Voluntary standards and FPIC

INSIGHTS FOR IMPROVING IMPLEMENTATION

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iseal alliance

ABOUT THIS REPORT

This is a research report published by ISEAL and authored by Dr Emma Wilson. The report was developed as part of a collaboration between ISEAL and GIZ to support the work of sustainability standards in the metals, mining and minerals sector. It is a research effort in collaboration with the Evidensia platform (www.evidensia.eco) whose approach and methodology lie behind the evidence mapping that this report is based on.

ABOUT THE AUTHOR

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ABOUT ISEAL

ISEAL is the global membership organisation for ambitious, collaborative and transparent sustainability systems. We support and challenge our members to continually improve their impact for the benefit of people and planet.

ABOUT EVIDENSIA

Evidensia's mission is to put evidence at the heart of sustainability actions and decisions. With growing commitment by governments and businesses to tackle sustainability challenges, there is a need for understanding what approaches work where, why and how. Evidensia helps you access and interpret credible research on the sustainability impacts and effectiveness of supply chain initiatives and tools. It provides a portal to information and evidence and supports shared learning through its insights and analysis.

ABOUT GIZ

The German Development Agency (GIZ) develops and supports sustainable approaches for good governance in the extractive sector.

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ACRONYMS AND ABBREVIATIONS

ADB	Asian Development Bank
ASI	Aluminium Stewardship Initiative
CIB	Congolaise Industrielle des Bois
FPIC	Free, prior and informed consent
FSC	Forest Stewardship Council
GPS	Global Positioning System
HRC	UN Human Rights Council
IBA	Impact and benefit agreement
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organisation
ILO	C169 International Labour Organisation Indigenous and Tribal Peoples' Convention (ILO C169)
IRMA	Initiative for Responsible Mining Assurance
ISO	International Organization for Standardization
ISPO	Indonesian Sustainable Palm Oil
LNG	Liquefied Natural Gas
MMSD	Minerals, Mining and Sustainable Development
MSPO	Malaysian Sustainable Palm Oil
OECD	Organisation for Economic Co-operation and Development
OECD	Guidelines OECD Guidelines for Multinational Enterprises
REDD+	Reducing Emissions from Deforestation and forest Degradation
RJC	Responsible Jewellery Council
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable on Sustainable Palm Oil
RTA	Rio Tinto Aluminium
UN	United Nations
UN Guiding Principles	UN Guiding Principles on Business and Human Rights
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
VSI	Voluntary sustainability initiative

THIS REPORT SEEKS TO SUPPORT SUSTAINABILITY STANDARD SYSTEMS TO IMPROVE THE EFFECTIVENESS OF FPIC IMPLEMENTATION, SO AS TO ENABLE THE PROTECTION AND RESPECT OF INDIGENOUS RIGHTS AND TO SAFEGUARD VULNERABLE AND RESOURCE-DEPENDENT COMMUNITIES.

FOREWORD

There is growing consensus that voluntary sustainability standards are playing a key role in supporting communities, governments, and private sector to collectively achieve the 2030 goals. Whilst voluntary standards are clearly demonstrating their contribution to goals around livelihoods, decent work and preservation of the environment, there is renewed focus on the extent to which these tools can also protect and promote core human rights in sectors where they operate.

The right to free, prior and informed consent, commonly referred to as FPIC, is now recognised as an essential safeguard to preserve the rights of indigenous people by the United Nations. It is also seen as an integral process through which companies can engage with indigenous peoples, and other resource-dependent communities, to preserve their rights and mitigate risks from business practices and actions.

However, despite widespread recognition of its significance, FPIC is challenging to 'get right' in practice. These challenges stem from incomplete and varied interpretations of what constitutes FPIC, divergence between community expectations, national legislation and industry norms around FPIC, power imbalances between stakeholders and a lack of practical insight into how FPIC can be best operationalised. As multi-stakeholder market-based approaches, voluntary standards have a strong enabling role to play in defining good practice around FPIC, providing guidance to operationalise it and providing assurance that core FPIC processes are adhered to in sectors and supply chains where they operate.

Recognising this, ISEAL members have been actively working with a wide range of stakeholders to better understand the topic and challenges around FPIC and what is needed to conduct an effective FPIC process in practice. Since 2018, the ISEAL Innovations Fund, with support from the Swiss Secretariat of Economic Affairs SECO, has contributed to these efforts by awarding a grant for the development of a practical FPIC verification framework in consultation with indigenous people. The two organisations leading this work (Equitable Origin and Roundtable on Sustainable Materials) are preparing to pilot the proposed FPIC 360 tool in collaboration with the Coordinator of Indigenous Organizations of the Amazon River Basin (COICA) in 2021.

In addition, over the last five years, ISEAL and GIZ (German Cooperation for International Development) have partnered to develop and support sustainable approaches for good governance in the extractive sector. Our work in this space has focussed on how voluntary standards in the MMM (metals, mining and minerals) sector can deepen their impacts and improve effectiveness through interoperability and guided further work in that direction currently supported by the ISEAL Innovations Fund.

This ISEAL research report is the next step in that partnership and brings together our work on FPIC and focus on the MMM sector. Based on a systematic mapping of evidence looking at the operationalisation of FPIC by voluntary standards across sectors, this report provides a review of the 'ground truths' on how FPIC has been understood and carried out in practice and what the outcomes of such efforts have been. It adds empirical insight to our theoretical understanding of what FPIC should look like and supports learning from practice to date.

The report highlights that whilst voluntary standards have helped establish FPIC as a norm in the mining industry, much more work is needed by them to ensure that FPIC is properly understood and executed in sectors they operate in. A key insight is that although the application of voluntary standards cannot guarantee the full protection of indigenous rights, standards do have a strong enabling role to play in setting up FPIC-informed stakeholder engagement processes, capacity building, improved assurance that FPIC criteria are being met and ultimately strong redressal and remediation measures in cases of rights' violations.

Drawing from a wide range of empirical cases across forestry, agriculture (especially palm oil) and mining sectors, the report provides a set of key recommendations and actions for how voluntary standards can play a stronger enabling role in establishing good practice around FPIC and safeguarding the rights of indigenous and resource-dependent communities.

We hope this report and the insight it offers spurs more thinking and action with voluntary standards and other similar tools on the positive role they can play in this space.

Kristin Komives
Director, Programmes, ISEAL

SUMMARY

This report focuses on the principle of free, prior, and informed consent (FPIC) and its application by sustainability initiatives in the context of companies' engagement with indigenous and local communities. It covers a range of sectors, but the aim is to draw practical lessons and insights from existing literature to inform the development of sustainability standards specifically for the mining and minerals sector. The report seeks to support sustainability standard systems to improve the effectiveness of FPIC implementation, so as to enable the protection and respect of indigenous rights and to safeguard vulnerable and resource-dependent communities. It contributes to wider efforts to inform sustainability policy and practice with evidence and insight from empirical research.[1]

Recent reports by Solidaridad,[2] MSI Integrity[3] and others have questioned the extent to which voluntary initiatives can support and promote human rights protection, calling for stronger legal protections, such as the EU human rights due diligence law, expected to be introduced in 2021. In May 2020, Rio Tinto's destruction of ancient culturally and spiritually significant caves at Juukan Gorge, Western Australia, demonstrated that even a leading promoter of indigenous rights and voluntary sustainability initiatives can fail to respect indigenous rights if the necessary checks and balances are not in place, while reactions from the public and investors can be intense.[4]

Taking the starting point that there is a still an important enabling role for voluntary sustainability initiatives, this report considers that role and how it can be strengthened, alongside efforts to increase legal protections. A key challenge is the verification and reporting of FPIC performance and risk. How can investors, CEOs and voluntary initiatives themselves be confident that a project has successfully implemented an FPIC process that protects the rights of indigenous and local communities and has adequately addressed project risks? And in what ways does the evidence base for FPIC implementation need to be strengthened?

APPROACH

The study explores the following research questions:

- What questions about the effectiveness and impact of standards (or other market-based mechanisms) on securing FPIC has the literature addressed?
- What are the key findings from the analysed literature?
- What practical lessons can be drawn for standards working in the mining and extractive sector on improving their work on FPIC and deepening social impacts of their schemes?
- What are the most critical questions that are not yet covered by the literature and should be addressed through future research and/or performance monitoring by standards systems themselves?

The work involved two phases, carried out by separate independent teams:

- A systematic search of the academic and grey literature on FPIC implementation by sustainability standards and other leading sustainability approaches, across a range of sectors, resulting in a list of 84 relevant research papers.[5]
- Analysis of this literature for key insights, lessons and recommendations for mining-related standards aimed at improving the implementation of FPIC.

KEY FINDINGS

The literature identifies two main purposes of FPIC within voluntary sustainability systems:

- Promoting the protection and respect of indigenous peoples' rights, including the right to self-determination; and
- Minimising risks and enhancing opportunities for vulnerable and resource-dependent communities (who may or may not be indigenous) and for the businesses themselves.

In both cases, this relates to resource development taking place in areas that people depend on for their cultural and livelihood security.

Major challenges in weak governance contexts

The literature highlights the challenges of implementing FPIC in situations where there is no relevant legal framework in the domestic law of the host country; if governments have not acknowledged indigenous rights or they are poorly protected; and if a government has legally granted exploration or development rights to a company without the consent of affected indigenous peoples. There is very little evidence of voluntary initiatives protecting the rights of indigenous and local communities in such contexts. However, their complaints mechanisms are frequently used by local communities to draw attention to, and address, land rights violations and failures to implement FPIC.

FPIC established as a norm but not as a practice

Voluntary sustainability initiatives have helped to raise the profile of FPIC in resource-development contexts, through the adoption of FPIC requirements in standards, the extensive guidance available, and related public debates. FPIC is now accepted as an industry norm. There is much less evidence of successful practical application of this norm. This is partly because FPIC has been adopted relatively recently by some standards; it is often poorly understood, while required implementation capacities are lacking; it is also difficult to verify and often takes place in isolated locations, difficult to access for the purposes of third-party monitoring and independent research.

Enforcement and verification challenges

Studies call for greater transparency and fairness in audit processes and more effective verification approaches. Issues often relate to the role of auditors, including conflicts of interest, lack of social assessment skills, lack of awareness and knowledge of indigenous rights, and lack of time, access and funding. Moreover, FPIC is not a mandatory requirement in some standards, and priority may be given to environmental requirements.

Inclusive governance of standards

It is important to include indigenous peoples and other rights holders in the governance structures of sustainability standard systems, to address issues relating to the balance of responsibilities and power relations among stakeholders. Indigenous participation in local monitoring and data gathering and independent research by indigenous and local researchers are also emphasised.

Partnerships

Sustainability standard systems are not designed to operate as stand-alone interventions. Effective partnerships with key stakeholders are crucial, including governments, rights holders, local communities and NGOs, both within and outside of the initiative itself. The ideal of working in effective partnership with others was identified as a key challenge.

The literature broadly agrees on key FPIC principles, including the following:

- **FPIC is a collective endeavour:** It involves collective community consultation, participation and decision-making, rather than engagement on a one-to-one basis or with unrepresentative elite groups. The decision whether to grant consent is made collectively through community-approved representatives according to community-agreed processes. An effective FPIC process will take time.

- **FPIC is a joint responsibility:** Companies, communities and the state share responsibility for ensuring that the principles of free, prior and informed consent are followed and the result is respected. FPIC is a joint process of information sharing, planning and decision-making, with communities playing a central role in impact assessments, in determining mitigation measures and benefit sharing, and in on-going monitoring.
- **FPIC is not a one-off intervention:** Consent is an on-going relationship between companies and fully represented local communities; it is about people being involved meaningfully in decisions that fundamentally affect their lives, having a voice at every stage of project planning and implementation and in the sharing of benefits. FPIC processes may also need to be repeated if circumstances change.

The following elements were highlighted as important components of an FPIC process:

- **Community protocols:** Some studies promote so-called 'community protocols' as a way for communities to formalise their own rules for engagement, prior to the arrival of developers. Sustainability initiatives are starting to recommend companies support such processes.
- **Impact assessment:** Effective due diligence includes environmental, social and cultural impact assessments carried out prior to an intervention and discussed in depth with affected communities, to satisfy the 'prior' and 'informed' FPIC criteria.
- **Community-company agreements:** Negotiated agreements are recognised as an important part of an FPIC process, and some experts propose them as a 'proxy' for FPIC in sustainability standards and investor screening. This requires further research and guidance on meeting FPIC criteria.[6]
- **Complaints mechanisms:** Studies highlight three key functions of complaints mechanisms: 1) for use by rights holders to challenge projects that fail to secure FPIC; 2) to help 'maintain FPIC', by supporting ongoing dialogue, ensuring accountability and drawing attention to potential future infringements of the FPIC principle; and 3) as a source of continual learning and improvement.

FPIC is also seen as part of a wider vision of extractive industry development that fully respects indigenous peoples' right to self-determination.[7] This vision not only sees FPIC as a way to give indigenous peoples greater control over decision making; it also promotes greater indigenous control over the implementation of such projects through indigenous-led enterprises (if such developments are desired). Support for indigenous-led industrial enterprises is starting to be promoted by sustainability initiatives (in addition to support for traditional non-industrial resource-based enterprises).

RESEARCH GAPS

There is a lack of field-based research on FPIC implementation in the context of sustainability initiatives in all resource sectors, but especially in the mining sector. This is despite the large amount of field-based research that has been published on mining, indigenous rights, FPIC and local community impacts by anthropologists, indigenous and local researchers, and NGOs. This speaks of a disconnect between mineral sustainability initiatives and research organisations, NGOs and local groups, who could carry out valuable localised research, although this is starting to change. Specific research gaps include the following:

- **Measurement of FPIC implementation:** Reliable metrics and reporting mechanisms to demonstrate FPIC implementation
- **Assessment of FPIC agreement-making:** Effective frameworks to assess the FPIC compatibility of community-company agreements
- **FPIC case studies:** Comparative case study research into FPIC implementation in diverse resource-development contexts, both within and outside of voluntary sustainability initiatives
- **Inclusive debate on challenging questions:** Participatory research and multi-stakeholder dialogue to discuss and debate outstanding challenges, including: When should FPIC imply a veto and when should it not? When and how to apply the term FPIC; who is eligible; who should represent local interests? How to 'go beyond agreement-making' in an FPIC process? Should voluntary initiatives evaluate FPIC at the strategic planning level, prior to the involvement of member companies? The compatibility of FPIC with other sustainability agendas.

RECOMMENDATIONS FOR SUSTAINABILITY STANDARD SYSTEMS

Key recommendations for sustainability standard systems include the following:

Inclusive governance

Include indigenous peoples in the governance of voluntary standard systems, for instance in an indigenous peoples' advisory forum, which is involved in the design and review of standards and other aspects of implementation, including the complaints mechanism.

Targeted FPIC due diligence

Require companies to have a due diligence plan for assessing the FPIC governance gap and to proactively engage with governments on indigenous rights, land rights, customary rights, consultation and FPIC.

Effective partnerships

- **Review of multi-stakeholder partnerships:** Assess current partnerships with governments, NGOs, indigenous and local communities, researchers, donors and inter-governmental organisations and enhance collaboration for more effective support of indigenous rights and FPIC.
- **Support and promotion of research partnerships:** Promote and support field-based research on FPIC implementation in the context of mineral sustainability initiatives, with involvement of indigenous and local researchers, along with research councils and donors.

FPIC- enabling standards

In collaboration with indigenous peoples and other rights-holders and stakeholders affected by the standard (where appropriate involving host governments and other standards initiatives), review and update the standard system to support FPIC implementation:

- **Relevant and realistic vision:** Review overall mission and purpose of the standard to ensure that expectations are realistic, and goals are appropriate in relation to FPIC and the protection of indigenous and local communities affected by resource development.
- **Mandatory FPIC requirement:** Ensure that FPIC is not an optional requirement for meeting a minimum threshold and that there are no conflicts with environmental requirements.
- **Context-specific FPIC guidance:** Produce FPIC guidance for companies on developing a due diligence plan for assessing the FPIC governance gap; negotiating community-company agreements in line with FPIC criteria; and further good practice in FPIC implementation. Adapt guidance for countries and regions where the standard is applied.
- **Effective complaints mechanism:** Ensure complaints mechanisms can capture and address complaints relating to indigenous rights and FPIC; include a protective whistle-blowing function; ensure the mechanism is widely understood; gather data on its operation and report regularly; and use it for continual learning and improvement.

Capacity building for FPIC implementation and evaluation

- **Knowledge and awareness:** Ensure that people contributing at all levels to the application of the sustainability standard have the required understanding of indigenous rights and culture, resource dependency and FPIC.
- **Skills:** Provide context specific FPIC guidance and training for auditors and others involved in implementing, monitoring and reporting on FPIC processes
- **Evaluation frameworks:** Provide consistent, reliable frameworks, adaptable to local contexts, to support the effective implementation of FPIC, its measurement and reporting. These will include appropriate indicators of effectiveness.

Participatory revision of standards

In collaboration with indigenous peoples and other rights-holders and stakeholders affected by the standard, consider introducing additional requirements:

- **High-risk countries:** Consider applying an 'enhanced risk' label to countries which do not adequately protect the rights of indigenous and local communities.
- **FPIC agreements:** Consider using negotiated community-company agreements as a 'proxy' indicator for FPIC (in accordance with strict FPIC criteria).
- **Community protocols:** Consider requiring companies to support communities to develop community protocols as a way to establish their own rules of engagement with external developers, in advance of early project activities.
- **Indigenous enterprise support:** Consider requiring companies to support indigenous-led enterprises and capacity building in the sector covered by the standard (in addition to support for traditional local enterprises not related to the sector).

THE ENABLING ROLE AND EFFECTIVENESS PRINCIPLES

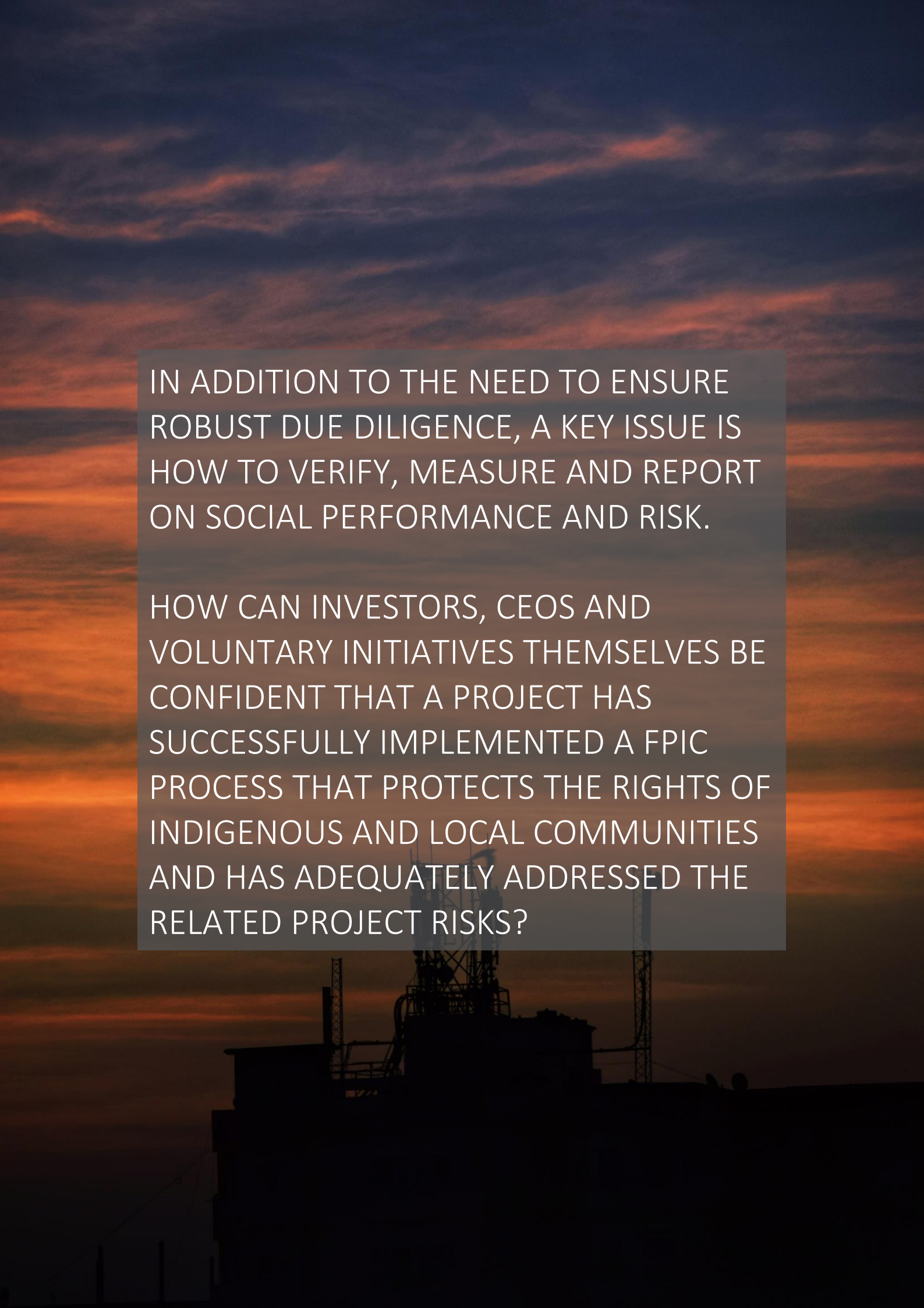
Based on the literature, the enabling role of voluntary sustainability standards in the mining sector can be seen broadly as a set of five key functions, outlined in Table A. Five so-called 'effectiveness principles' are essential in order to deliver these functions (Table B).[8]

Table A: Functions of the role that sustainability standards can play to enable FPIC adoption and implementation

Functions of the enabling role	Key activities for standard systems to deliver enabling functions
Enhancing legal compliance	• Supporting member companies to comply with legislation, where it exists, through expert guidance and knowledge sharing • Encouraging practices that go beyond basic legal requirements (which are often deliberately vague) to enhance social and environmental outcomes
Supporting governance risk management	• Highlighting 'governance gaps' and drawing attention to the risks of operating in regions where such gaps exist • Developing robust governance risk assessment approaches (with high thresholds) • Applying strict safeguards to mitigate the risks of operating in regions with weak governance • Providing standards and guidance that can be adopted by governments
Building awareness, knowledge and capacities	• Raising awareness about, and raising the status of, indigenous rights and FPIC • Creating forums for dialogue; opening up political space for affected communities to engage constructively with companies, investors, NGOs and government • Sharing case studies on good practice, effective FPIC approaches, challenges and mistakes
Ensuring fairness and accountability	• Providing monitoring and evaluation frameworks to ensure adherence to sustainability requirements, transparency of activities and effective reporting on outcomes • Ensuring that audit procedures and complaints mechanisms are able to guarantee that failure to meet FPIC requirements can be addressed swiftly and effectively
Stimulating wider sectoral and governance reform	• Creating norms and building acceptance of those norms; setting an example by enabling and promoting good practice • Building partnerships and dialogue with industry associations; engaging and aligning agendas with inter-governmental initiatives

Table B: Effectiveness principles for planning and assessing the work of standard systems relating to FPIC

Effectiveness principles	Guidance for application
Context-appropriate	Standards and requirements need to be relevant and adaptable to diverse and challenging local contexts; all participants in voluntary standard systems need to comprehensively understand the contextual factors that may influence the effective implementation of FPIC.
Rights-holder inclusive	Indigenous peoples and other rights holders should be involved in all aspects of voluntary standard systems – including standard setting, governance and grievance resolution – to balance power relations and ensure that requirements and approaches are rights-compatible, realistic, measurable, and adaptable to local contexts.
Measurable	Reliable approaches are needed to verify compliance, measure impacts and effectiveness of FPIC application. These need to be adaptable to local contexts, yet sufficiently clear and comparable across different contexts, so as to provide an adequate understanding of performance for investors, governments and civil society observers.
Transparent	Transparency about the purpose and requirements of a standard – its approaches and impacts, including complaints and their resolution – needs to be a core principle of all activities in order to build understanding and trust, enhance communication and ensure accountability.
Collaborative	Voluntary action alone cannot enable adequate application of FPIC in diverse contexts. Collaboration and sharing is essential – within voluntary standard systems, between initiatives and between stakeholder groups, including governments and rights-holders.



IN ADDITION TO THE NEED TO ENSURE ROBUST DUE DILIGENCE, A KEY ISSUE IS HOW TO VERIFY, MEASURE AND REPORT ON SOCIAL PERFORMANCE AND RISK.

HOW CAN INVESTORS, CEOS AND VOLUNTARY INITIATIVES THEMSELVES BE CONFIDENT THAT A PROJECT HAS SUCCESSFULLY IMPLEMENTED A FPIC PROCESS THAT PROTECTS THE RIGHTS OF INDIGENOUS AND LOCAL COMMUNITIES AND HAS ADEQUATELY ADDRESSED THE RELATED PROJECT RISKS?

1. BACKGROUND

Mining and minerals are essential to the green transition, green energy and smart technology, and there is an increasing need for the industry to improve its upstream sustainability credentials. A growing number of sustainability standards and other supply chain tools and initiatives are operating in the extractives space, and in relation to mining supply chains in particular.

While the environmental impacts of mining and minerals developments were early motivations to establish these initiatives, interest has grown in recent years in the potential contribution of these standard systems to improving social conditions, delivering community benefits and reducing conflict between companies and communities. An important element of this process has been the adoption of the principle of free, prior and informed consent (FPIC) as a key criterion or procedural requirement that standards and other sustainability initiatives should follow.

The mining and minerals sector is considered to pose a high risk to indigenous peoples, with examples of negative experience outnumbering examples of positive social and environmental performance in the literature. Land tenure and the allocation of land have long been among the most contested issues in mining, while increasing demand for minerals has resulted in the expansion of mining into new isolated and vulnerable areas, including indigenous peoples' territories. The use of mobile communication technology makes it easier to report human rights abuses and for local groups to self-organise. All of this means that FPIC is becoming increasingly important as a way for companies to respect indigenous rights, enhance community engagement and avoid potentially costly mistakes.

This report focuses on the application of FPIC by sustainability standards and other leading sustainability approaches in the context of companies' engagement with indigenous and local communities. The report covers a range of sectors, but the aim is to draw practical lessons and insights from existing knowledge and research to inform the development of sustainability standards specifically for the mining and minerals sector. Issues range from the challenges of operating in countries with weak governance frameworks to the selection of appropriate metrics for investors to adequately assess their investment risks.

Recent reports by Solidaridad,[9] MSI Integrity[10] and others have questioned the extent to which voluntary sustainability initiatives can support and promote human rights protection, and call for stronger legal protections, such as the EU human rights due diligence law which is to be introduced in 2021. In May 2020, Rio Tinto's destruction of the ancient caves of the Puutu Kunti Kurrama and Pinikura (PKKP) peoples at Juukan Gorge, Western Australia, further demonstrates that even a leading promoter of sustainability initiatives and indigenous rights in the mining sector – a member of the International Council on Mining and Metals (ICMM) and leading promoter of minerals certification – can still fail to protect ancient cultural heritage if the necessary checks and balances are not in place.[11]

In addition to the need to ensure robust due diligence, a key issue is how to verify, measure and report on social performance and risk. How can investors, CEOs and voluntary initiatives themselves be confident that a project has successfully implemented an FPIC process that protects the rights of indigenous and local communities and has adequately addressed the related project risks? This report identifies some of the key challenges associated with implementing FPIC and measuring, verifying and reporting on those processes effectively. The overall goal of this work is to support sustainability standard systems to improve their effectiveness in implementing FPIC as way to enable the protection and respect of indigenous rights and the safeguarding of vulnerable and resource-dependent communities. This report also contributes to the wider effort to inform sustainability policy and practice with evidence and insight from empirical research.[12]

OUR STUDY FOUND THAT THE ACADEMIC AND NON-ACADEMIC LITERATURE IS GENERALLY SPARSE ON STUDIES THAT FOCUS SPECIFICALLY ON FPIC AND MINING SUSTAINABILITY INITIATIVES. THERE ARE SIGNIFICANTLY MORE STUDIES RELATING TO FPIC AND SUSTAINABILITY INITIATIVES IN THE FORESTRY AND AGRICULTURE SECTORS, NOTABLY THE FOREST STEWARDSHIP COUNCIL (FSC), THE ROUNDTABLE ON SUSTAINABLE PALM OIL (RSPO), THE ROUNDTABLE ON SUSTAINABLE BIOMATERIALS (RSB) AND REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION (REDD+).

2. APPROACH

This report focuses on the application of FPIC by sustainability standards and other leading sustainability approaches in the context of companies' engagement with indigenous and local communities. The aim is to draw practical lessons and insights to inform the development of sustainability standards for the mining and minerals sector, although relevant insights have also been taken from other sectors, including forestry, oil and gas, palm oil and carbon initiatives.

2.1. METHODOLOGY

This analysis of relevant literature was based on a systematic search of the academic and grey literature on FPIC implementation by sustainability standards and other leading sustainability approaches (including other sectors). This research was led by the research group at Evidensia (www.evidensia.eco). The work involved two phases, carried out by separate independent teams:

- A systematic search of the academic and grey literature for relevant research on the implementation of FPIC by sustainability standards and other leading sustainability approaches. The search covered a range of sectors as it was felt that insights from how other sectors had worked with FPIC or challenges therein would also be relevant for mining sector standards. This search resulted in a list of 84 relevant research papers on this topic (see **Primary references** and access all literature at www.evidensia.eco).
- Analysis of this literature for key insights, lessons and recommendations for standards working in the mining sector on improving the operationalisation and effectiveness of the FPIC principle, to be presented in an accessible research report. Further literature referenced in the report is listed in **Additional references**.

The analytical framework is based on the following research questions:

- What questions about the effectiveness and impact of standards (or other market based mechanisms) on securing FPIC has the literature addressed?
- What are the key findings from the analysed literature?
    - What do we know about the effectiveness and impacts of sustainability standards and other leading supply-chain based sustainability approaches in operationalising and realising the principle of FPIC?
    - What can we learn about the extent to which the adoption of the FPIC principle protects the rights and interests of indigenous peoples and other marginalised groups?
    - What are some of the key challenges and barriers faced in more effective implementation of FPIC?
- What practical lessons can be drawn for standards working in the mining and extractive sector on improving their work on FPIC and deepening social impacts of their schemes?
- What are the most critical questions that are not yet covered by the literature and should be addressed through future research and/or performance monitoring by standards systems themselves?

The methodology is elaborated in full in **Annex 6**.

2.1.1 Limitations of the study

The short duration of this project, the large number of resources selected for review (as well as additional resources identified as relevant in the course of the analysis), and the fact that this is purely a literature review (and not a review of the standards themselves) have all placed limitations on this analysis. Efforts have been made

to focus on what is most pertinent to FPIC, mining and voluntary sustainability standards, including relevant learning from other sectors that is directly applicable to mining. While the literature has been thoroughly reviewed, there was little time to chase updates on authors' claims and observations. The author has tried to avoid possibly outdated claims and apologises in advance for any oversights.

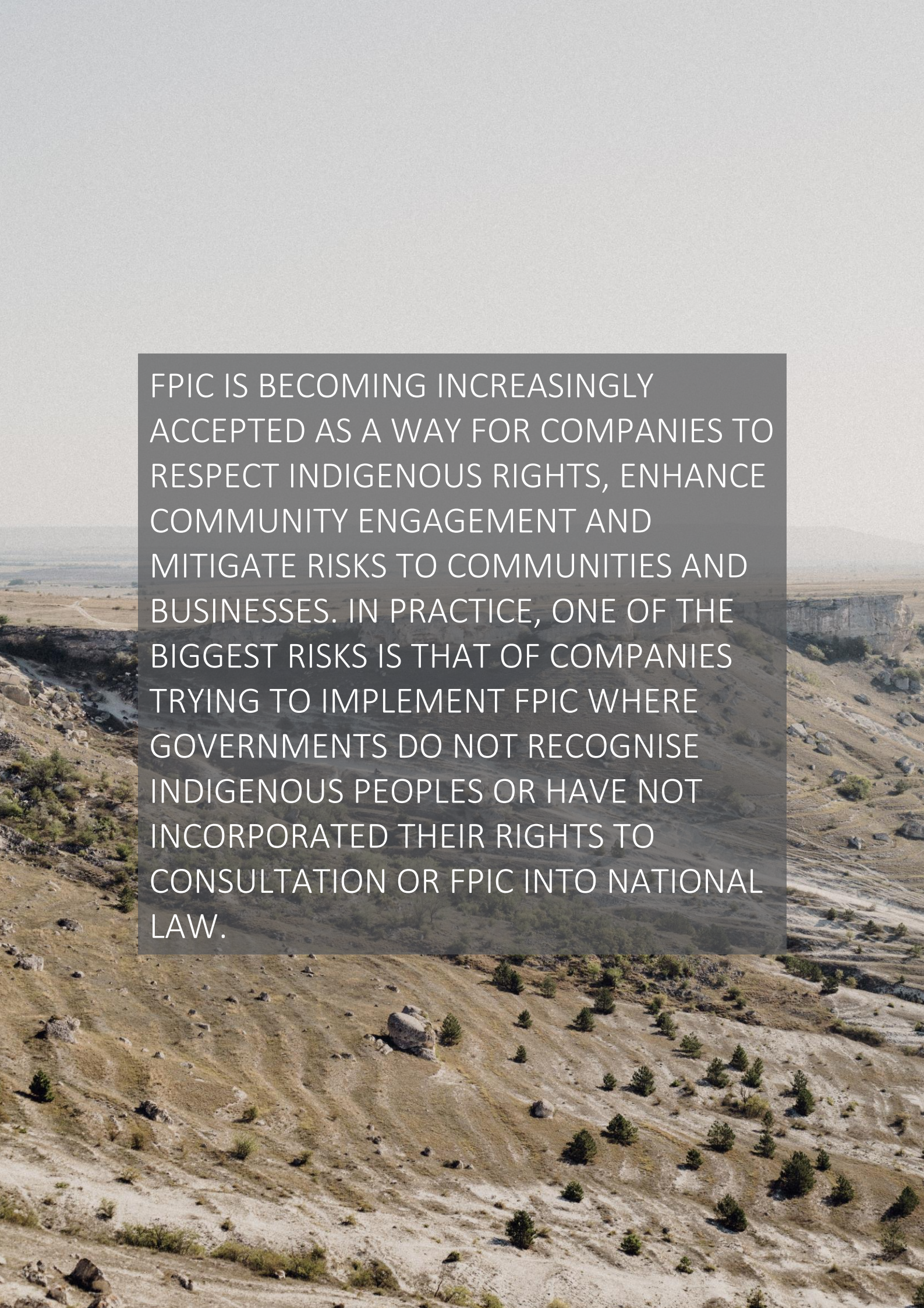
2.2. BRIEF OVERVIEW OF THE LITERATURE

Our study found that the academic and non-academic literature is generally sparse on studies that focus specifically on FPIC and mining sustainability initiatives.[13] There are significantly more studies relating to FPIC and sustainability initiatives in the forestry and agriculture sectors, notably the Forest Stewardship Council (FSC), the Roundtable on Sustainable Palm Oil (RSPO), the Roundtable on Sustainable Biomaterials (RSB) and Reducing Emissions from Deforestation and forest Degradation (REDD+). However, overall the trend appears to be towards greater analysis of FPIC and indigenous rights in the context of mining-related sustainability initiatives.

Most of the selected papers and reports employed the document review method, which focused primarily on the texts of standards and guidance. The literature review revealed a disconnect between mining sustainability initiatives and community-level research and monitoring, compared to non-mining-related sustainability initiatives. Overall, there is a lack of field-based case-study analysis of sustainability initiatives in all sectors. A large part of the evaluation of sustainability initiatives has been based primarily on document review, supported by workshops and interviews.

The main two types of publisher are academic publishers and NGOs (including think tanks), funded from academic and donor sources. A core group of NGOs has been very committed to analysing and influencing sustainability initiatives. To date, this has mostly been in the non-mining sectors, primarily FSC, RSPO, RSB, REDD+ and, more recently, Equitable Origin. However, with the emergence of the Aluminium Stewardship Initiative (ASI) and the Initiative for Responsible Mining Assurance (IRMA), there is a move towards more collaboration and field-based research relating to sustainability initiatives in the mining sector. Specifically, an ongoing collaboration between Equitable Origin, RSB and the Coordinator of Indigenous Organizations of the Amazon River Basin (COICA) has focused on trying to understand the challenges around FPIC and its adoption and implementation by sustainability standards, especially in the context of securing indigenous rights.[14] For the full overview of the literature, see Annex 1.





FPIC IS BECOMING INCREASINGLY ACCEPTED AS A WAY FOR COMPANIES TO RESPECT INDIGENOUS RIGHTS, ENHANCE COMMUNITY ENGAGEMENT AND MITIGATE RISKS TO COMMUNITIES AND BUSINESSES. IN PRACTICE, ONE OF THE BIGGEST RISKS IS THAT OF COMPANIES TRYING TO IMPLEMENT FPIC WHERE GOVERNMENTS DO NOT RECOGNISE INDIGENOUS PEOPLES OR HAVE NOT INCORPORATED THEIR RIGHTS TO CONSULTATION OR FPIC INTO NATIONAL LAW.

3. ANALYSIS

This analysis aims to provide an overview of the state of knowledge, the priorities identified in the literature, and the ways in which the topic of FPIC and mining sustainability initiatives has been tackled overall. The analysis is based primarily on the 84 papers in the original selection, which are listed in the **Primary references**. Further papers are referenced as appropriate and listed in the **Additional references**.

Section 3.1. explores the evolving landscape of mining sustainability initiatives and FPIC. Section 3.2. highlights a key challenge for FPIC implementation, namely the understanding and interpretation of the concept. Section 3.3. focuses on the extent to which voluntary sustainability initiatives are considered able to protect the rights and interests of indigenous and local communities through the application of FPIC, seeking evidence of effectiveness and impacts. Section 3.4. covers the ways in which key challenges have been identified and tackled, including standard design, enforcement and verification, representation and legitimacy, community-company agreements, capacities and resources, and learning and sharing. The concluding Section 4 covers three key areas: research gaps; recommendations for voluntary sustainability standard systems; and a description of the enabling functions of voluntary sustainability initiatives, along with a set of identified effectiveness principles.

3.1. THE EVOLVING LANDSCAPE OF MINING SUSTAINABILITY INITIATIVES AND FPIC

This section sets voluntary sustainability standards within the wider context of mining sector governance. It then briefly summarises the evolution of FPIC as a norm and a practice in relation to mining sector governance.

3.1.1. Voluntary sustainability standards and mining sector governance

Voluntary standards need to be viewed in the wider governance context (Lomax 2014; Dias 2007). Franks (2015, pp.126-127) offers a typology of regulatory initiatives that influence the mining sector:

- International standards, legal instruments/norms and frameworks
- Industry standards
- Corporate standards and policies
- Government regulation
- Conditions on finance and share market activism
- Social regulation (e.g. the mobilisation of public opinion through civil society campaigns)
- Litigation

The voluntary standard systems under consideration in this report fit mainly under ‘industry standards’, ‘international standards’ and ‘conditions on finance’ in Franks’ typology (see Table 1). At the same time, all of the categories mentioned by Franks are relevant to this study, and in many cases several of these categories of regulation are applied to a particular case at the same time (Lomax 2015; Cotula and Blackmore 2014). The complexity of the overall field of mining regulation, and the sheer number of voluntary initiatives, underscore the importance of collaboration and alignment, while also pointing to the difficulty of attributing ‘impact’ to any one aspect of what is a very complex system (Sturman 2018; Mori Junior 2017).[15]

The standards and initiatives in Table 1 feature in this study because of: (a) the relevance of FPIC to the core purpose of the standard/initiative; and (b) the level of coverage of the standard/initiative in the selected literature. The initiatives have been categorised in the table using Evidensia's 11-point typology of sustainability standard approaches.[16] Several non-mining initiatives have been included in the analysis because of the availability of evidence from the implementation of those initiatives and its relevance to this analysis.

Table 1: Voluntary standards and initiatives considered in this report

Voluntary sustainability standards
• Aluminium Stewardship Initiative (ASI) Performance Standard • Equitable Origin EO100™ Standard for Responsible Energy • Forest Stewardship Council (FSC) Forest Management Certification Standard • FSC Community Standard • Initiative for Responsible Mining Assurance (IRMA) Standard for Responsible Mining • Responsible Jewellery Council (RJC) Code of Practices • Roundtable on Sustainable Biomaterials (RSB) Certification Standard • Roundtable on Sustainable Palm Oil (RSPO) Certification Standard
Specific global or regional implementation norms for responsible supply chains
• Akwé: Kon Guidelines on environmental, social and cultural impact assessment (Secretariat of the Convention on Biological Diversity) • Asian Development Bank (ADB) Safeguards • Equator Principles • International Council on Mining and Metals (ICMM) Sustainable Development Framework • International Finance Corporation (IFC) Environmental and Social Performance Standards • OECD Guidelines for Multinational Enterprises (OECD Guidelines) and Due diligence guidance on meaningful stakeholder engagement in the extractives sector • UN Global Compact • UN Guiding Principles on Business and Human Rights • UN Sustainable Development Goals • World Bank Environmental and Social Framework
Specific national plans, policies and platforms
• REDD+
Sustainability requirements within trade or procurement policies
• European Union Renewable Energy Directive (EU-RED)

3.1.2. Emergence of FPIC as a norm and a practice

Two significant international instruments for indigenous rights protection are the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) and the International Labour Organisation (ILO) Indigenous and Tribal Peoples' Convention (ILO C169) (1989). ILO C169 is a binding international treaty, ratified to date by 23 countries. As a Declaration of the UN General Assembly, UNDRIP is not strictly binding on its own terms, but to a large degree codifies binding customary international law. A further influential development relevant to this study was the approval of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011), which stimulated the incorporation of human and indigenous rights into voluntary sustainability standards, while also promoting voluntary initiatives as a way to address so-called 'governance gaps' (HRC 2008) (see Annex 2).

The World Commission on Dams, the World Bank's Extractive Industries Review and the Forest Stewardship Council (FSC) have all influenced the current landscape of FPIC in mining regulation and voluntary sustainability initiatives (see Tomlinson 2019; Equitable Origin 2018; MacInnes et al 2017; Cariño and Colchester 2010) (see Annex 3 for a timeline). Human rights jurisprudence at global and regional levels has further established FPIC as an essential condition for protecting indigenous rights (Johnstone 2020; Cotula 2016).

FPIC appears in national and subnational law in different forms in a limited number of places, including Peru, the Philippines, Papua New Guinea and Australia's Northern Territory; however, consultation-related law is also highly relevant, notably Canada's Duty to Consult and Accommodate indigenous groups (Hawkes 2019; Tomlinson 2019; Wilson 2017b; Smith 2015; Bradshaw and McElroy 2014; Buxton and Wilson 2013).[17] Tomlinson (2019, p.891) refers to 'partial manifestations of FPIC' that are emerging in the growing body of consultation laws applicable to resource-extraction projects, which can be seen as 'part of an emerging process to give indigenous peoples more control over and benefits from extractive projects'.

FPIC is also becoming increasingly accepted as a way for companies to respect indigenous rights, enhance community engagement and mitigate risks to communities and businesses. Equitable Origin (2018, p.14) observes that FPIC is 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'. There is a strong business case for companies to apply FPIC processes, in light of the considerable financial and reputational risks associated with failing to obtain local support for large-scale development projects (Dudine and Szoke-Burke 2020; Hawkes 2019; Equitable Origin 2018; MacInnes et al 2017; TMP Systems 2016; Sohn 2007). Tomlinson (2019, p.881) observes that '[t]he debate has now moved away, at least in [industry] circles, from whether FPIC should be applied in the context of extractive projects taking place in indigenous territories, to how it should be applied in these circumstances'.

Extractive companies are starting to apply FPIC processes in their projects, and case studies are starting to emerge around these – albeit not always in great detail – in the mining sector (Sturman 2018; Annandale 2018; Quastel 2011) and in other sectors (Milne and Mahanty 2019; Lewis 2013; Freeman et al 2008; Wilson 2017b) (see Annex 4 for selected case study summaries). In addition, the negotiation of agreements between companies and communities, which is widespread in the extractives sector in some jurisdictions, is increasingly being considered as a proxy for FPIC, subject to their evaluation against FPIC principles (Bradshaw and McElroy 2014; Hanna and Vanclay 2013) (see Section 3.4.4).

In practice, one of the biggest risks highlighted in the literature is that of companies trying to implement FPIC in a context in which governments do not recognise indigenous peoples, have not incorporated indigenous peoples' rights to consultation or FPIC into national law, have not recognised indigenous peoples' rights to the lands that they use on a customary basis, or take the position that FPIC (as a veto) is a threat to national sovereignty (Tomlinson 2019; Rodhouse and Vanclay 2015) (see Section 3.3.1.). Kemp and Owen (2017, p.166) argue that in the wrong context, 'a one-off, company-supported indigenous consent process could be considered invalid, or viewed as a threat to state sovereignty'. In this context, they pose the question: 'where conditions are not in place, could the human rights risks of entering into an FPIC process, outweigh its presumed benefits for indigenous peoples?'(ibid, p.165).

FPIC IS DESCRIBED AS A RIGHT, A NORM, A NORMATIVE OBLIGATION, A STANDARD, A PRINCIPLE AND A PROCESS. WHETHER OR NOT FPIC IS CONSIDERED TO BE A RIGHT IN ITSELF, IT IS SEEN AS AN ESSENTIAL PRE-CONDITION FOR PROTECTING AND RESPECTING THE RIGHTS OF INDIGENOUS PEOPLES AS WELL AS OTHER VULNERABLE RESOURCE-DEPENDENT COMMUNITIES.

3.2. UNDERSTANDING AND INTERPRETING FPIC: A KEY CHALLENGE

A key challenge identified in the literature is that of diverse interpretations and understandings of FPIC (Tomlinson 2019, McDermott and Ituarte-Lima 2016). This section offers a brief overview of the thinking to date. As a starting point, one needs to consider the purpose of FPIC as it applies in the context of voluntary sustainability initiatives. Two main approaches are reflected in the literature:

(1) Promoting the protection and respect of indigenous peoples' rights, including the right to self-determination; and

(2) Minimising risks and enhancing opportunities for vulnerable and resource-dependent communities (who may or may not be indigenous) and for the businesses themselves.

3.2.1. FPIC and indigenous rights, including the right to self-determination

While human rights relate to individual human beings and human dignity, indigenous rights are based on the collective right to exist as a people and are based on indigenous sovereignty, as a response to colonialism (Johnstone 2020). While human rights apply to individuals (including individual indigenous people), many indigenous rights – including the right to FPIC – are collective rights. Thus, individual indigenous people do not have the right to grant or withhold consent to resource development on their traditional territories; it is the right of the community or people as a whole to grant consent, through their representative institutions, to protect the territories that are essential for their physical and cultural survival as a people (ibid). While indigenous rights may be justified on the basis of historic oppression, they are not dependent on an ongoing situation of marginalisation; they remain valid even when a community or people has secured an equal place – or an ostensibly equal place – in the dominant society (ibid).

While provisions for the consultation and participation of indigenous peoples in resource-related decision-making have evolved in international and national law, FPIC has emerged as a 'focal rights-based approach' to empower indigenous peoples affected by resource development (Tomlinson 2019, p.890). A key challenge lies in whether the implementation of FPIC is considered to be the responsibility of governments or businesses, and indeed whether governments are supportive of the principle in practice. It is clear that under international law, the protection of indigenous rights, including FPIC, is primarily the responsibility of governments. However, the UN Guiding Principles have made it clear that businesses have a responsibility to respect human rights whether or not governments have met their own obligations to protect them.

FPIC is described in the literature as a right, a norm, a normative obligation, a standard, a principle and a process. Whether or not FPIC is considered to be a right in itself, it is seen as an essential pre-condition for protecting and respecting indigenous peoples' rights, including the right to self-determination, to land, territories and resources, health, culture and non-discrimination (HRC 2020; Tomlinson 2019; Nagai 2019; Annandale 2018; Equitable Origin 2018; Colchester et al 2015; Hanna and Vanclay 2013). As such, where indigenous peoples are affected by resource development, FPIC falls under the requirement to respect the internationally recognised human rights of those affected by that development. In some cases, the lack of specific mention of indigenous rights or FPIC in human rights instruments (e.g. the UN Guiding Principles or the OECD Guidelines for Multinational Enterprises) or initiatives such as the UN Sustainable Development Goals, may lead to a de-prioritisation of FPIC within standards frameworks. In other words, the selection of some or prioritisation of one international instrument can mean neglecting others that are equally relevant.

Efforts have been made to address these gaps by analysing these instruments through an indigenous rights lens (Anaya, 2013; OECD 2017; Fair Finance Guide International 2018). Box 1 summarises some of the published commentaries of two former UN Special Rapporteurs on the Rights of Indigenous Peoples, Professor James Anaya (2008-2014) and Victoria Tauli-Corpuz (2014-2020). Those working to this UN mandate are considered by many as providing an authoritative voice on the interpretation of FPIC in the context of extractive industry development (Nagai 2019; Tomlinson 2019; Equitable Origin 2018; Wilson 2017b; Kemp and Owen 2017; Banerjee 2017; Seck 2016; Doyle et al 2015).

Box 1: Commentaries by UN Special Rapporteurs James Anaya and Victoria Tauli-Corpuz

The principles of consultation and consent are 'instrumental to rights of participation and self-determination, and … safeguards for all those rights of indigenous peoples that may be affected by external actors', such as 'rights to property, culture, religion and non-discrimination' (HRC 2013, para 28). The starting point is 'evaluation of the substantive rights of indigenous peoples that would be at stake' in the context of a development (HRC 2020, para 49). 'Regarding extractive projects, consultation and consent may be necessary at different stages – from impact assessments to exploration to production to project closure' (HRC 2020, para 54).

The right to self-determination means indigenous peoples have the right to determine and pursue their own priorities and strategies for the development or use of their lands and territories, in accordance with UNDRIP, Article 32 (HRC 2013, para 9; HRC 2020, para 49). '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' including processes of selecting exploration areas and prioritising extractives within economic planning (HRC 2014, para 9). Anaya's 'preferred model' for natural resource development within indigenous peoples' territories – if it is to take place at all – is for it to be conducted by indigenous peoples themselves as an exercise of their right to self-determination (HRC 2013, para 8). Indigenous peoples have the right to oppose extractive projects in accordance with their rights to freedom of expression and participation (HRC 2013, para 19). Further, they 'should be free from pressure from State or extractive company agents to compel them to accept extractive projects' (HRC 2013, para 24). This means that States and companies should not insist on consultations where indigenous peoples have 'affirmatively withheld their consent' (HRC 2013, para 25).

In a 2009 report, Anaya states that the right to FPIC 'should not be regarded as according indigenous peoples a general "veto power"… but rather as establishing consent as the objective of consultations with indigenous peoples' (HRC 2009, para 46), while 'the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved' (HRC 2009, para 47). In his 2013 report, Anaya states that, given the 'invasive nature' of industrial resource extraction, indigenous rights are invariably affected by such developments (HRC 2013, para 28) and so there should be a 'general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent' (HRC 2013, para 27). Tauli-Corpuz further clarifies that 'obtaining free, prior and informed consent should be understood as the objective of consultations and as an obligation in cases of significant impacts on the rights of indigenous peoples' (HRC 2020, para 60). She states: 'Reducing the principles of consultation and consent to a debate about the existence of a veto power would amount to losing sight of the spirit and character of these principles which seek to end historical models of decision-making regarding indigenous peoples that have excluded them and threatened their survival as peoples' (HRC 2020, para 59).

Tauli-Corpuz emphasises the need to move beyond the veto debate to focus on the international human rights obligations of states: 'Any restrictions on these rights, such as a decision to proceed without the free, prior and informed consent of an indigenous people, imposes on the State a burden to prove the permissibility of the said restrictions under the international criteria of legality, necessity and proportionality in relation to a valid public purpose' (HRC 2020, para 61). Where States have chosen to proceed with development without FPIC, this decision must have a 'valid public purpose', not simply commercial interests, revenue-generation or private gain (HRC 2013, para 35). The State also remains bound to protect affected indigenous peoples' rights by taking steps to 'minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing' and undertaking 'good faith efforts to consult with indigenous peoples and to develop and reach agreement on these measures, in keeping with its general duty to consult' (HRC 2013, para 38). Moreover, any decision by a State entity that does not have the consent of the indigenous peoples affected should pass through a review by an impartial judicial body to ensure that it does not affect the physical and cultural survival of the indigenous peoples concerned; if it does, then the measure or activity should not proceed (HRC 2013, para 39; HRC 2020, para 62).

In line with the UN Guiding Principles, extractive companies have an independent responsibility to respect the rights of indigenous peoples, irrespective of a State's compliance with its own duties, by undertaking due diligence at the earliest stages of exploration and when purchasing assets (HRC 2013, paras 53-54) and by not accepting permits or concessions from States when prior consultation and consent requirements have not been met or if the operations would otherwise not comply with international standards (HRC 2013, paras 40 and 55).

3.2.2. FPIC to safeguard vulnerable and resource-dependent communities

Increasingly FPIC is being applied more broadly as a means of protecting vulnerable resource-dependent communities, who may or may not be indigenous. The Forest Stewardship Council (FSC), for instance, applies FPIC to all resource-dependent communities affected by their operations (Van der Vlist and Richert 2012). Application of FPIC more widely than indigenous peoples avoids complex debates about 'who is indigenous' and the risks of operating in countries where governments have not recognised indigenous peoples (Nagai 2019; Seck 2016).

Debates over the concept of a 'social licence to operate' may also range along a continuum, which includes FPIC, or 'consent' more generally, as applied to indigenous or non-indigenous local communities, and compared to parallel government 'consent' processes (Collins et al 2016; Parsons et al 2014). Some industry managers reportedly prefer the (vaguer) 'social licence' concept as they feel the term 'consent' 'signifies a greater challenge to power relations' (Parsons et al 2014, p.85).

Nonetheless, FPIC is increasingly being seen as a potentially effective tool to build mutual respect and to balance the inequalities of power that exist in a resource-development context between governments, companies and resource-dependent communities, whether or not they are indigenous (Hawkes 2019; Buxton and Wilson, 2013). Tomlinson (2019, p.881) goes as far as to say:

> [T]he focus on FPIC is leading to a phenomenon, whereby FPIC is being divorced from indigenous rights specifically, and is being put forward as a process that generally safeguards all communities' human rights when faced with extractive projects. In these circumstances, FPIC becomes a process to ensure responsible development by fulfilling people's right to participation, rather than a process which specifically stems from indigenous land and self-governing political rights.

However, it is important to see these as distinct aspects of FPIC implementation, rather than a shift towards the latter. A report produced by Oxfam, for instance, presents FPIC as both a 'recognized right of Indigenous peoples under international law' and 'a best practice principle that applies to all communities affected by projects or activities on the land, water and forests that they rely on' (Hawkes 2019, p.5).

Efforts have been made to apply 'the spirit of FPIC' as the 'gold standard' for community engagement in the extractive industries, as a way to pre-empt and manage risks to communities and related risks for companies (Buxton and Wilson 2013, Collins et al 2016). This requires good faith, deliberative processes that empower communities to engage on an equal footing and make informed shared decisions; it means ensuring diversity and inclusion; timely and adequate information-sharing based on trusted sources; substantive balance in dialogue processes; and conscientious consideration by all participants (Buxton and Wilson 2013).

However, care should be taken when applying FPIC too far beyond the realm of indigenous rights. While the application of a process that applies FPIC principles to communities who are not indigenous is largely welcomed, indigenous rights advocates tend to oppose any co-optation or misuse of the term FPIC (especially if the question of a veto remains unclear), or the use of any terms which might suggest a weakening of the impact – such as 'free prior and informed consultation' and 'broad community support' – if they are applied to indigenous communities (Hawkes 2019; Tomlinson 2019; Rodhouse and Vanclay 2016; Szablowski 2011). Legal experts also argue that divorcing FPIC from indigenous rights undermines its basis in the striving for equality between peoples (Johnstone 2020).

Whether or not FPIC relates to indigenous peoples – in order to protect their right to self-determination – or resource-dependent and potentially vulnerable communities who may be indigenous or non-indigenous, there is some agreement in the literature on some common principles for the application of FPIC. These are summarised in Box 2.

Box 2: Principles and key steps of an FPIC process

- **FPIC is a collective endeavour:** It involves collective community consultation, participation and decision-making, rather than engagement on a one-to-one basis or with unrepresentative elite groups. The decision whether to grant consent is made collectively through community-approved representatives according to community-agreed processes. An effective FPIC process will take time.
- **FPIC is a joint responsibility:** Companies, communities and the state share responsibility for ensuring that the principles of free, prior and informed consent are followed and the result is respected. FPIC is a joint process of information sharing, planning and decision-making, with communities playing a central role in impact assessments, in determining mitigation measures and benefit sharing, and in on-going monitoring.
- **FPIC is not a one-off intervention:** Consent is an on-going relationship between companies and fully represented local communities; it is about people being involved meaningfully in decisions that fundamentally affect their lives, having a voice at every stage of project planning and implementation and in the sharing of benefits. FPIC processes may also need to be repeated if circumstances change.

Key steps of an FPIC process include the following:

- **Understand government obligations to implement FPIC:** Ascertain whether these have been met and the risks and required mitigation actions if they have not. FPIC is not possible where people cannot speak freely. Avoid operations in countries or regions where there is ongoing conflict or extreme oppression.
- **Identify and make public the company's obligations to seek FPIC:** Understand legal obligations and voluntary commitments; publicise a policy stating that the company recognises and respects local people's rights.
- **Identify the traditional rights, resource use and spiritual values of local people:** Analyse rights, resource use and spiritual values, and assess the potential impacts of industrial resource development, by listening to local resource users, and through participatory environmental, social and cultural impact assessments.
- **Share as much information as is possible in advance:** Listen to local people's concerns and local insights. Share information about their rights; the company; an objective assessment of the risks and benefits of the project; what FPIC is and how the FPIC process might be conducted. Uncertainty about project details is not an excuse for not engaging.
- **Include all major stakeholder groups (not just the most powerful and vocal):** Engage with communities on their own terms; conduct negotiations with properly representative bodies.
- **Support capacity building and community consensus-building:** Capacity support might include legal empowerment, training in data gathering techniques, and learning about FPIC procedures. Consensus building within the community is important prior to negotiation and requires a generous time-frame.
- **Ensure mutual agreement on FPIC procedures in advance:** FPIC should be based on customary law and practices, or a combination of customary and state-sanctioned decision-making processes, agreed in advance with the community; again a sufficient time frame needs to be allowed to achieve this.
- **Co-design mutually acceptable strategies:** Co-develop mitigation measures and benefit-sharing arrangements; ensure that these are widely communicated and discussed within the community.
- **Sign an agreement:** This should be a legal document with the force of law, confirming whether the proposed project can go ahead, according to what conditions, in compliance with which standards. Include the conditions of benefit sharing and compensation; required monitoring and evaluation systems; sanctions if the agreement is broken; measures to revisit and reinforce the agreement periodically.
- **Respect the result:** Respect communities' right to say 'no' to a project. The withholding of consent should be respected, as should a community's refusal to engage. In this regard, indigenous peoples may have distinct legal rights that non-indigenous peoples do not have.
- **Maintain consent:** Once consent has been granted, it needs to be maintained, through ongoing dialogue between the project developer and affected communities, with an accessible mechanism for complaints and redress. The mechanism should be co-developed, with respect for customary law and institutions. Companies need to assume that community concerns are valid and real unless proven otherwise, and make efforts to engage in good faith to address and resolve them.
- **Repeat FPIC when required:** Modifications to the original project plan, including in cases where the project changes ownership, may require a new FPIC process. A method to respond to circumstances such as these should be defined from the outset in agreement with the community involved.

Sources: Dudine and Szoke-Burke 2020; Hawkes 2019; Equitable Origin 2018; Annandale et al 2018; Colchester et al 2015; Wilson 2016; Doyle and Cariño 2013; Freeman et al 2008

WHILE MUCH OF THE LITERATURE APPEARS TO CONCLUDE THAT VOLUNTARY SUSTAINABILITY STANDARDS ARE INADEQUATE TO PROTECT THE RIGHTS AND INTERESTS OF INDIGENOUS AND LOCAL PEOPLE THROUGH FPIC, THERE IS AGREEMENT THAT THEY HAVE HELPED TO ESTABLISH FPIC AS AN INDUSTRY NORM, WHILE THEIR COMPLAINTS MECHANISMS HAVE SERVED AS CHANNELS FOR PEOPLE TO PROTEST AGAINST ABUSES OF THEIR RIGHTS.

3.3. PROTECTING RIGHTS AND INTERESTS: EFFECTIVENESS AND IMPACTS

One of the research questions for this study concerns the extent to which the adoption of the FPIC principle by voluntary sustainability standards protects the rights and interests of indigenous peoples and other local communities and marginalised groups; a second question seeks evidence of 'effectiveness and impacts'. These two questions are tackled below. While much of the literature appears to conclude that voluntary sustainability standards are failing to protect the rights and interests of indigenous and local people through FPIC, there is agreement that they have helped to establish FPIC as an industry norm, while the complaints mechanisms of voluntary initiatives have served as channels for people to protest against abuses of their rights. Moreover, there is emerging evidence of individual cases of effective FPIC implementation and results that support and promote indigenous and local people's rights and interests. As yet, however, evidence and case studies in these areas remain sparse.

3.3.1. Inadequacy of voluntary initiatives to protect rights in states with weak legislation

Most of the publications reviewed for this report support the view that one of the biggest challenges for voluntary sustainability initiatives is the adequate protection of rights-holders in contexts where state protections are weak (Kemp and Owen 2017; Banerjee 2017; Rodhouse and Vanclay 2016; Scheyvens 2011). In some cases, the safeguards of sustainability initiatives naturally align with existing legal frameworks. For instance, the strong alignment of Mexican law and the REDD+ safeguards means that FPIC is well aligned with Mexico's existing land tenure system – although implementing FPIC through the existing ejido assembly system can lead to the exclusion of women, young people and migrants (McDermott and Ituarte-Lima 2016; McDermott 2013). Similarly in Brazil, the legal framework for FPIC implementation is supportive, but implementation is often lacking (Gebara et al 2014).

Yet, in many jurisdictions, rights protections remain inadequate in law (Nagai 2019; Annandale et al 2018; Kemp and Owen 2017; Pirard 2017; Bulkan 2017). Colchester (2016, p.150) concludes:

> Certification schemes seek to go beyond the law but are not above the law and have to operate within national legal frameworks that diminish indigenous rights. Consequently, they cannot fully uphold or remedy rights violations. Ultimately, national legal reforms are necessary to secure indigenous rights.

Moreover, the research suggests that FPIC is being inconsistently and poorly implemented in the context of extractive development throughout the world (Annandale et al 2018). Several papers refer to cases of voluntary initiatives assisting indigenous peoples in strengthening their land and resource rights and protecting their resource base (see below). Yet many studies refer to cases where a company's commitment to one or more sustainability initiatives has failed to protect the rights of indigenous peoples (Hawkes 2018; Franks 2015; Hill and Lillywhite 2015; Laplante and Nolin 2014; Buxton and Wilson 2013).

MacInnes et al (2017, p.54) provide examples where ICMM members have 'fallen short of aspired policies, particularly regarding human rights violations,' and conclude that voluntary initiatives are 'far from sufficient' to uphold human rights on the ground, while they can also 'mask human rights abuses, given their reliance on self-reporting and lack of third-party verification' (ibid, p.54). Moreover, even where the safeguards of voluntary initiatives state otherwise, companies may feel they have legitimate rights to the resources as they have been granted concessions legally by the state and therefore do not require the consent of local people (Banerjee 2017; Freeman et al 2008).

Some schemes delegate responsibility to voluntary initiatives as a way of meeting safeguards. For instance, the European Union Renewable Energy Directive (EU-RED) requires biofuel suppliers to the EU to become members of one or more of its approved biofuel certification schemes. The literature suggests that the approved initiatives are unable to guarantee that rights have been protected through the application of FPIC, while verification is unreliable (Bracco 2015; Larsen et al 2014; German and Schoneveld 2011). In a similar way, companies seeking to follow the sourcing guidelines of the Consumer Goods Forum for palm oil, soy and pulp and paper (which include FPIC provisions) typically make their commitments indirectly, for instance through the sourcing of certified products (Jopke 2018). Research suggests that this approach cannot guarantee effective implementation of the safeguards, largely due to a lack of independent monitoring and verification (ibid).

Evidence suggests that investors also frequently fail to address indigenous rights risks adequately through their due diligence processes (Nikolakis et al 2014; Bradshaw and McElroy 2014). Hawkes (2019) repeatedly refers to a study by financial sector analyst TMP Systems on investor approaches to land rights and conflict, which concludes that 'current approaches to tenure risk are objectively dysfunctional' (TMP Systems 2019, cited in Hawkes 2019, p.7).

3.3.2. FPIC established as a norm

The literature does provide ample evidence of the extent to which FPIC has become established as a norm within the extractives sector, including as a result of its adoption by voluntary sustainability standards (Tomlinson 2019; Annandale 2018; Potts et al 2018; Equitable Origin 2018; Seck 2016; Doyle et al 2015). Potts et al (2018) also write of the potential for sustainability standards to influence wider policy processes. MacInnes et al (2017, p.158) observe that one of ASI's core strengths is in the way it has incorporated the FPIC principle and involved indigenous people in its governance structure and standard development, arguing that in this way 'the ASI standard is taking an important stand towards fulfilling its role as a safeguard for indigenous peoples' rights across the entire aluminium value chain'.

The acceptance of FPIC as a norm is reflected in the ever increasing amount of guidance relating to FPIC implementation (e.g. Equitable Origin 2018; Buxton and Wilson 2013; Colchester et al 2015) and a steadily increasing, but still sparse, body of case studies on FPIC implementation in the context of compliance with voluntary standards (e.g. Sturman et al 2018; Doyle et al 2015; Laplante and Nolin 2014; Lewis and Borreill 2013; Freeman et al 2008). Several studies have singled out particular companies or projects, highlighting elements of good practice in their community engagement approaches, agreement-making or actual FPIC implementation (see Table 2). It should be noted that in some cases the same project or company has been criticised for other aspects of its practices in other papers included in this literature review. Annex 4 provides a selection of case studies, including some more critical observations about FPIC approaches and outcomes.

Overall, however, the emergence of these lessons and case studies indicates an emerging body of research to build understanding about key challenges and opportunities relating to FPIC processes, and support ongoing improvements. A key finding in the literature is the need for more (field-based) case study analysis of FPIC implementation.



Table 2: Projects highlighted in the literature for positive FPIC and community engagement practices

Project	Highlighted elements	References
Congolaise Industrielle des Bois (CIB), northern Republic of Congo	In the context of FSC certification, CIB seeks to clearly define and acknowledge local land tenure and use rights; seeks to obtain the FPIC of indigenous peoples for proposed forest management activities; and involves communities in land and resource-related decision-making (see Annex 4).	Lewis and Borreill 2013
Gove Bauxite Mine, Northern Territory Australia – Rio Tinto Aluminium (RTA)	The RTA Gove Traditional Owners Agreement (2011) documents how RTA and the Yolngu people have reconciled the past, and are working together for a shared future; and RTA's commitment to support Yolngu-owned mining enterprises (see Annex 4).	Sturman et al 2018; Rio Tinto 2017
Gulkula Mining Company, Northern Territory, Australia	A 100% indigenous owned and operated bauxite mining company. Currently seeking ASI certification and working with ASI auditors to verify FPIC implementation (see Annex 4).	Sturman et al 2018; Annandale et al 2018
Malampaya Deep Water Gas-to-Power Project, Philippines – Shell	Project has documented cost savings estimated at between US$44 and 66 million (according to 2007 figures) following an effective strategy to obtain community consent.	Vermijs 2013; Sohn 2007
Papua New Guinea Liquefied Natural Gas (PNG LNG) – ExxonMobil	The project has employed multiple culturally acceptable community and stakeholder engagement methods, enabling effective participation of women, vulnerable people and minority groups.	Annandale et al 2018
Rio Tinto refinery and smelters, Saquenay, Quebec	Agreements are in place with indigenous people within the Saguenay region, relating to land, water stewardship, employment and enterprise development.	Sturman et al 2018
Surui Forest Carbon Project (SFCP)	The project is based on a consultation and FPIC process, which accommodated traditional chiefs, village leaders and leaders of tribal associations. This was the first extensive FPIC process to approve a REDD+ project in Brazil (see Annex 4).	Gebara et al 2014
Yamal Liquefied Natural Gas Project, Western Siberia, Russia – Novatek, Total	The project carried out an FPIC process with affected indigenous communities, which has been documented and is publicly available (see Annex 4).	Wilson 2017b

3.3.3. Community benefits from the adoption of FPIC by voluntary initiatives

There is some evidence that forest certification has enabled communities to defend their rights to land and resources in some cases. For instance, Bulkan (2017) observes that some indigenous communities engage strategically with forest certification schemes for reasons including the recognition of their claims to customary lands that are licenced to third parties by the government. In the case of the Bolfor Project in Indonesia, the community secured legal communal title, although ultimately they did not maintain FSC certification due to the lack of a perceived market advantage (ibid). Dobrynin et al (2020) refer to use of FPIC within forest certification processes in Russia as a way for local people to protect forest areas for non-timber forest products and hunting or those with spiritual meaning; as a way to secure (or extract) money or support from forest companies; or as a way to request modification of company practices (e.g. avoid driving timber trucks through villages).

Mahanty and McDermott (2013) observe that, while there is very limited research on the ways that FPIC has benefited communities, anecdotal evidence suggests that indigenous peoples have at times used forest certification standards to leverage benefits, including increased control over the pace and kind of forestry, protection of non-timber resources, capacity building, and direct and indirect economic profit. If a forest operation is not community-owned, 'the most important perceived benefits of certification for indigenous peoples are access to forestry decision-making processes and assistance with land and resource claims' (ibid, p.414).

Nagai (2019) observes that because Japanese law has not incorporated UNDRIP effectively, the indigenous Ainu are turning to FSC certification because it requires managers to respect indigenous rights, including FPIC. Nagai observes that relations have improved as a result, with agreements negotiated between forest managers and Ainu communities, although these agreements fall short of meeting FPIC criteria, being more focused on cultural promotion than rights protection (ibid).

Several papers have highlighted the importance of an FPIC process in helping to explain an intervention, for instance in the context of REDD+ projects (Gebara et al 2014; Gene et al 2012). However, where such interventions are complicated to explain (as REDD+ is), or are explained poorly, this may undermine the meaningfulness of the FPIC process itself (Milne and Mahanty 2019; Myers et al 2015). Blomley et al (2016), however, conclude that the inclusion of FPIC as a requirement of the Climate, Community and Biodiversity validation for REDD+ has enhanced engagement between project developers and participating communities in Tanzania. Participating NGOs also recognised that engaging local people in project decisions and planning resulted in greater trust-building and more effective project implementation, despite the associated higher transaction costs and time requirements (ibid).

3.3.4. Complaints procedures as a channel for asserting rights

While voluntary standard systems have repeatedly failed to prevent human and indigenous rights violations on the ground, including through their failure to ensure FPIC processes are implemented, one way in which they do serve to support rights-holders is via the channels that they provide for complaint (Higgins and Richards 2019; Persch-Orth and Mwangi 2016; Wilson and Blackmore 2013). This includes the mechanisms provided by certification initiatives and international standards as well as those linking complainants directly to investors (Hawkes 2019; Nikolakis et al 2014; Bradshaw and McElroy 2014; Cooke et al 2011). Following his study of RSPO and FSC, Colchester (2016, p.150) concludes that 'certification systems provide some, albeit compromised, protection of rights and scope for redress of violations'.

Other channels for influence are used by communities and activists who make reference to FPIC requirements in voluntary standards and international law in their campaigns. These include judicial channels, rankings of companies and banks, community protests, NGO and media campaigns, in host countries and in companies' home jurisdictions; they are often used alongside the complaints mechanisms of voluntary standards (Hawkes 2019; Lomax 2015; Cotula and Blackmore 2014).

The use of the RSPO complaints procedure is widely explored in the selected literature. When the RSPO Complaints Panel was established in 2010, it was inundated by complaints about the operations of RSPO's member palm oil companies, mostly relating to land disputes with indigenous peoples (Colchester 2016). In Malaysia, customary law was recognised and hundreds of cases of land disputes had been filed in the courts, whereas few cases were being taken to the courts in Indonesia, as they did not uphold indigenous peoples' rights (ibid). NGOs therefore helped local rights-holders in Indonesia to file complaints with RSPO. Between 2010 and 2015, RSPO registered 56 complaints, two thirds of which related to Indonesia, with 41% relating to violations of FPIC (ibid). Local people now report that 'RSPO members are more easily held accountable and generally are faster to respond to any complaints filed, even without direct intervention of the RSPO' (Persch-Orth and Mwangi 2016).

The RSPO New Planting Procedures policy requires advance notice of new plantings, allowing communities to submit complaints in advance (Lomax 2015). However, the procedures are disclosed on the RSPO website in English, while the maps are often unclear, so intermediary NGOs are essential (ibid). In Liberia, the RSPO complaints mechanism allowed communities to secure a temporary freeze on plantation development while longer term solutions were negotiated, and allowed communities to meet around the table with the companies (ibid). However, users of the mechanism complained of its failure to deal with complaints quickly or effectively; poor communication; lack of resources; and the fact that RSPO was insufficiently independent from the companies and the rest of the RSPO structure. Lomax (2015, p.19) therefore concludes:

> Many communities faced with the loss of their land and destruction of their natural resources and livelihoods right now would rather have the RSPO complaints procedure than nothing at all, if only to temporarily prevent encroachment onto community lands, territories and resources, and buy time and space to find more long-term protection of community rights and interests.

Thus, the RSPO complaints procedure is a valuable, though imperfect, tool for communities; it should be used alongside other non-judicial remedies, and should not replace concerted efforts to push for systemic national-level reform of the legal and governance systems (ibid).

In West Kalimantan, communities and NGOs invoked the standards of both RSPO and the International Finance Corporation (IFC) in order to pressure oil palm companies belonging to the Wilmar Group to renegotiate with communities whose customary lands had been taken without consent (Cariño and Colchester 2010). This led the companies to reinstate community lands and provide them with compensation for damages (ibid). However, Persch-Orth and Mwangi (2016) later report on the damaging effect when Wilmar sold its shares in one company to a non-RSPO member in 2013. At that point, mediation efforts stalled, as the company no longer had external incentives to resolve the conflict, leading to an escalation of the conflict and the death of a local community member (ibid).

The literature review has also revealed a number of approaches to support and promote FPIC within a sustainability initiative or development intervention. These are presented in Table 3.

Table 3: Approaches to enhance the effectiveness of FPIC implementation: examples from the literature

Category	Example	References
Indigenous governance and standard development	• The establishment of ASI's Indigenous Peoples Advisory Forum (IPAF) and FSC's Permanent Indigenous Peoples Committee (PIPC) • Development of FSC's community standard from the indigenous community perspective, to include community-level FPIC verification • Inviting review and comment on standards from indigenous communities through field-based research	Annandale et al 2018; MacInnes et al 2017; Stammler et al 2017
Legal empowerment	• Legal empowerment of communities including: providing legal information and support from legal experts; supporting negotiations with companies; using complaints procedures; litigation	Cotula and Berger 2017; Lomax 2015; Jagger et al 2012
Localised decision-making forums and approaches	• Efforts to align voluntary requirements with local practices and traditions • Use of traditional forums such as consultas (referendums) and ejido assemblies • Use of legal pluralism frameworks for analysis and practical guidance • Use of 'community protocols' or 'FPIC protocols' for communities to internally agree in advance the rules of engagement for external developers (see Section 3.5.3.2.)	Banerjee 2017; Blomley et al 2016; Laplante and Nolin 2014; Mahanty and McDermott 2013; Colchester and Ferrari 2010, Equitable Origin 2018
Accessible digital technology	• Use of digital technologies, such as mobile phones and hand-held Global Positioning System (GPS) devices, to support indigenous and local people's participation in data gathering, to report abuses and support community self-organisation • Use of online self-assessment tools to help companies prepare for certification, with potential to serve as a data repository on members' sustainability performance	Annandale et al 2018; Lewis and Borreill 2013
Targeted and inclusive mapping and verification techniques	• Use of satellite tracking, drone technology and spatial databases to track company operations and to identify where concessions overlap with indigenous territories • Use of participatory mapping techniques and participatory data collection • Evolution of community-based impact assessment techniques	Annandale et al 2018; Leifsen et al 2017; Fripp 2014; Freeman et al 2008
Evolution of locally-relevant indicators	• Comprehensive guidance to support standards, e.g. from IFC Guidance Notes and Asian Development Bank Good Practice Sourcebook • Efforts to develop adequate indicators for local-level verification	Equitable Origin 2018
Community-company agreement making	• Increased use of community-company agreements as a way of formalising negotiations between extractive companies and indigenous peoples • Growing interest in promoting community-company agreements as a proxy for FPIC in due diligence, subject to them meeting strict FPIC criteria • Increasing critical analysis of current agreement-making practices	McElroy 2014; Hanna and Vanclay 2013
Indigenous enterprise and partnership models	• Increased interest in supporting models of indigenous-led resource enterprise, including in the mining sector • Analysis of models of community-based resource management and community-company partnership	Sturman et al 2018; Annandale et al 2018; Cooke et al 2011; IGES 2012

THE EFFECTIVENESS OF A WELL-DESIGNED SET OF REQUIREMENTS CAN BE UNDERMINED BY A LOW LEVEL OF OBLIGATION TO MEET THEM. SEVERAL PAPERS HIGHLIGHT THE CHALLENGES WHEN COMPLIANCE WITH AN FPIC REQUIREMENT IS NOT MANDATORY.

3.4. TACKLING KEY CHALLENGES

Previous sections have outlined some of the broad contextual challenges to FPIC implementation. This section explores in more practical terms some of the key challenges and opportunities for FPIC implementation. These relate to the areas of: standard design; enforcement and verification; representation and legitimacy; negotiating agreements; capacities and resources; and learning and sharing.

3.4.1. Standard design

Based on the analysis of standards documents, as well as interviews and workshops involving industry players and indigenous representatives, there is quite a high level of agreement around what is considered to be good practice in terms of standard-setting, assurance systems and good governance (Annandale et al 2018; Equitable Origin 2018; Sturman et al 2018; Doyle et al 2015). The literature emphasises the importance of a mandatory requirement for FPIC in clearly defined situations, along with sanctions for non-compliance, and context-specific guidance.

3.4.1.1. Mandatory and consistent FPIC requirements

Potts et al (2018) highlight the importance of considering not only the adequacy of requirements that comprise a voluntary standard but also the level of obligation that the initiative demands to comply with the standard. The effectiveness of a well-designed set of requirements can be undermined by a low level of obligation to meet them. Several papers highlight the challenges when compliance with an FPIC requirement is not mandatory. For instance, FPIC might be included in the requirements for certification, but as just one of several ways that companies can meet the certification threshold (Hawkes 2019). Where a sustainability initiative or certification system has been developed mainly to promote environmental sustainability, environmental protection takes priority over, or comes into conflict with, social safeguards and indigenous rights protection (Cheyns et al 2019; Smith 2015; Nikolakis et al 2014; De la Fuente and Hajjar 2013). However, secure community tenure rights are increasingly recognised as being critical in delivering global development, climate and biodiversity goals (Rights and Resources 2020).

Frequently there are inconsistencies in FPIC guidance, notably in relation to the power of veto. FPIC guidance can be confusing if it states that FPIC means communities have the right to say 'no', but also refers to James Anaya's 2009 statement that the right to FPIC should not be regarded as according a veto, but rather as establishing consent as the objective of consultations (Nagai 2019). If FPIC guidance from a voluntary initiative suggests that member companies should rely on the good faith of the host government to judge whether a project should proceed in the absence of consent, this 'risks allowing members to pursue projects in the absence of FPIC, putting them in a position where they are potentially complicit in State violations of indigenous peoples' rights' (MacInnes et al 2017, p.155).

3.4.1.2. Scope of application

An FPIC requirement needs to apply early in the project cycle to ensure adequate protection. A challenge is where requirements for FPIC apply only after concessions have been granted (Colchester 2016). The Initiative for Responsible Mining Assurance (IRMA) explicitly requires companies to conduct due diligence to determine the extent to which the host country has carried out FPIC processes related to potential new mining projects (Equitable Origin 2018). Companies are required to publicly justify their decision and disclose what they have done to obtain FPIC before the project goes ahead, even if the state has not fulfilled its own obligations to protect indigenous rights (ibid).

The FPIC obligation applies to all responsible players in a project development. Frequently it is the smaller, so-called junior companies that are the first to acquire lands from the state. MacInnes et al (2017) observe that junior mining companies make little effort to obtain FPIC and frequently fail to respect indigenous peoples' rights when seeking access to their lands. The authors highlight the importance of ICMM members applying FPIC due diligence when considering a joint venture with, or acquiring concessions from, junior companies (ibid). In a similar way, Gynch et al (2015) highlight the importance of considering those smaller companies operating in a resource-extraction economy (in their case, palm oil) who are not members of sustainability initiatives, and being

aware that high-profile signs of adoption by major companies may not necessarily signify improvements across the sector.

Provisions need to be made for FPIC to be repeated and maintained throughout the project cycle, from exploration to project closure and land reinstatement (HRC 2020; Collins 2016; ICMM 2015). Hawkes (2019) calls for banks to include a requirement for FPIC due diligence in contracts and agreements with clients to ensure that it becomes a valid reason to pull out of the financing, and to ensure FPIC due diligence is carried out throughout the loan, especially when circumstances change.

3.4.1.3. Context-specific guidance

FPIC implementation relies on appropriate interpretation, good judgement and integrity, but this is difficult to present clearly and unambiguously in industry guidance. Cariño and Colchester (2010, p.434) state that:

> Exercise of the right to FPIC should be very context-specific and, as an expression of the right to self-determination, must vary from people to people and situation to situation, depending on a multitude of factors including the people's own representative institutions, their customs and customary laws. It will also vary depending on what the planned interventions are. Procedures that people choose to follow suited to decisions about where to locate a tube well in a village, for example, will differ from those suited to discussions about an entire river basin development plan.

Context-specific FPIC guides are needed to support extractive industry operators and local indigenous communities, so as to ensure that the FPIC process (design and implementation) fits with the context of local laws and will be culturally-appropriate (Annandale et al 2018). Equitable Origin's (2018) tool for monitoring and verifying FPIC requires a due diligence process to assess gaps between national legal obligations and international standards to establish the project developer's obligation to achieve FPIC in the given context – and also to highlight the risks if the governance framework is weak.

Context-specific guides require use of local languages, avoidance of overly technical language, and they need to enable the community to develop their own methodology based on local traditional authority and decision-making structures (Annandale et al 2018). Context-specific FPIC verification criteria and frameworks are also required to support auditors and enable affected communities to monitor company practices and provide objective data for assurance purposes (ibid).

In other sectors, there is some experience of context-specific standards. For instance, FSC has national standards (e.g. Nagai 2019); REDD+ has national-level implementation (Milne and Mahanty 2019; Myers et al 2016; Jagger et al 2012); Indonesia and Malaysia have developed their own standards for oil palm supply chains (ISPO and MSPO) (Gnych et al 2015; Hospes 2014; Hunsberger et al 2014). The literature offers lessons from these localised experiences, such as the perceived weakening of safeguards in the Malaysian and Indonesian national standards, which were developed partly as a result of governments' perception of being excluded from those initiatives (Filer et al 2020; Higgins and Richards 2019). Further lessons could be learned from these national-level standard development experiences for the minerals and mining sector.

3.4.2. Enforcement and verification

Enforcement and compliance represent a major challenge in FPIC implementation in voluntary standards, especially if there is no consensus within a community about whether a development should go ahead (McInnes et al 2017). Issues around unsettled land-tenure, low government capacity, institutional gaps and lack of transparency regarding compensation all influence the feasibility of verifying compliance with FPIC. This section considers some of the challenges and weaknesses in enforcement and verification processes, and highlights some of the good practice recommendations, such as independent third-party auditing and indigenous and local community participation in data gathering and audits.

3.4.2.1. Self-reporting vs third-party auditing

In their assessment of 15 major voluntary sustainability initiatives in the mining sector, Potts et al (2018) reflect that with government-led initiatives such as the Voluntary Principles for Security and Human Rights and the Kimberley Process, high rates of adoption have come at the price of weak enforcement: neither of these initiatives specifies what participating countries must do to demonstrate compliance. Early industry-led initiatives, such as ICMM and Towards Sustainable Mining have displayed a similar approach to compliance, with a focus on verification and self-reporting rather than independent certification (ibid). A common approach to assurance in mining sustainability initiatives is to request a self-assessment against the standard, as the basis for independent third-party auditing, followed by the initiative itself determining compliance and issuing a certificate (ibid).

There is a high level of agreement within the literature that a well-designed verification system, using accredited, independent third-party auditors, based on both document review and interviews with affected parties, is good practice for the assurance of voluntary sustainability standard systems (Annandale et al 2018; Equitable Origin 2018; Colchester and Ferrari 2007). Sturman et al (2018) advocate the use of online self-assessment tools for implementing companies or countries, which could also provide a useful source of baseline data for impact assessment of initiatives.

Hawkes (2019) urges banks not to rely so much on company self-reporting or the presentation of documents, without further verification that they have been obtained legally and have involved the rights-holders in the appropriate way. She also warns that commonly used reputational databases for environmental, social and governance (ESG) due diligence are not accessible to communities, often limited to English and high profile NGO reports, time-bound – so quickly go out of date, report problems only after they have happened, do not cover different contexts of a company's operations, do not include suppliers and subcontractors, and are not designed to address human rights risks (ibid).

3.4.2.2. Measuring evidence of FPIC: process vs outcome

The literature highlights the challenge of measuring outcomes on the ground and translating those into data that can be used in completely different contexts, for instance to measure investment risk or the sustainability of consumer products. In general, there is a lack of practical field-based research results, while social analysis of sustainability initiatives lags behind research on the environmental impacts of these initiatives (Newton and Benzeev 2018; Blomley et al 2016).

The literature offers several reasons for the relative paucity of social research in general and FPIC-related evidence in particular, including: the difficulty of identifying and verifying relevant social metrics, the lack of readily-available sources of data, the remoteness of sites and diversity of local contexts, the complexity of land-tenure systems, the intricacy of supply chains and the involvement of different companies at different stages of a project, and the need for first-person testimony as verification, which means field work can be time- and resource- intensive (Masuda et al 2020; Hawkes 2019; Newton and Benzeev 2018; McDermott 2013; Freeman et al 2008).

Equitable Origin (2018, p.5) concludes from its literature review 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'. Also (ibid, p.20):

> [T]here are very few resources that define what successful implementation of FPIC is from 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.

One exception to this is Doyle and Cariño (2013) who provide indigenous perspectives on what an FPIC process should look like. The critical next step is the integration of this kind of study and further insights from co-produced anthropological studies, into international guidance and indicators, which is emerging as a practice, including in relation to the mining sector, with initiatives from ASI and IRMA.

Equitable Origin (2018) concludes that verification guidelines of voluntary sustainability standards tend to be process-focused – primarily they require documented evidence of management systems and processes, with few

examples of outcome or impact indicators. The IFC provides detailed guidance on implementing FPIC through its Guidance Note to Performance Standard 7; however, the verifiers mainly comprise documented evidence of management processes (ibid). The most detailed verification guidance has been produced by the UN REDD Programme, REDD+ and the Asian Development Bank (ADB). ADB's Good Practice Sourcebook, provides both process indicators (to demonstrate implementation of required management systems), and outcome indicators that require in-depth monitoring of social and cultural factors at the community level (ibid). However, there is little evidence that indigenous peoples have been involved in determining appropriate indicators specific to FPIC (ibid).

This report by Equitable Origin (2018) provides the framework for a tool for monitoring and verifying FPIC that they are developing in partnership with RSB and COICA,[18] and aims to go 'beyond verifying the existence of management systems, to verify the legitimacy and credibility of the process itself' (ibid, p.6). The aim 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' (ibid, p.6). The framework itself includes requirements not only for documented evidence of a step in the process (e.g. evidence that a community meeting took place, or a negotiated agreement) but also documented evidence of interviews with community members that confirm that they support the step having been taken (e.g. demonstrating that they are willing to enter into a negotiation in the first place; they understand their rights including the right to say no; they understand all aspects of the negotiated agreement and its implications) (ibid, p.90).

3.4.2.3. Weaknesses in the auditing procedures

Much of the critique of the verification processes of voluntary sustainability standards is targeted at the auditing procedures and the auditors themselves. McDermott (2013) argues that the role of auditors is one of the least problematized dimensions of environmental and social certification, yet is critical to shaping equity outcomes. Following the International Organization for Standardization (ISO) guidelines for third party auditing, certification is perceived as a 'technical rather than socially negotiated process' (ibid, p.431). A further challenge is the preference for commercial multinational auditing firms headquartered in the global North (ibid).

Weaknesses in the auditing systems reported in the literature include: auditors' lack of awareness of indigenous rights; the lack of clarity about what is required to demonstrate FPIC and the lack of context-specific frameworks to support their work; conflicts of interest, such as when auditors are paid directly by the companies they are auditing; low thresholds for compliance with a standard and lack of penalties for non-compliance; the reliance on document-based compliance and the lack of independent monitoring of their work (Nagai 2019; Hawkes 2019; Annandale et al 2018; Equitable Origin 2018). In some cases, audit reports fail to identify poor practice and non-compliance (including FPIC), or choose not to (Filer et al 2020; MacInnes et al 2017; Freeman et al 2008). In other cases, auditors are required to make nuanced decisions between environmental and social priorities (Milne and Mahanty 2019; Freeman et al 2008) (see also Annex 4). Auditors have also been known to grant certification before a required FPIC process has been completed (Szablowski 2010; Colchester and Ferrari 2007).

Hawkes (2019) also highlights the importance of finding the right consultants to conduct bank due diligence processes, who need to be independent and unbiased, with indigenous rights expertise and local language skills. FSC auditors must be certified as following international auditing standards and they themselves have their assessment procedures checked and approved (Colchester and Ferrari 2007). The FSC procedures for accrediting auditors were strengthened following complaints about auditors being too close to the companies they assess (ibid). Accredited certification bodies working to the Responsible Jewellery Council (RJC) certification scheme may be subject to unscheduled witness audits and reviews by independent peers as part of the RJC quality control process (Mori Junior et al 2017).

Annandale et al (2018) call for greater transparency of auditor credentials, suggesting that auditors should provide all interested parties, including affected communities and NGOs, with fully disclosed company profiles including their history of engagement with Indigenous communities. This kind of disclosure would serve to prevent the appointment of auditors with negative experience and increase the confidence of affected communities in the credibility of the standard assurance processes (ibid).

3.4.2.4. Indigenous participation in data gathering and auditing

The participation of affected indigenous peoples in the monitoring, evaluation and auditing of company operations is seen as important in ensuring an effective and credible assurance process, and building trust in the process among local people (Nagai 2019; Annandale et al 2018; Jagger et al 2012, 2010). Nagai (2019) suggests adding indigenous experts to audit teams or providing programmes for auditors to learn about indigenous rights. Annandale et al (2018) also propose awareness training for auditors relating to the local environmental and socio-cultural context, delivered by local indigenous community members, to ensure that data collection methods are participatory and culturally appropriate, and so that the auditors can properly assess and understand the inputs from local indigenous peoples.

Equitable Origin (2018) emphasises that international guidance makes clear that indigenous peoples must be engaged from the outset in a participatory process that allows them to co-design the FPIC process. Annandale et al (2018) and Sturman et al (2018) also highlight the need for increased participation of indigenous peoples in data collection for assurance processes, using context-specific criteria and verification frameworks. The FSC Community Standard, currently being designed by and for forest-based communities, seeks to approach responsible forest management from an indigenous community perspective, including verification of community-level FPIC implementation, and greater community involvement in, and ownership of, data collection and monitoring, recognising local expertise rather than employing external auditors (Annandale et al 2018).

3.4.2.5. Use of complaints procedures for enforcement

MacInnes et al (2017) observe that the experience of RSPO, FSC and others has illustrated that 'a system predicated entirely on the ability of its auditors to monitor company operations is critically flawed'. As a result of weakness in the auditing processes, '[o]versight of illegal practices is instead provided by the rigorous policing of communities and activists who must go through tedious complaints procedures to achieve redress for company abuses' (ibid, p.154). As noted in Section 3.4., the most effective way that many initiatives protect indigenous rights appears to be through the application of these complaints procedures. Despite this, the complaints mechanisms themselves are viewed as inadequate in many studies (Hawkes 2019; Lomax 2015).

Wilson and Blackmore (2013) argue that grievance mechanisms need to be seen as a key part of the enforcement and compliance of an FPIC process and as a way to 'maintain FPIC' in the longer term. Hawkes (2019) recommends that all stakeholder groups, including communities affected by bank-financed projects and activities, have access to bank grievance mechanisms.

The complaints mechanisms of certification programmes should follow the effectiveness principles laid out in the UN Guiding Principles on Business and Human Rights (Annandale 2018). The mechanism should be simple to use and accessible to all stakeholders, with dedicated contact points, clear guidance, including timeframes for responses and resolution. There should be a mechanism for independent assessment in difficult and controversial cases; full transparency of complaints and remedies (while preserving confidentiality); thorough record keeping and reporting; a commitment to lesson learning and continual improvement; and the process should not limit complainants' access to alternative judicial or administrative approaches (ibid 2018; Wilson and Blackmore 2013).

An effective whistle-blowing mechanism should be part of an overall complaints resolution approach – for companies and for sustainability initiatives – and should afford whistle-blowers anonymity and protection (Potts et al 2018; Mori Junior et al 2017; Colchester 2016; Wilson and Blackmore 2013). This is an important element of a complaints process, while also being a way to highlight potential issues in advance, before a situation turns into a crisis.

CONTEXT-SPECIFIC FPIC GUIDES ARE NEEDED TO SUPPORT EXTRACTIVE INDUSTRY OPERATORS AND LOCAL INDIGENOUS COMMUNITIES, SO AS TO ENSURE THAT THE FPIC PROCESS FITS WITH THE CONTEXT OF LOCAL LAWS AND WILL BE CULTURALLY-APPROPRIATE.

3.4.3. Representation and legitimacy

Representation and legitimacy are seen as key challenges for an FPIC process. This relates to the governance of voluntary standard systems, the levels of representation of different parts of the community within an FPIC process, and various ways that communities can be empowered to participate effectively.

3.4.3.1. Inclusive governance of voluntary standard systems

Governance is seen as a critical challenge in voluntary sustainability initiatives, with the balance of power often being in favour of business. Pichler (2013, p.372) argues that 'the emphasis on consensus orientation and multi-stakeholder composition masks power relations and exclusion mechanisms in … certification schemes'.

MacInnes et al (2017) consider IRMA to be the most promising of extractive industry multi-stakeholder initiatives involving Indigenous peoples. IRMA recognised early on the importance for indigenous peoples to be directly represented as a key stakeholder in negotiations, rather than a subgroup of NGOs, and the multi-stakeholder approach to the development of the standard has helped in addressing issues such as FPIC (ibid). MacInnes et al (2017) also believe that one of ASI's core strengths is in the way it has involved indigenous peoples in its governance structure and standard development.

ASI's Indigenous Peoples Advisory Forum (IPAF) and FSC's Permanent Indigenous Peoples Committee (PIPC) are considered to be good practice (Annandale et al 2018). Representation on such forums should be via self-selection and the forum should have clearly defined Terms of Reference that include participation in standard-setting and review, audits, the assessment and resolution of complaints from Indigenous peoples, and the preparation of regularly updated information materials for Indigenous peoples (ibid).

Table 4 highlights good practices of various sustainability initiatives relating to governance and assurance processes, specifically with regard to FPIC and the involvement of indigenous peoples, as highlighted in the selected literature.

Table 4: Good practice in governance and assurance processes: examples from sustainability standards

Initiatives	Governance and assurance good practice	References
Aluminium Stewardship Initiative	• The Indigenous Peoples Advisory Forum (IPAF) is a permanent part of the governance and decision-making structure of the certification programme, including for the development and review of standards • Indigenous peoples were recognised and consulted with as a separate group from social/environmental NGOs, from the start of standard development • ASI has a clear, strong position on FPIC • Participation of affected indigenous peoples in the standard assurance processes • Comprehensive complaints mechanism	Annandale et al 2018; Sturman et al 2018; MacInnes et al 2017
Forest Stewardship Council	• FSC has been a pioneering inclusion of the FPIC principle in its standard since 1993 • The Permanent Indigenous Peoples Committee (PIPC) is part of the governance and decision-making structure of the certification programme, including for the development and review of standards	Annandale et al 2018; Bradshaw and McElroy 2014
FSC Community Standard	• Currently being designed by and for forest-based communities • Expected to increase opportunities for indigenous peoples to access and benefit from FSC certification • Includes verification of community-level FPIC implementation, developed from the indigenous community perspective	Annandale et al 2018
Initiative for Responsible Mining Assurance	• Indigenous peoples were recognised and consulted with as a separate group from social/environmental NGOs, from the start of standard development • IRMA has a clear, strong position on FPIC • Participation of affected indigenous peoples in the standard assurance processes • Comprehensive complaints mechanism • Requires companies to be transparent about their FPIC processes	Annandale et al 2018; MacInnes et al 2017
Roundtable on Sustainable Palm Oil	• RSPO commissioned a series of workshops between industry, government and indigenous peoples to review their understanding of how an FPIC-based process should work and to develop a guide for companies (in 2008) on how to adhere to FPIC in line with the RSPO's Principles and Criteria. The guide was updated following a similar process in 2015 • The guide explicitly acknowledges the right of indigenous peoples to reject projects on their lands	Colchester et al 2015; Cariño and Colchester 2010

3.4.3.2. Representative bodies

Kemp and Owen (2017, p.166) suggest that the way companies engage with indigenous leaders and other community representatives is 'a major determinant of FPIC's risk profile in practice', while Tomlinson (2019, p.891) argues that the 'strength and unity of indigenous representative organisations' is a key success factor in FPIC processes. Indigenous and local community representation and levels of participation are critical aspects of an FPIC process, and are best determined within communities, according to their own representative organisations and customary decision-making processes – all of which requires adequate time allocation (Annandale 2018; Doyle et al 2015; Colchester and Ferrari 2007).

Ensuring adequate and appropriate representation in practice is frequently a major challenge. Nagai (2019), for instance, observes that the indigenous Ainu people in Japan currently have no publicly recognised representative or decision-making institutions. Milne and Mahanty (2019) question the representativeness of village-based processes of agreement-making in the context of REDD+ in Cambodia. In resource developments, processes can

be undermined if there are internal contestations around representation within indigenous groups, while both contemporary and traditional structures of government might be exclusionary (e.g. of women and young people) (Tomlinson 2019; Mahanty and McDermott 2013; Colchester and Ferrari 2010). As Kemp and Owen (2017) put it, '[a]n unqualified pursuit of FPIC has the potential to overlook and even reinforce forms of traditional authority that would not be regarded as "rights respectful"'.

Outside agencies may also misunderstand customary decision-making systems; accept the authority of the wrong institution or individuals; or deliberately manipulate and divide communities, creating the appearance of FPIC by excluding parts of a community (Hanna and Vanclay 2013; Colchester and MacKay 2004). Indigenous peoples themselves may be unsure of the authority of their own representatives, especially in new contexts, and in situations of legal pluralism with multiple channels for involvement (Colchester and Ferrari 2010). The challenge of who gives consent can also be an issue in contexts of conflicting indigenous land claims in one area, or projects that span large areas and multiple indigenous traditional territories (such as pipelines), where one or several indigenous groups might grant their consent, while others refuse it (Tomlinson 2019).

3.4.3.3. Empowering communities

Leifsen et al (2017) suggest that participation instruments, including FPIC, employed in the extractives sector are sometimes limited by the pro-extraction bias of the information shared and the lack of local ownership over the processes. Related environmental impact assessments (EIAs) might be nothing more than 'invited spaces' in which scientific knowledge outweighs local knowledge, and where people have little option but to legitimise decisions already taken (ibid). Freeman et al (2008) argue that the aim should be to facilitate the formation of a representative community structure that includes all stakeholder groups, without alienating the traditional leadership. While this can take time, it can also help to avoid future conflicts and delay. Cariño and Colchester (2010) observe that affected peoples often choose to express their right to FPIC through multiple institutions, depending on the type and scale of the proposed intervention.

Participatory mapping processes can be useful as a way to involve and empower communities in identifying risks and resolving land tenure issues (Fripp 2014; Freeman et al 2008). However, such exercises can also be undermined by exclusionary approaches and the failure to value local knowledge alongside scientific knowledge (Cheyns et al 2019). Such challenges could be overcome through deeper and more inclusive consultation processes; training in map literacy; and use of maps that better reflect local experiences of people's own reality (Freeman et al 2008). Several authors promote involvement of local communities in data-gathering, while Annandale et al (2018) also propose a 'safe' database of evidence collected by local people via digital technologies such as mobile phones and Global Positioning System (GPS) handsets. Lewis and Borreill (2013) similarly observe the value of using GPS handsets for information gathering by forest-dwellers in the Congo.

Various types of local representative organisational structure are used by communities to engage with industry in different contexts. In the context of REDD+ implementation in Tanzania, Blomley et al (2016) observe the importance of framing FPIC within existing legitimated local government forums, such as the Village Assembly, while also extending discussions to sub-village level. Banerjee (2017) draws attention to the emergence of gram sabhas in India or los caracoles in Latin America, which are deployed by communities to negotiate with corporations and governments. Laplante and Nolin (2014) also refer to the local referendum form known as consultas, used by local people in Guatemala to oppose gold mining. Mahanty and McDermott (2013) question the inclusiveness of the ejido assemblies used for FPIC implementation in the context of REDD+ in Mexico. Colchester and Ferrari (2007, p.20) observe that the plurality of institutions 'can be both a strength and a weakness, either forcing outsiders to accommodate local realities and reinforced local voices, or allowing them to use "divide-and-rule" tactics'.

INDIGENOUS AND LOCAL COMMUNITY REPRESENTATION AND LEVELS OF PARTICIPATION ARE CRITICAL ASPECTS OF AN FPIC PROCESS, AND ARE BEST DETERMINED WITHIN COMMUNITIES, ACCORDING TO THEIR OWN REPRESENTATIVE ORGANISATIONS AND CUSTOMARY DECISION-MAKING PROCESSES. AN FPIC PROCESS THUS RELIES ON THE CREATION OF SPACE FOR TWO-WAY DIALOGUE, CARRIED OUT IN GOOD FAITH WITH EQUAL PARTICIPATION FROM THE PARTIES.

3.4.4. Negotiating agreements

This section considers the increasing use of agreement making in engagement processes between companies and indigenous and local communities, and considers the potential to use agreement-making as a proxy for FPIC in due diligence and screening, subject to assessment against FPIC criteria.

3.4.4.1. Community-company agreements

Increasingly, agreements between communities and project developers are being considered as a valuable part of an FPIC process. Community-company agreements – not necessarily related to FPIC – are widely used in Canada and Australia, where experience is well-documented, while similar practices are also established in Russia, Brazil and other countries (Hanna and Vanclay 2013; Novikova and Wilson 2013). Bradshaw and McElroy (2014) observe the widespread usage of community-company agreements in Canada's mining sector, despite them not being legally required, except in a few jurisdictions established through modern land claims such as Nunavut and the Tlicho territory. However, their corporate interview respondents referred to a huge expectation from the Canadian government to negotiate agreements, driven by the duty of the Crown to Consult and Accommodate First Nations, which tends to be delegated to resource-development companies (ibid; see also Papillon and Rodon 2017).

It is worth noting, that the starting point for a community-company agreement tends to be a project developed in the context of standard models of resource development, with the attendant power imbalances (HRC 2013). Szablowski (2010) offers the example of BHP's Ekati diamond mine in Canada's North West Territories. The government required impact and benefit agreements (IBAs) as a condition of a water licence, which ostensibly put the Aboriginal peoples in a strong bargaining position.

> However, inexperience, a lack of information, and very short timelines placed limitations on what they could achieve, while Aboriginal peoples understood that they would not be allowed to reject the Ekati project by withdrawing from IBA negotiations. Thus, although they were able to negotiate certain conditions with BHP, the influence they could exercise was also substantially constrained by the nature of the regime. Their consent was sought but not required.

Moreover, a focus on agreement-making might distract from wider governance reform. Mahanty and McDermott (2013), for instance, question whether 'FPIC policies should require a fundamental restructuring and resolution of rights to land and resources or be used more as instrumental tools to facilitate negotiated agreements on a project-by-project basis'. Moreover, indigenous groups are now increasingly calling for companies to 'go beyond agreement-making' to ensure that relationships are based on long-term commitments rather than just focused on the signing of a one-off agreement.

3.4.4.2. Agreement-making as a proxy for FPIC?

Bradshaw and McElroy (2014) explore the possibility of promoting community-company agreements as a screening tool by responsible investors, essentially as a 'proxy' for a successful FPIC process, to reduce investment risk, address social justice concerns and help communities to visualize and realise their goals. Investors' current approach to screening puts too much emphasis on the practices of companies as the sole determinant of community-company relations, while agreements are seen as a way to empower communities by enabling them to play a greater role in determining community-company relations and driving improved environmental and social performance (ibid).

Hanna and Vanclay (2013) conclude that, if written carefully and negotiated in good faith, community-company agreements can form the evidence to establish that FPIC was observed, as required by IFC Performance Standards and other standards. Bradshaw and McElroy (2014) similarly conclude that community-company agreements can make provisions that exceed current investor expectations regarding engagement with indigenous communities (relating to business and employment opportunities, revenue sharing, land rights, impacts on culture, use of traditional knowledge in monitoring and recognition of FPIC), although some agreements may fail on wider community relations criteria, such as their ability to identify and empower marginal voices. Mining executives interviewed for Bradshaw and McElroy's study recognize the utility of agreement making with communities, and were comfortable with such efforts being interpreted as recognition of the indigenous right to consent to

development, despite their frustration at the 'downloading of the Crown's Duty to Consult and Accommodate to industry' (ibid, p.188).

Hanna and Vanclay (2013) argue that for agreements to be successful in achieving their goals, companies need to have high levels of cultural sensitivity, and need to apply participative and transparent approaches to decision making, work in collaboration with the communities, address confidentiality issues sensitively and ensure access to complaints mechanisms. Bradshaw and McElroy (2014, p.181) argue that:

> [C]ommunities justifiably need time and resources to develop better understandings of the implications of mining for their well-being, to develop community visions that may (or may not) include partnerships with firms, and to articulate negotiating positions with as much consensus as possible to effectively negotiate agreements with mine developers to manage impacts and secure benefits.

Mahanty and McDermott (2013) argue that the up-front focus on FPIC and agreement-making in mining projects is problematic and may not provide for ongoing negotiations and consultation, despite the fact that over the lifetime of a mine, young people will reach adulthood and may expect their own benefit arrangements, or question agreements made by their parents. Without ongoing consultation, static agreements may store up trouble in the future, although a major disincentive to longer term approaches lies in the limited external influence over mining companies once financial and state approvals have been granted (ibid).

Moreover, the process of negotiation can sometimes devalue the object of the negotiations, which make the resulting agreement inappropriate for representing an FPIC process. Writing about the High Carbon Stock methodology, Cheynes et al (2019, p.5) suggest that the negotiation process proposed as a form of FPIC to overcome land-use conflicts values land for its function or utility, not necessarily for the values ascribed to it by local land users:

> The negotiation process guides local communities towards a particular format, where they are expected to transform their attachments to the place and their familiar experience into interests and calculated needs, which are more suited for trade-offs with other stakeholder interests'.

Similarly, Papillon and Rodon (2017, p.220) observe that impact and benefit agreements in the Canadian extractive industry context can mobilise indigenous consent through negotiations, but in doing so, they can narrow the expression of consent to economic considerations.

> More importantly, as they engage in this type of bargaining, Indigenous communities agree to put the exercise of their right to FPIC on the table, as an integral part of the negotiation process. They are in essence expected to trade their potential right to say no to a project in exchange for some tangible benefits. The problem is that this trade-off occurs through elite negotiations, often with very little input from the community.

Thus there are many challenges in assessing to what extent an agreement might equate to a process of FPIC. An agreement might be the result of coercion; companies may not have revealed all relevant information; communities may not have understood the implications of what was going to happen; negotiations may not have taken place with fully representative institutions; and agreements are often finalised and signed after a project has started up (Papillon and Rodon 2017; Bradshaw and McElroy 2014; Hanna and Vanclay 2013). Papillon and Rodon (2017, p.216) conclude that negotiated consent through impact and benefit agreements 'offers a truncated version of FPIC from the perspective of the communities involved'. Bradshaw and McElroy (2014) conclude that the mere signing of a community-company agreement is not sufficient to pass as a proxy for FPIC. Hawkes (2019) warns investors against taking copies of agreements alone as evidence of FPIC processes, without further evidence that companies have not obtained them illegally or failed to engage with the appropriate rights holders.

3.4.5. Capacities and resources

This section considers the need for capacities and resources to support indigenous and local communities, company personnel, auditors and others responsible for implementing, monitoring and enforcing the requirements of voluntary sustainability initiatives, in order to ensure effective FPIC implementation.

3.4.5.1. Understanding rights, roles and processes

Indigenous and local communities affected by resource-development projects have a very wide range of capacities and different levels of knowledge about their own rights. Kemp and Owen (2017) argue that FPIC assumes a situation where citizens understand their rights and are willing and able to assert those rights, although in practice this may not be the case. The UN Global Compact Guide to UNDRIP urges communities to be proactive in learning and asserting their rights (Lehr 2014).

Workshops conducted by Equitable Origin (2018) revealed that while indigenous community representatives may be aware of their rights to FPIC, and what it means in theory, they frequently lack the capacity to participate meaningfully because they are not clear on what the FPIC process should constitute in practice, including the expectation that they co-lead the process. An FPIC process thus relies on the creation of space for two-way dialogue, carried out in good faith with equal participation from the parties (ibid; Buxton and Wilson 2013). Annandale et al (2018) argue that indigenous peoples affected by extractive projects seeking certification need to be better informed about the certification process and how they can engage in it, and local NGOs could be trained to support indigenous peoples' culturally-appropriate participation.

Tomlinson (2019) argues that an FPIC process can be successful when indigenous peoples have the opportunity to envisage and reach agreement amongst themselves on what development means for them going forward. By contrast, she argues, the focus on the issue of veto rights rather than the nuances of implementation, risks FPIC becoming more of a box-ticking exercise. Equitable Origin (2018) refers to the use of so-called 'community protocols' as a way for communities with already strong institutional capacity to agree their preferred FPIC decision-making processes in advance and providing potential project developers with clear guidance on how to engage (for more on community protocols, see Swiderska et al 2012; Doyle and Cariño 2013; and Wilson 2016). The ASI Standard includes the requirement that companies support potentially affected indigenous communities with the resources to develop such protocols, independently of the company (Equitable Origin 2018).

Annandale et al (2018) highlight the importance of capacity training for indigenous peoples to take part in auditing processes and local data-gathering, so as to help build a base of skilled citizen scientists among affected communities. Training could involve use of innovative and accessible technological applications for data collection, such as mobile phone devices and hand-held GPS devices (ibid; Lewis and Borreill 2013).

3.4.5.2. Capacity support for consultation and consent processes

The strength of indigenous governance institutions and processes and the level of capacity support that indigenous communities receive in the course of an FPIC process are key factors in the success of such a process (Tomlinson 2019; Mahanty and McDermot 2013). Cotula and Berger (2017) describe how legal empowerment initiatives in the context of land-use investments have helped local communities to secure their rights and have a greater say in decision making. Results from 14 case studies include policy change, fairer compensation payments, and the halting of contested projects (ibid).

The UN Global Compact guide to UNDRIP, among other guidance documents, calls for the private sector to support capacity-development of indigenous peoples as a way to build a more equitable relationship (Equitable Origin 2018; Lehr 2014). Tomlinson (2019) refers to the practice, in British Colombia, of companies negotiating Capacity Funding Agreements with First Nations in the early stages of engagement and due diligence, with support ranging from the funding of legal and technical support, organisation of community meetings, and funding the travel and administrative expenses of community representatives.

Where governance capacities are low in the host country, the human and financial resources required to implement an effective FPIC process are much greater and vary greatly depending on the context (Kemp and Owen 2017). However, a process funded by a mining company in a low-capacity jurisdiction may well raise questions over whether consent has been given freely (Kemp and Owen 2017; Collins et al, 2016; Hanna and

Vanclay 2013). Tomlinson (2019) similarly notes that while support is generally welcomed by communities, it is not without its controversies relating to perceived levels of influence and impartiality. She further observes that while NGOs and donor agencies could provide capacity support to inclusive community processes, they tend to focus more on support for opposition campaigns (ibid). Annandale et al (2018) argue that certification programmes should have dedicated budgets and staff to facilitate indigenous peoples' participation in programme governance and should consider cultural awareness training for dedicated staff.

A further question relates to the capacities of local indigenous communities to pursue opportunities to develop their own natural resource base, including by taking an active role in resource extraction and processing, through partnerships with investors and through indigenous-led enterprise development (IGES 2012; Cooke et al 2011). This is a central part of the self-determination agenda, along with making the decisions about whether or not to develop the resource base (HRC 2013). A rare example from the selected literature is that of the Gulkula Mining Company, a 100% indigenous owned and operated bauxite mining company located in Australia's Northern Territory, currently working towards ASI certification (Annandale et al 2018; Sturman et al 2018) (see Annex 4). Support for the Gulkula Regional Training Centre and other capacity support for the local Yolngu people were written in to the Rio Tinto Aluminium (RTA) Gove Traditional Owners Agreement, signed in 2011, which relates to RTA's Gove Bauxite Mine (Sturman et al 2018; Rio Tinto 2017) (see Annex 4).

3.4.5.3. Capacity building among operational staff

Capacity building is also essential among those responsible for implementing sustainability initiatives. Annandale et al (2018) emphasise the importance of certification programmes' management and operational staff understanding the rights-based approach of engagement with indigenous peoples, which requires skills, understanding and more generous time frames. Milne and Mahanty (2019, p.138) observe that project staff implementing FPIC in the context of REDD+ projects frequently had only a vague idea of what they were doing, with an expatriate member of staff commenting: 'we don't even know what REDD+ is, so how can communities consent to it?'.

In the context of forest certification in Russia, Dobrynin et al (2020) highlight the risk that the application of FPIC can lead to the transfer of forest-management responsibilities from state agencies to private timber companies and communities, without proper consideration of their preparedness and capacities to take part in forest governance. This can 'lead to situations where communities acquire new forest governance duties that they are unable to bear' (ibid, p.1). The authors call for effort to be focused on building multi-level (collaborative) governance approaches (ibid).

In the forest sector, Freeman et al (2008) recommend companies to hire staff with the appropriate skills to work with the local populations (including language skills, research skills, appropriate cultural knowledge and social skills) and to provide them with adequate resources and institutional support. Nagai (2019) points out the need to train certification auditors in human rights and indigenous rights and to involve indigenous experts in audit teams.

Hawkes (2019) offers advice to banks on how to build their internal expertise: building up human rights knowledge, creating human rights 'champions', embedding human rights in the leadership, exposing staff to people who have experienced human rights abuses, and organising training for staff led by indigenous peoples themselves. Hawkes (2019) also urges banks to incorporate measurable FPIC-related performance criteria into staff key performance indicators, recruitment, and bonus structures.

Kemp and Owen (2017, p.165) highlight the lack of preparedness of most companies to 'navigate the complexities of FPIC' and conclude that: 'Application of FPIC requires heightened capability in social performance; a domain of practice that remains marginalized within the mining sector, particularly on-site at projects and operations' (ibid, pp.163-4). Thus the commitments being made by resource industries – including through their membership of voluntary sustainability standards – are not necessarily matched by their internal capacities to deliver on those commitments (ibid; Filer et al 2020). Effective implementation of FPIC requires a deep knowledge base (about local context, indigenous rights and social theory), along with effective management systems and a supportive corporate culture, as well as the corporate vision to conduct the appropriate studies to determine social risks, all of which tend to be lacking in companies (Kemp and Owen 2017; Owen and Kemp 2014). Tomlinson (2019, p.890) concludes that '[f]or FPIC to be successfully implemented in the extractive industries, the overall standard of company social management will need to improve. And for this to happen, companies will need to invest more money and resources in this area'.

CAPACITY BUILDING IS ESSENTIAL AMONG THOSE RESPONSIBLE FOR IMPLEMENTING SUSTAINABILITY INITIATIVES. RESEARCH EMAPHASISED THE IMPORTANCE OF CERTIFICATION PROGRAMMES' MANAGEMENT AND OPERATIONAL STAFF UNDERSTANDING THE RIGHTS-BASED APPROACH OF ENGAGEMENT WITH INDIGENOUS PEOPLES, WHICH REQUIRES SKILLS, UNDERSTANDING AND MORE GENEROUS TIME FRAMES.

3.4.6. Learning and sharing

Voluntary sustainability standard systems can be a good source of innovation and learning in relation to participatory processes of decision-making and governance. Two key areas highlighted in the literature are processes of transparency and accountability, and the sharing of positive and negative or challenging experiences and in the form of case studies.

3.4.6.1. Enhancing transparency, reporting and communication between stakeholders

There is considerable support in the literature for transparency and mandatory reporting on issues related to FPIC implementation and indigenous and human rights protection more widely, ensuring that forms of disclosure enable local communities to gain access to the information they require on their rights and proposed developments (Hawkes 2019). Annandale et al (2018) argue that greater systematic transparency of companies' FPIC implementation would help with verification and enable lesson learning for companies and communities. This would require public disclosure of FPIC processes and outcomes (such as negotiated agreements), while respecting confidentiality (ibid).

Grievance or complaints mechanisms are seen not only as a way to address complaints and resolve issues, but as a means of continual learning and improving, both internally through tracking and learning from the grievance database, and externally through transparency about complaints and outcomes (Wilson and Blackmore 2013). However, the question of confidentiality, and the risks of sharing intimate data about communities' resource-use practices or the benefits negotiated in an FPIC process, is an issue much discussed by anthropologists, political scientists and indigenous rights activists, and something that needs to be addressed sensitively (Papillon and Rodon 2017: Wilson 2017b).

Potts et al (2018, p.26) argue that voluntary sustainability initiatives (VSIs) can influence wider participatory processes within society by setting examples through their own practices:

> [S]ome VSIs, through their engagement with local communities and requirements for multi-stakeholder cooperation, can influence future public policy by modeling more inclusive processes, informing citizens about their rights and broadening the range of interests represented in policy making. This can result in innovation and the emergence of more participatory rule-making processes.

Other literature refers to fostering synergies between standards, by promoting inter-operability, shared processes and mechanisms (Mori Junior 2017; Jagger et al 2012); building understanding among researchers and practitioners on issues such as land tenure security (Masuda et al 2020); and promoting better integration and constructive engagement across multiple layers of governance (Dobrynin et al 2020; Myers et al 2016; Kowler et al 2016). Quastel (2011) emphasises the importance of ensuring that relationships fostered within networks of responsibility in investment governance are able to develop and promote shared values. Hawkes (2019) notes the need to promote learning among and between development banks, export credit agencies and commercial banks, which might include sharing due diligence resources (e.g. a shared database of consultants with relevant indigenous rights and human rights expertise) and combining forces to engage collectively with NGOs and indigenous rights groups.

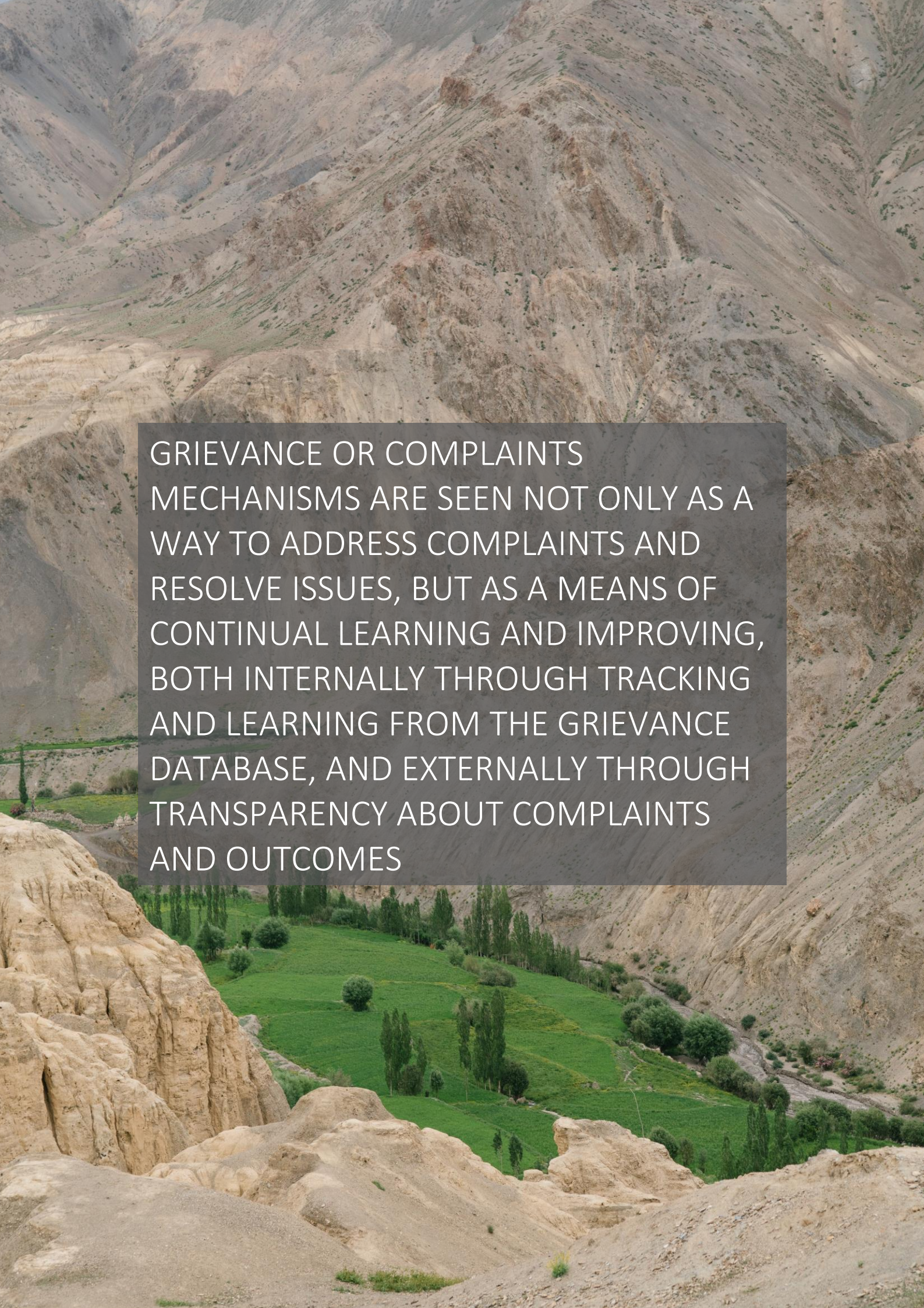
3.4.6.2. Learning through case studies

Several of the analysed publications recommend case studies as a way to improve understanding and highlight key areas of weakness and challenge. Tomlinson (2019, p.893) proposes the following:

> More case studies … need to be documented, highlighting the good and bad practices of FPIC processes, taking into consideration the nuance and complexities of socio-economic contexts as well as internal motivations and capabilities of companies. A growing body of practice needs to be built, involving cases where companies have implemented FPIC processes and reached an agreement with indigenous groups, cases where companies have implemented an FPIC process and not reached consent, and cases where companies have claimed to implement FPIC but where this claim is contested. The knowledge built through these case studies will help to hold companies and governments to account in cases where they have clearly not tried to reach consent with indigenous peoples affected by projects.

Nagai (2019) proposes empirical and comparative research on standard utilisation to reveal opportunities and challenges for indigenous rights protection. Hawkes (2019) recommends pilots and case studies looking at the steps taken by banks to screen clients, verify information provided by clients, understand systemic risks in a given context and ensure that clients' operations are legally compliant. A case study of the first two ASI certifications, both Rio Tinto projects, points towards where and when impact could be measured, at the site- level and the corporate level within member companies (Sturman et al 2018). Case studies of companies operating outside of voluntary sustainability initiatives are also useful in comparing different companies' engagement with indigenous peoples in the same geographical region, in the presence or absence of additional pressures to seek indigenous peoples' consent to resource-development activities (Wilson 2017a).

In a study carried out in the Arctic, researchers took ethical guidelines into the field to discuss and evaluate them together with local indigenous communities (Stammler et al 2017). A 2017 case study of the Conflict-Free Gold Standard offers evidence of improving practices, and Sturman et al (2018) suggest that companies be encouraged to share de-identified data from their audits to enter into a centralised database to support a more quantitative impact assessment of the standard over time. Hawkes (2019) proposes that case studies be assessed by indigenous organizations, human rights experts, and communities themselves, encouraging them to highlight weaknesses and suggest improvements. The research itself could also be carried out by indigenous researchers.



GRIEVANCE OR COMPLAINTS MECHANISMS ARE SEEN NOT ONLY AS A WAY TO ADDRESS COMPLAINTS AND RESOLVE ISSUES, BUT AS A MEANS OF CONTINUAL LEARNING AND IMPROVING, BOTH INTERNALLY THROUGH TRACKING AND LEARNING FROM THE GRIEVANCE DATABASE, AND EXTERNALLY THROUGH TRANSPARENCY ABOUT COMPLAINTS AND OUTCOMES

4. CONCLUSIONS AND RECOMMENDATIONS

This concluding section includes: 1) an outline of key gaps in the research base; 2) targeted recommendations for voluntary sustainability standard systems; and 3) a description of the enabling functions of voluntary sustainability initiatives, along with a set of identified effectiveness principles.

4.1. RESEARCH GAPS

There is a lack of field-based research on FPIC implementation in the context of sustainability initiatives in all resource sectors, but especially in the mining sector. This is despite the large amount of field-based research that has been published on mining, indigenous rights, FPIC and local community impacts by anthropologists, indigenous and local researchers, and NGOs. This speaks of a disconnect between mineral sustainability initiatives and research organisations, NGOs and local groups, who could carry out valuable localised research, although this is changing gradually.

Critical questions that are not yet covered by the literature and should be addressed through future research and/or performance monitoring by standards systems themselves include the following:

Measurement of FPIC implementation

Development of reliable metrics and reporting mechanisms. What evidence is needed to demonstrate adherence to FPIC criteria? What approaches can enable greater local involvement in data gathering? What indicators are most appropriate and measurable for use by investors, communities, governments and civil society organisations?

Assessment of FPIC agreement-making

Development of frameworks to assess the FPIC compatibility of community-company agreements. Analysis of various types of community-company agreement, how they have been negotiated and implemented, and ongoing implementation and monitoring. How to assess these against FPIC criteria? Indigenous-led discussion about whether community-company agreements could be considered as a proxy for FPIC and under what conditions.

FPIC case studies

Comparative case study research into FPIC implementation in diverse contexts relating to voluntary sustainability initiatives. Empirical and comparative research on FPIC application, agreement negotiation, costs and benefits, and key issues (e.g. land rights, cultural impact assessment, complaints and redress). Consider levels of awareness among local stakeholders about what FPIC means and their perspectives on effectiveness. Assessment of the risks of applying FPIC in the context of weak governance and capacities. Multi-level power analysis and mapping of critical relationships. Case studies of major critical events of non-compliance taking a whole system approach, examining factors that led to the failure. Comparative study of what is happening outside of voluntary sustainability initiatives, by non-member companies.

Inclusive debate on challenging questions

Multi-stakeholder dialogue to discuss and debate outstanding challenges, including:

- ***When should FPIC imply a veto and when should it not?*** According to official commentaries, a veto is not meant to apply in all FPIC processes, but not everyone agrees with this. In some cases the justification for a veto is clear (e.g. severe impacts and resettlement). Such decisions need to be made with greater confidence and legitimacy, with greater clarity provided in the guidance.
- ***When and how to apply the term FPIC?*** Who is eligible and who should represent local interests? Can FPIC be done 'retroactively'? Should it apply to non-indigenous people? Is the term being used too much? Should sustainability initiatives and companies find alternative terminology, or will the gains made by promoting FPIC widely be lost in modifying the terminology?
- ***How to 'go beyond agreement-making' in an FPIC process?*** What needs to be in place to 'maintain' FPIC, in addition to an effective complaints mechanism? When and how often should FPIC be repeated and for what reasons?
- ***Should voluntary initiatives evaluate FPIC at the strategic planning level?*** Should sustainability initiatives seek to influence indigenous peoples' involvement in decision-making prior to the allocation of rights to their member companies? Should voluntary initiatives take a stronger stance against resource industries operating in jurisdictions that do not protect indigenous rights?
- ***The compatibility of FPIC with other sustainability agendas***, including the UN Sustainable Development Goals and the climate and biodiversity agendas.

4.2. RECOMMENDATIONS FOR VOLUNTARY SUSTAINABILITY STANDARD SYSTEMS

Key recommendations for sustainability standard systems include the following:

Inclusive governance

Include indigenous peoples in the governance of voluntary standard systems, for instance in an indigenous peoples' advisory forum, which is involved in the design and review of standards and other aspects of implementation, including the complaints mechanism.

Targeted FPIC due diligence

Require companies to have a due diligence plan for assessing the FPIC governance gap and to proactively engage with governments on indigenous rights, land rights, customary rights, consultation and FPIC.

Effective partnerships

- Review of multi-stakeholder partnerships: Assess current partnerships with governments, NGOs, indigenous and local communities, researchers, donors and inter-governmental organisations and enhance collaboration for more effective support of indigenous rights and FPIC.
- Support and promotion of research partnerships: Promote and support field-based research on FPIC implementation in the context of mineral sustainability initiatives, with involvement of indigenous and local researchers, along with research councils and donors.

FPIC-enabling standards

In collaboration with indigenous peoples and other rights-holders and stakeholders affected by the standard (where appropriate involving host governments and other standards initiatives), review and update the standard system to support FPIC implementation:

- Relevant and realistic vision: Review overall mission and purpose of the standard to ensure that expectations are realistic and goals are appropriate in relation to FPIC and the protection of indigenous and local communities affected by resource development.
- Mandatory FPIC requirement: Ensure that FPIC is not an optional requirement for meeting a minimum threshold and that there are no conflicts with environmental requirements.

- **Context-specific FPIC guidance:** Produce FPIC guidance for companies on developing a due diligence plan for assessing the FPIC governance gap; negotiating community-company agreements in line with FPIC criteria; and further good practice in FPIC implementation. Adapt guidance for countries and regions where the standard is applied.
- **Effective complaints mechanism:** Ensure complaints mechanisms can capture and address complaints relating to indigenous rights and FPIC; include a protective whistle-blowing function; ensure the mechanism is widely understood; gather data on its operation and report regularly; and use it for continual learning and improvement.

Capacity building for FPIC implementation and evaluation

- **Knowledge and awareness:** Ensure that people contributing at all levels to the application of the sustainability standard have the required understanding of indigenous rights and culture, resource dependency and FPIC.
- **Skills:** Provide context-specific FPIC guidance and training for auditors and others involved in implementing, monitoring and reporting on FPIC processes
- **Evaluation frameworks:** Provide consistent, reliable frameworks, adaptable to local contexts, to support the effective implementation of FPIC, its measurement and reporting. These will include appropriate indicators of effectiveness.

Participatory updating of standards

In collaboration with indigenous peoples and other rights-holders and stakeholders affected by the standard, consider introducing additional requirements:

- **High-risk countries:** Consider applying an 'enhanced risk' label to countries which do not adequately protect the rights of indigenous and local communities.
- **FPIC agreements:** Consider using negotiated community-company agreements as a 'proxy' indicator for FPIC (in accordance with strict FPIC criteria).
- **Community protocols:** Consider requiring companies to support communities to develop community protocols as a way to establish their own rules of engagement with external developers, in advance of early project activities.
- **Indigenous enterprise support:** Consider requiring companies to support indigenous-led enterprises and capacity building in the sector covered by the standard (in addition to support for traditional local enterprises not related to the sector).

4.3. A FRAMEWORK TO SUPPORT THINKING BY VOLUNTARY STANDARDS ON FPIC

In an effort to support further thinking by voluntary standards on the enabling role that they can play in the adoption and implementation of FPIC, the following framework have been developed as part of this research project. First, the enabling role of voluntary sustainability standards can be seen broadly as a set of five key functions, outlined in Table A. A set of 'effectiveness principles' are also essential in order to deliver these functions and are suggested in Table B. Both these tools can be used as the basis for developing an FPIC action plan, using the matrix presented in Annex 5.

Table A: Functions of the role that sustainability standards can play to enable FPIC adoption and implementation

Functions of the enabling role	Key activities for standard systems to deliver enabling functions
Enhancing legal compliance	• Supporting member companies to comply with legislation, where it exists, through expert guidance and knowledge sharing • Encouraging practices that go beyond basic legal requirements (which are often deliberately vague) to enhance social and environmental outcomes
Supporting governance risk management	• Highlighting 'governance gaps' and drawing attention to the risks of operating in regions where such gaps exist • Developing robust governance risk assessment approaches (with high thresholds) • Applying strict safeguards to mitigate the risks of operating in regions with weak governance • Providing standards and guidance that can be adopted by governments
Building awareness, knowledge and capacities	• Raising awareness about, and raising the status of, indigenous rights and FPIC • Creating forums for dialogue; opening up political space for affected communities to engage constructively with companies, investors, NGOs and government • Sharing case studies on good practice, effective FPIC approaches, challenges and mistakes
Ensuring fairness and accountability	• Providing monitoring and evaluation frameworks to ensure adherence to sustainability requirements, transparency of activities and effective reporting on outcomes • Ensuring that audit procedures and complaints mechanisms are able to guarantee that failure to meet FPIC requirements can be addressed swiftly and effectively
Stimulating wider sectoral and governance reform	• Creating norms and building acceptance of those norms; setting an example by enabling and promoting good practice • Building partnerships and dialogue with industry associations; engaging and aligning agendas with inter-governmental initiatives

Table B: Effectiveness principles for planning and assessing the work of standard systems relating to FPIC

Effectiveness principles	Guidance for application
Context-appropriate	Standards and requirements need to be relevant and adaptable to diverse and challenging local contexts; all participants in voluntary standard systems need to comprehensively understand the contextual factors that may influence the effective implementation of FPIC.
Rights-holder inclusive	Indigenous peoples and other rights holders should be involved in all aspects of voluntary standard systems – including standard setting, governance and grievance resolution – to balance power relations and ensure that requirements and approaches are rights-compatible, realistic, measurable, and adaptable to local contexts.
Measurable	Reliable approaches are needed to verify compliance, measure impacts and effectiveness of FPIC application. These need to be adaptable to local contexts, yet sufficiently clear and comparable across different contexts, so as to provide an adequate understanding of performance for investors, governments and civil society observers.
Transparent	Transparency about the purpose and requirements of a standard – its approaches and impacts, including complaints and their resolution – needs to be a core principle of all activities in order to build understanding and trust, enhance communication and ensure accountability.
Collaborative	Voluntary action alone cannot enable adequate application of FPIC in diverse contexts. Collaboration and sharing is essential – within voluntary standard systems, between initiatives and between stakeholder groups, including governments and rights-holders.

END NOTES

[1] See https://www.evidensia.eco/

[2] See https://www.business-humanrights.org/en/latest-news/not-just-due-diligence-solidaridad-accelerates-debate-on-need-for-sustainability-regulations/

[3] See https://www.msi-integrity.org/not-fit-for-purpose/

[4] See https://www.riotinto.com/en/news/inquiry-into-juukan-gorge and https://www.smh.com.au/please-explain/please-explain-podcast-why-did-rio-tinto-destroy-sacred-juukan-gorge-caves-20200909-p55txq.html

[5] See related blog post here: https://www.evidensia.eco/resources/485/seeking-consent-how-the-fpic-clause-is-treated-by-sustainability-approaches-across-sectors/

[6] The Akwé: Kon Guidelines for environmental, social and cultural impact assessment include a 'prior informed consent' consideration and are recommended by the Secretariat of the Convention on Biological Diversity for adoption by all CBD signatories. See https://www.cbd.int/traditional/guidelines.shtml

[7] See Professor James Anaya's report on extractive industries and indigenous rights, produced in his former role as United Nations Special Rapporteur on Indigenous Peoples (HRC 2013).

[8] These draw on the ISEAL Credibility Principles: https://www.isealalliance.org/credible-sustainability-standards/iseal-credibility-principles

[9] See https://www.business-humanrights.org/en/latest-news/not-just-due-diligence-solidaridad-accelerates-debate-on-need-for-sustainability-regulations/

[10] See https://www.msi-integrity.org/not-fit-for-purpose/

[11] See https://www.riotinto.com/en/news/inquiry-into-juukan-gorge and https://www.smh.com.au/please-explain/please-explain-podcast-why-did-rio-tinto-destroy-sacred-juukan-gorge-caves-20200909-p55txq.html

[12] See https://www.evidensia.eco/

[13] There are many research papers on indigenous rights and mining, or FPIC and mining, but not necessarily focused on mining sustainability initiatives (see the **Additional references** for some of these).

[14] For more details on this collaboration, see https://www.isealalliance.org/innovations-standards/innovations-projects/safeguarding-right-indigenous-peoples-fpic

[15] For their review of sustainability initiatives in the extractives sector, Potts et al (2018, p.16) 'began with a list of no fewer than 158 potentially relevant mining standards or initiatives'.

[16] Evidensia's 11 point typology can be found here: https://www.evidensia.eco/how-to-use-evidensia/exploring-content/ Four of the categories are relevant to this analysis. The others are: sustainability performance and progress reporting; public or quasi-public sustainability standards; sustainable sourcing codes; bans, moratoria and multi-party agreements (for specific commodities/areas); jurisdictional approaches; supplementary voluntary sustainability standard tools; and supply chain investment programmes.

[17] National legal provisions for FPIC are not straightforward, for instance in countries which have ratified ILO C169 but not explicitly incorporated FPIC into national legislation. For a discussion on FPIC and indigenous rights in Brazil, for instance, see Gebara et al (2014). See also Johnstone (2020) on FPIC in Greenland.

[18] See https://www.isealalliance.org/innovations-standards/innovations-projects/safeguarding-right-indigenous-peoples-fpic

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These are the original references gathered through the systematic literature search (see Annex 6 for the search approach and methodology). All of these publications have been reviewed, although not all of them have been referenced in the report, largely due to lack of space and a need to prioritise. Two chapters of one publication have been separately referenced in this list, bringing the total to 86 references. Further references used in the report are listed under **Additional references**. All the papers listed below can be accessed from the Evidensia platform by using the Online Library and searching for FPIC or clicking this link.

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ANNEX 1: OVERVIEW OF THE LITERATURE

This section outlines the general characteristics of the literature analysed for this report. It considers the methods used by the authors of the selected publications and the types of questions that are asked, as a way to gain insights into what evidence is available, how it has been gathered, and the research gaps. The section also looks at who is publishing and funding the literature, to assess the balance of academic and grey literature on the topic and the level of involvement and investment of different interest groups. This section is based on analysis of the 84 publications that were selected as part of the systematic selection process, despite the fact that further relevant publications were sourced in the course of the review (see Additional references).

Our study found that the academic and grey literature is generally sparse on studies that focus specifically on FPIC and mining sustainability initiatives, while there are significantly more studies relating to FPIC and sustainability initiatives in the forestry and agriculture sectors (notably FSC, RSPO, RSB and REDD+). A total of just 28 papers out of the 84 reviewed (33%) covered the mining sector (including mixed-sector publications that covered mining).

However, overall the trend appears to be towards greater analysis of FPIC and indigenous rights in the context of mining-related sustainability initiatives. Our literature review revealed a marked increase in mining-related studies on this topic over the period 2007-2020, with 13 out of the most recent 25 papers (dated 2017-2020) being mining-related (52%) compared to 25% (15 out of 60) for the period between 2007 and 2016. A comparable literature review covering the period 1992-2017 indicated a similar trend (Annandale et al 2018).

1. METHODS USED IN THE ANALYSED STUDIES

The 84 selected publications were analysed for the type of primary method employed in the analysis (see Table A below). The categories included: 1) field work/action research; 2) interviews, surveys and/or workshops (listed as 'social methods' in the table); 3) literature review only; 4) a review of relevant documents; and 5) a more free-flowing contextual analysis.[1]

Table A: Types of method used in the studies

Sector	Field work	Social methods	Literature review	Document review	Context analysis	Total
Mining	3	6	5	9	6	29
Other	19	8	4	19	5	55
Both	22	14	9	28	11	84

Not surprisingly, a significant proportion of the selected papers and reports employed the document review method, which focused primarily on the texts of standards and guidance. What is most striking is the difference between the sectors in the relative lack of field work for the mining-related publications, compared to those covering other sectors. That is not to say that there is a lack of field research relating to the mining sector and indigenous rights – far from it. What it does indicate, however, is a lack of field-based research into mining sustainability initiatives with a focus on the implementation of FPIC, and a certain detachment between mining sustainability initiatives and researchers and NGOs who might carry out this kind of field work.

[1] Most papers incorporated a literature review, but were categorized as literature review when this was the only method used. Field work was categorized as the primary method in all cases where field work was employed. Several papers used a combination of social methods and document review, so these were categorised as 50/50 and the results were divided between those two categories.

By contrast, non-mining-related sustainability initiatives appear to be more closely linked to community-level research, monitoring and feedback, with a total of 19 publications that involved field work. That said, mining initiatives that are seeking to involve grassroots organisations and employ field research (notably the Aluminium Stewardship Initiative) are still relatively new, so there is less published material as yet.

2. FOCUS ON FPIC IN THE RESEARCH QUESTIONS

The 84 selected publications were analysed to assess how many of them focused primarily on FPIC in the research question, how many were generally focused on indigenous rights or the involvement of indigenous peoples in standards initiatives, and how many had a more general focus on sustainability initiatives or sustainability more widely. The latter two categories were summarised as 'other' for this purpose, as the primary goal was to elicit the level of focus on FPIC. The categories represented in Table B are thus: 1) direct focus on FPIC; 2) wider focus on indigenous rights and indigenous peoples' participation in sustainability initiatives; and 3) other.

Table B: Types of question posed by the studies

Sector	FPIC	Indigenous rights	Other	Total
Mining	14	5	10	29
Other	9	14	32	55
Total	23	19	42	84

It is interesting to note that overall the mining-related (and mixed-sector) publications had a more focused approach to FPIC. This perhaps relates to the fact that many of the non-mining related publications were very large studies of sustainability initiatives which had a wider overall scope.

In our literature set, there was no noticeable increase in the focus on FPIC between 2007 and 2020. However, the comparable literature review conducted by Annandale et al (2018) did observe an increase in the coverage of FPIC in their selected literature over the period 1992-2017.

3. TYPE OF PUBLICATION

The 84 selected publications were further categorised according to the type of document: 1) review of literature or a situation; 2) field-based case studies; 3) evaluation of an approach or initiative(s); 4) guidance document; 5) theoretical or conceptual analysis (see Table C).

Table C: Types of document

Sector	Review	Case study	Evaluation	Guidance	Theoretical	Total
Mining	9	2	10	3	5	29
Other	12	3	31	6	3	55
Total	21	5	41	9	8	84

4. WHO FUNDED AND PUBLISHED THE RESEARCH?

The selected publications were also categorised according to the publisher and the source of funding. Publisher categories were: 1) academic (journals); 2) NGO (including think tanks); 3) sustainability initiative; 4) consultancy; and 5) intergovernmental organisation (Table D). The funder categories were: 1) academic (institution or research council); 2) donor (or government ministry); 3) NGO (including think tanks); 4) sustainability initiative; and 5) author (Table E).

Table D: Publishers of the studies

Sector	Academic	NGO	SI	Consultancy	Inter-gov	Total
Mining	20	7	1	1	0	29
Other	28	25	1	0	1	55
Total	48	32	2	1	1	84

The main two types of publisher are academic publishers and NGOs (including think tanks), with academic publishers leading by a comfortable margin (48 compared to 32). The NGOs and think tanks appearing most frequently as publishers of the selected literature are: CIFOR (15 publications, all in non-mining sectors); IIED (eight publications in mining and non-mining sectors); and the Institute for Global Environmental Strategies (three publications in non-mining sectors). The Forest Peoples Programme published one of the selected publications, but was also closely involved in several more of them, either by funding them or being part of a research team.

The general impression is that a core group of NGOs has been very committed to analysing and influencing sustainability initiatives. To date, this has mostly been in the non-mining sectors (primarily FSC, RSPO, RSB, REDD+). However, with the emergence of ASI, there is a move towards more collaboration and field-based research relating to sustainability initiatives in the mining sector, and some NGOs and researchers are now sharing their experience from forestry and agriculture with the mining sector. Equitable Origin has also been closely involved in driving research on FPIC, along with a range of indigenous and non-indigenous experts, researchers and NGOs, notably the Coordinator of Indigenous Organizations of the Amazon River Basin (COICA).

Table E: Funders of the studies

Sector	Academic	Donor	NGO	SI	Author	Total
Mining	15	7	4	2	1	29
Other	22	20	12	1	0	55
Total	37	27	16	3	1	84

The main sources of funding were academic (37) and donors (27), followed by NGOs (16). Very few research papers were funded by sustainability initiatives themselves. None of the selected publications were funded by industry, but that is not to say that industry does not support or produce publications in this general area (e.g. ICMM 2015; Rio Tinto 2017).

ANNEX 2: FPIC AND INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Instrument	FPIC
International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976) and International Covenant on Civil and Political Rights (ICCPR) (1976)	**Article 1** of both Covenants states: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. **Article 2** of both Covenants states: All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
Convention on Biological Diversity (CBD) (1992) Ratified by 198 parties	**Article 10** calls on governments to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements' Signatory governments have been encouraged to incorporate The **Akwé: Kon Guidelines (2004)** for environmental, social and cultural impact assessment in national legislation; these include a requirement for prior informed consent.
ILO Convention 169 on Indigenous and Tribal Peoples (1989) Ratified by 23 parties	**Article 6(2)**: 'The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.' **Article 16(1-2)**: '1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.'
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)	**Article 10**: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' **Article 19**: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.' **Article 29**: 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.' **Article 32(2)**: 'States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.'
UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011)	**Principle 12**: 'The responsibility of business enterprises to respect human rights refers to internationally recognised human rights ...' **Commentary to Principle 12**: 'Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. ...'

ANNEX 3: TIMELINE OF FPIC IN INTERNATIONAL LAW AND VOLUNTARY STANDARDS

Timeline	International law	Voluntary standards
2008		• European Bank for Reconstruction and Development revises its social performance standards to include FPIC • ICMM produces position statement on mining and indigenous peoples, without a commitment to FPIC
2011	• UN Guiding Principles on Business and Human Rights	• OECD Guidelines updated to incorporate the UNGPs
2012		• International Finance Corporation (IFC) revises its social performance standards to include FPIC • FSC produces comprehensive FPIC policy • Launch of Equitable Origin Standard for Responsible Energy Development, incorporating FPIC requirement • Launch of Aluminium Stewardship Initiative, with FPIC requirements in its Performance Standard
2013	• UN-endorsed interpretation of the UNGPs through the lens of indigenous rights and extractive industries produced by Special Rapporteur James Anaya	• ICMM revises its Indigenous Peoples and Mining Position Statement to include requirement for companies to 'work towards FPIC' • Equator Principles updated to incorporate the UN Guiding Principles • Responsible Jewellery Council launches its Code of Practices including requirement for FPIC
2014	• UN Global Compact publishes a report on indigenous peoples and the role of FPIC	
		• ICMM produces Guidance on FPIC in their Good Practice Guide
2016	• OECD Guidelines produce due diligence guidance on meaningful stakeholder engagement in the extractives sector, with an Annex relating to indigenous peoples that advocates for FPIC	• World Bank incorporates the term 'consent' into its new Environmental and Social Framework
2018		• Initiative for Responsible Mining Assurance (IRMA) Standard v1.0 published, incorporating FPIC
2020		• Global Reporting Initiative carries out a review of its human rights-related standards to align with UN Guiding Principles and other international instruments

Sources: Tomlinson 2019; Wilson 2017b; MacInnes et al 2017; Hanna and Vanclay 2013

ANNEX 4: CASE STUDIES

These case studies of FPIC implementation demonstrate positive experience and innovative use of methods, while also highlighting key challenges and in some cases illustrating poor practice and its consequences.

Case study 1: Rio Tinto Aluminium and the Gove Bauxite Mine

Sources: Sturman et al 2018, Rio Tinto 2017

In April 2018, Rio Tinto Aluminium (RTA)'s Gove Bauxite Mine became one of the first two sites to be certified to the Aluminium Stewardship Initiative (ASI) standard. The mine is located on the Gove Peninsula in North East Arnhem Land in the Northern Territory of Australia, where FPIC is required by regional law. Operations had already begun in 1970 led by Nabalco and then Alcan, which Rio Tinto acquired in 2007. The mine is located on Aboriginal land and since exploration began in the 1950s, local protests have been prominent in Australian Aboriginal land rights struggles. An historic bark petition presented to the Australian Parliament in 1963 objected to the lack of consultation over the land acquisition and opposed agreement-making with any company threatening the livelihoods and independence of the Yirrkala people.

When Rio Tinto acquired the rights in 2007, the leases were up for renewal with the Northern Territory Government, and the company entered into a negotiation process with the Gumatj and Rirratjingu clans of the Yolngu people and with the Northern Land Council. The RTA Gove Traditional Owners Agreement was signed in June 2011 and documents how the company and the Yolngu people have acknowledged and reconciled the past and are working together for a shared future. Among the commitments was for Rio Tinto to assist Yolngu-owned companies to acquire mining leases, to provide training, employment and enterprise support schemes. The company has provided financial support to the Garma Knowledge Centre and the Gulkula training centre, and an independent business trainer to support the Gulkula mine lease application. The Gulkula Mining Company, a 100% indigenous-owned mining enterprise, owned by the Gumatj Corporation, also joined the ASI in its own right in February 2018.

Case study 2: Surui Forest Carbon Project (SFCP), Brazil

Source: Gebara et al 2014

The Surui Forest Carbon Project (SFCP) was the first to be approved on indigenous lands in Brazil based on an FPIC process. As a case study it has been important in building trust and acceptance of REDD+ within indigenous groups in Brazil. The consultation strategy accommodated the range of political representation of the Surui tribe, including traditional chiefs, village leaders and leaders of tribal associations. In 2009, the leaders came together in a general assembly to discuss the tribe's economic and environmental options, including the prospect of commercializing carbon credits as a means to finance its local development plan, with 95% agreeing to pursue this option, suggesting that a well-structured, inclusive process of informed consultation can lead to a high level of consent and avoid conflicts.

The consultation process was based on anthropological and cultural approaches and was carried out through fieldwork, cultural observation, group meetings and semi-structured interviews. A technical paper was prepared about the FPIC process and how people would build knowledge about REDD+ and carbon credits. The culturally sensitive methodology is considered to reinforce the self-determination of indigenous peoples by enabling them to better evaluate such initiatives based on their own perspective of how local development should be pursued. Participation is also considered to enable a more equitable benefit-sharing process, helping people to identify and adjust to emerging problems and to engage in advocacy and policy dialogue with local and national policy makers. A fund was designed to guarantee long-term equitable distribution of benefits from the carbon project, and has a deliberative body composed exclusively of representatives of the Surui people, including a chamber for conflict resolution made up of elders.

Case study 3: Maintaining FPIC in a forestry project in the Congo

Source: Lewis and Borreill 2013

Since 2004 the forestry company Congolaise Industrielle des Bois (CIB) has been committed to achieving Forest Stewardship Council (FSC) certification for its forest concessions in the northern Republic of Congo, securing FSC certification for all its concessions by October 2010. CIB seeks to clearly define and acknowledge local land tenure and use rights, and to ensure that their activities do not threaten or diminish these rights. It seeks to obtain the FPIC of indigenous peoples for proposed forest management activities and it involves local communities in land and resource-related decision-making. CIB's approach has evolved over the past decades from informal decisions taken by the company director as issues arose, to increasingly more systematic procedures since 2002 as the company has moved towards FSC certification.

Forums are set up to enable meetings and discussions between all civil society intermediaries: trade unions, employees' representatives, village committees, traditional committees of elders of the semi-nomadic populations, associations and local NGOs, formal or informal, the Ministry of Forest Economy, and other local or national administrations, depending on the nature of the debates. The results of discussions are logged in a report drafted by CIB's social team and ratified by CIB's management. The documents are then read out to the groups concerned in the relevant language to ensure that non-literate or non-francophone people have access to the information. With people's agreement, meetings are also filmed to prove that participants gave or refused their consent in a free and informed manner. A ritual celebration is then held with food and wine supplied by CIB as a way to respect local custom, and a way for the community to demonstrate their agreement. The CIB complaints mechanism serves as a tool to support the process of maintaining the consent of local communities, by addressing issues and concerns as they arise, with the aim of resolving or avoiding conflict.

While CIB's processes are effective and have been successful, the authors observe a situation where it was understood that CIB did not provide people with full information about their right to say no to logging activities on their land, which suggests that local people could not have given their 'free and informed consent' to logging activities. However, the FSC auditors argued that the government claims it is their land and that the government has given CIB the rights to log; therefore this is considered to be a conflict at the level of state law and enforcement and not at the level of CIB management. Therefore it was not reported as a major conflict, and CIB was able to secure its FSC certification.

Case study 4: FPIC in a Cambodian REDD+ project: competing priorities

Source: Milne and Mahanty 2019

A REDD+ project was implemented in the Seima Wildlife Sanctuary in Cambodia. To tackle local social complexity, project managers implemented FPIC through a series of village-level agreements. Nominated or elected village leaders were to sign an agreement with the Forestry Administration consenting to REDD+ on behalf of all households in their village, with a total of 20 agreements for the project area. The challenge was how village representatives would be legitimately chosen. In villages where indigenous communal land-titling was underway, the existing local land-titling committees were selected as FPIC signatories; otherwise, the government-appointed village chiefs were asked to be FPIC signatories, with the blessing of local authorities.

The FPIC process had three phases: (1) local awareness-raising about REDD+, and a REDD+ social impact assessment in 2010; (2) drafting of the FPIC agreement text, which included seeking community feedback and independent legal advice in 2011; and (3) finalisation of the agreement text in 2012, with the signing of agreements by the Forestry Administration and village representatives in early 2013. There was exhaustive consultation with villagers and independent lawyers, but the final agreement text was finalised privately by a small group of key actors. This included the decision that ownership of the carbon would stay with the government even if indigenous people secured title to the forested lands in future. The signing bypassed community-level representative committees; instead, thumb-prints were taken from every household, without discussing the agreement, all of which was followed by a public ritual signing ceremony.

Problems with FPIC revolved around land conflicts and the villagers' confusion between the REDD+ project and ongoing land-tenure interventions. While local village leaders appeared knowledgeable about the project, this was not evident at the broader community level. The purpose of FPIC seemed distant and vague to the project staff themselves, in light of ongoing uncertainties around REDD+ policy internationally and in Cambodia.

The validation and verification audit involved the auditor preparing assessment reports on project compliance with the REDD+ standards, based on a review of project documents and a four-day site visit. A key issue was the fact that the auditor felt the presence of areas under potential or existing indigenous title presented a threat to project 'permanence' – i.e. a risk to the carbon credits – since communities could seek to use land in other ways. Thus, while the project complied with REDD+ from the perspective of carbon production, the exclusion of indigenous titled lands in the scheme was ultimately inconsistent with REDD+'s promise to deliver co-benefits and respect indigenous rights.

Case study 5: Yamal LNG, Russia: activities making up an FPIC process

Source: Wilson 2017b

In July 2014, the Yamal Liquefied Natural Gas (LNG) Project, involving Novatek, Total and the China National Petroleum Corporation, and financed by Equator Principles Financial Institutions, obtained the FPIC of affected communities for project implementation and approval of the indigenous peoples' development plan. This was signed by authorised representatives of the nomadic population directly and indirectly affected by the project. The process included public hearings as part of the formal Russian legal process; working sessions with civil society representatives, indigenous communities and reindeer-herding enterprises; informal engagement with indigenous representatives; visits to herders' camps; a programme of engagement and support for the indigenous population; and public hearings relating to a rural settlement development programme in the village of Seyakha (the closest village to project activities, 90km from the licence area and 120km from the LNG plant).

From 2010, Yamal LNG began to inform people about project plans and to consult with the authorities and NGOs. Research into traditional land use and the historical, archaeological and ethno-cultural context was carried out from 2012. An Advisory Board was established, with representatives of Yamal LNG, regional and municipal authorities, NGOs and indigenous organisations. Three rounds of consultation were held specifically on project activities and the indigenous peoples' development plan in order to obtain 'FPIC declarations':

- March 2014: nomadic families were informed about the status of the LNG project, the intention to develop an indigenous peoples' development plan, creation of the consultative council and the work of public liaison offices. In total, 593 reindeer herders participated in the consultations.
- April 2014: indigenous people's opinions were elicited about the support measures being provided by the project and any related issues. Twenty-four authorised representatives were elected by 160 nomadic families to continue a dialogue with Yamal LNG.
- May 2014: The draft indigenous peoples' development plan was presented to the 24 authorised indigenous representatives. All comments and proposals were included in the final version of the plan. A process of FPIC was initiated for the indigenous communities and their authorised representatives.

According to the project's stakeholder engagement plan, consent is achieved through a series of activities that constitute evidence of the agreement. These included: a register of comments from public hearings; minutes of meetings reflecting the voting process; field notes, video/audio recordings; questionnaires; and signed agreements on planned activities. During the second meeting of the Advisory Board held in June 2014, the decision was made to approve the indigenous peoples' development plan (now available on the project website) and commence the signing of a series of FPIC declarations. By July 2014, all the FPIC declarations and the development plan had been signed by the 24 authorised representatives. Following the signing of the declarations, Yamal LNG continues to engage regularly with local stakeholders by visiting indigenous communities, welcoming local people at the site area, providing emergency assistance to nomads and carrying out Advisory Board meetings. As of February 2017, the Advisory Board had gathered 11 times, with written minutes of each of these meetings.

ANNEX 5: PLANNING AND EVALUATION MATRIX

This matrix can be used to plan and evaluate actions towards embedding FPIC and indigenous rights into a voluntary sustainability initiative.

Enabling functions	Effectiveness principles				
	Context-appropriate	Rights-holder inclusive	Transparent	Measurable	Collaborative
Enhancing legal compliance					
Supporting governance risk management					
Ensuring fairness & accountability					
Building awareness and knowledge					
Stimulating wider sectoral and governance reform					

ANNEX 6: FULL METHODOLOGY FOR SYSTEMATIC EVIDENCE MAPPING

Conducting a targeted search involves three main steps. The first is to determine the purpose of the search and build the search strings based on the population, intervention, comparison, and outcomes of interest (PICOs). The second step consists of conducting the search using online bibliographic databases (in this case, CAB Direct and Web of Science), and the third step involves downloading and organizing the results of the search.

PART 1: LITERATURE SEARCH

1. PICOs and search strings for systematic search

Two versions of the FPIC search were conducted. The first search was intended to find any papers that mentioned free, prior, and informed consent, while the purpose of the second search was to find only papers that mentioned FPIC in the context of a voluntary sustainability standard (VSS) or related supply chain tool.

For the first search, the outcome was specified as "FPIC," "free prior informed consent" or "free prior and informed consent" (see Appendix; search 1, term #1) but the population, intervention, and comparison components of the PICOs were not specified. In the second search, the outcome was specified as in the first search (see Appendix; search 2, term #6) and the intervention was specified as any VSS or related supply chain tool (see Appendix; search 2, terms #1-4).

2. Databases and searching

Searches were conducted using two different online bibliographic databases: CAB Direct[2] and Web of Science.[3] On both platforms, the advanced search function was used, which allows users to combine different search terms into a single targeted search string using "AND", "OR", and "NEAR" operators (see Appendix for the search strings that were used).

3. Additional searches on Sciencedirect, JSTOR and Google Scholar

Additional searches were conducted for the second search type (FPIC and VSS) on JSTOR, ScienceDirect and Google Scholar. This was done to pick up any insights or results relevant to FPIC that would not have come up in the Abstract and Title-only searches on CABI and Web of Science as well as to capture grey literature. The same search strings were used on these databases with the main difference being that these ran full-text searches where the CABI and Web of Science run only title, abstract and key word searches.

The team also searched the websites of 20 leading mining sector sustainability standards for any documents or reports that reference FPIC.

4. Full text review

A total of 227 credible results came through these searches which were then subjected to full text review. The objective of the full text review was to confirm that the report / article / paper had content that was directly relevant to the search question of understanding the effectiveness and implementation of the FPIC clause amongst sustainability standards and other market-based sustainability tools and approaches. A total of 84 papers were selected for the research at the end of full text review.

See Part 3 for search strings

[2] https://www.cabdirect.org/cabdirect
[3] www.webofknowledge.com

PART 2: ANALYSIS

The 84 selected publications were reviewed in depth. Most papers were read in full, while selected reading was applied to reports over 80 pages long with a multiple topic focus. Extensive notes were taken, which were organised and prioritised in word documents and could subsequently be searched for key words. Key data were also extracted into a searchable Microsoft Excel spreadsheet, including: author(s), title, publication year, publisher, types of method used in the data gathering, types of question posed/purpose of report, type of publication, sector focus and type of voluntary standard system(s) covered (see Section 2.3).

The analytical framework was based on the following research questions:

- What questions about the effectiveness and impact of standards (or other market based mechanisms) on securing FPIC has the literature addressed?
- What are the key findings from the analysed literature?
    - What do we know about the effectiveness and impacts of sustainability standards and other leading supply-chain based sustainability approaches in operationalising and realising the principle of FPIC?
    - What can we learn about the extent to which the adoption of the FPIC principle protects the rights and interests of indigenous peoples and other marginalised groups?
    - What are some of the key challenges and barriers faced in more effective implementation of FPIC?
- What practical lessons can be drawn for standards working in the mining and extractive sector on improving their work on FPIC and deepening social impacts of their schemes?
- What are the most critical questions that are not yet covered by the literature and should be addressed through future research and/or performance monitoring by standards systems themselves?

Literature gaps and how they have been addressed

A number of important papers were not included in the final cut of papers. There were several reasons for this. In some cases, for instance issues that have been identified as important in the course of the review were not included in the search criteria (e.g. community-company agreements). In several cases, the papers or chapters were published after the cut-off date for the literature search (January 2020).

It is worth noting that a very large number of papers were analysed for this study, over a relatively short period of time. All of these papers were relevant for one reason or another, and several of them also conducted a literature review of relevant literature, some of which was not included in our selection (e.g. Annandale 2018). It would therefore have been difficult to include much more than the current set of literature, especially given the limited time frame. However, in some cases, additional literature has been referred to in this report, if it contains material, such as case studies, that is not available in the selected papers. These publications are listed in the 'Additional references'.

PART 3: SEARCH STRINGS

Web of Science and CAB Direct searches

17 October 2019

1) Search FPIC only

#1

TS=("FPIC" OR "free prior informed consent" OR "free prior and informed consent")

2) Search FPIC and all tools

1

TS=("certification" OR "quality standards" OR "quality label?ing" OR "sustainability standards")

2

TS=((private OR company OR companies OR “supply chain*” OR corpor* OR food OR commodity*) AND (collective OR group OR industry OR aspiration OR commitment OR pledge OR declarati* OR “sourcing standard*” OR code* OR “code* of conduct” OR policy OR ban OR moratori* OR “market exclusion” OR agreement OR sanction*))

3

TS=((fair* OR ethic* OR alternative OR sustainab* OR responsib* OR specialty OR eco OR ecologic OR ecological) NEAR/3 (certifi* OR standard* OR label* OR seal* OR scheme* OR trad* OR market* OR "value chain*" OR commodit* OR product*))

4

TS=(“fair trade” OR fairtrade OR fair-trade OR transfair OR “fair for life” OR “Rainforest Alliance” OR “Sustainable Agriculture Network” OR “UTZ Certified” OR “UTZ” or “FSC” OR “Forest Stewardship Council” OR “Global Partnership for Good Agricultural Practice” OR “Global GAP” OR “GlobalGAP” OR “4C Association” OR “Nespresso AAA” OR “CAFÉ Practices” OR “C.A.F.E. Practices” OR “Better Cotton Initiative” OR “BCI” OR “Cotton made in Africa” OR Bonsucro OR “Ethical Tea Partnership” OR Trustea OR “soil association” OR “bird friendly coffee” OR “Smithsonian Bird Friendly” OR “Sustainable Coffee Challenge” OR “International Cocoa Initiative” OR “Linking Environment and Farming” OR “Union for Ethical BioTrade” OR “UEBT” OR “Roundtable on Sustainable Palm Oil” OR “RSPO” or “Indonesia Sustainable Palm Oil Standard” OR “ISPO” OR “Malaysia Sustainable Palm Oil Standard” OR “MSPO” OR “Palm Oil Innovation Group” OR “POIG” OR “Fair Flowers Fair Plants” OR “ProTerra” OR “Brazil Cattle Agreement*” OR “Global Roundtable for Sustainable Beef” OR “GRSB” OR “Food and Ranch Certification Program” OR “American Grassfed” OR “Canadian Beef Roundtable” OR “Joint Solutions Project” OR “Sainsbury’s Sourcing Code” OR “Climate Collaborative” OR “Consumer Goods Forum” OR “Ethical Trading Initiative” OR “Supply Chain Initiative” OR “IDH Sustainable Trade Initiative” OR “We Mean Business” OR “GCF Impact Platform” OR “Verra Landscape Standard” OR “IDH Verified Sourcing Areas” OR “UN Global Compact” OR “ISO 14001” OR “Accreditation Services International” OR “Aid by Trade” OR “Alliance for Water Stewardship” OR “Australian Forest Certification Scheme” OR “Audubon G.U.L.F. RFM Certification Program” OR “BSC production” OR “Cerflor Forest Certification Program” OR “Chilean Sustainable Forest Management Certification System” OR “EnVeritas” OR “Equitable Origin” OR “FairWild” OR “Field to Market” OR “Florimark” OR “FlorVerde” OR “Flower Label Program” OR “Food Alliance Certified” OR “GEO Foundation” OR “Global Infrastructure Basel” OR “International Sustainability and Carbon Certification” OR “LEAF Marque” OR “Living Forest Standards” OR “Local Food Plus” OR “Max Havelaar” OR “Potato Sustainability Initiative” OR “Programme for Endorsement of Forest Certification” OR “Proterra” OR “Roundtable on Responsible Soy” OR “Roundtable on Sustainable Biomaterials” OR “SAI Platform” OR “SIP Certified” OR “Social Accountability Accreditation Services” OR “Sustainable Forestry Initiative” OR “Textile Exchange” OR “Amazon Soy Moratorium” OR “Ban on Uzbekistan Cotton” OR “Cocoa and Forests Initiative” OR “Collaboration for Forests and Agriculture” OR “Singapore Alliance for Sustainable Palm Oil” OR “Joint Solutions Project” OR “Africa Palm Oil Initiative” OR “Colombia D-free palm oil pledge” OR “Global Coffee Platform” OR “African Palm Oil Initiative” OR “Unilever sustainable agriculture code” OR “Nike Code of Conduct” OR “Marks and Spencer Sourcing Code” OR “AgWater Challenge” OR “Partnership for Sustainable Textiles” OR “Sedex Information Exchange” OR “WWF Jurisdictional Risk Assessment” OR “Governors Climate and Forest Task Force” OR “Sistem Verificasi Legalitas Kayu” OR “International Organization for Standardization” OR “Global Reporting Initiative” OR “Cocoalife” OR “Novo Campo” OR “Global Coffee Platform” OR “International Cocoa Initiative” OR “Amsterdam Declaration”)

5

#4 OR #3 OR #2 OR #1

6

TS=(“FPIC” OR “free prior informed consent” OR “free prior and informed consent”)

7

TS=#5 AND #6

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