guidelines for verification include: i) reviews of baselines, assessments, information, procedures, outcomes, monitoring and implementation ii) wide-ranging interviews with a wide range of representatives, rights-holders and land users; iii) a public meeting at which the preliminary findings of the verification review are discussed and open to comment and iv) all documents compiled during the verification process are retained for scrutiny by all parties. [52]
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*RSB members are organized into five Chambers that elect the governing body of the organization – the Assembly of Delegates. Chamber 3 comprises Indigenous Peoples as well as rights-based NGOs, rural development, smallholder farmers and community-based civil society organizations. Each Chamber elects three delegates to appear at Assembly meetings.*			
Roundtable on Sustainable Palm Oil - RSPO, (2015)* *(Relevant section/s: Principle 2, criteria 2.2 and 2.3.)*	Certified entities	All local communities with legal, customary of user rights.	FPIC applies to projects that may diminish the legal, customary or user rights of land.	RSPO provides an extensive guide to FPIC implementation, together with a list of process verifiers that demonstrate compliance against their Standard. [53]
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*Forest Peoples Programme (FPP) serves on the Principles & Criteria Review Task Force in representation of indigenous interests. There does not appear to be any direct representation from Indigenous Peoples organizations either in the Task Force or other Committees. The standard undergoes public consultation, but no explicit reference has been found to show that indigenous stakeholder groups are targeted for inclusion. The Human Rights Working Group is currently focusing on FPIC as a key theme for 2017. The Working Group includes FPP but no direct indigenous representation.*			
Sustainable Agriculture Network (SAN) Standard (2017)	Certified or certification-seeking entities	Communities	FPIC applies to contexts where farm activities may diminish the land or resource use rights or collective interests of communities.	SAN provides an extensive guide to FPIC implementation, however this does not include guidance for verifying if and when

[50] RSB, (2016) *RSB Standard.* Indicator 2b1:" *While FPIC provides the process conditions for stakeholder engagement and negotiated agreements, consensus shall be the decision-making tool applied in all cases and carried out in accordance with the RSB consensus building toolkit in the Impact Assessment Guidelines." (RSB-GUI-01-002-01).*

[51] RSB, (2016) *RSB Standard.* Indicator 2b1:" *While FPIC provides the process conditions for stakeholder engagement and negotiated agreements, consensus shall be the decision-making tool applied in all cases and carried out in accordance with the RSB consensus building toolkit in the Impact Assessment Guidelines." (RSB-GUI-01-002-01).*

[52] RSB (2014) Guidelines for Land Rights, Version.2.2, Section 3.18.

[53] RSPO (2015) *Free Prior and Informed Consent Guide for RSPO Members,* Annex 2

(Relevant section/s: Principle 4, Critical Criteria 4.19 and 4.20.)				FPIC has been implemented.
Mechanisms for Indigenous Peoples' Participation in Standard-Setting and Governance	*No reference found of indigenous stakeholder groups as having been targeted for consultation. No reference found of ongoing mechanisms for indigenous participation with standards-setting and governance.*			

Treatment of FPIC within the above Standards varies widely. It should also be acknowledged that there is also diversity in the objectives, intended scope, maturity and implementation of the Standards themselves and therefore should not be considered a like-for-like comparison. It is notable that explicit guidance on the implementation of FPIC in relation to extractive industries is recently emerging, while the most comprehensive examples of FPIC codification come from standards relating to forest-based resources. Affirmed as an effective means of avoiding conflicts at timber and plantation projects, the FSC integrated FPIC requirements into the standard in 1993, and it remains a core mechanism promoted by The Forest Dialogue, a multi-stakeholder forum on forest-based development and human rights.

The newest mining-related standard, the Initiative for Responsible Mining Assurance (IRMA)'s draft Standard for Responsible Mining (v2.0[54]), is more comprehensive in its recommendations for FPIC implementation. The Standard explicitly recognizes the potential of a standard to fill 'gaps' in national legislative frameworks by calling for companies to first conduct due diligence to determine the extent to which the host country has already implemented FPIC processes in relation to potential new mining projects. A project developer is then required to publicly justify their decision and disclose the processes implemented to obtain consent in support of the project before it goes ahead in absence of the state having fulfilled its duties to protect indigenous rights to FPIC.

Among those that include FPIC requirements, some are aligned with IFC Performance Standard 7, and its view that "a review of existing global standards and practices on consent revealed that none of the institutions that have adopted FPIC have interpreted this to mean granting veto power to indigenous peoples over development projects, or requiring unanimity of opinion in favour of a project among affected groups and notes that in situations where consent is not forthcoming a government may have the deciding vote." Others, such as FAO, are more explicit

[54] IRMA is in the process of adding a chapter on Artisanal and Small-Scale Mining and plans to launch their assurance system in 2018 (as of October,2017).

in their understanding of 'consent' as an opportunity for indigenous peoples to *withhold* consent as much as to grant consent, an interpretation reflected in the forthcoming IRMA standard, which requires companies to acknowledge that the people whose consent is being sought can approve or reject a project activity,[55] explicitly stating that "if a company does not obtain consent from indigenous peoples, mining-related activities shall not proceed."[56] RSPO is equally explicit in its interpretation of FPIC as the right of indigenous peoples and other local communities to give or to withhold their consent to any project affecting their lands, livelihoods and environment.[57] Later revisions to the RSPO standard include ensuring that local peoples understand that they can withhold consent.[58]

Where even the most progressive and comprehensive Standards struggle however, is in facilitating the means by which auditors and assurance providers can verify that their requirements for FPIC have been met. Outreach and interviews among ISEAL member Standards[59] that engage FPIC have highlighted the difficulty of verifying FPIC as one of the key challenges faced by Standards and their assurance providers. Representatives of ISEAL member Standards who completed our survey cited the following difficulties specific to verification: determining if consent was sought at the end of a process that was free, prior and informed; lack of clarity around what evidence is required; and a lack of auditor knowledge and expertise. Similar challenges were identified in the November 2017 report by Oxfam, which uses the Tullow Oil project as a case study to test company compliance against the principle of FPIC.[60] The study finds that a lack of documentation of FPIC processes, together with a lack of verifiable consensus within communities regarding what the FPIC agreement consists of, makes verification of 'free,' 'prior' and 'informed' impossible.[61] Likewise, a 2015 study by RESOLVE discovers that where there is a documented agreement, this does not necessarily constitute successful implementation of FPIC.[62] Improving the verification of FPIC processes will inevitably be an iterative process in itself, requiring that Standards build in their own continual improvement process as they learn from past experience and that of others striving to operationalize human rights standards regarding FPIC.

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[55] IRMA Standard, (2016) Draft v.2.0, p.117
[56] *ibid.*, 2.10.6.1
[57] RSPO, (2015) *Free Prior and Informed Consent for RSPO Members.* RSPO Human Rights Working Group 2015, p.6. Available at: http://www.rspo.org/news-and-events/announcements/free-prior-and-informed-consent-guide-for-rspo-members-2015-endorsed, accessed 31 October 2017.
[58] *ibid., 8*
[59] See Annex 1 for the ISEAL Member survey/ semi-structured interview questions used.
[60] Oxfam (2017) Testing Community Consent: Tullow Oil project in Kenya, Oxfam Briefing Paper, November 2017.
[61] *Ibid.* See especially pp.29-33.
[62] **Resolve,** (2015) *From Rights to Results: An Examination of Agreements between International Mining and Petroleum Companies and Indigenous Communities in Latin America.* Washington: Resolve. P. 34.

In part to aid community-level verification of successful FPIC implementation, NEPCon, Forests of the World, Rainforest Alliance and Imaflora, among others, are also in the process of developing a Community Certification standard for FSC. One of the primary goals of this initiative aims to make participation in FSC certification easier for under-resourced communities by reducing the financial burden of verification and audit. It plans for the community to be able to carry greater responsibility for collecting and monitoring data, facilitated through innovative technological applications for crowd-sourcing data and the employment of local experts in place of certified auditors.[63] At the same time, the local ownership of the data collection and monitoring processes affords increased legitimacy and transparency to results, and offers a means to match impact data to management processes.

The Community Certification approach described above would be well-suited to tackling some of the issues and challenges of FPIC verification that are experienced by assurance providers, particularly regarding the responsibly the process is conducted. To ensure the efficacy of this approach it is crucial, as for any FPIC process, that the community is engaged from the outset in designing the verification framework and that they have sufficient knowledge and capacity to ensure its ongoing monitoring and implementation.

3.5 Membership commitments and policies of industry associations

Companies whose business operations risk impacting on Indigenous Peoples can voluntarily choose to follow and comply with relevant Standards that apply to the commodities that they produce. This helps them to assess and mitigate risks, and to demonstrate the level of sustainability and responsibility that they uphold within business operations. Additionally, there are also a number of industry-level membership associations who oblige their members to follow specific operational requirements or adopt certain policies. Table 4 details two key industry initiatives that detail specific FPIC requirements that their members must respect.

[63] See: http://www.nepcon.org/newsroom/community-certification-fsc-system

Table 4: Membership commitments and policies of industry associations

Reference Document	Audience	Who has the right to FPIC?	In what contexts is FPIC required?
EXTRACTIVES INDUSTRY			
CCCMC Guidelines for Social Responsibility *(Relevant section/s 3.4)*	Companies	All affected local communities.	FPIC applies to any new mining projects, or changes to existing ones, that are located on lands traditionally owned by or under customary use of Indigenous peoples are likely to have significant adverse impacts on Indigenous Peoples including relocation of and/or significant adverse impacts on critical cultural heritage. The "principles" of FPIC should also be followed in relation to significant impacts to ancestral territories but without specifying consent as a requirement.
International Council on Mining and Metals – ICMM, Mining & Indigenous Peoples Position Statement (2013) *(Relevant section/s: 4 - Commitments)*	Companies (ICMM members)	Indigenous Peoples. Members can choose to extend FPIC principles to all affected communities.	FPIC applies to projects that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples including relocation of and/or significant adverse impacts on critical cultural heritage.

Following the recommendations in the World Bank's Extractive Industry Review[64], the mining sector has made increasingly strong commitments to respect the rights of Indigenous Peoples, including the right to FPIC. In 2008, the International Council on Mining and Metals (ICMM) issued a 'position statement' that detailed a commitment to 'seek agreement with indigenous peoples based on the principle of mutual benefit,' to be developed through participation and building 'long term partnerships. [65] This position statement was updated in 2013 to include a commitment from members to achieve FPIC, as detailed in Table 4.[66] Furthermore, ICMM explicitly acknowledges that the outcome of an FPIC process "is that Indigenous Peoples can give or withhold their consent to a project," although the ICMM also states that in cases where consent is not obtained then the final decision rests with the State. In this case it is up to ICMM members to decide whether or not to proceed with a project that

[64] The World Bank Group and Extractive Industries, *ibid.*
[65] ICMM (2008) *Position statement: Mining and indigenous peoples.* London: International Council of Mining and Metals.
[66] ICMM (2013) *Position statement on indigenous peoples and mining.* London: International Council of Mining and Metals. Available at https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement, accessed 31 Oct 2017.

is approved by the State but not by affected communities. Meanwhile, CCCMC explicitly advises its members to take responsibility for implementing FPIC "irrespective of recognition by the state."

Without a legally binding mechanism for private sector actors, the degree to which companies abide by their public commitments to FPIC cannot easily be verified. Doyle and Cariño attribute this to the fact that private sector commitments tend to be defined in broad rather than detailed terms.[67] A report by First Peoples Worldwide in 2012 concluded that the majority of companies were not prepared with effective policies and practices for managing community relations with Indigenous Peoples, including those relating to FPIC.[68] In a 2015 update to their Community Consent Index in 2012, Oxfam discovered that the number of extractive companies with FPIC commitments had tripled since 2012. The study investigates the corporate claims of 38 extractive industry companies with specific regards to community engagement and FPIC processes and finds that the number of companies with public commitments to FPIC increased from five to fourteen.[69] Despite this indication of improved awareness and prioritization of FPIC among the mining industry, the study warns that corporate commitments fail to provide sufficient detail regarding how FPIC will be implemented.[70] Research by the Business and Human Rights Resource Centre in 2017 on the human rights policies and practices of renewable energy companies, found that renewables lag behind mining in FPIC commitments, with only ten percent of companies surveyed having policies referring to Indigenous Peoples' right to FPIC.[71]

While the emergence of new standards and industry position statements demonstrate an upwards trend in the evolution of FPIC acknowledgement,[72] the resulting commitments and practices will be limited in meaning unless: i) there is a more rigorous system in place for monitoring and verifying FPIC processes which allows companies to be held accountable; ii)

[67] Doyle, C., and Cariño, J., (2013) *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector.* London Indigenous Peoples Links (PIPLinks), Middlesex University School of Law, The Ecumenical Council for Corporate Responsibility, p.73.
[68] First Peoples Worldwide, (2012) *Indigenous Peoples Guidebook on Free Prior Informed Consent and Corporation Standards.* First Peoples Worldwide, International Indian Treaty Council and Trillium Asset Management, p.19.
[69] Oxfam, (2015) *Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior and Informed Consent,* 207 Oxfam Briefing Paper, 23 July 2015, p.14.
[70] *ibid.,* p.6.
se, 2 November 2016, available at: https://business-humanrights.org/en/report-services-coordinator-at-gri/press-release-50-renewable-energy-companies%E2%80%99-human-rights-policies-records-examined
[72] EU Directorate General for External Policies, (2014) *Policy Report: Indigenous peoples, Extractive Industries and Human Rights.* European Union: Brussels. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534980/EXPO_STU(2014)534980_EN.pdf

that this system is based on a shared understanding of what constitutes an effective process for the different parties involved[73]; iii) there is a genuine will to implement commitments and policies to safeguard Indigenous Peoples rights.

3.6 Guidance on human rights and the implementation of FPIC in business contexts

Companies seeking guidance on how to respect the fundamental tenets of FPIC in their relationships with affected communities, can take advantage of a number of recognized guidelines and best practice frameworks written by NGOs, think tanks and specialist consultancies. Table 5 details a number of these documents, some of which are generic and apply to all companies that may identify the need to exercise an FPIC process, while others are specific to extractive or forest-based industries.

Table 5: Guidance on human rights and the implementation of FPIC in business contexts

Reference Document	Audience	Who has the right to FPIC?	In what contexts is FPIC required?
GENERAL			
Akwé: Kon Guidelines, Convention on Biological Diversity (2004)	Companies. States & Parties. Financial Institutions	Indigenous Peoples. Local communities.	The guidelines apply to cases where developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by Indigenous Peoples and local communities, and they specify a need for a mechanism that gives communities the option to accept or propose a development that may impact on their community.
Development without Conflict: the business case for community consent, World Resources Institute (2007)	Companies. States. Financial Institutions	Indigenous Peoples. Local communities.	Unspecified.

[73] Doyle, C., and Cariño, J., *ibid.*

Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenge, Foley Hoag (2009) *(Relevant section/s: VI. Recommendations for Talisman Energy)*	Companies. Financial Institutions	Indigenous Peoples. And non-indigenous when they are adjacent and where differential treatment could trigger conflict.	Foley Hoag recommends that Talisman, the subject of a company case study, to implement FPIC when projects would be located on lands under traditional use, and where the project would adversely affect communities' existing means of earning a living, or where it would impact cultural, ceremonial, or spiritual uses that define the community and its identity.
Making Free Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector, **Doyle**, C., and Cariño, J., (2013)	Companies. Indigenous Peoples.	Indigenous Peoples.	From the Indigenous Peoples perspective, FPIC should be implemented at the policy and program levels before the project level. That is, Indigenous Peoples would have to consent for their territories to be designated as mining areas, before the government can even consider entering into investment agreements with, or issuing mining concessions, exploration permits or licenses to, mining companies.
OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017) *(Annex B: Engaging with Indigenous Peoples)*	Companies.	Indigenous Peoples.	FPIC applies to any project affecting their lands or territories and other resources, where activities requiring FPIC are identified in collaboration with affected indigenous communities.
Respecting Free, Prior and Informed Consent, Food and Agriculture Organization of the United Nations (2014)	Companies. States. Financial Institutions	All affected communities with customary tenure.	Following UNDRIP and the principle of self-determination, states and companies who undertake a corporate responsibility to implement FPIC should obtain consent on matters of fundamental importance for the rights, survival, dignity and well-being of indigenous peoples.
The Tikarihwaie:ri Code of Ethical Conduct, Convention on Biological Diversity, (2011)	Companies. States. Financial Institutions. NGOs. Certifying bodies.	Indigenous Peoples. Local communities.	FPIC applies to any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups.

UN Global Compact's Business Reference Guide: UN Declaration on the Rights of Indigenous Peoples (2013)	Companies	Indigenous Peoples.	Aligns with UNDRIP: FPIC is explicitly mentioned with regard to relocation of Indigenous Peoples communities, removal of cultural, intellectual, religious and spiritual property, and legislative or administrative measures that the state may adopt that could affect them.
INDUSTRY-SPECIFIC			
Engaging with Free, Prior and Informed Consent, BSR (2012)[74]	Companies	Indigenous Peoples.	FPIC applies to any relevant situations identified through national legislation, by requirements of the IFC, and/or through company human rights due diligence procedures.
FPIC and the Extractive Industries: a guide to applying the spirit of FPIC in industrial projects, IIED (2013)	Companies	Indigenous Peoples. Significantly affected local communities.	Scope of FPIC application differs. The paper offers a three-step guidance for evolution of company policy, from minimal interpretation to broad.
Conflict Sensitive Business Practice: Guidance for Extractive Industries, International Alert (2005) *(Relevant section/s: Flashpoint Issues 1 and 4.)*	Companies	All communities, but with key implications for Indigenous Peoples.	Acknowledges that extractive projects who do not obtain consent are at higher risk of community conflict, though not explicit about what contexts require consent.
Putting Free, prior and Informed Consent into Practice in REDD+ Initiatives: A Training Manual, RECOFTC, IGES, NORAD (2012)	Trainers in FPIC/REDD. Communities.	Indigenous Peoples. May also be relevant to other local communities.	FPIC is required for any external development project that will affect local communities' customary territories or well-being.

For now, the OECD National Contact Point system under the OECD Guidelines for Multinational Enterprises (2011) is the only mechanism that allows for complaints directly examining corporate behaviour, regardless of whether that behaviour is legal within the host State. IFIs also have a complaints mechanism for corporate behaviour, although it focusses on their own staff's compliance with their policies. However, the OECD Guidelines do not specifically provide for the right to FPIC and only reference UN instruments on the rights of Indigenous Peoples in the context of the need for companies to respect the human rights of individuals belonging to

[74] Note, the BSR document is not explicitly aimed at the extractive industry, however it integrates input and ideas from participants in the BSR-sponsored Free, Prior, and Informed Consent Workshop for Extractives Companies held in London on June 19, 2012.

specific groups.[75] Although accessible internationally, each NCP operates autonomously, so that one NCP may treat a case in a manner that differs significantly from others. The Norwegian NCP, for example has provided FPIC guidance for mining companies, specifically in the case of the Mindoro Nickel Project in the Philippines.[76]

The recommendations contained within Doyle and Cariño's (2013) "Making FPIC a Reality" report is also notable here. Resulting from a multi-year project directed by a global indigenous advisory body it is unique in its extensive engagements with both mining companies and indigenous community representatives. These discussions served to identify where there are gaps are in understanding between mining companies and Indigenous Peoples, and the report features case studies to highlight issues that were selected and approved by both parties. As such, the report aims to provide a starting point for future dialogue about the implementation of FPIC processes between mining companies and indigenous peoples. "Making FPIC a Reality" is discussed further in section 4.8.

3.7 Guidance *for* indigenous and other project-affected communities

For a project developer to implement an effective and fair FPIC process, Indigenous Peoples must have the institutional strength and negotiation capacity that allows them to participate in the process on a level playing field, a factor that has been emphasized by the UN Special Rapporteur on the Rights of Indigenous Peoples.[77] Table 6 details a number of training manuals and guidelines that have been designed for the purpose of educating Indigenous Peoples on their rights to FPIC and building their capacity to better assert and negotiate these rights.

Table 6: Guidance for indigenous and other project-affected communities

Reference Document	Audience	Who has the right to FPIC?	In what contexts is FPIC required?

[75] OECD Guidelines for Multinational Enterprises (2011) available at: http://www.oecd.org/daf/inv/mne/48004323.pdf
[76] See the Norwegian NCP for the OECD Guidelines for Multinational Enterprises (2011) *Final Statement: Complaint from the Future in our Hands (FIOH) Against Intex Resources ASA and the Mindoro Nickel Project*.

[77] Anaya, J., (2009) *Promotion and protection of all human rights, civil, political, economic, social cultural rights. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people.* Para.51. A/HRC/12/34

Guide to FPIC, Oxfam Australia, 2010	Indigenous Peoples.	Indigenous Peoples and other project-affected communities.	FPIC applies to large-scale development projects, such as dams, mines, logging and other large infrastructure projects, which may affect Indigenous Peoples in some way.
Indigenous Peoples Guidebook on Free Prior and Informed Consent and Corporation Standards, First Peoples Worldwide (2012)	Indigenous Peoples.	Indigenous Peoples.	FPIC applies in contexts that jeopardize Indigenous Peoples rights, lands, livelihoods and cultures.
Making Free Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector, **Doyle**, C., and Cariño, J., (2013)	Companies. Indigenous Peoples.	Indigenous Peoples.	From the indigenous perspective, FPIC should be implemented at the policy and program levels before the project level. That is, Indigenous Peoples would have to consent for their territories to be designated as mining areas, before the government can even consider entering into investment agreements with, or issuing mining concessions, exploration permits or licenses to, mining companies.
Training Manual for Indigenous Peoples on Free Prior and Informed Consent (FPIC), Asia Indigenous Peoples Pact (2014)	Indigenous Peoples.	Indigenous Peoples.	FPIC applies when development projects affect Indigenous Peoples enjoyment of their rights.

3.8 Guidance *by* indigenous and other project affected communities

This literature reviewed in this category frequently references the need for a thorough understanding of the cultural and contextual specificities of project-affected communities as an essential precondition for the effective implementation of FPIC. Taking these specificities into account when implementing FPIC processes helps ensure that procedures will be culturally appropriate, in particular ensuring alignment and consistency with local knowledge systems and customary mechanisms for collective decision-making. In this respect, it is argued that there can be no common template for FPIC because each context surrounding each new proposed project will be entirely unique.[78] Companies that commit to implement best practice guidelines

[78] AIPP, (2014) *Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC).* AIPP, NORAD.

must therefore expect to invest time and resources to understand the cultural environment of the communities that might be impacted by their proposed business activities.

Of the literature reviewed, many of the guidelines and standards specify that affected communities should have the opportunity to co-design the consultation process through which FPIC should be sought. This means that together with the project developer, they should be able to jointly establish the ground rules and conditions for consultation, including what 'consent' looks like and how to decide when it has been achieved. By doing so, communities can ensure that FPIC processes will meet their needs based on their customary mechanisms for decision-making and socio-cultural values. For example, communities should decide when, where and how frequently meetings are held, what information needs to be provided in what format, and how benefit-sharing arrangements will be structured. They should also be able to inform how the grievance mechanism is designed, so that in the case of grievances the mechanism for reporting and remediating them is culturally appropriate and accessible. Communities can help to advance proceedings and put themselves into a robust position from the outset with regard to their rights and their negotiating power, by defining a code of conduct or a community protocol that companies should follow when engaging them in consultation.

Community protocols gained prominence after the Nagoya Protocol was developed in 2010 to aid implementation of the third objective of the 1992 UN Convention on Biological Diversity (CBD), the fair and equitable sharing of benefits arising from the utilization of genetic resources.[79] To achieve this objective the Nagoya Protocol requires ratifying parties to undertake both i) prior and informed consent processes to obtain access to traditional knowledge or genetic resources and ii) to support the development of community protocols.[80] There are now many examples of community-led protocols from around the world, including the First Nations of Canada, Indigenous Peoples groups from the Philippines and South American and Native American communities. [81] In contexts specifically relating to biodiversity there are also examples arising from indigenous communities in Africa.[82]

[79] See Article 1, CBD.
[80] See Article 12, Nagoya Protocol, available at: https://www.cbd.int/abs/
[81] For example, see the *Cree Nation Mining Policy*, the *Taku River Tlingit First Nation Mining Policy*, the *Subanen Conference On Free Prior And Informed Consent* and the *Protocolo de Consulta e Consentimiento Wajãpi.*
[82] For example, the Tanchara Biocultural Community Protocol (BCP), Ghana, and the Saburu Community Protocol, Kenya.

Indigenous communities often have existing protocols that they use to guide and regulate their conduct in relation to external actors, their territories and their resources, including, for example, the customary practices of paying respect and asking permission for access to or impacting on territories or resources.[83] However these protocols are commonly held in unwritten form, and research suggests that they can better serve a community in the context of development projects if they are articulated in a way that can be understood by outsiders too.[84] A community protocol can serve to communicate the importance of Indigenous Peoples relationships to land, resources and traditional livelihoods in a way that is also clearly aligned with national and international law. It this sense it may be one of the most effective instruments for communities to assert their own self-determined models of FPIC.[85] Moreover, the process of defining a community protocol is empowering in itself, particularly where the process is owned and facilitated by community members. [86] In the interviews conducted with mining companies for the "Making FPIC a Reality" report, Doyle and Cariño find that companies would welcome the existence of any structures or protocols set up prior to community engagement procedures, particularly if there were more case studies to exemplify their use.[87] Concerns were also raised however, about the level of community representation involved in the design of community protocols, with one company having modified their engagement strategy from engaging only with tribal leaders, to now engaging with all households affected by the proposed project.

In 2018, two reports have been published that emphasise the need for increased community involvement not just at the project and consultation process design stage but also in monitoring and auditing the project throughout its lifecycle. A report prepared for the German Development Corporation (GIZ), by Annandale et al., 'Indigenous Peoples' Participation in Sustainability Standards for Extractives,'[88] includes among its recommendations the need for increased participation of Indigenous Peoples in data collection for assurance purposes, according to criteria and verification frameworks that have been developed to ensure that they are context-specific and relevant. A second report, 'The Scramble for Land Rights,'[89] by the World Resources Institute, calls for monitoring mechanisms for managing land and natural resources

[83] See Doyle, C. and Cariño, J., (2013) *ibid.* p.17.
[84] See IIED (2012) Consent and conservation: getting the most from community protocols. Briefing. October 2012.
[85] See Doyle, C. and Cariño, J., (2013) *ibid.* p.26.
[86] See Swiderska et al, (2012) "Community protocols and free, prior, informed consent – overview and lessons learnt," *Participatory Learning and Action*, 65, pp. 35.
[87] See Doyle, C. and Cariño, J., (2013) *ibid.* p.49
[88] Available at: https://www.bmz.de/rue/includes/downloads/GIZ_Indigenous_Peoples___Participation_in_Sustainability_Standards_for_Extractives_GIZ.pdf
[89] Available at: http://www.wri.org/publication/scramble-for-land-rights

that are as much bottom-up as they are top-down, in order to level the playing the field between companies and the communities affected by their business activities.

Efforts have also been made to establish 'indigenous' indicators for development projects that affect indigenous peoples. FPIC is considered a key indicator for the self-determination of indigenous peoples, and can be a measure of a community's institutional capacity to negotiate development on their own terms.[90] In 2006, the Latin American and Caribbean Regional Expert Meeting on Indicators of Well-being and Indigenous Peoples convened to establish how indicators could be more indicative of the special relationship that indigenous peoples have with 'Mother Earth' or the natural environment, namely one of interdependence and reciprocity.[91] To this end the Meeting elected to use UNDRIP, including its FPIC provisions, as the human rights instrument that best fit their collective purpose.

The resulting document, published in 2008, lists regionally-specific indicators that may be relevant to Indigenous Peoples territories, language, education and health and medicine.[92] Furthermore, in 2017 the Indigenous Navigator was launched as a platform for collecting and hosting data that can be used to monitor the level of recognition and implementation of Indigenous Peoples rights.[93] Placing emphasis on community data collection and monitoring, the platform data collection framework is primarily aligned to UNDRIP, the Sustainable Development Goals and to the outcomes of the World Conference on Indigenous Peoples, affording indigenous communities the tools and resource to monitor their rights.

For the Standards, the ability to verify successful implementation of FPIC could be enhanced by engaging and enabling communities to develop their own indicators for FPIC and by providing a mechanism for communities to monitor and report on those indicators as part of the Standards' assurance and impact assessment processes. However, it is unrealistic to expect that such capacity-building activities be carried out to a sufficient level within the scope of an imminent planned project, given time and resource constraints. For the best results, these activities would be better implemented in an ongoing basis, and externally to specific project requirements.

[90] TEBTEBBA, (2008) *Indicators Relevant for Indigenous Peoples: A Resource Book.* Philippines: TEBTEBBA Foundation, p. 47.
[91] *ibid*., p. 85
[92] *ibid*.,
[93] See: http://indigenousnavigator.org/index.php/en/about

3.9 Summary and Conclusion

3.9.1 Summary – points of consensus and difference

This literature review demonstrates an emerging consensus around some aspects of FPIC, and divergence on others. Although the terms that are used to define FPIC may differ, the broad understanding of FPIC is similar: it is viewed as a normative obligation to be undertaken in advance, and throughout the lifecycle, of development projects that may impact Indigenous Peoples. Where the IFC and the World Bank were once not explicit for the need for 'consent' within consultation processes, and therefore financed projects that may not have aligned with the requirements of consultation under UNDRIP and IHRL in general, the IFC Performance Standards have since been revised to include explicit provisions for FPIC. While there is now agreement that FPIC requires 'consent' to be achieved, literature differs in terms of whether or not this is considered an absolute right to veto and in the event of consent not being achieved, how this impacts on commitments at the State level. If an international human rights perspective is used to approach project development, however, the requirements of necessity and proportionality must first be met for a project to be implemented that may have limitations on Indigenous Peoples' rights.

Analysis of the literature also demonstrates a consensus that the private sector has a role to play in upholding human rights within their business operations. This is now accepted as a human rights requirement that exists independent of State compliance with its duty to protect indigenous peoples' rights. Even where national legislation on Indigenous Peoples' rights is considered robust, it is acknowledged that for a project developer to avoid potential human rights risks they should demonstrate that they have carried out their own due diligence to ensure that community engagement and consultation practices are aligned with international standards. This includes a commitment to implementing FPIC in contexts where impact assessments reveal that Indigenous Peoples may be impacted by proposed projects. Some Standards extend this commitment to non-Indigenous Peoples communities who might also be affected by proposed projects~~,~~ although it tends to be viewed as a consideration to be assessed on a case-by-case basis in accordance with the rights of the communities that are impacted by the proposed project and the consultation processes designed in conjunction with them.

One of the remaining areas where there is some variation between different sources of literature on FPIC is the contexts in which FPIC should be sought. As discussed under section 3.2, this

variation may be accounted for by the difference in explicit treatment of FPIC, between the two international legislative frameworks that include FPIC requirements, ILO169 and UNDRIP. The IFIs tend to align the contexts in which FPIC is required with the requirements outlined by UNDRIP and contemporary IHRL jurisprudence. In addition to including situations where Indigenous Peoples may be physically displaced, or where ownership rights may be jeopardized, they also require consideration of other potential impacts. The most detailed requirements call for FPIC processes to be triggered in relation to potential impacts on land and natural resources, but also to impacts on cultural, spiritual or ceremonial life and general wellbeing of affected communities. They also detail instances where customary resources, including traditional knowledge, of Indigenous Peoples may be used for commercial purposes, whether or not resources are located on land occupied by Indigenous Peoples.[94]

Among the Standards and the industry associations there is general alignment with the approach taken by international human rights law standards towards Indigenous Peoples' rights and FPIC. Consequently, they acknowledge that impacts must be considered not only in relation to formally recognized rights, but also in relation to inherent customary and traditional ones, irrespective of whether or not these have been recognized by the State. Guidance available to businesses on responsible implementation of FPIC tends to assume that the need for FPIC has already been correctly identified, and therefore focusses on *how* it should be implemented, rather than in what contexts. On the other hand, guidance that is written for the benefit of Indigenous Peoples advises that FPIC should be triggered in relation to potential impacts in the broadest sense, for example: contexts that "affect Indigenous Peoples enjoyment of their rights;"[95] or that "may affect Indigenous Peoples in some way.[96]" This point of difference emphasizes the need to ensure that Indigenous Peoples participate in the design of FPIC processes from the very outset of development projects, including in what contexts they should be triggered.

Of those categories of literature where verification of FPIC implementation is required, i.e. for the Standards and also for lending requirements of IFIs, some provide practical information to aid companies and assurance providers in verifying FPIC, while others have minimal guidance beyond outlining and explaining their requirements. Of those Standards that do provide

[94] See especially the Asian Development Bank and the European Bank for Development and Reconstruction.
[95] Asia Indigenous Peoples Pact (2014) Training Manual for Indigenous peoples on Free, Prior and Informed Consent.
[96] Oxfam Australia (2010) *Guide to FPIC.*

guidelines specifically for the verification of FPIC, most are process-focussed and few provide examples of outcome or impact indicators. The most detailed guidance for FPIC verification in this respect comes from the UN REDD Programme, REDD+ and the Asian Development Bank. A further point of note is that guidance on requirements and verification of FPIC is commonly found within long, complex documents. While it may be thorough, this format does not always translate well into practical implementation by project developers.

3.9.2 Conclusion

In this literature review we have found a growing body of guidelines and best practice frameworks for companies needing guidance on how to effectively implement FPIC in the absence of, or supplementary to, state legislation regarding Indigenous Peoples rights. However, we also found that there is limited guidance available to help companies and assurance providers to verify if, and when, implementation of FPIC has been successful.

The best-case scenario is one where all relevant parties can meet on a level playing field in order to negotiate the outcome of the proposal, and the process by which that will be sought. The UN Global Compact guide to UNDRIP, among other guidance documents, calls for the private sector to be pro-active in investing in the capacity-development of Indigenous Peoples in order that an equitable relationship is reached. At the same time, communities are asked to be pro-active in learning, and asserting their rights[97]. Communities which already have strong institutional capacity have the opportunity to stay ahead of the development curve by agreeing decision-making processes regarding FPIC in self-determined 'development plans' or protocols[98] and providing potential project proponents with clear information on how to obtain FPIC.[99] The Aluminium Stewardship Initiative Standard includes the specific requirement that companies should support potentially affected Indigenous Peoples' communities with the resources to develop such protocols, independently of the company.[100]

We have identified a gap in existing literature and guidance whereby the guidance for FPIC verification is predominantly based on documented evidence of required management systems and processes. Regarding the verification or validation of FPIC, the perspective of Indigenous

[97] Doyle, C., and Cariño, J., (2013) *ibid.*

[98] *ibid.* p.76

[99] UNEP, (2009), *Bio-cultural Community Protocols: A community approach to ensuring the integrity of environmental law and policy.* Available at: *http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-091086.pdf*

[100] ASI Performance Standard Version 2 – Guidance, December 2017, pp.74. Available at: https://aluminium-stewardship.org/asi-standards/asi-performance-standard/

Peoples and other affected communities is largely absent. While Standards increasingly involve Indigenous Peoples within their development processes, there is little information to show how they have been involved in determining appropriate indicators specific to FPIC.

Our findings lead us to conclude that that there are two pathways that could be developed for improving the likelihood of successful FPIC implementation:

1) Improvement of methods for disseminating information about FPIC processes and Indigenous Peoples' rights to FPIC, to Indigenous Peoples' and their representatives, particularly in areas where their territories overlap with, or are adjacent to potential large-scale development projects.
2) Development of a concise, practical tool for monitoring and verifying FPIC that implemented from the bottom-up as well as top-down and developed from both:
    a. a distillation of rights-based guidelines from the literature analysed in this review and
    b. engagement with project-affected communities to ensure that Indigenous Peoples' perspectives are accurately codified in the tool.

Given the limited time scale of this project, it will focus on developing the latter of these pathways. However, with little further development it will also be tailorable for use by communities, while also providing an applied means of raising awareness and educating community members about the requires steps of an FPIC process. In the longer term EO will continue to explore avenues and partnerships for facilitating improved methods of information and education around FPIC.

4. NATIONAL REGULATORY CONTEXT

4.1 Overview

National law plays a significant role in determining the efficacy of FPIC processes. Where countries have ratified ILO 169, courts are able to cite the convention in cases concerning Indigenous Peoples and help to establish a benchmark at the national level. Few countries so far have adopted the principle into their domestic legislation, however. The most notable exceptions are the Philippines' Indigenous Peoples Rights Act of 1997 which requires FPIC in relation to any proposed project of natural resource exploitation,[101] and the Aboriginal Land Rights (Northern Territory) Act, 1976.[102]

As the ICMM Good Practice Guide (2015) notes, most countries retain ownership rights of mineral resources.[103] If managed responsibly, including compliance with international standards on impacts assessment and remediation, resource-rich countries hold the potential to leverage extractive activity to alleviate poverty and fund positive development outcomes through jobs provision, local procurement, tax contributions and development of infrastructure.[104]States therefore hold decision-making power regarding how those resources are developed, according both to applicable national laws, and the obligations of international laws that the host country has ratified, like ILO 169. At times the requirements stipulated by international human rights law may conflict with national development priorities, creating a challenging environment for companies and initiatives seeking to uphold best practice requirements regarding FPIC. For example, one government agency may grant licenses for forestry operations or mining concessions, yet another agency may be responsible for registering land titles and claims of indigenous peoples. In these situations, a project developer may find itself in receipt of a concession for which consent has not been granted, exacerbating distrust at the community level and increasing the risk of conflict regarding the proposed project. Moreover, a project developer wishing to uphold the principles of FPIC may find its access to permits for projects

[101] IPRA, Sec 7c, Sec. 33a and Sec. 46a, available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=50632&p_country=PHL&p_count=544
[102] See: https://www.clc.org.au/index.php?/articles/info/the-aboriginal-land-rights-act/
[103] ICMM (2015) *Good Practice Guide: Indigenous Peoples and Mining*, Second Edition. London: International Council of Mining and Metals, p.27. Available at https://www.icmm.com/en-gb/publications/mining-and-communities/indigenous-peoples-and-mining-good-practice-guide, accessed 31 October 2017
[104] Colombia Centre on Sustainable Investment, UN Sustainable Development Solutions Network (SDSN), United Nations Development Programme (UNDP), and the World Economic Forum (2016) *Mapping Mining to the Sustainable Development Goals: An Atlas.* Available at: http://unsdsn.org/resources/publications/mapping-mining-to-the-sustainable-development-goals-an-atlas/, accessed 25/08/17

compromised where the state does not recognize or promote the principle, especially when in competition with other companies who do not regard FPIC a prerequisite.[105] On the other hand, while national laws may not explicitly mention FPIC, in some cases they may still reflect the same key values, and therefore create a more enabling environment for FPIC implementation.

The domestic legal systems in Colombia and Peru assign constitutional rank to international human rights treaties, while Ecuador accords them the same rank as statutory law. The Constitutional Courts in all three countries have handed down rulings that—over and above the decision in the specific matter at hand—recognize the UN Declaration on the Rights of Indigenous Peoples as a source for the interpretation of State obligations.[106]

Even where national law calls for FPIC or similar processes, gaps remain between the legal commitments that states have made and the observed implementation of these commitments. In these cases, companies must revert to the international frameworks, the Standards and business and human rights guidance reviewed earlier in this study in order to supplement these gaps.[107] The following section outlines key elements of national regulatory context that have a bearing on FPIC implementation and considers each one in light of the three country environments considered in this study.

4.2 Colombia

4.2.1 Colombia Country Profile

The 1991 Political Constitution recognizes Colombia as a pluri-ethnic and multicultural society, with ethnic groups recognized as collective subjects with differential rights such as the rights to territory, participation, autonomy, self-determination, and self-government.[108] Rulings of the Constitutional Court have built on this institutional framework, creating an extensive body of

[105] BSR, *ibid.*
[106] Due Process of Law Foundation (DPLF) and Oxfam, (2011) *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru.* Available at: https://www.oxfamamerica.org/publications/the-right-of-indigenous-peoples-to-prior-consultation-the-situation-in-bolivia-colombia-ecuador-and-peru/
[107] *ibid.*
[108] Machado, M., López Matta, D., Mercedes Campo, M., A., Escobar, A., and Weitzner, V., (2017) 'Weaving hope in ancestral black territories in Colombia: the reach and limitations of free, prior, and informed consultation and consent,' *Third World Quarterly*, 38:5, pp. 1075-1091.

jurisprudence that was described in a 2010 report to the UN Human Rights Council by the UN Special Rapporteur on the rights of Indigenous Peoples as "world-class".[109]

According to the Colombian government, Colombia is the country with the highest number of successful FPIC processes in the region. By 2014, the Ministry of Interior reported over 690 successful FPIC process closures, 130 FPIC processes in progress and over 1300 ethnic communities engaged, corresponding to 38 industrial projects[110].

Table 7: Colombia Country Profile

Proportion of national population recognized indigenous	3.4 %[111]	
Proportion of national territory land-titled to indigenous groups	28% [112]	
Primary indigenous organizations, national/regional level:	Organización Nacional Indígena de Colombia (ONIC) Autoridades Indígenas de Colombia (AICO) Organization of Indigenous Peoples of the Colombian Amazon (OPIAC) Tairona Indigenous Confederation (CIT) Asociación de Autoridades Indígenas de Colombia (AIC)	
Natural resource ownership rights:	The Constitution places responsibility on Indigenous authorities to "ensure the preservation of natural resources" but does not clearly define who has ownership over natural resources in their land.[113]	
Adoption of international policies -UNDRIP -ILO 169	 Yes Ratified 1991	
Key elements of national regulatory context	Legal commitments	Observed Commitments
Indigenous Peoples Rights		
Legal recognition of Indigenous Peoples and their traditional and/or representative institutions?	Colombia planned to include self-identification in the country's most recent census planned for 2015-2017. Self-identification is considered a key tenet of the determination of indigeneity.	
Right to self-determination enshrined in law?	Not explicitly recognized but the Constitutional Court has affirmed the right of Indigenous Peoples to self-determination already laid down by ILO 169.	

[109] Anaya, J., (2010) *ibid.*
110 Ministerio del Interior, Colombia: http://www.mininterior.gov.co/sites/default/files/noticias/infografia_-_consulta_previa_new.pdf
[111] U.S. Department of State, (2016) *Country Report on Human Rights Practices: Colombia.* Available at: https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper
[112] U.S. Department of State, (2016) *Country Report on Human Rights Practices: Colombia. Ibid.*
[113] Resolve, (2015) *Colombia Country Report*, *From Rights to Results: An Examination of Agreements between International Mining and Petroleum Companies and Indigenous Communities in Latin America*. Washington: Resolve. Available at: http://solutions-network.org/site-fpic/files/2015/09/From-Rights-to-Results-Sept-2015-FINAL-ENG.pdf, accessed 05/08/17.

Right to prior consultation and/or consent enshrined in law?	Law 21 of 1991 incorporates ILO 169 into national law including the requirement for consultation as contained in Article 6 of the Convention. Law 99 of 1993 (the Environment Act) obliges governmental authorities to "conduct prior consultation with indigenous and black communities as a prerequisite for making decisions about natural resource exploitation."	." *In 2009 the Ministry was using a framework for consultation that was deemed to be incompatible with the requirements of ILO 169. The Special Rapporteur has found many examples of concessions granted and projects authorized without the necessary prior consultation with the affected communities*[114]
Collective right to customary land and resources?	Colombia is progressive in its delineation of indigenous territories (in the 2013-2014 agriculture census) established jointly by the National Administrative Department of Statistics (DANE) and the National Indigenous Organization of Colombia (ONIC) using the territorial boundaries established by the Indigenous Peoples, regardless of their legal status[115]	
Right to culturally appropriate jurisdictional treatment?	Yes. The law provides for special jurisdictions based on traditional community laws.[116] Decree 1953 of October 7th, 2014, which created a special regime to put into operation the administration of indigenous peoples' own systems in their territories, until Congress issues the Organic Law of Territorial Management that will define the relations and coordination between the Indigenous Territorial Entities and the Municipalities and Departments.[117]	
Government Infrastructure		
Existing government department or other centralized institution responsible for Indigenous Peoples affairs?	**Ministry of the Interior and Justice** – responsible for consultation processes with Indigenous Peoples. **National Commission for Indigenous Reserves (Ministry of Agriculture and Rural Development)** - responsible for reviewing all requests to constitute, augment, legalize and delimit indigenous reserves; **Permanent Working Group for Concertation with Indigenous Peoples and Organizations** - highest national-level body for joint decision making between	

[114] Anaya, J., (2010) *ibid.*
[115] ECLAC, *ibid*.
[116] U.S. Department of State, *ibid*.
[117] IWGIA, (2017) *The Indigenous World.* Copenhagen: IWGIA. Available at: https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2017.pdf

	Government and indigenous authorities on other policy issues; **Mesa Regional Amazónica para los Pueblos Indígenas de la Amazonía Colombiana (MRA)**	
Mechanism for Indigenous Peoples' land-titling?	Yes – prior to the 1980's this only applied to on-forest peoples with ancestral claims, but since then there has been large-scale titling of forest lands granting indigenous rights to 1.8 million square kilometres of the Amazon. [118]	*The demarcation of lands has been disputed between indigenous groups, neighbouring landowners, and the government.*[119] *Indigenous Peoples representatives claim much of the land titled to Indigenous Peoples is unproductive or not suited to their cultural needs, with only 7.68% of indigenous reserves situated in agricultural areas. Land granted to Indigenous Peoples has subsequently been declared 'empty' and therefore the property of the state.*[120]
Official status granted to indigenous languages?	Languages are recognized as being official in the territories in which they are spoken. The Constitution also enshrines the right to bilingual and ethno-education for all minority groups.	
Mechanism for Indigenous Peoples participation and representation in national politics	Minority ethnic groups actively participate in political life at both regional and local level. Colombia is the only Latin American country that recognizes an ethnic 'quota' in Senate representation.	
Mechanism for Indigenous Peoples' participation in natural resource planning / decision making / dispute resolution		*Some indigenous groups continued to assert that they were not able to participate adequately in decisions affecting their lands.*[121]

5.2.2 Consequences for FPIC Implementation in Colombia

Despite the national Constitutional Court recognizing FPIC as a fundamental right for indigenous groups, in practice the legal structure lacks the infrastructure, even the political will, to ensure its proper implementation, leaving questionable or even negative results at the

[118] Minority Rights Group International, (2008) *World Directory of Minorities and Indigenous Peoples - Colombia: Overview*, available at: http://www.refworld.org/type,COUNTRYPROF,MRGI,COL,4954ce5dc,0.html
[119] U.S. Department of State, (2013) *Country Report on Human Rights Practices: Colombia.* Available at: https://www.state.gov/j/drl/rls/hrrpt/2013humanrightsreport/index.htm#wrapper
[120] *ibid.*
[121] U.S. Department of State, 2013, *ibid.*

community level.[122] The extractive-based development strategy that the government has promoted for years may also have contributed to a lack of political will to adhere to commitments defined above. In 2010 the UN Special Rapporteur on the Rights of Indigenous Peoples reported an over-emphasis from the government on drawing-up formal guidelines and policies that had little practical bearing,[123] particularly with regards to cultural appropriateness in their consideration of indigenous organizational structures, customs and aspirations.

Before the peace deal between the government and the FARC guerrilla group, the gap between legislation and the lack of institutional support led to increased vulnerability for indigenous groups[124]. Implementation of FPIC in Colombia continues to be an important preoccupation for indigenous groups in light of the current peace process, fuelled by concerns that the end of the war could intensify government-led exploitation of natural resources and restorative land claims by internally displaced people. Indeed, in Colombia the peace process, extractivism and Indigenous Peoples rights including FPIC are inseparable. Historically, mining projects and state-led extractive or hydroelectric development plans facilitated by free trade agreements for natural resource exploitation, have failed to successfully implement FPIC.[125] Colombia has one the highest murder rates of land, social and environmental defenders related to mining and extractive industries globally, reaching 217 fatalities in the 17 months after the peace agreement was signed, from December 2016 to March 2018[126].

In 2010, the Special Rapporteur to the UN on Indigenous Peoples reported efforts by the Colombian government to improve dialogues via the creation of a Standing Committee for Consultation, the establishment of National Human Rights Commission and an Amazonian Committee. Colombia's legal framework on FPIC is constantly changing, especially given that relevant government entities and the high courts disagree on its implementation[127], clearer rules that define a bigger responsibility of the government at the FPIC processes are the main request from all stakeholders. Nonetheless, out of the countries subject of this study, Colombia has the highest number of FPIC processes officially implemented, with an average of 1.000 FPIC processes a year[128].

[122] Machado et al, (2017) *ibid*. p. 1076-77
[123] Anaya, J., (2010*) ibid.* p. 6
[124] *ibid.*
[125] Machado et al, (2017) *ibid*. p. 1088
126 http://www.eltiempo.com/colombia/otras-ciudades/el-mapa-de-los-lideres-sociales-asesinados-en-colombia-184408#
127 https://www.dinero.com/edicion-impresa/pais/articulo/consultas-previas-se-regularan-con-ley-estatutarias/246291
128 Ibid

4.2.3 Lessons from FPIC Application

In 2016 the Colombian Constitutional Court ruled in favour of the Sikuani indigenous community, during a legal dispute with a private energy developer regarding a proposed project to which the community had not consented.

Controversy arose because at the beginning of the industrial project, the project developer was not legally required by law to conduct an FPIC process. It was only through community demand that the case was able to gain institutional support. The Court ordered an injunction against the project, until the FPIC process was conducted correctly.[129]

This case is a milestone for the FPIC application in the region, since the Colombian Court states that fundamental rights are not renounceable and are applicable independently of the timeframe in which official institutions implement the legal mechanisms required to protect collective rights. Therefore, the application of an FPIC process under voluntary international standards remains critical for a project developer to meet its responsibility to respect human rights and maintain stakeholder support.

4.3 Peru

4.3.1 Peru Country Profile

Peru is a constitutional multi-party republic. In the Peruvian legal system, the term “peasant community” (*comunidad campesina*) includes the Aymara, Quechua and Uro indigenous communities of the Andean region, while the term “native communities” (*comunidades nativas*) covers the indigenous peoples of Peru’s Amazon region. The 1993 Constitution recognizes the legal personality of peasant and native communities and guarantees their autonomy in respect of their organization, community work, the use and free disposal of their land and with regard to economic and administrative matters[130].

Table 8: Peru Country Profile

Proportion of national population recognized indigenous	Lack of precise data. The only ethnic indicator used in the last national census in 2007 was the language learned during childhood. According to this census, 15.9% of the population learned an

[129] Organización indígena nacional de Colombia ONIC, Feb 2016: http://www.onic.org.co/noticias/958-corte-constitucional-ordeno-suspender-explotacion-de-petroleo-en-proyecto-quifa-en-el-meta

[130] Anaya, J., (2014). *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people. The situation of Indigenous Peoples' rights in Peru with regard the extractive industries*. A/HRC/27/52/Add3.

	indigenous language during childhood, of which Quechua and Aymara were the most widely spoken.[131]	
Proportion of national territory land-titled to indigenous groups	Lack of precise data. However, an estimated 88% of licensed hydrocarbon areas in the Amazon region that are currently being explored or exploited overlap with the titled land of Indigenous Peoples communities, while approximately 32% of licensed areas overlap with reservations set up for peoples living in a situation of isolation or initial contact.[132] 21% of the national territory is covered by mining concessions, and these overlap with 47.8% of the territory of peasant communities.[133]	
Primary Indigenous Peoples organizations, national/regional level:	Regional Coordinating Bodies of Indigenous Peoples (CORPI) Inter-ethnic Association for the Development of the Peruvian Forest (AIDESEP) Unity Pact of Indigenous Organizations of Peru; Amazon National Confederation Peru (CONAP)	
Natural resource ownership rights:	The rights to all subsurface resources are held by the state. Peasant and native communities can apply to obtain concession rights to exploit the natural resources associated with their lands (forest resources are handled differently and only require administrative authorization).[134]	
Adoption of international policies -UNDRIP -ILO 169	 Yes Ratified 1994	
Key elements of national regulatory context	Legal commitments	Observed Commitments
Indigenous Peoples Rights		
Legal recognition of Indigenous Peoples and their traditional and/or representative institutions?	Yes. The Prior Consultation Act (No.29785) requires the government keep a database of Indigenous Peoples groups entitled to this right, including both 'peasant' and 'native' communities, as well as those in a situation of isolation or initial contact. Peru has planned to include self-identification in their most recent census planned for 2017.[135]. Self-identification is considered a key tenet of the determination of indigeneity.	*The Act's criteria stipulate that certain Andean groups are considered on a case by case basis, according to objectives factors (e.g. descent, links with the occupied territory, customs, institutions and cultures) and subjective factors such as collective indigenous identity. This has drawn criticism by indigenous representatives who consider such criteria to leave ultimate determination of who is indigenous and entitled to consultation in the hands of the government.*[136] *Public agencies' recognition of existing and registered*

[131] Anaya, J., (2014) *ibid*.
[132] Anaya, J., (2014) *ibid*.
[133] IWGIA (2017) Peru Country Report, *The Indigenous World.* Copenhagen: IWGIA. Available at: https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2017.pdf
[134] US AID: Country Profile Property Rights and Resource Governance: Peru, available at https://usaidlandtenure.net/country-profile/peru/, accessed 07/10/17
[135] ECLAC, *ibid.* p.36
[136] Anaya, J., (2014*) ibid*.

		peasant and native communities is inconsistent, complicating policy implementation.[137]
Right to self-determination enshrined in law?	Yes, implicitly. Article 89 of the Constitution states: "They are autonomous in their organization, community work, and usage and free disposal of their lands, as well as in the economic and administrative aspects within the framework as provided by law. In 2012, the Constitutional Court of Peru ruled in favour of Indigenous self-determination in its recognition of the Tres Islas Madre de Dios community as autonomous within its own territory, and the Wampis declared themselves an autonomous nation in 2016.	*The Wampis are not yet officially recognized by the government as an autonomous nation*
Right to prior consultation and/or consent enshrined in law?	Yes. FPIC is enshrined in the Prior Consultation Act (No.29785) of 2011. Although it does not protect rights to FPIC for land which is not titled, in 2014 procedures were in place to extend this right to non-titled land under customary use. Until June 2017, the Peruvian government has completed 19 FPIC processes, and has over 20 more in implementation[138].	*The consent requirement is weak in law, applying to a narrow range of contexts and not regulated to the same extent as consultation. The 2012 regulations of the Act, notes that the process of consultation would still be deemed valid in the absence of consent. Clear guidelines are lacking regarding implementation of the Act. Each responsible government ministry is required to develop its own implementing regulations, leading to a lack of consistency across sectors. The government is still in the process of building capacity to effectively support and regulate the Act, and consultations are regulated in manner that allows consultations to happen after ESIAs rather than in advance of a participatory process.*
Collective right to customary land and resources?	Yes. Peru implements a land-titling program in official recognition of collective land and resource rights.	*Peru's land-titling program does not, however, cover entire areas claimed by Indigenous Peoples under customary tenure, instead titling lands in a fragmentary manner at the community level. Though Indigenous leaders have submitted a number of proposals for*

[137] US AID: Country Profile Property Rights and Resource Governance: Peru, available at https://usaidlandtenure.net/country-profile/peru/, accessed 07/10/17
[138] Interculturality Ministry: http://consultaprevia.cultura.gob.pe/proceso/?estado=7

		constitutional reforms on the issue of collective rights, the majority of such proposals have not been implemented as formal legislation.[139]
Right to culturally appropriate, jurisdictional treatment?	Yes. Article 149 of the Constitution states "Authorities of peasant and native communities, in conjunction with the peasant patrols, shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate the fundamental rights of the individual. The law provides for the coordination of such jurisdiction with justice-of-the-peace court and other instances of the national judicial system.	
Compensation and profit sharing?	Yes. Law requires that Indigenous Peoples are compensated for the surface use of their territories and for damages or curtailments to their rights as a result of the projects [140] In some cases indigenous communities have negotiated a direct percentage share of the project benefits. In others, profits are paid instead to regional governments for social investment. The state also runs a 'social fund' for social development initiatives in project-affected areas, run by multi-stakeholder groups.	*Typically, the benefits of projects shared with communities are nominal compared to those gained by companies, and further compromised by endemic corruption in regulatory bodies.*
Government Infrastructure		
Existing government department or other centralized institution responsible for Indigenous Peoples affairs?	**Yes. Multiple.** **Office of the Deputy Minister of Intercultural Relations of the Ministry of Culture** -oversees and advises FPIC, also responsible for the land registry of indigenous territories, both titled and untitled. **Ministry of Culture** - coordinates the efforts of the various actors involved in land titling. **Ministry of Agriculture** – oversees of the titling of peasant and native lands	*The FPIC processes themselves are the responsibility of the relevant government ministry according to the sector of the proposed project, which, as previously discussed, contributes to inconsistencies in FPIC implementation.*
Mechanism for Indigenous Peoples' land-titling?	Yes. The ownership rights of peasant and native communities are recognized and upheld through establishment of land titling procedures. The land of 6,381 indigenous peasant and native communities has been titled pursuant to these laws, while approximately	*Land titling is slow, partly due to devolvement of authority to the regional governments in 2009. Ombudsman office has reported that state is intending to improve land titling policies, in especially*

[139] Minority Rights Group International, (2007) *World Directory of Minorities and Indigenous Peoples - Peru: Overview*, available at: http://www.refworld.org/docid/4954ce0b2.html.
[140] Anaya, J., (2014*) ibid*.

	1,200 peasant and native communities are awaiting a title.[141]	*in Amazon area. Without legal title it is difficult for Indigenous Peoples to protect their lands from encroachment by outsiders.*[142]
Official status granted to indigenous languages?	Yes. Art. 48 of Peru's Constitution recognizes Quechua, Aymara and "other aboriginal language" in addition to Spanish and that all citizens have the right to use their own language before any authority through an interpreter [143]	*The government dedicated insufficient resources for interpretation services, impeding the full participation of indigenous persons in the political process.*[144]
Mechanism for Indigenous Peoples participation and representation in national politics	Yes. In 2002, a reform was instituted for regional elections, which sought to increase the participation of Indigenous peoples in national politics. Party list quotas now mandate that at least 15% of candidates be Indigenous.[145]	*Many Indigenous Peoples lack identification documents preventing their participation in public voting.*[146]
Mechanism for Indigenous Peoples' participation in natural resource planning / decision making / dispute resolution	Yes. One of the prerequisites for the fulfilment of indigenous rights in the context of extractive projects is their participation in the strategic planning process in this sector.[147] The National Office of Dialogue and Sustainability of the Presidency of the Council of Ministers was established in 2013 to facilitate better relationships between companies, communities, and the government and resolve conflict.[148]	*Although the implementation of prior consultation has led to the greater inclusion of indigenous peoples in the granting of licenses for extractive projects (see chap. VI below), so far, the indigenous peoples in Peru have not taken part in the strategic planning concerning natural resources.*[149]
Other resources	The Ministry of Culture offers interpreter training, guidelines for providing public services, and administrative processes for creating indigenous land reserves. The Ministry of Education operates bilingual schools in certain areas of the Amazon. The National Dialogue and Sustainability Bureau of the Office of the Council of Ministers works in areas of unrest to set up multi-sectoral discussions forums, increase the presence of the State and help improve community-corporation relations. Peru has implemented a	

[141] Anaya, J., (2014) *ibid*.
[142] US Department of State (2016) Country Report: Peru, 2016, available at: https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper
[143] US Department of State (2016) Country Report: Peru, 2016, *ibid.*
[144] US Department of State (2016) Country Report: Peru, 2016, *ibid.*
[145] Resolve, (2015) *From Rights to Results: An Examination of Agreements between International Mining and Petroleum Companies and Indigenous Communities in Latin America*. Washington: Resolve, p. 95. Available at: http://solutions-network.org/site-fpic/files/2015/09/From-Rights-to-Results-Sept-2015-FINAL-ENG.pdf, accessed 05/08/17.
[146] Resolve, (2015) *ibid.*
[147] Anaya, J., (2014) *ibid*.
[148] Anaya, J., (2014) *ibid*.
[149] Anaya, J., (2014) *ibid*.

	community questionnaire as additional to the national population and housing census in Amazonian indigenous territories, creating a mechanism for monitoring collective rights.	

4.3.2 Consequences for FPIC Implementation in Peru

As the only one of the three countries considered here and one of only a handful of countries worldwide that makes explicit reference to FPIC within its national legal framework following ILO 169, Peru appears to have a relatively strong enabling environment for the effective implementation of FPIC. Yet Peru continues to experience increased incidences of community conflict around large-scale development projects. Mining-related activities are cited as the most common cause of social protest.[150]

The former UN Special Rapporteur on the Rights of Indigenous Peoples highlighted a number of factors associated with prior consultation and consent that may exacerbate conflict associated with extractive activity. Extractive activity is regulated by its own set of laws and regulations, based in the Single Consolidated Text of the General Mining Act. While the Ministry of Energy and Mines has acknowledged the need to consult affected indigenous populations at various stages of the project, these stages are limited to (a) prior to authorization of the construction works; (b) prior to the start of exploration activities; (c) prior to approval of the mining plans.[151] However, the very first stage of extractive project development– the point at which a mining concession is granted – is omitted. Currently the government may grant mining concessions to companies without any prior consultation of potentially affected communities, although the Government informed the UN Special Rapporteur in 2013 that granting of concessions initiates a subsequent public participation process in order to communicate "the effects of the concession rights granted by the State, the mining activities, the environmental obligations, and the rights of the populations involved, amongst others.[152]" Nonetheless, the issuing of concession licenses prior to consultation is contrary to the requirements of ILO 169 and constitutes a direct infringement on the decision-making rights of Indigenous Peoples regarding projects that affect them. [153] This policy contributes to situations described earlier in this section

[150] Defensoria del Pueblo, (2017) Reporto de conflictos sociales No. 160, June 2017. Available at http://www.defensoria.gob.pe/conflictos-sociales/, accessed 15/07/17.
[151] Anaya, J., (2014*) ibid*.
[152] Anaya, J., (2014*) ibid*.
[153] AIPP, *ibid*. p.19

whereby a project developer can find itself in receipt of a license for which prior consent from relevant communities has not been obtained.

Moreover, consultations are not obligated to take place in advance of Environmental and Social Impact Assessments. A consultation process aligned with FPIC principles would require that communities are engaged in advance of impact assessments, to participate in the design of impact assessment frameworks and in their implementation. Instead, communities tend to be engaged once the ESIA has already been approved, and consultations must instead focus on impact mitigation and prevention measures. This violation of decision-making rights risks creating an environment of distrust by weakening Indigenous Peoples bargaining power from the outset. It may also undermine good intentions regarding prior consultation at subsequent stages of the process, and, in worst cases, contribute to conflict at extractive sites.

Peruvian legislation following ILO 169 also fails to acknowledge the more comprehensive interpretation of FPIC as defined by UNDRIP. Indeed, Peruvian law remains weaker than ILO 169 in that decision-making power resides with the State in cases of FPIC where consent is not achieved. The Special Rapporteur recommends that the State apply the Act and its accompanying regulations in a manner consistent with both ILO 169 and UNDRIP.[154] [155] Nonetheless recent years have seen positive outcomes for those fighting for Indigenous Peoples rights to self-determination and autonomy, with the consolidation of the Autonomous Territorial Government of the Wampis Nation (GTANW) in 2016. The Wampis government declared to prioritize wellbeing, food security and pathways of development that are rooted in a more balanced and reciprocal relationship with their surrounding environment, namely the 1.3 million hectares that comprise their ancestral territory.[156] Although Peruvian law recognizes their autonomous rights as an indigenous nation, the State has not yet recognized the status of the Wampis National government or the extent of their land claims. The Wampis have since inspired other indigenous groups to work on similar plans for autonomy, modelled on the Wampis Nation Strategic Plan.[157]

[154] Anaya, J., (2009) Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas. Observaciones sobre la situación de los pueblos indígenas de la Amazonía y los sucesos del 5 de junio y días posteriores en las provincias de Bagua y Utcubamba, Perú. A/HRC/12/34/Add.8
[155] Anaya, J., (2014) *ibid.*
[156] Forest Peoples Programme, (2017) 'UNDRIP: 10 years on and into the future.' Available at https://www.forestpeoples.org/en/un-human-rights-system/news-article/2017/undrip-10-years-and-future
[157] IWGIA, (2017*) The Indigenous World.* Copenhagen: IWGIA. Available at: https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2017.pdf

4.3.3 Lessons from FPIC Application

Block 192/1AB, a petroleum block in northern Peru, has a long history of social and environmental harm. Reclamations by the local Indigenous Peoples due to oil spills and slow remediation's processes are frequent and have been on-going for almost two decades. This production site began operation in the 1970's, before Peru's ratification of ILO C169 in 1994, and no consultation with local Indigenous Peoples communities was conducted prior to ongoing operations. Indeed, even following the ratification of ILO C169 no consultations were held in relation to significant changes in the concession, in contravention with the government obligations under the Convention. It was only in 2011 that the Peruvian State enacted a law on consultation, designed, albeit it imperfectly, to give effect to its obligations under C169.

Indigenous Peoples groups have demanded that their rights be respected, including through the conduct of consultations in the context of the renewal of the Block 192 concession contract in 2015. The historical violations of their rights and the failure of the company and the State to provide remediation for the serious harms caused, were compounded by a flawed consultation process, which the communities and their federations regard as failing to comply with the good faith requirements of the 2011 law on consultation, ILO C169 and the UNDRIP. Key issues identified with the consultation process included: the scope of the consultation processes, which focused on compensation, protection from harm and remedy; the time frame imposed by the government and its unilateral termination of the consultations before an agreement had been reached.[158] In 2017, a new demand was made by the affected Indigenous Peoples' communities and their federations, as the project development contract was due for renewal . This demand was rejected by the government under the argument that no new administrative measure existed on the concession[159].

Cases in which resource production occurs in the absence of prior consultation with indigenous peoples are common in the Andean and Amazon regions. This is true not only in the oil and gas sector, but also in mining, agriculture and even in the determination and conservation of natural protected areas.

Irrespective of when FPIC processes are initiated (be it for a new project or for a change to an existing one, or to address on-going impacts in relation to which no consultations were held) indigenous peoples must always be engaged in a transparent and good faith consultation

[158] Baqué, Doyle. "El daño no se olvida", Centro de Políticas Públicas y Derechos Humanos, Lima, Perú, 2017
[159] El Comercio Perú: https://elcomercio.pe/peru/loreto/lote-192-ministerio-cultura-rechaza-solicitud-consulta-previa-comunidades-noticia-458486

process. Significant operational or legal changes affecting the structure of the industrial activity, should be triggers for conducting FPIC processes in line with international standards, especially if consultation processes to obtain FPIC have not been held because operations commenced prior to the ratification of ILO 169 or because the State failed to enact legislation to give effect to its legal obligations under the Convention.

FPIC Requirements for the Palm Oil Industry:

Consultation and consent rights have traditionally been discussed and analysed for industries that have historically had impacts at the local level in Peru, Ecuador and Colombia. Unlike in Asia, where palm oil production has long-impacted on Indigenous Peoples, in South America the predominant industries infringing on Indigenous Peoples territories are mining, oil, gas and hydroelectric projects. However, there is an imperative to recognize the applicability of FPIC to all industries that may impact on indigenous lands, irrespective of whether they have been operational in these lands in the past.

In 2017, the Vice Ministry of Intercultural Affairs issued a directive on the need for consultations in relation to the implementation of the national Palm Oil industry plan. The industry plan includes production of Palm Oil in 13 different indigenous territories, including Loreto, San Martín, Huánuco and Ucayali. This directive is the result of the indigenous organizations lobbying for their rights of consultation. Although the regulatory framework will need to be different to that of extractive projects due to the decentralized system that exists for authorizing palm oil projects, for indigenous communities, the requirement to hold consultation on the industry plan constitutes a major milestone and reflects the application of lessons learned from the extractive industry to the palm oil sector.[160] Regardless of the industry, early engagement between private, public and indigenous stakeholders remains critical to guarantee that FPIC processes result in the desired outcome of safeguarding Indigenous Peoples' rights, environmental conservation and sustainable local economic development.

[160] Centro Amazonico de Antropologia y Aplicacion Practica, mayo 2017: http://www.caaap.org.pe/website/2017/05/17/ordenan-consulta-previa-del-plan-nacional-de-palma-aceitera/

4.4 Ecuador

4.4.1 Ecuador Country Profile

Constitutionally, Ecuador is a multicultural and multi-ethnic country, which recognizes a range of collective rights of the country's 14 officially recognized indigenous nationalities. Among the fundamental principles of the Republic of Ecuador are sovereignty, inter-culturalism and plurinationality principles, including rules on dual citizenship, which allow individuals to hold both Ecuadorian and the indigenous nationality.

Table 9: Ecuador Country Profile

Proportion of national population recognized indigenous	7% according to 2010 census, though other sources estimate anywhere up to 45%[161]	
Proportion of national territory land-titled to indigenous groups	20% [162]	
Primary indigenous organizations, national/regional level:	Confederation of Indigenous Nationalities of Ecuador (CONAIE).	
Natural resource ownership rights:	The mining acts of 2000 and 2009 define the State as the owner of all mineral wealth, with power to transfer rights to private entities. State maintains responsibility for conducting required consultation where concessions overlap with indigenous territory.[163]	
Adoption of international policies -UNDRIP -ILO 169	 Yes 1998	
Key elements of national regulatory context	Legal commitments	Observed Commitments
Indigenous Peoples Rights		
Legal recognition of Indigenous Peoples and their traditional and/or representative institutions?	Yes. Ecuador includes self-identification in this decade's censuses - self-identification being a key tenet of the determination of indigeneity.	
Right to self-determination enshrined in law?	Yes, implicitly. Article 57 of the Constitution brings a long list of indigenous peoples' collective rights including those relevant to self-determination (although it is not explicitly mentioned) such as the right to maintain and develop their own ways of living and social organization,	

[161] Stavenhagen, R., (2006) Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Addendum: Mission to Ecuador. A/HRC/4/32/Add.2.
[162] US AID: Country Profile Property Rights and Resource Governance: Ecuador, available at: https://usaidlandtenure.net/country-profile/ecuador/, accessed 07/10/17
[163] Bavinck, M. Pellegrini, L., Mostert, E.(2014) *Conflicts over Natural Resources in the Global South: Conceptual Approaches*, RC Press.

	to create and exercise authority, and to enact and enforce their law.	
Right to prior consultation and/or consent enshrined in law?	Yes. The Constitution grants Indigenous Peoples the right to prior consultation before the execution of projects that affect their rights.	*In instances where consent it not obtained via consultations, the Constitution and law can be invoked on a case by case basis leading to context-specific interpretations of the rights affirmed in the Constitution and under the law. Moreover, on July 11 2016, the UN Human Rights Committee expressed concerns over reports that the government granted natural resource concessions in indigenous territories without prior consultation and despite the potential negative impact of natural resource exploitation projects on indigenous peoples in voluntary isolation.*[164]*There have since been numerous concluding observations from UN treaty bodies to similar effect.*
Collective right to customary land and resources?	Yes. The 1998 Constitution recognizes the rights of indigenous communities to hold property communally.[165]	*Indigenous land ownership is not adequately covered by legislation. This therefore frustrates efforts by communities and peoples to exercise their autonomy and to participate fully in the management of natural resources in their territories.*
Right to culturally appropriate jurisdictional treatment?	Yes. The Constitution allows indigenous authorities to exercise judicial function by applying their own rules and procedures to solve internal conflicts in accordance with their customs or customary law[166].	*No law has been passed to harmonize these functions with the national system and there have been numerous conflicts of jurisdiction between indigenous and legal authorities as well as, apparent abuses by both authorities.*[167]
Government Infrastructure		
Existing government department or other centralized institution responsible for Indigenous Peoples affairs?	In 1998, an Indigenous Peoples Commission was constituted in the National Congress. The National Agrarian Development Administration (INDA) and the Environmental	*Lack of coordination between INDA and the Environmental Authority on demarcation of their jurisdictions is one of the key contributors of land conflict*[168]

[164] US Department of State (2016) Country Report: Ecuador, available at: https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper
[165] *ibid.*
[166] Stavenhagen, R., (2006) *ibid.*
[167] *ibid.*
[168] US AID: Country Profile Property Rights and Resource Governance: Ecuador, available at: https://usaidlandtenure.net/country-profile/ecuador/, accessed 07/10/17.

	Authority share responsibilities for land titling.	
Mechanism for Indigenous Peoples' land-titling?	From 2002, the State (via The National Institute for Agrarian Development - INDA) began to title land to coastal and Amazonian Indigenous Peoples, and began to recognize indigenous communal lands in the highland regions as inalienable, imprescriptible and not subject to seizure	*The titling process remains incomplete in parts of the country, characterized by a lack of accessibility, lack of resources, high transaction costs, slowness, corruption, and lack of transparency.*[169] *A lack of legal arrangements pertaining to the regularization of indigenous land has been reported.*[170]
Official status granted to indigenous languages?	Kichwa and Shuar are "official languages of intercultural relations."[171] Indigenous Peoples have right to use mother tongue in any actions against them.[172]	
Mechanism for Indigenous Peoples participation and representation in national politics	Yes, the Constitution provides for indigenous political party representation	*However, many indigenous Ecuadorians face discrimination at the polls*.
Mechanism for Indigenous Peoples' participation in natural resource planning / decision making / dispute resolution	Yes. The Constitution grants the right for Indigenous Peoples to participate in decisions about the exploitation of non-renewable resources located on their lands and that could affect their culture or environment.[173]	[174] *Indigenous groups continued to challenge government decisions and laws covering mining, water resources, and hydrocarbon resources that did not consider indigenous viewpoints, their right to prior consultation, or intruded upon indigenous autonomy over their lands and resources.*
Other resources	DINEIB, established in 1987, is legally responsible for education programs for indigenous peoples and nationalities.	*DINEIB has the status of a national institution but lacks the necessary resources to perform all the tasks assigned to it. E.g. not all indigenous children have access to schooling or the state school meals program.*[175]

4.4.2 Consequences for FPIC Implementation in Ecuador

In 2006, the then UN Special Rapporteur on the rights of Indigenous Peoples, Dr. Rodolfo Stavenhagen, reported a lack of adequate secondary legislation despite the comprehensive

[169] US Department of State, (2016) Country Report: Ecuador, *ibid.*
[170] *ibid.*
[171] *ibid.*
[172] Stavenhagen, R., (2006) *ibid.*

[174] US Department of State, (2016) Country Report: Ecuador, *ibid.*
[175] *ibid.*

constitutional recognition of Indigenous Peoples' rights. In other words, while there are indicators at a structural level that Indigenous Peoples' rights are recognized, the degree to which they can be seen at a policy or results level remains limited.

Of the three case study countries considered, Ecuador is interesting due to its adoption of the indigenous concept of Buen Vivir, or 'sumak kawsay' into its Constitution in 2008, in parallel with greater formal recognition of other forms of 'derecho propio' including territoriality and autonomy. Roughly translating as 'a life of fullness' in Kichwa / Quechua or 'good living' in Spanish, the progressive potential of sumac kawsay's institutionalization lies in the fact that it acknowledges indigenous values of peace, equality, sustainability and solidarity and inserts them into the very system that will govern future development strategies.[176] Instead of a system based on economic growth, it advocates for one characterized instead by peace, equality, sustainability and solidarity.[177] Yet while Buen Vivir has affected positive law, the extent to which it can be operationalized is yet to be seen.

5.4.3 Lessons from FPIC Application in Ecuador

In 2001 Iamgold was awarded a mining concession in Quimsacocha in southern Ecuador by the Ecuadorian government without undertaking an FPIC process. In response, in 2004, indigenous and community leaders organized a local environmental committee to demand the cancelation of the operations due to lack of community consent and called attention of local authorities to the issues of access to and quality of water resources. Mobilizations and protests continued until 2010. Quimsacocha's community organizations held a public consultation process in 2011, to define the conditions in which they would authorize or reject mining activities in their lands. This practice was implemented in accordance with international FPIC principles and was held in parallel to the government-led consultation process. The communities then signed a declaration in rejection of the current mining projects in their territories, to share with the state government and the ILO[178]. Prior to February 2017, the Ecuadorian government had established four priority mining projects in southern Ecuador, all located in municipalities that had been designated by local authorities as "mining free"[179].

[176] Villalba, U., (2013) '*Buen Vivir* vs Development a Paradigm Shift in the Andes?' *Third World Quarterly,* 34(8), pp. 1427-1442; Villalba-Eguiluz, C.U., and Etxano, I. (2017) '*Buen Vivir* vs Development (II): The Limits of (Neo-) Extractivism,' *Ecological Economics* 138, pp. 1-11.
[177] Villalba, (2013 *ibid.;* Gudynas, E., (2011) 'Buen Vivir: Today's Tomorrow,' Development, 54(4), pp. 441–447.
[178] https://noalamina.org/latinoamerica/ecuador/item/7414-poblacion-de-quimsacocha-rechazo-la-mineria
[179] El Comercio: http://www.elcomercio.com/actualidad/mineria-preocupacion-austro-cuenca-agua.html

The Yasuní ITT initiative was a government-led project that aimed to create an Amazon forest conservation buffer zone using a pay-for-performance mechanism that would prevent the need to extract oil and gas from the Yasuní ITT natural reserve. Yasuní natural park is located within the polygon formed by the hydrocarbon production zones of Ishpingo, Tiputini y Tambococha, and is considered one of the most important biodiversity hotspots in the world. Home to indigenous peoples in voluntary isolation and initial contact, this park has been catalogued as one of the most vulnerable to resource extraction in the world.[180]

In 2013, the Ecuadorian government announced the failure of the Yasuní ITT pay-to preserve scheme and opened a process to extract hydrocarbons from blocks 31 and 43, located within the natural reserve. As a consequence, the government initiated an expedited FPIC process at the Aguarico indigenous communities to seek consent. This FPIC process was criticized by numerous civil society organizations and indigenous leaders, noting that the consultation procedure was not conducted prior to operations beginning (given that blocks 31 and 43 had already been operational), was not properly informed (since it was conducted rapidly) sought a conditioned consent (given that the government decided on land use), and did not consider impacts on tribes in voluntary isolation or initial contact.

The rights of Indigenous Peoples to consultation and consent have been embraced by empowered communities. Regardless of local law, the local population expects companies and regulators to conduct a comprehensive FPIC process that guarantees human rights, community development and conservation.[181] Empowered indigenous organizations can play a critical ombudsman-like role overseeing and guaranteeing the effective application of FPIC principles. Good faith consultation and FPIC processes require that the scope be adequately defined, timeframes be culturally appropriate and sufficient to address information provision needs, impact identification be through and participatory and that transparency and independency be ensured. Community oversight can act as the main monitoring mechanism regulating and guaranteeing the integrity of consent seeking consultations.

[180] Global Conservation Significance of Ecuador's Yasuní National Park, Margot S. Bass, et al January 19, 201
[181] "Análisis de la consulta previa, libre e informada en el Ecuador" CENTRO ECUATORIANO DE DERECHO AMBIENTAL (CEDA) Patricia Carrión Quito, diciembre 2012.

5. FIELD WORKSHOPS

A key factor influencing the degree to which FPIC implementation is successful, is the capacity of Indigenous Peoples to participate in FPIC processes in an effective way. While numerous institutions have developed guidance specifically for Indigenous Peoples to increase their knowledge of the FPIC process and aid them in asserting their right to protect it, evidence from our field workshops in Colombia, Peru and Ecuador shows that leaders of Indigenous Peoples do not always have a solid understanding of these rights, and depth of FPIC knowledge varies widely among Indigenous Peoples representatives.

Facilitated by our regional partner COICA, we conducted a series of three workshops in the Amazonian regions of Colombia, Peru and Ecuador. COICA was responsible for identifying and inviting workshop participants, as well as local logistical arrangements. Collectively, 45 representatives of Indigenous Peoples' regional federations and associations took part in these workshops, including key representatives of the Achuar, Cofán, Coreguaje, Inga, Kichwa, Murui, Pijao, Secoya, Shipibo-Conibo Shuar, Siona, Tacana, Urarina, Witoto and Yanacona nations.

The methodology for this series of field workshops was initially designed for a one-day pilot workshop, which took place in Mocoa, Colombia, in October 2017. The design consisted of first establishing a common understanding of FPIC principles and how it is supported by international and national legislative and regulatory mechanisms. After this, the participatory approach of World Café was used for participants to explore their own perspectives on these principles and what they translate to in reality. Collating the insights that resulted from this exercise we were able to distil the common values and expectations.

Participants in the pilot workshop, however, demonstrated highly variable levels of prior knowledge of FPIC and more time was required to establish a shared baseline of knowledge before moving on to the participatory element. Given the duration of the workshop was only one day, the limited time available restricted the level of detail that was achieved. Based on this observation, two key changes were made in advance of the Peru and Ecuador workshops: 1) greater effort was made by COICA to identify participants with direct experience of FPIC processes, and 2) the duration of the workshop was extended to two days.

The longer duration of the workshop subsequently allowed for a comprehensive orientation to FPIC on the first day, comprising the same elements as the Mocoa workshop. The second day allowed for additional sessions facilitated by government officials from relevant departments

responsible for mining and/or petroleum and gas projects in each of the two countries, together with integration of further participatory sessions, including role play, to offer participants the opportunity to draw from their own experience and explore FPIC scenarios from the perspective of different actors.

Please see additional PDF document *FPIC Workshop Reports_Mocoa_Iquitos_Lago Agrio* for the full reports on the workshops conducted in Colombia, Peru and Ecuador respectively.

6. FPIC MONITORING AND VERIFICATION TOOL

6.1 Background

Our research has demonstrated that existing guidelines and tools for FPIC tend to be geared towards use by project developers and the data produced regarding the FPIC process is similarly one-sided. Based on our analysis of Standards' FPIC requirements, and insights gained from field workshops, we have developed a draft framework for monitoring and verifying FPIC. The framework is designed to be implemented via a multi-sided tool that will allow it to be used by project developers to guide the implementation of an FPIC process, and also by Indigenous Peoples' communities to participate more effectively in FPIC processes. Assurance providers can also use the tool to access the data generated by other users for verification purposes. The tool can also be used by all parties to monitor the ongoing compliance of projects according to agreements that have been negotiated between project developers and affected communities. We have involved Indigenous Peoples community representatives in the development of this framework in an effort to ensure that the framework reflects what is socially and culturally appropriate, effective and useable from the perspective of Indigenous Peoples. The more trusted and credible the framework is to affected communities, the more effective it will be for project developers and assurance providers to use as a supporting resource in implementing and verifying FPIC processes.

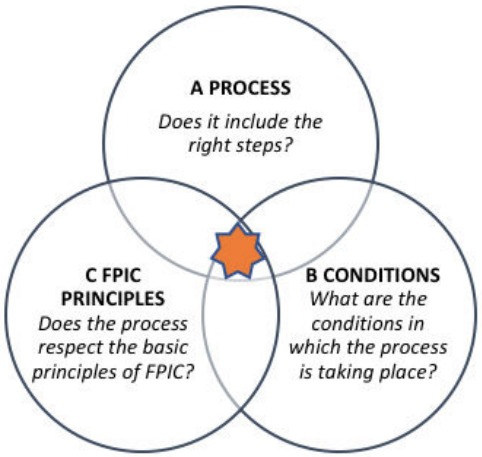
The multi-sided approach of the tool is innovative in that it will facilitate data generation from both sides of the FPIC process. Given the unique perspective and worldviews of Indigenous Peoples, particularly regarding their connection with territory and resources, we propose that FPIC can only be adequately monitored if the community has equal ownership over the data generation and monitoring processes as the project developer. By employing considered application of appropriate technological solutions, this tool can help rebalance the project developer – community dynamic by facilitating greater community ownership of the FPIC process and its ongoing verification.

Beyond the facilitation of more effective and equitable FPIC processes, this tool will also contribute to increased transparency and knowledge of FPIC processes that will provide a valuable learning resource for others. Through the development of specialist software, this project holds further innovative potential in enabling a centralised system for hosting data that can be mapped or analysed in a variety of ways for the educational benefit of all.

It is expected that this tool will be implemented by practitioners with the specific skills, cultural awareness and linguistic capabilities required to be able to engage directly with stakeholders involved with the FPIC process.[182]

6.2 Structure

The tool is based on the premise that without a responsible process for achieving FPIC, the credibility of the outcome of that process is compromised. The resulting framework is unique in that it considers not only the outcome of the process, but also the *Process* used to obtain FPIC, the *Conditions* under which this process is conducted, and whether or not it adheres to the key *Principles* of Free, Prior, Informed and Consent. That is, FPIC can only be verified when all three of these elements coincide.



Structuring the framework according to these three elements enables it to be implemented in a circular way and with multiple entry points, as opposed to a linear 'tick-box' system, which has been critiqued for over-simplifying the complex and iterative nature of FPIC processes. Although numbered, the Process stages defined within the framework are not necessarily sequential; some may need to happen in a specific order, while others may happen in parallel. The Conditions fall into two categories – conditions relevant to the community, and conditions relevant to the project developer. The tool does not currently address Conditions relevant to local legislatory or regulatory context, such as land titling policy, for example, since these are unlikely to be influenced or changed by project stakeholders during the timeframe of a project. Nevertheless, it is important that companies and communities approach an FPIC process with knowledge of the national legal and policy environment relevant to FPIC processes and an understanding of how this environment may either help or hinder the efficacy of the FPIC process. This expectation is included within the second Process stage of the tool's framework.

[182] For further information on competence requirements for human rights assurance practitioners, see: the UN Guiding Principles Reporting Framework, Guidance Part II: Assurance of Human Rights and Reporting, p.19-21.

Each of the Process stages, Conditions and Principles are further broken down into: 1) the *Expectation*, that has been distilled from our analysis of international voluntary and human rights standards and their FPIC requirements; 2) the *Action* that the Project Developer needs to take to meet with the outlined Expectation; and 3) the *Evidence* that an assurance provider or auditor can use to verify that the Action has been undertaken in conformance with the Expectation.

Where "documented evidence" is specified this should be understood as written and signed by the relevant stakeholder representatives, for example the community representatives agreed upon in advance of the FPIC process, relevant company personnel and local government. The community may specific that such documentation should also be notarized. In some cases, in relation to interviews, community meetings, or dissemination of information regarding FPIC processes, audio or visual documentation may be appropriate, or preferable to, written documents. In addition to hard copies of this evidence being publicly viewable at a pre-agreed community location, evidence should also be digitalised and uploaded to an agreed online location or central registry that is publicly accessible. This may be the website of the relevant indigenous association and/or through a central platform or dashboard integrated with the software solution for the tool itself.

The full draft framework is included in Annex 3 of this document.

6.3 Limitations

The framework is currently structured for use in a situation where the need for an FPIC process has been identified but no part of the process, or the proposed project, has yet been implemented. Further modification will be required for it to be employed retroactively, for example instances where a project has already been implemented without having undertaken an FPIC process in advance.

The development of the framework has been informed by Indigenous Peoples' leaders from the Amazon region. The example forms of evidence it stipulates may need to be reconsidered the framework is to be implemented in other regions, however the overall structure, expectations, and actions required of the developer should remain relevant and applicable worldwide.

In draft form, the framework does not lend itself to easy implementation, however it is currently being translated into Excel format, where simple programmed functions will sufficiently ‘toolify’ the framework for it to be piloted.

7. NEXT STEPS

Equitable Origin is currently securing funding to continue this project to stage two, involving three key activities:

1) Piloting the framework to further refine it through experiential input from ground-up. We are working to identify suitable pilot case study situations within the Amazon region, where the need for an FPIC process has been identified but neither the process or any aspect of the proposed project and yet been implemented. The pilot would be conducted as a joint effort between the project developer, the affected community and the assurance provider, to test the process and the indicators and to gather further examples of verification data.

2) Working with developers of existing software solutions that focus on supply chain transparency and community reporting, to develop software that will facilitate the 'toolification' and implementation of the framework. Software development will take a human-centred design approach to ensure the facilitating technology is culturally relevant and logistically viable.

3) Developing a training programme and materials to accompany the tool, to ensure its correct implementation, and integrate into existing Indigenous Peoples' leadership and capacity-building initiatives.

BE INVOLVED

For further information, or if you / your organization would like to support the project in some way, please contact Emma Hague (ehague@equitableorigin.org.)

To stay informed of project progress, please see Equitable Origin's blog page, or follow us on Twitter and LinkedIn.

If you work at the community level we have produced this animated video in Spanish (with subtitles in English) as an educational resource about FPIC that we welcome you to share.

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Annex 1: ISEAL Member Survey / Semi-structured interview on FPIC

1. Which standard do you use / oversee?

2. Does your standard include FPIC requirements for indigenous communities?
   Yes / No

3. Does your standard include FPIC requirements for non-indigenous communities?
   Yes / No

4. Does your standard define FPIC as Free, Prior and Informed "Consent" or "Consultation" and how does it consider these two processes to be connected?

5. How is FPIC verified under your standard?

6. Approximately how much time in the audit is dedicated to assessing FPIC?

7. How effectively do you consider entities certified under your standard to be implementing FPIC?
   Very effectively
   Somewhat effectively
   Not very effectively
   Unsure
   N/A

8. What, in your opinion, are the main challenges to successful implementation of FPIC? (Name up to three.)

9. What do you consider to be key factors for successful implementation of FPIC? (Name up to three.)

10. On average, what resources (i.e. budget, personnel) do entities usually allocate to FPIC implementation?

11. In which countries have producers/developers achieved conformance with FPIC requirements under your standard?

12. In your experience, in which countries or contexts has conformance with FPIC proved problematic, and why?

13. Does your standard provide guidance on implementing or verifying FPIC?
    Yes / No
    If yes, is this guidance public?

14. Is your organization participating in any other initiatives / projects engaging with FPIC that you can share here?

Annex 2: Summary of issues compromising effective FPIC implementation and methods for addressing them

ISSUES	DESCRIPTION	STRATEGIES AND APPROACHES FOR ADDRESSING THEM
MACRO LEVEL		
1. Unsupportive legislative or political rights context of host country	National legislation may have a limited recognition of Indigenous Peoples that encourages narrow application of FPIC. Equally, the degree to Indigenous Peoples' rights to land, resources (including sub-soil or carbon property) and sacred sites are recognized and upheld may influence the way in which private actors identify engage FPIC (see Section 4 for case studies.)	Private sectors companies are encouraged to carry out their own human rights due diligence to identify FPIC requirements, regardless of state provisioning. Increased engagement between private sector and government is required to create a more enabling environment for FPIC.
2. Pervasive power asymmetries between Indigenous Peoples, companies and states	Many states rely on foreign investment in the natural resource sector for national revenue. States may be in relationships of debt with international finance institutions. Rights of corporations may therefore supersede, or be given precedence over, the rights of indigenous peoples, who have limited bargaining power.	Reducing power inequalities relies on a robust and fair judiciary system. In absence of this third-party capacity building, particularly around Indigenous Peoples' self-governance, mediation and institutional capacity can increase Indigenous Peoples' power to assert rights and negotiate.
3. Lack of consistency in definition and use of 'consent' vs 'consultation'	Explicit application of FPIC within hard and soft laws differs depending on context, allowing for states and private entities to define their own interpretation.	In the long term UNDRIP and its broader applications of FPIC may 'harden' into legally-binding law. In the short-term capacity building Indigenous Peoples to know and assert their rights for FPIC are key to preventing 'consent' being foreshortened to 'consultation.'
4. Lack of consistency about what contexts FPIC applies to	FPIC was borne out of the need for a mechanism to address forced displacement of Indigenous Peoples. As such, some standards only require it explicitly in resettlement contexts. Others recognize that Indigenous Peoples may depend on land that they do not inhabit, but which is nonetheless key to their survival and as such extend FPIC to all potential impacts on land, resources or factors of traditional life – including intangible aspects such as sacred and ritual life.	

5. Lack of consistency about who FPIC applies to, particularly where it has been extended to all local affected communities, indigenous or otherwise.	Some standards[183] now extend FPIC rights to non-indigenous communities. All individuals have the right to self-determination, but not all have the collective rights to land and resources afforded to Indigenous Peoples. In these cases it is not clear who has the power to give or withhold consent, creating problematic tensions for relevant parties to resolve.	Emerging norms and further jurisprudence may be needed to clarify these matters.
6. Challenges with FPIC verification.	National verification mechanisms may be distrusted due to their susceptibility to being (see no.2 above) undermined by state self-interest at expense of Indigenous Peoples' rights. Utilizing third party verification approach of third party verification of compliance by independent auditors can be equally challenging due to : time and cost - particularly where standards recognize FPIC as an ongoing rather than standalone process; lack of guidance on regional specificities; insufficient or inadequate documentation of the process to assess; lack of agreement between project developers and affected communities over what constitute appropriate indicators of the FPIC process.	Increased involvement of the affected community in establishing appropriate indicators and verifiers for the FPIC process. Increased local ownership of the monitoring and verification process, using local experts where possible, to reduce verification costs.
MICRO LEVEL		
1. Defining Indigenous Peoples' territories, resources and customary use	Indigenous Peoples' relationships with, and rights over their territories, lands and natural resources derive from custom and may comprise intangible aspects of their heritage, for example – pertaining to sacred or ritual use. It can be difficult to establish the full extent of such areas, especially as peoples move and boundaries shift over time.	Clarifying the extent of the land, territories and resources over which Indigenous Peoples can assert their right FPIC will help make claims more successful. Carrying out participatory assessments of customary use of resources through mapping exercises is a recommended means of identifying and mapping all land and resources that are important for community livelihoods and wellbeing.[184]
2. Lack of Indigenous Peoples' access to adequate and correct information about a project and its potential impacts.	Where FPIC requires that communities are properly informed in advance of consultation, in many cases, only biased and misleading information or details of positive impacts of a project are provided.	it is important that knowledge gaps are bridged in advance of addressing project impacts, to ensure full understanding between parties and meaningful negotiations. It is also important to ensure that Indigenous Peoples representatives can communicate and disseminate information among their communities effectively. Communications can be made more efficient among all project stakeholders via smartphone technologies.

[183] For example, the Sustainable Agriculture SAN Standard, which stipulates that all traditional, local communities – including non-indigenous smallholders should always be covered by FPIC, not only indigenous groups.
[184] Colchester, M., and Ferrari, M.F., (2007) *Making FPIC Work: Challenges and Prospects for Indigenous Peoples*. FPIC Working Papers. Moreton-in-Marsh: Forest Peoples Programme, p.21.

3. Weak local institutional capacity	The degree to which local communities can participate effectively in FPIC processes depends on their local influence and capacity - including relationships with local government and access to technical advisors, as well as cultural factors such as confidence with public speaking, articulating their visions or demands and negotiating or expressing opinion. While FPIC should protect rights of the most vulnerable and marginalized groups, currently only those groups that are able to meet important preconditions for participatory governance can engage effectively in state-led consultations.[185]	Prior capacity-building that focusses on self-governance and communication skills can help ensure that communities have the institutional strength to participate effectively in FPIC processes. Supporting communities to network, meet, share information and strengthen relationships can help to facilitate collective decision-making.[186]
4. Inadequate investment of resources into Indigenous Peoples' capacity building	Meaningful Indigenous Peoples' participation in decision making processes and consultation may sometimes require substantial investment of time and resources prior to FPIC process implementation, particularly where traditional mechanisms and infrastructure for decision-making are convoluted or have become weak.	Further guidance for companies on sufficient budgeting for FPIC-related costs, including capacity building prior to FPIC implementation. This will be context-specific however perhaps there are indicators which could community relations and representative teams could use to identify level of capacity building required.
5. Ineffective or discriminatory local representation systems	Standards recommend use of traditional decision-making mechanisms wherever possible. However local representation systems can be innately discriminatory, excluding representation on the basis of ethnicity, age or gender. In other cases, organizational representatives may not be recognized or even known by the relevant communities,[187] or their authority may be uncertain in the light of unfamiliar or new contexts.[188] These leave some processes vulnerable to leaders or unrepresentative structures having undue influence.[189]	Private actors must be careful to balance use of local decision-making systems with the need to ensure that this system is also representative of the whole community in terms of gender, age and other factors which contribute to marginalization.[190] They should review local decision-making systems and assess them for accountability, inclusiveness and capacity.[191]
6. Absence of equitable indigenous ownership and design input into systems	Even where local communities have the capacity to participate and negotiate in FPIC processes, they often have to participate in the dominant language / formula. This means they must often depend on professional technical advisors to translate and mediate between themselves on the one side and the state and companies on the other.	Communities should be involved from the very outset to co-deign the process, including what constitutes 'consent' and how to know when it has been reached; the format of consultation procedures, and also how FPIC should be monitored and verified going forward. See the Akwé: Kon Guidelines for further guidance here.

[185] Flemmer, R., & Schilling-Vacaflor, A., (2016) "Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia's and Peru's extractive industries," *Third World Quarterly,* 37(1,) pp. 172-188. P.178.
[186] UNGC, (2013) *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples. New York: United Nations Global Compact Office.*
[187] UNGC (2013) *ibid.*
[188] Colchester, M., and Ferrari, M.F., *ibid.*, p.7
[189] AIPP, i*bid.*, p.80
[190] FAO, (2014) *Respecting Free, Prior and Informed Consent*, FAO Governance of Tenure Technical Guide No. 3, FAO: Rome.
[191] Colchester, M., and Ferrari, M.F., *ibid.,* p.21

7. Culturally disparate knowledge systems	The presence and participation of Indigenous Peoples in FPIC processes does not qualify them as 'intercultural dialogues.' A lack of community understanding about extractive industry and potential future impacts, combined with lack of corporate understanding about specificities of the Indigenous Peoples' communities in question can undermine the ability of both parties to negotiate appropriately. Ownership over the process in this case invariably becomes biased in favour of company.	In-depth community-level research may be required to identify ways and means of bridging the gap between corporate / scientific and traditional knowledge systems to explain impacts / benefits and negotiate accordingly. This should be supported by specialist anthropologists / topic/region consultants in addition to community relations / liaison staff. In some cases Indigenous Peoples may be engaged to deliver and run cultural awareness trainings for foreign company employees.[192]
8. Lack consensus around impacts of approved projects	Ongoing reaffirmation of FPIC may become difficult if communities and companies are not aligned on how to monitor and verify impacts.	Communities and companies are recommended to create an Impact Benefit Agreement. Further to this, both communities and assessment practitioners could benefit from cross-cultural training workshops on cultural, social and biodiversity-related aspects of impact assessments, before co-designing and facilitating the impact monitoring procedures that accompany projects.
9. Limited temporal scope of FPIC processes and application	If FPIC is treated as a standalone requirement at the front end of project rather than an ongoing iterative process, agreements (e.g. compensation or Impact-Benefit agreements) may become outdated and lead to future conflict. The temporal scope of FPIC processes is often restricted by time and budget constraints, particularly where a company is assuming responsibility for the process in absence of state infrastructure. Sometimes consultations happen so early that is difficult for communities to formulate project-specific demands, and if consultation does not continue it may be difficult to make these demands more specific at a later date.[193] Likewise, too-hasty procedures may prevent representatives from building community consensus before final agreements are announced.[194]	The iterative nature of the FPIC process should engender mutual trust between parties. There is also some discussion around the benefit of considering FPIC separately depending on whether it is in relation to the exploration or development phase of a project i.e. outlining a Code of Conduct and lighter-weight processes in advance of exploration, with the proviso that if the company wishes to pursue development then it must do so having implemented the full FPIC requirements. This may also serve the community better in that more details will be known about the project and its likely impacts / benefits before FPIC is sought.

[192] UNGC, (2013) *ibid.*
[193] Flemmer, R., & Schilling-Vacaflor, A., (2016*) ibid.,* p. 182
[194] The Forests Dialogue, *ibid.* p. 24

Annex 3: FPIC Monitoring Tool Framework

1) THE PROCESS

PROCESS STAGE	EVIDENCE
1. ESTABLISH THE SCOPE OF THE PROJECT	
Action: 1.1 Define project activities	
▪ *A list or schedule of known and expected project activities and their details, including their timeframes, locations etc.*	
2. ESTABLISH THE PROJECT DEVELOPER'S OBLIGATION TO ACHIEVE FPIC	
Action 2.1 National legal obligations Carry out an assessment of host country legislation regarding FPIC requirements.	
▪ *A legal registry that clearly describes the obligations of your host country toward safeguarding Indigenous Peoples' rights.* ▪ *Documented gap analysis between the Project Developer's organizational policy and national legal obligations identified in the legal registry.* ▪ *Interviews with relevant company personnel demonstrating that these obligations are understood.*	
Action 2.2 International standards Carry out a gap analysis between national legal obligations and international standards and identify potential gaps which may compromise effective safeguarding of Indigenous Peoples rights.	
▪ *Documented records of searches of relevant international standards and consideration of how these apply to the context of the project being proposed.* ▪ *A registry of requirements relating to international human rights law and any voluntary or industry standard that the company is committed to, including gap analyses between these and the national legal obligations identified in 1.1.*	
3. ESTABLISH WHO ARE THE RIGHTS-HOLDERS TO FPIC	
Action 3.1 Map the rights-holders who may be impacted by the company's operations, through an appropriately gender-balanced, culturally appropriate and inclusionary assessment process.	
▪ *A co-owned rights-holder map that has been created through an inclusionary, participatory process which has been approved and signed by all actors in the FPIC process, detailing, for example, who may be impacted by the project, by category of impact, gender, age, household income and location, what rights they are entitled to.*	

- *NOTE: Assurance provider / auditor may need to conduct their own rights-holder mapping exercise to ensure that no key groups have been omitted.*[195]
- *Inclusion of a rationale for any differential treatment between potentially affected Indigenous Peoples' communities and other local communities.*
- *Documented evidence that customary rights have been identified and acknowledged within the rights-holder map, in addition to legal rights.*
- *Documentation of any conflicting claims, and measures that were taken to mediate and resolve these conflicts.*
- *Interviews or surveys with community members that confirms there are not outstanding conflicts.*
- *Interviews or surveys with community members that confirms they feel they were sufficiently trained to participate in the rights-holder mapping, and that they were able to participate effectively in the process.*
- *Interviews or surveys with community members that confirms they were sufficiently compensated to be able to participate in the rights-holder mapping.*
- *Interviews or surveys of how the results of this process have been communicated and made accessible to all other community members.*
- *Interviews with community members that confirms the results of this process have been received and understood.*

4. ESTABLISH THE WILLINGNESS OF POTENTIALLY AFFECTED RIGHTS-HOLDERS TO CONSIDER THE PROPOSED PROJECT

Action 4.1 Hold an initial meeting with rights-holders identified in 2.1 who may be impacted by the proposed project, to present the project and establish whether they would be willing to consider it.

- *Documented evidence of a community meeting having been called.*
- *Documented evidence of the presentation given by the Project Developer about the proposed project that clearly shows the content of the presentation and information communicated to the meeting attendees.*
- *Interviews or surveys with meeting attendees clarifying that the content of the Project Developer's presentation was presented in a format and language that was understood and culturally appropriate.*
- *Signed meeting minutes that detail the willingness of the community to consider the proposed project.*

5. ESTABLISH HOW THE PROPOSED PROJECT MAY IMPACT IDENTIFIED RIGHTS-HOLDERS

To inform rights-holders about potential impacts of the proposed project and its associated activities, a cultural, social, environmental and human rights impact evaluation must first be carried out to identify the level of potential positive or negative impact upon their rights, the rights to land, resources, way of life and cultural integrity.

Action 5.1 Social, cultural, environmental, and human rights impact evaluation design

[195] See: the UN Guiding Principles Reporting Framework, Guidance Part II: Assurance of Human Rights and Reporting.

Design a social, cultural, environmental and human rights impact evaluation in collaboration with community representatives that will adequately assess the level of potential impact that the proposed project may have upon identified rights-holders.

- *Documented evidence that community representatives were engaged in advance of the impact evaluation and participated in the design of the evaluation.*
- *Documented agreement on the format, scope and content of the evaluation to be conducted, including who will conduct it.*
- *Documented evidence that impacts on customary rights have been considered within the scope of the impact evaluation, in addition to legal rights.*
- *Documented evidence that the rights-holder map (developed under Activity 2) is properly considered in the impact evaluation design.*
- *Assessment of community capacity (time, resources, skills) to participate in the impact evaluation and measures taken to ensure sufficient capacity.*
- *Written or recorded evidence of interviews with relevant company personnel demonstrating that Indigenous Peoples' rights are understood and that they have all been considered within the design impact evaluation.*
- *Documented interviews with community members that confirms they feel they were sufficiently trained and compensated to participate in the impact evaluation design.*

Action 5.2 Social, cultural, environmental impact evaluation implementation

Implement the cultural, social and environmental impact evaluation in collaboration with community representatives to assess the level of potential impact that the proposed project may have upon identified rights-holders.

- *Documented evidence that community representatives were engaged in advance of the impact evaluation and participated in the design of the evaluation.*
- *Documented evidence of the impact evaluation having been conducted – where, when and by who.*
- *Documented interviews with community members that confirms they feel they were sufficiently trained and compensated to participate in the impact evaluation implementation.*

Action 5.3 Communication of potential social, cultural, environmental impacts

Communicate the results of the cultural, social and environmental impact evaluation in culturally appropriate, language-appropriate and publicly accessible formats that allows their contents and implications to be fully understood by all project stakeholders.

- *Documentation of all potential impacts that may result from the proposed project and related activities in relevant languages and/or formats to maximise comprehension by as many community members as possible, including women, the elderly, children and other marginalised groups.*
- *Documented evidence of the methods used to communicate this process and its outcome to community members.*
- *Written or recorded evidence of interviews with relevant community representatives demonstrating that these impacts are understood.*

6. ESTABLISH IF THE COMMUNITY WANTS TO ENTER INTO NEGOTIATIONS

Action 6.1 Establish whether or not the community is willing to enter into negotiation regarding the approval and implementation of the proposed, based on the results of the impact evaluation, and effective communication of these results to the community and assurance that these results are fully understood.

- *Documented evidence of a community meeting(s) having been called.*
- *Signed meeting minutes that detail:*
- *The community has reached a consensus that they are willing to enter into negotiations based on the results of the impact evaluation.*
- *Signed attendance register.*
- *Documented evidence of how the results of this process have been communicated to all other community members.*
- *Documented evidence of interviews with community members that demonstrate they are willing to enter into negotiation based on the impact evaluation.*

7. NEGOTIATED AGREEMENTS

Action 7.1 Negotiate and come to an agreement with the community on the proposed project, impact mitigation, compensation, benefit sharing and grievance mechanism.

- *Documented evidence of a community meeting having been called.*
- *Signed meeting minutes that detail:*
    - *The agreement that has been reached, including impact mitigation, compensation, benefit sharing and grievance mechanism.*
    - *Conditions of the agreement e.g. that the project comply with specified international voluntary or industry Standards.*
    - *The monitoring system for monitoring compliance with the agreement.*
- *Signed attendance register.*
- *Documented evidence of how the results of this process have been communicated to all other community members.*
- *Independent verification of the process used to reach these negotiated agreements.*
- *Interviews or surveys with community members confirming:*
    - *They had sufficient time for the community to reach a consensus on the agreement using customary decision-making mechanisms.*
    - *That the decision was taken without any coercion.*
    - *The agreement was negotiated in accordance with the agreed process design.*
    - *They understood their rights, including the right to say no.*
    - *They felt they had sufficient institutional and technical capacity to negotiate the agreement.*
    - *IP perception of They considered the FPIC process to be culturally appropriate and inclusive of all community members.*
    - *That all community members understand all aspects of the negotiated agreement and its implications.*

8. ESTABLISH HOW SUSTAINABLE THE FPIC PROCESS IS

Action 8.1 Ongoing dialogue: Establish a mechanism for facilitating ongoing and open, two-way dialogue between the community and project developer.
▪ *Documentation of official and routine meetings both with community representatives on at least a monthly basis and with the wider community at least quarterly, detailing the number of consultation and participation activities that occur, including meetings, information dissemination, distribution of brochures/flyers and training.* ▪ *Demonstrated commitment to maintain and nurture relationships.* ▪ *Demonstrated commitment to continue consultation to maintain consent beyond its initial achievement.* ▪ *Documented evidence of consultation processes and agreements.* ▪ *Demonstrate the existence of open channels for communication, when possible e.g. phone, social media, radio, community groups etc.)*
Action 8.2: Monitoring and Evaluation Establish a participatory mechanism for monitoring and evaluating compliance of the FPIC process against the documented agreement.
▪ *Documented evidence of an agreement between the community and the project developer that includes:* o *What constitutes 'consent'* o *Criteria and indicators to be used for monitoring compliance with the agreed process.* o *Who will provide independent verification.* ▪ *Assessment of community capacity (time, resources, skills) to participate in the monitoring and evaluation of the process.* ▪ *Documented evidence taken of measures to ensure sufficient community capacity.* ▪ *Documented evidence of a positive and collaborative relationship existing between the community and the project developer, for example[196]:* o *No reported incidences of theft or vandalism on project developer property;* o *No evidence of anti-corporate groups being supported locally;* o *Interviews with community representatives clarify that they feel respected;* o *Requests from the community focus on trainings and skills rather than compensation.*
Action 8.3 Grievance and Remediation Mechanism Establish a grievance and remediation mechanism for addressing claims in the event that the negotiated agreement (see Stage 7) is breached.
▪ *Documented evidence of an agreement between the community and the Project Developer regarding how the grievance mechanism and remediation plan should be designed and how it should function.* ▪ *Interviews or surveys with community members that demonstrate familiarity with the grievance mechanism, how it can be accessed and how it should be used to make claims.*

[196] See *Preventing Conflict in Exploration: A Toolkit for Explorers and Developers*, pp.22-24.

- *Assessment of claims made using the grievance mechanisms, including:*
    - *Types of grievances, including the FPIC process itself.*
    - *Whether they have been resolved.*
    - *Length of time they have taken to be resolved.*
    - *Total number of people / groups to have used the grievance mechanism.*

2a) CONDITIONS FOR THE COMMUNITY

CONDITION	EVIDENCE
Community representatives The community should have agreed through customary decision-making mechanisms which individuals and/or institutions will represent them in the FPIC process.	
Action: Establish who will be representing the community throughout the FPIC process, and that they were selected by community members in a culturally acceptable manner.	
▪ *Documented evidence of a community meeting having been called.* ▪ *Signed meeting minutes that detail the election of the community members or institutions who will represent the community during the FPIC process.* ▪ *Signed attendance register.* ▪ *Documented evidence of how the results of this process have been communicated to all other community members.*	
Gender Community representation allows for the meaningful participation of women.	
Action: Establish how women participate in local decision-making mechanisms.	
▪ *Documented analysis of local gender dynamics which identifies potential obstacles to meaningful participation in consultations for female community members* ▪ *Documented evidence that community representatives maintain open communication with all community members. This may be via relevant community organisations and associations.* ▪ *Documented participation of women in consultation meetings and/or meetings conducted exclusively with women.*	
Marginalised and vulnerable groups Community representation allows for the meaningful participation of all marginalised and vulnerable groups, including children, the elderly, those with disabilities and other marginalised or vulnerable groups within the community.	
Action: Establish how marginalised or vulnerable groups, including children, the elderly, and those with disabilities, participate in local decision-making mechanisms.	

- *Analysis of local representation dynamics which identifies potential obstacles to meaningful participation in consultations for community members who are typically marginalised.*
- *Documented evidence that the elected community representatives maintain open communication with all community members. This may be via relevant community organisations and associations.*
- *Documented evidence that where traditional or customary systems do not allow for meaningful participation of marginalised groups in formal negotiations, that best efforts have instead been made to integrate these groups into other community engagement processes to ensure that their voice is heard and has bearing on the consultation processes.*
- *Documented participation of marginalized or vulnerable groups in consultation meetings and/or meetings conducted exclusively with these groups.*

Community consensus
The community has sufficient time to reach a consensus through customary decision-making mechanisms regarding whether they will consider they proposed project and how they should approach the FPIC process.

Action: Establish that the community has reached a consensus through an appropriately gender-balanced and inclusionary process.

- *Documented evidence of a community meeting having been called.*
- *Signed meeting minutes that detail:*
    - *The community has reached a consensus that they will consider the proposed project.*
    - *The election of the community members or institutions who will represent the community during the FPIC process.*
    - *The preferred location chosen by the community for consultations regarding the FPIC process to take place.*
    - *The community decision-making mechanism and processes that the FPIC process needs to respect, including the amount of time the community representatives estimate they will need for communicating and consulting with the wider community.*
    - *Reference to relevant community protocols or "Planes de Vida."*
- *Signed attendance register.*
- *Documented evidence of how the results of this process have been communicated to all other community members.*

Community institutional capacity: The community has sufficient institutional capacity to be able to effectively participate in an FPIC process.

Action: Establish that the community has sufficient institutional and technical capacity to be able to effectively participate in an FPIC process.

- *Documented evidence of existing decision-making, mediation and conflict resolution mechanisms.*

- *Evidence that the community has the capacity to store and maintain agreements and ensure access to the them for other members of the community e.g. via central archives, and also online.*
- *Evidence of the community having the opportunity for knowledge exchange with other communities or those who have participated in FPIC processes previously.*
- *Documented evidence of existing community protocols and/or "Planes de Vida" that detail:*
    - *The community's cosmovision and how this informs their position vis-a-vis development projects*
    - *how this intersects with international and national rights.*
    - *This should include evidence of how they were developed via an inclusionary, participatory process.*
- *Documented evidence of a gap analysis carried out in collaboration with community representation to identify gaps in institutional and technical capacity. Documentation of efforts made to bridge any identified gaps and to strengthen community capacity by supporting the community to identify and recruit suitable third-party experts and/or organizations to advise on e.g. the development of a Plan de Vida via an inclusive, participatory process; capacity building trainings for strengthening institutional capacity, negotiation or public speaking skills.*

Technical knowledge and capacity: To ensure that the community has sufficient technical knowledge and capacity to participate in the FPIC process equitably.

Action: Prior to initiating the FPIC process, establish that the community has sufficient technical knowledge and capacity to participate in the FPIC process equitably.

- *Documented evidence of pre-consultation community engagement to identify gaps in technical knowledge or capacity.*
- *Demonstrated engagement of cultural experts/third parties to maximise understanding of local context and technical knowledge capacity, and potential issues as well as identify potential means of bridging these gaps.*
- *Documented evidence of measures put in place e.g. technical training or capacity building; recruitment of local technical advisory experts.*
- *Demonstrated facilitation of knowledge-sharing between project-affected communities to ensure that all parties are aware of both the positive and negative long-term cumulative effects of the project and how these are influenced by immediate decisions.*
- *Interviews or surveys with community members that confirms they feel they were sufficiently trained and compensated to participate in the FPIC process.*

Cross-cultural understanding: Mutual and cross-cultural understanding exists between the community and project developer prior to initiating the FPIC process.

Action: Prior to initiating the FPIC process, establish that sufficient cross-cultural understanding exists between the community and project developer for a consultation process to take place according to FPIC principles.

- *Documented evidence of pre-consultation interviews with relevant project personnel and community representatives to establish what cultural understanding is considered important by each party, and to what extent this is present or lacking.*

▪ *Documented engagement of cultural experts to maximise understanding of local context, cultural gaps and potential issues, as well as identify potential means of bridging these gaps.* ▪ *Documented evidence of measures put in place e.g. training or cultural exchange programmes designed to bridge identified gaps.* ▪ *Recognition of traditional or local knowledge within project developer's policy regarding Indigenous Peoples.* ▪ *Interviews or surveys with project personnel and community members that confirms they feel they were given sufficient cultural awareness training to participate in the FPIC process.*

2b) CONDITIONS FOR THE PROJECT DEVELOPER

CONDITION	EVIDENCE
Procedures and Processes	
Action: Define an Operational Policy Define a policy regarding Indigenous Peoples and FPIC that the company commits to follow in respect to the proposed project and make it publicly available.	
▪ *A publicly available organizational policy on Indigenous Peoples and FPIC.*	
Action: Carry out environmental, social, cultural and human rights baseline studies	
▪ *Publicly available environmental, social, cultural and human rights baseline studies, including evidence of who they were conducted by and when.*	
Action: Establish a community grievance mechanism	
▪ *Publicly accessible mechanism for reporting and remediating social, environmental and cultural incidents that result from, either directly or indirectly, company activities.*	
Designated project personnel	
Action: Establish a designated team responsible for implementing the FPIC process.	
▪ *Documented recruitment or contracting of designated personnel.* ▪ *Documented policy or terms of reference defining roles and responsibilities of personnel.* ▪ *Interviews with the designated team that clarify their role regarding FPIC implementation and their suitability to represent the project developer during the FPIC process.*	
Action: Establish a training programme on human rights and Indigenous Peoples for the designated personnel.	

- *Documented evidence of a training programme including detail of programme content and qualifications / proof of suitability of those delivering it.*
- *Record of participants' attendance.*

Participation in Multi-Stakeholder Working Group

Action: Establish a multi-stakeholder Working Group consisting of, at a minimum, the community representatives, project developer personnel, and representation from the relevant local government department/s, responsible for managing the FPIC process.

- *A signed agreement between the community representatives, project developer and state that details the establishment of the Working Group and its role in the FPIC process.*
- *Interviews or surveys with Working Group members and the wider community to establish that it functions according to the signed agreement.*

Recognition of customary systems

Community customary decision-making mechanisms and structures are acknowledged and respected.

Action: Establish what the local decision-making mechanisms and structures are and how they work.

- *Documented evidence that demonstrates understanding of what local decision-making mechanisms and structures exist, and that details, for example, how they work, who they involve and what temporal or logistical factors they depend on to make decisions.*
- *Documented acknowledgement of how the FPIC process design, including timeline, human resource and budget, needs to accommodate local decision-making mechanisms.*
- *Signed acknowledgment by community representatives that this information is correct.*

Gender

Community representation allows for the meaningful participation of women.

Establish how women participate in local decision-making mechanisms.

- *Documented analysis of local gender dynamics which identifies potential obstacles to meaningful participation in consultations for female community members*
- *Documented evidence that community representatives maintain open communication with all community members. This may be via relevant community organisations and associations.*
- *Documented participation of women in consultation meetings and/or meetings conducted exclusively with women.*

Marginalised and vulnerable groups

Community representation allows for the meaningful participation of all marginalised and vulnerable groups, including children, the elderly, those with disabilities and other marginalised or vulnerable groups within the community.

Action: Establish how marginalised or vulnerable groups, including children, the elderly, and those with disabilities, participate in local decision-making mechanisms.

- *Analysis of local representation dynamics which identifies potential obstacles to meaningful participation in consultations for community members who are typically marginalised.*
- *Documented evidence that the elected community representatives maintain open communication with all community members. This may be via relevant community organisations and associations.*
- *Documented evidence that where traditional or customary systems do not allow for meaningful participation of marginalised groups in formal negotiations, that best efforts have instead been made to integrate these groups into other community engagement processes to ensure that their voice is heard and has bearing on the consultation processes.*
- *Documented participation of marginalized or vulnerable groups in consultation meetings and/or meetings conducted exclusively with these groups.*

Cross-cultural understanding

Mutual and cross-cultural understanding exists between the community and project developer prior to initiating the FPIC process.

Prior to initiating the FPIC process, establish that sufficient cross-cultural understanding exists between the community and project developer for a consultation process to take place according to FPIC principles.

- *Documented evidence of pre-consultation interviews with relevant project personnel and community representatives to establish what cultural understanding is considered important by each party, and to what extent this is present or lacking.*
- *Documented engagement of cultural experts to maximise understanding of local context, cultural gaps and potential issues, as well as identify potential means of bridging these gaps.*
- *Documented evidence of measures put in place e.g. training or cultural exchange programmes designed to bridge identified gaps.*
- *Recognition of traditional or local knowledge within project developer's policy regarding Indigenous Peoples.*
- *Interviews or surveys with project personnel and community members that confirms they feel they were given sufficient cultural awareness training to participate in the FPIC process.*

Technical knowledge and capacity

The community has sufficient technical knowledge and capacity to participate in the FPIC process equitably.

Action: Prior to initiating the FPIC process, establish that the community has sufficient technical knowledge and capacity to participate in the FPIC process equitably.

- *Documented evidence of pre-consultation community engagement to identify gaps in technical knowledge or capacity.*
- *Demonstrated engagement of cultural experts/third parties to maximise understanding of local context and technical knowledge capacity, and potential issues as well as identify potential means of bridging these gaps.*
- *Documented evidence of measures put in place e.g. technical training or capacity building; recruitment of local technical advisory experts.*

▪ *Demonstrated facilitation of knowledge-sharing between project-affected communities to ensure that all parties are aware of both the positive and negative long-term cumulative effects of the project and how these are influenced by immediate decisions.* ▪ *Interviews or surveys with community members that confirms they feel they were sufficiently trained and compensated to participate in the FPIC process.*
Collaborative design The community actively participates in designing the FPIC process, including the schedule, format and location of consultations, requirements, expectations and monitoring and grievance mechanisms.
Action: Prior to initiating the FPIC process, engage community representatives in a design process to establish the schedule, format and structure of the subsequent stages of the process.
▪ *A joint formal or legal agreement between the community representatives and project developers demonstrating a commitment to follow the defined process, including:* ▪ *The specific activities, current or future, for which FPIC must be sought, together with a means of re-visiting and revising these as the project progresses.* ▪ *What constitutes 'consent.'* ▪ *Logistical aspects of the process, including the schedule (as far as it can be defined at this stage;) location of consultations; format and structure of consultations.* ▪ *Grievance mechanism to address claims in the event that the agreement is breached.* ▪ *Signed attendance register of those who participated in this decision-making process.* ▪ *Documented evidence of the methods used to communicate this process and its outcome to community members.* ▪ *Documented evidence that community representatives maintain open communication with all community members. This may be via relevant community organisations and associations.*

3)THE TENETS OF FPIC

TENET	EVIDENCE
Free To commit to undertaking the process in good faith, free of coercion, intimidation and manipulation.	
Action: Demonstrate that all community engagement and consultation is undertaken in good faith, free of coercion and manipulation.	
▪ *Documented evidence of community consultations regarding the proposed project and impact evaluation taking place before discussion of compensation or economic benefits.* ▪ *Interviews or surveys with relevant community representatives confirming that no money or goods have been offered by the project developer in advance of, or during consultation processes.* ▪ *Interviews or surveys with relevant community representatives confirming that the project developer has not used any form of intimidation, including the presence of security personnel or law enforcement in the community.*	

- *Establishment of a reporting mechanism for community members to make complaints or comments regarding the FPIC process itself.*

Prior

To undertake consultation processes sufficiently in advance of the proposed project to allow the community to reach a decision in a timely manner using their customary decision-making processes.

Action: Demonstrate that the FPIC process was initiated prior to any decisions being taken regarding the project's advancement, including with regards to the impact assessment and design of the process itself and that the timeline has been established and agreed upon by/with the community.

- *Documented evidence that consultation processes began in advance of the proposed activity for which consent is being sought.*
- *Documented evidence (including interviews with relevant personnel) demonstrating that local, customary systems are understood and respected, including the time required to reach a decision.*

Informed

To ensure that information pertaining to the proposed project and the consultation process is made readily accessible, is disseminated in a culturally-appropriate manner and is available in languages that can be understood by project stakeholders.

Action: Establish a communications strategy to be followed for engaging with community representatives, and also for ensuring that information regarding the FPIC process is disseminated to, and accessible by the wider community.

- *Documented communications and engagement strategy specific to engagement with community representatives.*
- *Documented communications and engagement strategy for dissemination of information about the FPIC process to the wider community.*
- *Documented evidence that these strategies are implemented in all necessary languages that are relevant both locally and nationally in order for all communications to be fully understood by the community.*
- *Documented evidence that the community has the capacity to disseminate written and/or audio or visual information about the FPIC process*
- *Documented evidence that the community has capacity to store and maintain written and/or audio or visual information about the FPIC process and ensure access to the them for other members of the community e.g. via central archives in community building, online.*
- *Interviews or surveys with community representatives and the wider community that clarify the above strategies are effective at communicating and disseminating information about the FPIC process.*

Consent

The community has sufficient time to reach a consensus through customary decision-making mechanisms regarding whether they will consider they proposed project and how they should approach the FPIC process.
Action: Establish that the community has reached a consensus through an appropriately gender-balanced and inclusionary process.

▪ *Documented evidence of a community meeting having been called.*
▪ *Signed meeting minutes that detail:*
  o *The community has reached a consensus that they will consider the proposed project.*
  o *The election of the community members or institutions who will represent the community during the FPIC process.*
  o *The preferred location chosen by the community for consultations regarding the FPIC process to take place.*
  o *The community decision-making mechanism and processes that the FPIC process needs to respect, including the amount of time the community representatives estimate they will need for communicating and consulting with the wider community.*
  o *Reference to relevant community protocols or "Planes de Vida."*
▪ *Signed attendance register.*
▪ *Documented evidence of how the results of this process have been communicated to all other community members.*