

FPIC – Free, Prior and Informed Consent

A Guidance Document for ASI Entities

VERSION 1
April 2025



Aluminium Stewardship Initiative (ASI)

ASI is a not-for-profit Standards setting and Certification organisation for the Aluminium value chain.

Our **vision** is to maximise the contribution of Aluminium to a sustainable society.

Our **mission** is to recognise and collaboratively foster responsible production, sourcing and stewardship of Aluminium.

Our **values** include:

- Being inclusive in our work and decision-making processes by promoting and enabling the participation of representatives in all relevant stakeholder groups.
- Encouraging uptake throughout the Bauxite, Alumina and Aluminium value chain, from mine to downstream users.
- Advancing material stewardship as a shared responsibility in the lifecycle of aluminium from extraction, production, use and recycling.

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The official language of ASI is English. ASI aims to make translations available in a range of languages and these will be posted on the ASI website. In the case of inconsistency between versions, reference shall default to the official language version.

Acknowledgements

The drafting of this series of Free, Prior and Informed Consent guidance documents was led by Anders Blom, an expert in Indigenous Peoples' human rights-based issues, with the input and support of the Free, Prior and Informed Consent Working Group. The Working Group consisted of three experienced IPAF members, Marina Wangurra, Abu Karimu and Nicholas Barla, and three ASI secretariat, Mark Annandale, Jessica Patterson de Oliveira Pereira and Vicky Tran. The range of knowledge, geographical location and gender within the Working Group ensured a broad perspective was reflected in the guidance documents.

These Guidance documents were developed after IPAF and ASI members expressed a need for additional guidance on the Free, Prior and Informed Consent process, so that all stakeholders understand the importance of FPIC, what the process is and how to implement it. The Guidance documents aim to help understand what best practice engagement and consent looks like, as well as supporting ASI members correctly upholding Indigenous Peoples rights and complying with the ASI Performance Standard.

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Foreword

Free Prior and Informed Consent, FPIC, is a concept that for many Indigenous Peoples as well as non-Indigenous people, is a foreign concept. But FPIC is not hard to understand. It's all about self-determination, about the right of Indigenous Peoples to decide over their own lives, their own culture, their own place on earth, their own language, and the connection that Indigenous Peoples have created over the millennia to Mother Earth. A togetherness that is manifested in the form of the cosmovision that can be found in most Indigenous Peoples.

Indigenous Peoples are not a homogenous group, among the approximately 500,000 Indigenous Peoples who today populate a quarter of the earth's land mass, there are large differences in material conditions. But even if the welfare of some Indigenous Peoples is better than that of others, many Indigenous Peoples still share the experience of not having their rights recognized and respected. The international human rights convention is based on all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. What appears to many non-Indigenous peoples as obvious is experienced by many Indigenous Peoples as a utopia. It is in this context that FPIC is so significant.

Today there is a movement among responsible and sustainability-oriented companies to take their own stated responsibility for the fact that the human rights of Indigenous Peoples must also be respected. When governments hesitate to create the necessary protection, certification systems like ASI pave the way for a sustainable and respectful relationship with Indigenous Peoples. In ASI's Performance Standard today there are requirements that make it mandatory to apply FPIC in relation to affected Indigenous Peoples, a system of Criteria that the ASI members voluntarily adhere to.

The present guidance document is a first attempt to create an instruction on how the ASI certified Entities can adapt their activities to implement FPIC in the areas where they encounter Indigenous Peoples. This task is both a duty and an opportunity. In a well-executed FPIC process, opportunities are created to establish knowledge and relationships that can mutually enrich both the Entity and the Indigenous Peoples who are part of the meeting. The goal of an FPIC process is of course important, but also keep in mind that it may be the way there, which is worth the effort, and which creates the greatest opportunities.

Anders Blom

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1.Introduction

The Aluminium Stewardship Initiative (ASI) Board of Directors decided on 11 December 2023 to develop Free Prior and Informed Consent (FPIC) guidance documents within ASI Certified operations. In ASI's new Performance Standard V3.1 (April 2023), FPIC concerning Indigenous Peoples became mandatory for companies and organizations seeking the benefits of being ASI Certified. Implementing FPIC is complex—numerous international organizations have developed FPIC guidance for their members and companies looking to fulfil their CSR obligations. Most of these manuals are written for certifying companies in various fields. Guidance documents written directly for Indigenous Peoples are less common. Implementing FPIC within ASI is also complex—national and international law must be satisfied, as well as ASI's Performance Standard.

ASI's Board decided to approach the development of FPIC guidance from three different perspectives: the companies known as Certifying Entities, the Indigenous Peoples, and the Auditors. As a result, three ASI guidance documents regarding FPIC will be developed:

1. Guidance document for the implementation of FPIC aimed at ASI Certified companies known as Certifying Entities
2. Guidance document for implementation aimed at Indigenous Peoples
3. Guidance document/checklist for the implementation and verification of FPIC aimed primarily at the companies/Auditors who check Conformance with the standard¹

This is the first version of a guidance document aimed at Certifying Entities within the whole value chain that have a responsibility and obligation to apply FPIC in their operations. It has been developed in close collaboration with Indigenous Peoples Advisory Forum (IPAF), the ASI Secretariat and the ASI Standard Committee.

This document presents everything that is expected of a Certifying Entity, per the requirements of ASI's Performance Standard. It also describes the importance of FPIC for a Certifying Entity and suggests how it can be implemented. This guidance is intended to further the effective implementation of FPIC in accordance with the Performance Standard

In discussions on protecting Indigenous Peoples' rights and introducing FPIC, the risks of companies failing to meet these standards are often the focus. It's also valuable, however, to emphasize the benefits of carrying out FPIC processes in good faith; ASI's

¹ <https://aluminium-stewardship.org/wp-content/uploads/2023/04/ASI-Glossary-V1.1-April-2023.pdf>

FPIC guidance must be seen from this perspective. FPIC processes aim to facilitate the crucial task of fostering positive relations with Indigenous Peoples. This guidance serves as a tool for Certifying Entities to apply FPIC respectfully and to create relationships based on respect for rights, trust, and a desire to manage our shared planet sustainably.

2. FPIC – Free Prior and Informed Consent

2.1 Introduction

Free Prior and Informed Consent, FPIC, refers to the right of Indigenous Peoples to give or withhold their consent for any action that would have an impact on their lands, resources, territories, or rights. FPIC is derived from the right to Self-Determination, which is a cornerstone of Indigenous People's rights. Therefore, consent cannot merely be the signing of a contract but instead must ensure that Indigenous Peoples and their communities have substantial control over matters affecting them and their territories

FPIC is a manifestation of Indigenous Peoples' right to self-determine their political, social, economic, spiritual, and cultural priorities. It constitutes three interrelated and cumulative rights of Indigenous Peoples: the right to be consulted; the right to participate; and the right to their lands, territories, and resources. FPIC cannot be achieved if one of these components is missing.

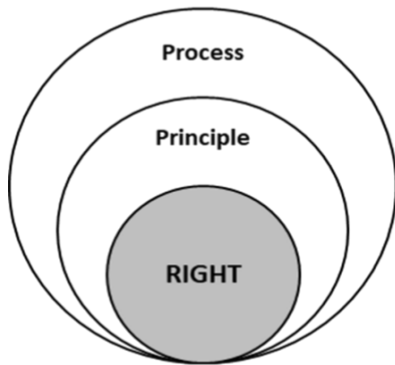
Indigenous Peoples' connection to the land transcends physical and geographical aspects. As part of Mother Earth, the land binds the past to the present and connects ancestors to the living, thus serving as the foundation of cultural continuity. Losing land isn't just about forfeiting the opportunity to exercise Traditionally Practiced Ecosystem Services—it erases historical narratives and threatens cultural survival.

Land loss means that the landscape as a narrator of history is lost, and cultural practices risk being wiped out. On an individual level, losing land can make it difficult to identify with one's origins and maintain relationships with ancestors

*"Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous Peoples' particular distinct cultures is threatened."*²

FPIC as a concept contains many dimensions; It can be seen as a right, as a process, and as a principle. At its core, however, FPIC is a right.

² United Nations Permanent Forum on Indigenous Issues, Report on the 6th Session (25 May 2007)



FPIC as a right:

All people have the right to self-determination. However, the right to grant, withhold and withdraw consent is a collective right specific to Indigenous Peoples. The normative framework for the right to FPIC is based on international law

FPIC as a principle:

As such, FPIC is not dependent on an endorsement by national laws and legislation to be a valid standard for human existence. As a result, actions respecting FPIC may directly conflict with national laws, or fall within a policy gap.

FPIC as a process:

FPIC is also viewed as a process that offers better practice engagement tools throughout a resource development cycle. This view of FPIC falls in line with the human rights-based principle of participatory decision-making

Defining the components of FPIC can be complicated. Since FPIC is derived from the right to self-determination, Indigenous Peoples must have an opportunity to decide how this concept should be interpreted. In addition, several UN bodies have elaborated on which principles FPIC's four components should embody.³ In this document, the definitions below guide FPIC:

- ❖ **“Free”** implies consent is sought in the absence of any actual or perceived coercion, intimidation, or manipulation. Indigenous Peoples should determine the format of the consultations. “Free” also denotes that Indigenous Peoples have the right, rather than an obligation, to participate in FPIC consultations, which aligns with their right to Self-Determination. For an FPC process to be considered “Free” the concerned Indigenous Peoples must have sufficient capacity and resources to participate in the process.
- ❖ **“Prior”** implies consent is sought sufficiently in advance of any decisions or actions that may impact Indigenous Peoples’ rights. Indigenous Peoples should have adequate time to make decisions in accordance with their traditional processes and through their own freely chosen representatives and institutions.
- ❖ **“Informed”** implies that there is full disclosure of all the information Indigenous Peoples need to meaningfully assess the potential risks and benefits of the project (including its location, duration, scope, impacts, benefits, and/or partnership models). This information must be provided in an accessible

³ The interpretations of the four components of Free Prior and Informed Consent have been addressed by UN bodies such as the UN Permanent Forum on Indigenous Issues, FAO, and standard setting working groups such as the UN Working Group on Indigenous Populations.

format and through a process agreed upon by the affected Indigenous Peoples, involving participation in, or conducting of, Impact Assessments, access to funding for independent technical and legal advice, and negotiations regarding benefits.

- ❖ **“Consent”** implies respect by all parties, irrespective of the outcome, for the freely taken informed, and autonomous decision of Indigenous Peoples. This decision should be the outcome of good faith, rights-based consultations, and cooperation with the affected Indigenous Peoples. It should align with their chosen procedures and timeframes and be premised on Indigenous rights-based principles of self-determination, inclusivity, consensus, harmony, and intergenerational well-being. Where consent is provided, agreed conditions should be formalized in a legally binding document. Where consent is withheld, the decision of the Indigenous Peoples should be respected.

FPIC, is a collective right of Indigenous Peoples, requiring consent from the indigenous Peoples as a whole, as affirmed by the Inter-American Commission on Human Rights.⁴ As with any collective, differences of opinion and different perceptions of what is acceptable and what is not can arise. Therefore, the FPIC consultation process should adequately consider competing priorities within Indigenous communities. This process should be inclusive, including women, children, the elderly, and Vulnerable or At-Risk groups in the decision-making process.

2.2 FPIC as a right

The application of FPIC has become increasingly common in relation to Indigenous Peoples. FPIC has existed as a concept in international law⁵ for several decades, but it was through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that FPIC gained wider spread. In a historic vote on September 13, 2007, 144 countries voted for the UNDRIP Declaration, 11 abstained, and only four (Australia, Canada, New Zealand, and the United States) voted against it. Since 2007, those 4 countries have reversed their positions and now officially endorse the UNDRIP.

A Certifying Entity may question the significance of understanding Indigenous People’s rights and the legal instruments outlining them. Declarations such as

⁴ Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).

⁵ International law is a system, often under the control and supervision of the UN, of treaties and agreements between nations that governs how they interact with each other, including their citizens, and businesses. The international law is enshrined in conventions, treaties and standards. Treaties are binding for the countries that have ratified them, while agreements and declarations are seen as strong recommendations to follow.

UNDRIP and Conventions relevant in international law are primarily addressed to states. Why then should an Entity take this into account? For many businesses within the Aluminium value chain, it may come naturally to prioritise Indigenous Peoples rights due to ethical and moral values, but if there is any doubt regarding what this entails in practice the ASI Performance Standard, clearly describe the Certifying Entity responsibilities.

Excerpt from ASI's Performance Standard:

9.3 Indigenous Peoples

The Certifying Entity shall:

a. Implement Policies and processes that ensure respect for the rights and interests of Indigenous Peoples, consistent with international standards, including ILO Convention 169 and UN Declaration on the Rights of Indigenous Peoples.

Regardless of the conditions in the country where the Certifying Entities' activity is conducted and **whether or not Indigenous Peoples are recognized as such in these countries**, the Certifying Entity has an obligation to respect Indigenous Peoples' rights and adhere to the relevant procedures and policies found in international law.

FPIC is a crucial instrument of international law for Indigenous Peoples in their efforts to achieve self-determination and freedom from racial Discrimination. Several articles of UNDRIP reinforce the right of Self-Determination and FPIC over development affecting Indigenous lands, territories, and resources. State governments and corporations have obligations to implement the UNDRIP and uphold its standards in their relations with Indigenous Peoples. The right to FPIC is also present in some national legislations where UNDRIP has been incorporated into national law, for example the Philippines, Australia, Bolivia, Peru, and the Republic of Congo. However, many states argue that the UNDRIP regulations are already integrated into existing legislation, a point contested by Indigenous Peoples and experts in international law.

In accordance with its mandate under the Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples⁶ (EMRIP) decided in December 2017 to produce a study on FPIC, as it appears in several provisions of the UNDRIP.

⁶ The Expert Mechanism provides the Human Rights Council with expertise and advice on the rights of Indigenous Peoples. It assists Member States in achieving the goals of the UNDRIP.

The EMRIP report⁷ came to several conclusions:

3. *Free, prior, and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the **International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination**. The provisions of the Declaration, including those referring to free, prior, and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural, and social circumstances of indigenous peoples.*

EMRIP writes that UNDRIP, while an independent declaration, rests on the rights described in several conventions concerning Indigenous Peoples. UNDRIP does not create new rights but relies on pre-existing ones, as outlined above. In addition to these, the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) is also of great importance.

In **Appendix 2** there is a more detailed description of Indigenous Peoples rights as described in international law.

2.3 FPIC as a principle

In international law states are often designated as primarily responsible for practicing and obtaining FPIC. As a result, companies have often avoided formal FPIC processes unless compelled to do so by legal mandates in countries which require them to obtain FPIC.

Problematically, states frequently do not seek the consent of, or consult with Indigenous Peoples before granting licenses to companies. With the growing expectation that companies have a responsibility to respect human rights regardless of a state's actions and laws, there is now more pressure in the global marketplace on companies themselves to obtain consent through FPIC processes. In doing so, companies can create the basis for sustainable decisions that respect Indigenous Peoples' rights.

According to the ASI Performance Standard, the Certifying Entity must 'consult and cooperate in good faith with Indigenous Peoples; to obtain their Free, Prior and Informed Consent concerning operations that could have material impacts on them

⁷ *Free, prior and informed consent: a human rights-based approach*; Study of the Expert Mechanism on the Rights of Indigenous Peoples; A/HRC/39/62

such as impacts on lands and natural resources, resettlement etc. This applies to all Bauxite mines, New Projects or Major Changes to existing projects such as mine closure. Consent must be clearly demonstrated.

If a government authority grants a license to a Certifying Entity in accordance with current regulations in that particular country, this does not remove the Certifying Entity's obligation to carry out an FPIC process.

Today, businesses tend to focus on Economic and Social Governance (ESG) issues in terms of risk and opportunities. For many years, the international consulting company Ernst & Young has published an annual summary of the biggest risks and opportunities for the international mining and metal industry. Their annual report for 2024 emphasizes that issues related to ESG and the license to operate involve significant risks but also great opportunities.⁸ Addressing these challenges requires an approach that moves beyond regulatory compliance and cost control. Leaders need assurance that investments will add genuine, unproblematic value. In-depth scenario planning and process development can guide prioritization, identify potential trade-offs, and help to create real, long-term value. This should primarily be seen as an opportunity and not a risk.

Recent publications from institutions such as the International Finance Corporation, the World Bank, and the International Council for Metals and Mining (ICMM) have stated that mining companies and project operators must conduct a "free, prior and informed consent consultation" and "work to obtain" FPIC. This indicates a growing movement toward acknowledging corporate responsibility to respect Indigenous rights and obtain consent.

Respecting Indigenous Peoples' rights is in a company's best interest. Without community support, the financial and operational viability of a project may be jeopardized, in addition to the risk of litigation and reputational costs. By obtaining strong consent from Indigenous communities, businesses will have a deeper and more durable social license to operate.

In certain contexts, FPIC does not depend on the endorsement of national or international law to be a valid standard for Indigenous Peoples. As a result, actions respecting FPIC may sometimes diverge from the requirements of national regulation or fall within a Policy gap.

FPIC can be seen as a principle when it is included as a requirement in a certification model. Through its Performance Standard, ASI incorporates FPIC as a mandatory

⁸ https://www.ey.com/en_se/mining-metals/risks-opportunities

principle for Certifying Entities seeking to demonstrate responsible practices and show the market a credible Third-Party controlled brand.

2.3.1 FPIC as a Principle within ASI

The FPIC process is mandatory under the ASI Performance Standard where there are Indigenous Peoples or their lands, territories, and resources present. There are many situations where an FPIC process is necessary, including:

- Impacts on lands, natural resources, and Traditionally Practiced Ecosystem Services subject to traditional ownership or under customary use.
- Resettlement⁹ of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use.
- Any impacts on critical cultural heritage that are essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples.
- Use of cultural heritage, including traditional knowledge, innovations/intellectual property, or practices of Indigenous Peoples for commercial purposes.

ASI Performance Standard's main references and criteria regarding Indigenous People and FPIC can be found under principle 9 regarding Human Rights:

- Criterion 9.1; Human Due Diligence
- Criterion 9.3; Indigenous Peoples
- Criterion 9.4; Free Prior and Informed Consent (FPIC)
- Criterion 9.5; Cultural and Sacred Heritage
- Criterion 9.6; Displacement
- Criterion 9.7; Affected Populations and Organizations.

Appendix 3 describes the current criteria in principle 9 and how these should be interpreted.

The ASI Performance Standard, and its guiding document, contain many references to FPIC in addition to those mentioned under principle 9 above. The table below describes in which criteria references to FPIC occur.

Criterion	Content
2.9	Mergers and Acquisitions

⁹ "Resettlement" in this context may refer to both physical displacement, such as relocation or loss of shelter, and economic displacement, including loss of assets or access to assets, that lead to loss of sources of income or other livelihoods, as a result of project-related land acquisition and/or restrictions on land use (adapted from IFC's Performance Standards, 2012).

2.10	Closure, Decommissioning and Divestment.
6.1	Emissions to Air
6.2	Discharges to Water
8.1	Biodiversity and Ecosystem Services Risk and Impact Assessment
8.6	Protected Areas.
9.8	Conflict-Affected and High-Risk Areas.
Appendix 5 (in ASI Performance Standard Guidance)	Supplier Due Diligence Checklist

- **Criterion 2.9;** In front of a Merger and Acquisition the Entity shall obtain Indigenous Peoples Free, Prior, and informed Consent to approve the planned operations
- **Criterion 2.10;** In front of a Closure, Decommissioning and Divestment the ASI Entity shall obtain Indigenous Peoples Free, Prior and Informed consent of the proposed plans.
- **Criterion 6.1;** During the impact assessment and development approval stages Emission to Air should be incorporated in the Free Prior, and Informed Consent process.
- **Criterion 6.2;** During the impact assessment and development approval stages Discharges to Water should be incorporated in the Free Prior, and Informed Consent process.
- **Criterion 8.1;** When Indigenous Peoples are present in or around the Entity's Area of Influence they should be active participants in the Biodiversity assessment. New Projects or Major changes that has a significant Biodiversity impact on Indigenous Peoples trigger the requirement for a Free, Prior and Informed Consent process.
- **Criterion 8.6;** When a Entity is engaged in Bauxite Mining and Indigenous Peoples are present in the area of influence, exploration in a Protected Area cannot be done before the Indigenous Peoples have given their Free, Prior and Informed Consent.
- **Criterion 9.8;** When an Entity is performing a Human Rights risk-based due diligence over its Aluminium supply chain according to the OECD Guidance and if there has been an FPIC process undertaken, the Entity has to consider any implications for the "Free, Prior, and Informed Consent in the presence of conflict, including military, paramilitary, police or armed security presence in the affected Indigenous Peoples territory.

- **Appendix 5 (in the ASI Performance Standard Guidance);** In the Supplier Diligence Checklist the Entity shall verify that the supplier has a Policy concerning Indigenous Peoples and FPIC.

2.4 FPIC as a process

2.4.1 Introduction

Applying FPIC as a process is to integrate Indigenous Peoples rights and the ASI Principles of FPIC into a practice that falls within the framework of Indigenous Peoples Self-Determination and participatory decision-making.

A well-implemented FPIC process is a tool for respecting Indigenous Peoples rights, culture and Cosmivision while ensuring a Certifying Entity meets all the requirements in the ASI's Performance Standard. FPIC is not a tick-box activity – it's a process that requires a great deal of commitment from the Certifying Entity.

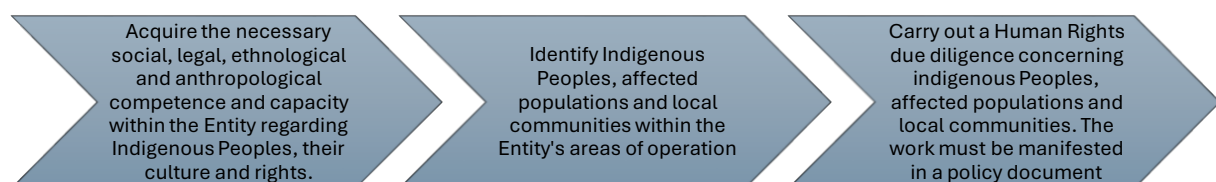
In this guidance document a FPIC process is divided into two phases.

- ❖ First, a preparatory phase occurs internally within the Certifying Entity. This process is described in three steps. When the preparatory process is completed, the Certifying Entity can begin the FPIC processes that may be needed.
- ❖ Second, the FPIC process is implemented through participatory and inclusive collaboration with affected Indigenous Peoples

This section will provide guidance on how a Certifying Entity can implement this to meet the mandatory requirement of ASI's Performance Standard.

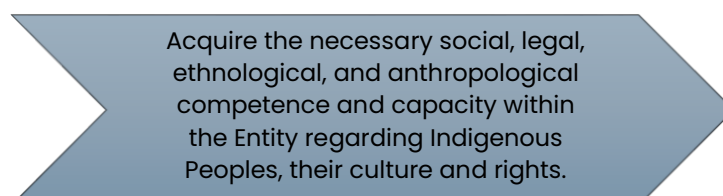
2.4.2 Preparations for an FPIC process

The preparatory lessons to create a readiness of an Entity to be able to initiate and participate in an FPIC process follow a three-step model:



Each step requires its own preparations and efforts. When the Certifying Entity has worked its way through the three steps, it has created a preparedness and good foundation for being able to initiate and participate in an FPIC process.

2.4.2.1 Preparation first step

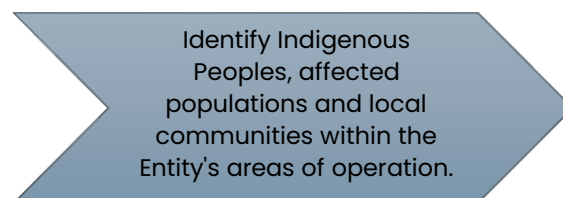


Every Certifying Entity that conducts business in an area where there are or may be Indigenous Peoples must be prepared for an FPIC process to be relevant sooner or later. The first step in this preparation is for the Certifying Entity to acquire the necessary social, legal, ethnological, and anthropological competence and capacity regarding Indigenous Peoples, including their culture and rights. This should occur regardless of whether an FPIC process is immediately anticipated or not.

Recommendations	How and Why
Create within the Certifying Entity an understanding, knowledge and recognition of Indigenous Peoples, their world view, culture, rights and Cosmovision. This understanding, knowledge and recognition must be integrated into the Certifying Entity's value base and shared by its management.	Seek contact with Indigenous representatives and their organizations in the region and country where the activity is conducted. If possible, organize workshops where Indigenous Peoples Organisations act as educators, and knowledge mediators. If none are available, contact NGOs and government officials who can contribute knowledge and insights. Another important source is to seek support from ASI's IPAF (Indigenous Peoples Advisory Forum)
Recruit personnel within the Certifying Entity who have a commitment to Indigenous Peoples combined with an education in areas such as	It is best if the Certifying Entity can hire permanent staff for this task, though consultants could also fulfil this function. The personnel should act in a culturally

anthropology, legislation, ethnology, and social science. It is a great advantage if parts of this staff themselves have an Indigenous background. It is also important to consider gender issues in this recruitment; people of all genders are important in this process.	appropriate way, considering barriers such as language. The staff responsible must be able to communicate in the language and with respect to the relevant Indigenous protocol. If staff do not have this knowledge, this resource must be created via external interpreters with appropriate cultural respect and understanding.
The group of internal Indigenous experts must be given the status and resources required to act independently and with the confidence of management.	The group of internal experts will meet Indigenous Peoples in various situations where a mandate may be required to make decisions. If the affected Indigenous Peoples are expected to make decisions, it is also required that the Certifying Entity's representatives in informational meetings, negotiations, and contract signings have both a mandate and the resources to facilitate this.

2.4.2.2 Preparation second step



One of the internal Indigenous experts' first tasks will be identifying the Indigenous Peoples who are or may be affected by the Certifying Entity and its operations. The internal Indigenous experts will also be responsible for carrying out Human Rights Due Diligence with a focus on Indigenous Peoples and developing a Policy regarding the relationship with them.

Considering the diversity of Indigenous Peoples, an official definition of "Indigenous" has not been adopted by any UN-system body. Instead, the UN system has developed a modern understanding of this term based on the following and which has been integrated into ASI's Performance standard.:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic, or political systems
- Distinct language, culture, and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

Indigenous Peoples can appear under different names and concepts – some groups do not explicitly identify as Indigenous. This can be for many reasons, for example due to risk of well-being in societies with sensitive political climates (both personal and collective), due to tribal identity prevailing, a lack of understanding/awareness about the term or the use of a different terminology e.g. First Nations, Adivasi etc.

The term **Local Communities** is used to ensure that groups who fall into the definition of Indigenous, but do not self-identify as such, are considered and protected under the ASI Performance Standard, therefore ensuring that an FPIC process is carried out. The concept of Local Communities can vary from place to place. Hence, the recommendation is to ensure that these communities are identified by credible and knowledgeable local community members and experts to ensure they are effectively represented in relevant activities.

The definition of Local Community is:

Local Communities are made up of groups of people living together with strong ties to the locality where they live who may or may not have originally come from that locality. This could include local communities such as Quilombo's in Brazil and other Latin American countries. However, Indigenous Peoples typically originate from a particular locality and have ancestral ties to that locality. The term Local Community also applies in countries like Guinea.

The use of the term Local Communities should not be used to weaken recognition of Indigenous Peoples' affirmed rights and identities. Whilst Indigenous Peoples and Local Communities often overlap, they are not always the same and may have distinct rights. Local Communities *may* include Indigenous Peoples who have not identified themselves as Indigenous.

Appendix 1 also provides examples of Indigenous Peoples across the world that can be a guide in mapping these populations.

ASI's Performance Standard mentions several different groups that can be regarded and recognized as Indigenous Peoples:

- a. Affected Populations recognized by authorities as Indigenous Peoples and self-identified as Indigenous Peoples meet the the United Nations and ASI's definition.
- b. Affected Populations recognized by authorities and self-identified as Indigenous, even if under a different name, meet the UN and ASI definitions of Indigenous Peoples. Aboriginals from Australia, Māori from New Zealand, Sámi people from Scandinavia, and First Nations from Canada fall in this group, among others.
- c. Affected Populations who, for various reasons, choose not to identify themselves as Indigenous but meet the UN's and ASI's criteria for Indigenous Peoples must be recognized as such. Sometimes these groups are referred to as Traditional Peoples. There are also Indigenous Peoples who live in voluntary isolation from the rest of the world and do not self-identify as Indigenous because this is a foreign concept to them, but they are still generally considered Indigenous.
- d. Affected Populations where national or regional authorities deny them the right to call themselves Indigenous despite meeting the criteria must be considered Indigenous Peoples, whether they identify themselves as such or not.
- e. Local Communities and their residents who, if the criteria for Indigenous Peoples apply to them, must be considered as Indigenous Peoples.
- f. Local Communities where both Indigenous Peoples and non-indigenous people living side by side, sometimes in harmony with each other, sometimes in conflict. Those who meet the criteria for Indigenous people must be recognized, while those who do not do so lack Indigenous status.

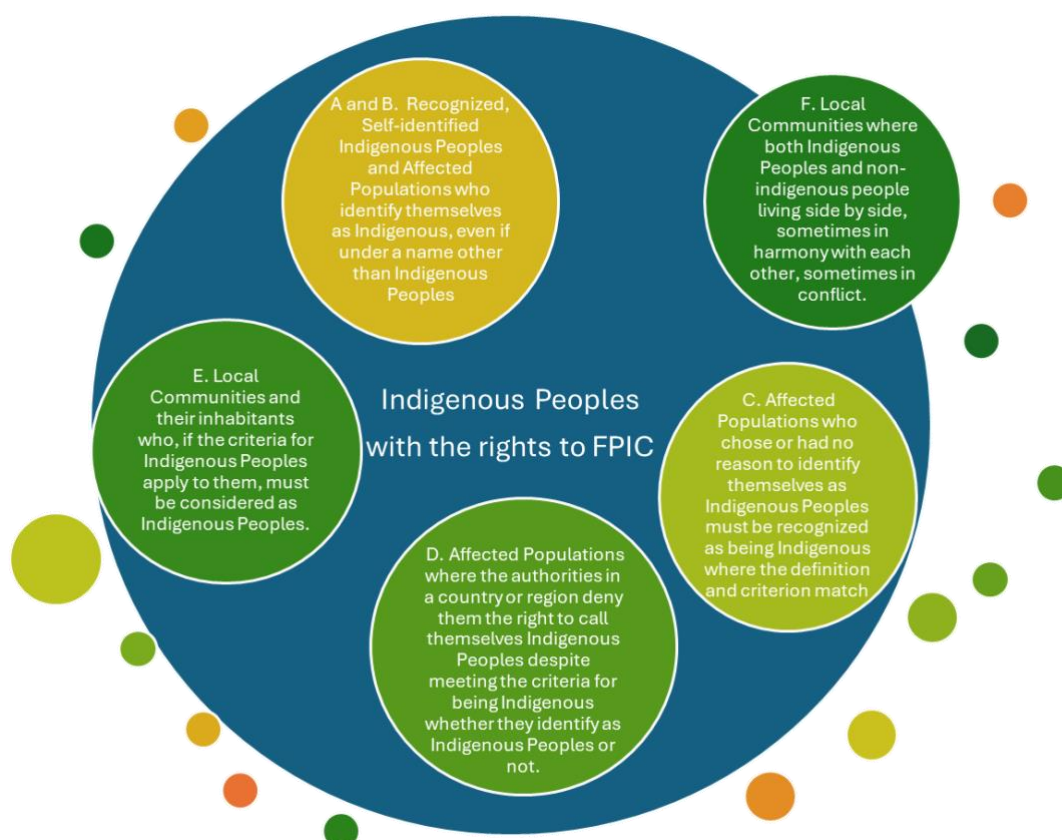
The Certifying Entity must map the Affected Populations potentially impacted by the Entity's activities and identify those who are considered Indigenous Peoples. The Entities Area of Influence extends both upstream and downstream e.g. a Bauxite mine or a smelter and includes Associated Facilities such as infrastructure, power supply and other indirect impacts.

Mapping of Indigenous Peoples is not always easy, but it must be carried out in good time before a planned action takes place within the Certifying Entity. The Certifying Entity alone does not determine whether there will be an impact and whether it will be

negative. This issue must be discussed and decided through an FPIC process with the Indigenous Peoples identified via the mapping activity.

When you carry out mapping work, you will likely end up in many discussions about how to interpret whether a population, group, or individual can be considered Indigenous. Unfortunately, there is no conclusion that unequivocally explains these concepts. What must be remembered is that ASI's Performance Standard requires Certifying Entities to work in good faith.

In **Appendix 1**, there are examples of Indigenous Peoples from different parts of the world that can be a guide.



Recommendations	How and why
Whilst mapping Indigenous Peoples within the area of influence where the Certifying Entity operates, it is naturally important to obtain information about	Remain open-minded and adhere in good faith to the definition of Indigenous Peoples applied by ASI and the UN. Failure to recognise Indigenous Peoples within the Entity's Area of Influence and initiate an FPIC process may result in a Major Non-Conformance.

Indigenous Peoples from various sources.	Repeated Non-Conformance or fraudulent representation of FPIC could lead to a Critical Breach, resulting in suspension of Certification, restriction of Certification Scope, and disciplinary action from ASI.
Affected Population, in category A, must without discussion be given the opportunity to be included in an FPIC process when this is relevant.	
Affected Populations, in category B. They must be, when this is relevant, be included in the FPIC process.	
Affected Populations in category C must be included in the FPIC process when relevant, though for those living in voluntary isolation, industrial activities must be avoided altogether.	<p>There are many different reasons for choosing not to identify as Indigenous. A common one is that identifying as Indigenous Peoples can be a serious risk to health and life. In some countries and regions, it is not unusual for Indigenous Peoples to be persecuted and subjected to serious threats and violence when they defend their rights and lands. In 2021 alone, as per the Global Witness report, 200 land and environmental defenders were killed worldwide—nearly four per week. Significantly, more than 40 percent of the documented killings were of Indigenous people, who account for no more than six percent of the global population.</p> <p>The choice not to identify as Indigenous can have many different reasons. A common one is that an identification as Indigenous Peoples can mean a serious risk to health and life. In some countries and regions of our world, it is unfortunately not unusual for Indigenous Peoples to be persecuted and subjected to serious threats and violence when</p>

	<p>they defend their rights and their lands. In 2021 alone, as per the Global Witness report, 200 land and environmental defenders were killed worldwide – nearly four per week. Significantly, more than 40 percent of the documented killings were of Indigenous people, who account for no more than six percent of the global population.</p> <p>Another reason may be that the people concerned live in a traditional way in a remote area where there is minimal contact with the outside world. In this context, there may be no need to apply a concept such as Indigenous, which to these people can seem abstract.</p> <p>As for Indigenous Peoples living in voluntary isolation, this is a relatively small group. Today, there is a widespread opinion among international organizations that these groups should always be allowed to continue their lives in accordance with their traditions and without external influence from competing land interests. Since it is not possible to carry out an FPIC process in this case, this means that Certifying Entities must avoid industrial activities that would impact these groups.</p>
Affected Populations in category D must be included in the FPIC process regardless of whether they are nationally recognized as Indigenous Peoples.	<p>Many Indigenous Peoples do not have nationally recognised status. Asia alone is the home to approximately 260 million Indigenous Peoples who largely do not have nationally recognized status. The lack of recognition by governments in Asia, Africa, Latin America, and countries such as China must not deter an Certifying Entity from identifying Indigenous Peoples within its Area of Influence.</p>
Local Communities, according to category E, and their inhabitants who, if the criteria for Indigenous Peoples apply to them, must be considered as Indigenous Peoples.	<p>Local Community is a term generally applied to any people or communities located in an Certifying Entities' area of influence, particularly those subject to actual or potential direct project related risks and/or adverse impacts on their physical environment, health, or livelihoods.</p>

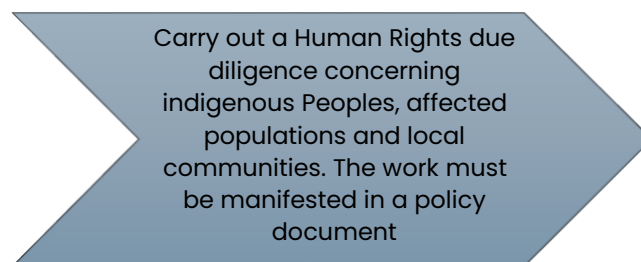
	<p>It can sometimes be difficult to define a Local Community as an Indigenous community. Non-indigenous Local Communities are made-up of groups of people living together who may not originally come from that locality while Indigenous Peoples normally are people who are originally from a particular locality or particular region, in the case of nomads.</p> <p>When the inhabitants of a Local Communities refer to a group of people or families who live in a particular locality/region, share a common interest and a common practice of traditional ecosystem services (water users associations, fishers, herders, grazers, gatherers and the like), have common cultural and historical heritage and a common Cosmovision, these Local Communities often consist of Indigenous Peoples.</p> <p>Before contacting a Local Community, consider whether this community is inhabited by Indigenous Peoples according to the definition in ASI's Performance Standard. If this is the case, then FPIC must be applied in all relevant matters. It cannot be taken for granted that the residents of the Local Community will self-identify as Indigenous.</p>
<p>Local Communities in category F must be mapped and considered carefully. Members of the community who are identified as Indigenous Peoples have the right to be included in the FPIC process.</p>	<p>Mapping in a Local Community with a mixed population of Indigenous and non-Indigenous Peoples is complex. The members of the community that has Indigenous status have the right to participate in an FPIC process with the Certifying Entity. It's crucial to understand the local social dynamics and decision-making structures. An impact on the Indigenous Peoples in the Local Community may have a similar impact on the non-Indigenous village residents.</p> <p>A first step in this mapping should be to seek contact with the group deemed to be Indigenous to inquire about how they see their position in the</p>

	<p>Local Community and whether they want the process to include the entire Local Community. For example, in certain African areas non-Indigenous community members dominate Indigenous Peoples and exploit their labour. In such a situation, it is extremely important that the FPIC process does not develop into a technique for the dominant village members to manipulate and rule over Indigenous members of the Local Community.</p> <p>In cases like this, it may be a good idea to consult with ASI's Indigenous Peoples Advisory Forum (IPAF) about how to proceed in the process.</p>
Consider using IPAF, one of ASI's resources, if there are difficulties identifying Indigenous Peoples within a Certifying Entity's Area of Influence.	IPAF and its members can be reached through ASI and Mark Annandale at ipaf@aluminium-stewardship.org or https://aluminium-stewardship.org
It is advisable to consult Indigenous Peoples' Organizations (IPOs) about how to interpret Indigenous terms and identify Indigenous Peoples. In most countries where Indigenous Peoples live, there are national organizations that can be found via an Internet search. Regional IPOs can also be helpful.	<p>Examples of regional IPOs:</p> <p>Africa:</p> <ul style="list-style-type: none"> • Indigenous Peoples of Africa Co-ordinating Committee (IPACC) • REPALEAC <p>Latin America:</p> <ul style="list-style-type: none"> • Coordinator of Indigenous Organizations of the Amazon River Basin (COICA) • Mesoamerican Alliance of Peoples and Forests (AMBP), <p>Asia:</p> <ul style="list-style-type: none"> • TEBTEBBA (Indigenous Peoples' International Centre for Policy Research and Education) • Asia Indigenous Peoples Pact Foundation (AIPP) <p>North America:</p>

	<ul style="list-style-type: none"> • National Congress of American Indians (NCAI), USA • Assembly of First Nations, Canada <p>Europe:</p> <ul style="list-style-type: none"> • Protects Sápmi Foundation, Norway • Sámi Council <p>Australia/New Zealand:</p> <ul style="list-style-type: none"> • The National Native Title Tribunal (NNTT), Australia • Te Kaunihera Māori o Aotearoa – New Zealand Māori Council
<p>In conjunction with identifying Indigenous Peoples within the area of operations, one should also identify the management/governance tradition and structure that prevails among them. This information is essential to be able to approach the relevant people and their leaders in a culturally appropriate way. In an FPIC process, this will be necessary for establishing a respectful relationship.</p>	<p>Indigenous Peoples have governed themselves since time immemorial, crafting laws, making collective decisions, resolving disputes, and establishing rules long before Europeans colonizers arrived. There were laws that governed their ways of interacting with others and with the natural and spirit worlds.</p> <p>While modern Western governance systems favour a globalized and linear perspective, the Indigenous system is very localized and its sphere expands only when there is a common issue to address. Indigenous governance systems are also very flexible. The core goals of Indigenous systems are prosperity, harmony, peace, sustainability, reciprocity, and responsibility for the whole community.</p> <p>In general, Indigenous systems favour participatory, inclusive, and consensus-based decision-making since the units are very localized and thus, such decisions are applicable and appropriate. When standards or by-laws for the management of the community, including resources, are established, all mature community members must attend a meeting and make decisions by consensus. The system ensures that everybody understands the rules, regulations, and laws, which they set up</p>

	<p>themselves. In important cases, unanimous agreement is practiced, such as the decision to go to war. However, only the Chief or Village Head and the Council of Elders may participate in deciding minor issues. Rarely, if at all, the Chief or Village Head alone decides on cases which affect the community. In all these processes, the community traditionally participate in decision-making at social gatherings either in community houses or other meeting places as well as in the course of daily work.¹⁰</p> <p>Indigenous judicial systems rely on customary, unwritten laws, now sometimes codified, to administer justice and maintain order. Comprehensive consultation ensures community harmony, with all members welcome to attend. The principle of collective indemnity and communal solidarity underpin their judicial system, which often follows circular decision-making processes over Western linear approaches.</p>
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2.4.2.3 Preparation third step



According to Criterion 9.1 in the ASI Performance Standard, a Certifying Entity must conduct a Human Rights Due Diligence guided by the UN Guiding Principles on Business and Human Rights. This due diligence shall, as a minimum, result in:

¹⁰ United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance

- A gender-responsive Human Rights Due Diligence to be designed and implemented together with affected populations. The process must identify, prevent and mitigate any negative human rights impact regarding affected populations.
- A Policy document considering gender issues, issues concerning intersectionality and Indigenous issues
- A mapping of Affected Populations and Organisations to ensure that they are engaged in the due diligence process. The identification mapping of Indigenous Peoples concerned under the second step will of course be instrumental in this work.

The criterion applies to all Facilities within ASI and where Indigenous Peoples are involved, FPIC will apply.

Human Rights Due Diligence is the globally recognized process for addressing companies' negative impact on human rights in the business operations and supply chains.

Once the Certifying Entity has identified potential Indigenous Peoples within its Area of Influence, it can engage with the relevant Rightsholders at the outset of this Due Diligence. It is important to let the affected Indigenous Peoples participate in the design of the process, which presents an excellent opportunity to create relationships that will be important in implementing the FPIC processes that may follow.

If the Certifying Entity, through its due diligence and/or through presented complaints, is found to have caused or contributed to negative consequences for the Human Rights of Indigenous Peoples, it must ensure that these violations of Human Rights cease and that any damage is rectified through a remedy process.

Conducting Due Diligence, especially concerning Indigenous Peoples, is ideally handled by the internal staff assigned to work with affected Indigenous Peoples (see Step 1 in the preparatory work for FPIC). It is sometimes both reasonable and necessary to use external experts to carry out certain Human Rights Due Diligence processes. However, caution should always be exercised. Respect for Human Rights relates to an Entity's core values, which is best ensured through internal integration. Overreliance on third parties can hinder this integration, making it crucial to internalize findings from external experts for effective company-wide action. It is particularly important that any findings regarding the company's impact on Human Rights are integrated throughout the Certifying Entity.

A well-executed Due Diligence process must lead to a Policy. If Indigenous Peoples are included, this Policy must contain a section on the Certifying Entity's responsibilities and relations with Indigenous Peoples.

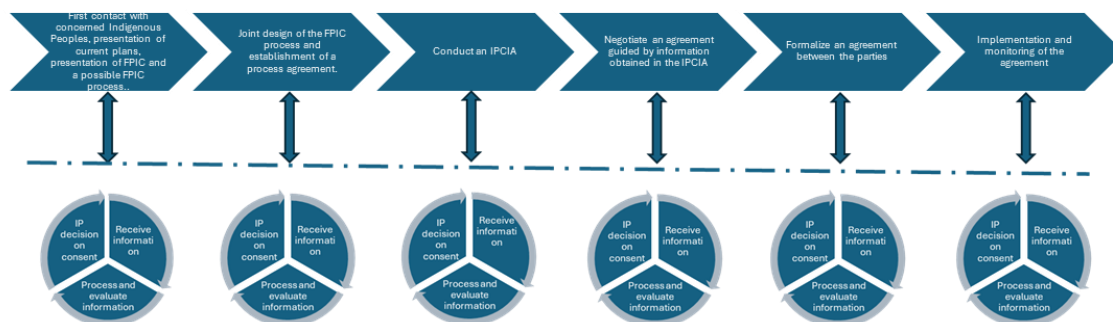
Recommendations	How and why
Before planning a Human Rights Due Diligence, "The UN Guiding Principles on Business and Human Rights" should be carefully studied. These Principles are the global standard for preventing and addressing the risk of adverse impacts on Human Rights involving business activity, and they provide the internationally accepted framework for enhancing standards and practices regarding business and Human Rights ¹¹	<p>Human Rights Due Diligence enables the Certifying Entity to proactively manage adverse Human Rights impacts on Affected Populations including Indigenous Peoples with whom they engage. The process involves four core components:</p> <p>(a) Identifying and assessing actual or potential adverse Human Rights impacts, on Indigenous Peoples, that the Certifying Entity may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.</p> <p>(b) Integrating findings from impact assessments, relating to Indigenous Peoples, across relevant Certifying Entity processes and taking appropriate action according to its involvement in the impact.</p> <p>(c) Monitoring and tracking the effectiveness of measures to address adverse Human Rights impacts, on affected Indigenous Peoples, to know if they are working.</p> <p>(d) Communicating how impacts are being addressed and demonstrating to the affected Indigenous Peoples that there are adequate policies and processes in place.</p>

¹¹ <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices>

<p>Guided by the completed Due Diligence process, develop a Policy on the Certifying Entity's work with issues related to Human Rights in general and Indigenous Peoples in particular. It is important that this Policy document is anchored by the company management and governance and that it is included as part of the basic values on which the entire Certifying Entity's operations rest.</p>	<p>For an example of what such a Policy might look like, see <u>Appendix 4.</u></p>
<p>Alongside any ongoing FPIC processes, it may be important to have regular or at least annual meetings with Indigenous Peoples affected by the Certifying Entity. At these meetings, Policy issues are followed up and experiences and information from both parties should be exchanged. For the Entity, it is valuable to understand what challenges the affected Indigenous Peoples live with alongside the Entity.</p>	<p>These meetings can also be an opportunity to share information about other ongoing encroachments, including the effects of climate change, political influences, and so on.</p>

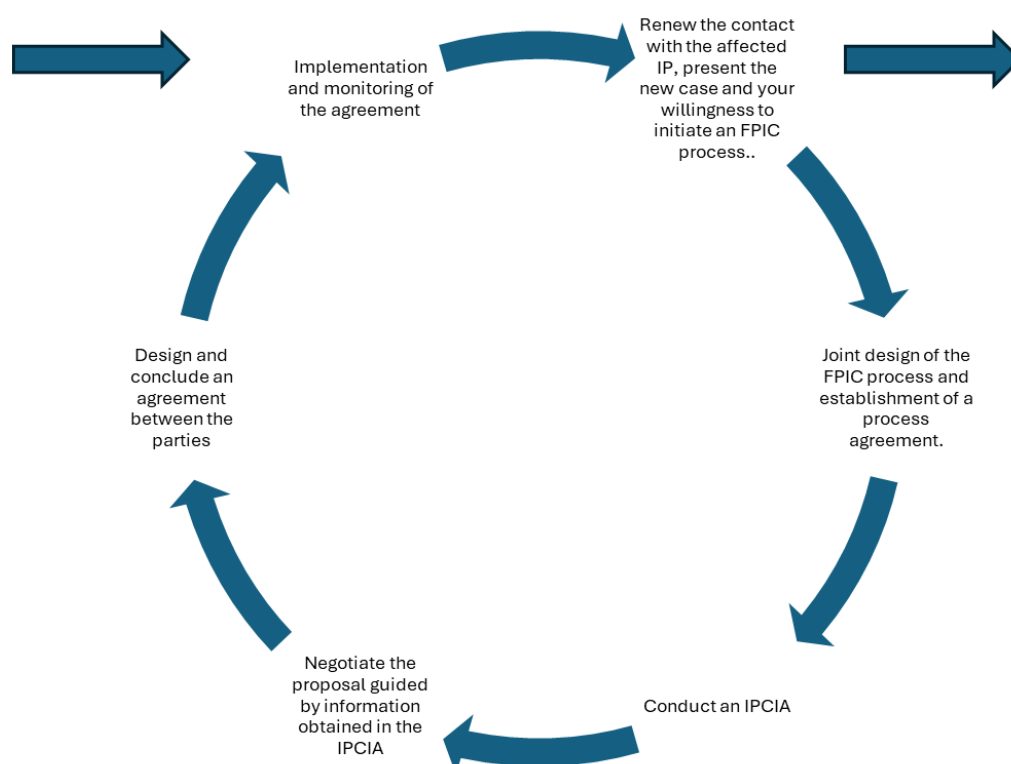
2.4.3 Implementing the FPIC process.

To implement the mandatory FPIC process, ASI has developed a process that is carried out in six steps. Each step contains a recommended action for the Entity followed by a responding action from the concerned Indigenous Peoples.



FPIC is often interpreted as a linear process aligning with Western ways of thinking and behaving. However, in the tradition of thought that prevails among Indigenous Peoples, the process can take on a circular form of thinking, acting, and decision-making.

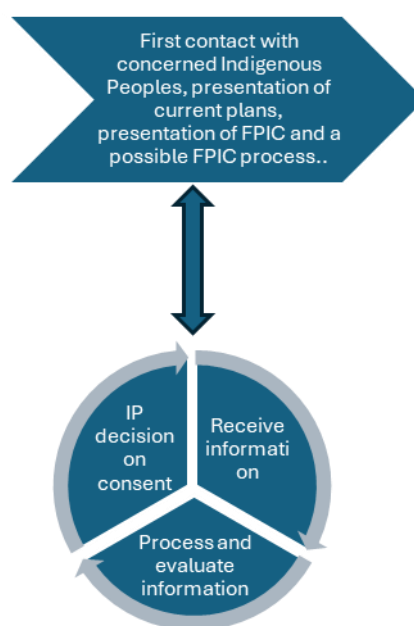
However, an FPIC process is not linear with a clear start and end. In the FPIC process, the Certifying Entity creates a lifelong relationship with the Affected Populations that will restart when notable changes occur. Such a restart does not entail repeating the FPIC process from the beginning; rather, a new process will revolve around the facts and relationships that have already been established



The various steps in the FPIC process are described in the following sections with recommendations for each step. One issue that touches all six steps is the issue of documentation. All meetings and all material in the form of memos, protocol, minutes of understanding and assessments, that are included in the process, should be documented.

Since all documentation will be shared with the affected Indigenous People, the choice of documentation format is governed by the traditions that exist among these Indigenous Peoples. However, it is important that both the format and content of this documentation is approved by both parties. It may be appropriate to raise a discussion about this with the affected Indigenous Peoples in connection with the first meeting/contact that takes place during step one. Ensuring that the FPIC process is well documented is also a good tool for future review by the Auditors who will review them as Objective Evidence as part of the ASI Audit.

2.4.3.1 Step 1 – First contact in the FPIC process with the affected Indigenous Peoples



The first contact with the affected Indigenous Peoples in an FPIC process becomes decisive for its further development and, hopefully, its success.

Ensure that the staff in the Certifying Entity who were previously appointed and trained for this matter attend the meetings and make sure that there is continuity in who attends the meetings. If the primary contacts change, ensure that their replacements

are briefed on the relationship, consultation, and negotiations before attending meetings with the community.

Recommendations	How and why
Initiate your first engagement in a culturally appropriate way and adapt to the Indigenous Peoples' protocol	<p>Contact the Indigenous Peoples and/or their community, through its leaders (whom you have earlier recognized in the preparatory phase) to arrange for an initial engagement. They can confirm permission to visit the land and/or community, arrange for the engagement and they will identify their representatives according to the community's decision-making processes.</p> <p>Indigenous Peoples' protocol primarily refers to ways of interacting with Indigenous Peoples in a manner that respects traditional ways of being. Protocols are not just "manners" or "rules" but rather reflect a culture's deeply held ethical system. A common way to show respect for this protocol is to start by thanking them for allowing you to come and visit their and their ancestors land, prioritizing personal introductions, and highlighting family background over professional titles.</p>
Show respect in word and deed.	<p>A sign of respect is that the Certifying Entity, via its internal experts, has carefully investigated the community and its Indigenous Peoples. If you are interested in working with them, you should be interested in learning about them, their history, worldviews, Cosmovision, governance structure, culture, traditions, Traditionally Practiced Ecosystem Services and economy. Developing a genuine understanding of a community and its Indigenous Peoples reflects a sincere commitment.</p>
Build trust and act in a way that inspires trust	<p>Trust is paramount in a relationship with Indigenous Peoples. When seeking to build these relationships, bear in mind that there is often a long history of broken promises regarding land rights, environmental protection, employment, revenue sharing, and community benefits.</p> <p>It takes years to build trust, seconds to break, and forever to repair</p>

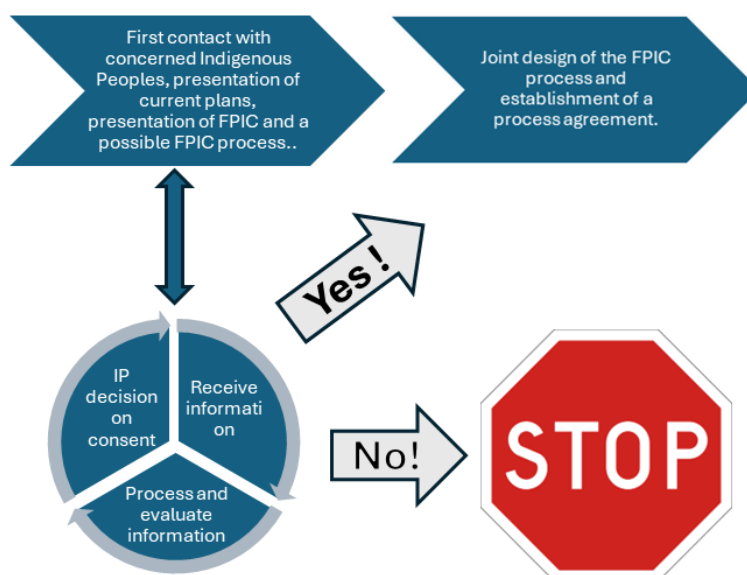
Be patient and have foresight in your relationship with Indigenous Peoples	<p>The Certifying Entity, informed by research, recognises that most development decisions are community-based. Decision-making revolves around many interconnected topics, so don't expect conversations to be about one topic. An additional factor that affects decision making is the community's ability to process the requirements of your project. The traditional decision-making order, be it a Chief, a council of elders or some other form, is very busy with community issues and events – your project is another demand on their time and resources, which in a smaller community can be a considerable burden.</p> <p>Traditional decision-making usually takes time, and that must be respected. The decision-making must also adapt to the annual cycle, for example a nomadic people do not gather for decisions except during certain times of the year.</p>
Get involved	If you have a partnership with a community then be involved in the community. Your relationship is with the entire community – not just those dealing with economic development. Show that your interest is deeper than just business. If you are welcome support and attend events. Celebrate with them.
Ensure your relationship is inclusive	Ensure that your relationship with IP is inclusive and that the decision to be made by the concerned Indigenous People includes old people, young people, women, men, and Vulnerable or At-Risk groups. This can be conflicting if the traditional management structure and decision-making does not include these groups. Since FPIC is a collective right, however, this issue must be ventilated and find its solution in the current FPIC process.
Assign time and resources to the process	It takes time and resources to build a relationship with an indigenous population. For your part, you will have to carry out many visits, meetings and phone calls over a long period of time. Enter this extra activity into your own budget. The Certifying Entity that expects the concerned Indigenous People to put up a corresponding contribution must also help create financial and knowledge capacity to be able to participate fully in these processes. A good way to ruin

	an initial FPIC process is to be too stingy in these respects.
Behave transparently	<ul style="list-style-type: none"> • Begin with transparent communications, expressing the Certifying Entity's intent to develop activities that may negatively affect the concerned Indigenous Peoples. Deliver this message in a language and format that the Indigenous Peoples are comfortable with. Offer the affected Indigenous Peoples to consult their own experts, at the expense of the Certifying Entity. • Outline your plans transparently, emphasizing that they are still in the planning phase and require the support of the affected Indigenous Peoples. • Be transparent about the FPIC process. Explain to the affected Indigenous Peoples what FPIC means and that the Certifying Entity will respect an informed decision from the affected people regardless of whether this means a yes, a no or a modified proposal. Clarify that subsequent meetings within the FPIC framework will follow if the Indigenous Peoples wish to participate. Explain to the affected Indigenous Peoples that a next step in the FPIC process is to sit down and design the content of the upcoming FPIC process. • Be transparent that you have full respect for the traditional decision-making that prevails in the current community, with the current affected Indigenous Peoples. • Maintain transparency when problems arise and communicate openly and honestly about any problems that may arise.
Respect the Indigenous Peoples' needs regarding time and place for future meetings	<p>If the affected Indigenous Peoples are willing to continue the dialogue, request a new meeting to discuss the future design of the FPIC process and establish an agreement to regulate this process. Explain that the Certifying Entity will wait for the Indigenous Peoples and their community to decide on their participation time frame, respecting their</p>

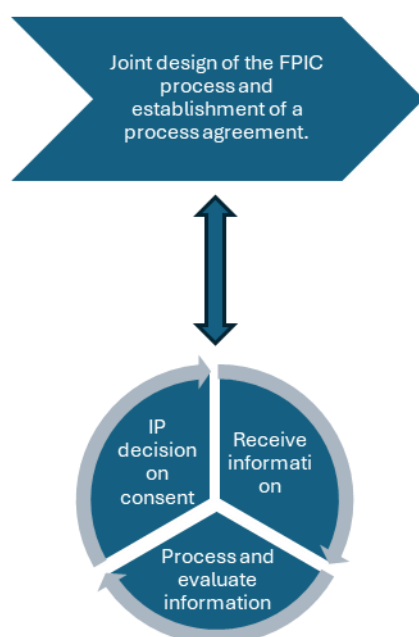
	decision-making traditions. The Indigenous Peoples must have full autonomy over the time and location of this meeting. Offer financial assistance if needed, such as providing advisers to the Indigenous Peoples to ensure equal participation in the meetings.
Documentation	Agree on the forms and content of documentation for the FPIC process

The final decision on participation in the continued process determines whether the FPIC process continues or concludes. The decision should be documented and approved by both parties. The decision of the affected Indigenous people can be a yes to the FPIC process or a no. A yes can also consist of a modified counter proposal or a yes with certain conditions. If the Certified Entity cannot accept such a modified positive decision, this likely leads to a negative decision, a no to the future process.

If the decision is negative, the Certifying Entity should ascertain the basis on which the decision was made. A negative decision made on an informed basis must be respected. An informed basis may be that the project proposals presented by the Entity will seriously destroy a sacred site, or that there is already a completed impact analysis that clearly points to serious consequences. If the Certifying Entity feels that their proposal has been misunderstood and that they have difficulty resuming a dialogue to clarify this, then ASI and IPAF can help to clarify the situation.



2.4.3.2 Step 2 – Joint process design and process agreement



The experience from many FPIC processes that have broken down shows contributing causes including a lack of consensus on how the process should be carried out, differences in the parties' expectations of the process and result, and an imbalance in the resources and capacities that the parties can invest in the process.

Preventing such failure involves negotiating a joint design for the FPIC process in this initial phase of the project, confirmed via a Process Agreement.

A Process Agreement does not mean that the affected Indigenous Peoples have taken a position on the issue underlying the FPIC process. That matter shall be dealt with later in the process. The Process Agreement's only function is to create clear rules of the game, which increases the probability of progressing in the process significantly.

The scope of the work to design the FPIC process and establish a Process Agreement will differ depending on whether this is the first time the parties are negotiating an agreement or if this is a recurring issue in a pre-established relationship. Regardless, great care should be taken to ensure that both parties design their arrangement in good faith and with a desire for consensus.

Recommendations	How and Why
<p>Establish a mutual understanding and agreement on the need for a Process Agreement, to support the FPIC process.</p>	<p>This work should have already started during Step 1, the first meeting. The Certifying Entity must count on the fact that many Indigenous Peoples have bad experiences in negotiations with its resulting agreements. If the Rightsholders show hesitation about entering a process agreement, they should be offered to use their own advisers or supervisors who are chosen by the Rightsholders, funded by the Entity.</p> <p>At this early stage, an alternative could be to consider the involvement of an independent verifier or observer. Such an independent observer could be recommended by ASI and/or IPAF, while the cost would usually fall on the Certifying Entity.</p>
<p>Establish reasonable expectations and strategies around Past Grievances</p>	<p>The affected Indigenous Peoples may request that past grievances be addressed before granting consent for future activities that may affect their legal or customary rights. Early discussions on the limits of ASI certification are critical for establishing reasonable expectations and strategies for redress.</p> <p>Grievances over past decisions that have affected legal and/or customary rights may not be within the scope of The Certifying Entity's responsibility. As general guidance, it is reasonable to assume that compensation for historical actions by the state remain the responsibility of the state. The Certifying Entity may be held responsible for any unauthorised actions that result in lands, territories, and resources of the affected Rights holder being confiscated, taken, occupied, used, or damaged without their FPIC.</p> <p>Even at this early stage, the affected Indigenous Peoples may decide to decline the negotiation of an FPIC Agreement. For example, the rights holder may assert that their legal and/or customary rights have been violated by the Certifying Entity and redress is required.</p> <p>It may be appropriate to create a space in the process agreement to handle this type of conflict as part of the ongoing FPIC process.</p>

<p>Establish a Process Agreement</p>	<p>The process agreement is the result of the talks and negotiations that the concerned Indigenous Peoples and the Certifying Entity have conducted. These conversations may have gone on for a long time, especially in cases where this is the first time the parties have met.</p> <p>The format of this agreement is itself a matter to be agreed upon by the parties. A contract drawn up by a corporate lawyer rarely contains language that is translatable into the language appropriate to the Indigenous people concerned.</p> <p>A Process Agreement may include overarching principles such as respecting the Rightsholders governance protocols and striving for mutual understanding and transparent good faith engagement.</p> <p>Key elements of a Process Agreement may include:</p> <ul style="list-style-type: none"> • An agreed scope of the FPIC process including a clear description of the Certified Entity's planned activities. • The format for protocols for meetings, negotiations and decision-making in all stages of the FPIC process • Flexible timelines that respect traditional decision-making methods • Designated representatives for both parties in the FPIC process. • Conditions for verification, monitoring and observation of the FPIC process. • Conditions for withdrawal from the FPIC process. • Financial commitments from the Certified Entity. • Terms of acceptable use of advisors, supervisors, and observers by the affected Indigenous Peoples and funding, which will be primarily from the Certifying Entity • Capacity building provisions for the affected Indigenous Peoples, if necessary.
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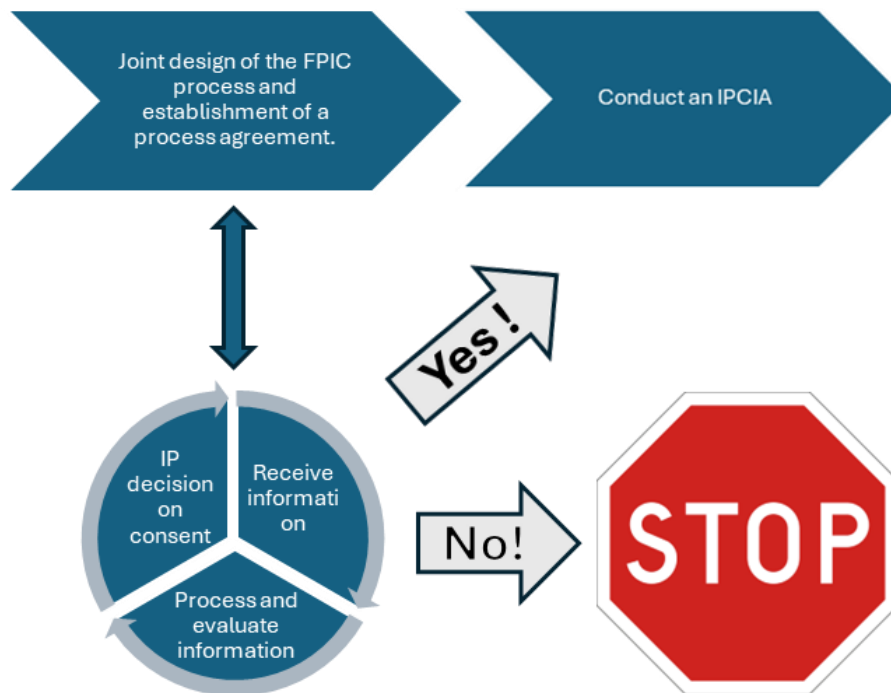
	<ul style="list-style-type: none"> • Agreement on the scope of mapping and Impact Assessments, including ensuring that these processes will be carried out in a participatory manner (see Step 3) • Mechanism to formalize the FPIC agreement. • Types of documents to be shared, for example the results of Impact Assessments. • Information exchange protocols during for coming process. • Consideration of Indigenous Peoples' intellectual property rights, such as how information acquired during the mapping process will be handled • Mechanisms for dispute resolution. • Recording of actions taken in the process. • Date of signature and expiration date, if applicable.
Multi-Stakeholder engagement	<p>While the primary parties to the FPIC process are the affected Indigenous Peoples and their representatives, other mutually agreed-upon experts and Stakeholders, like government bodies, NGOs, Indigenous organizations and scientific institutions, may also be able to support the process.</p> <p>An FPIC process with an affected Rightsholder is not the same as a public engagement process with interest groups. However, local conditions may sometimes blur these lines, allowing for a multi-Stakeholder approach to gathering preliminary data for the FPIC process, if all parties consent. Be aware of power relations and participation capabilities and remember that this process cannot replace the FPIC process prescribed by ASI's Performance Standard. Additionally, even in countries where national legislation mandates specific consultation protocols, these do not negate the need to plan and conduct an FPIC process.</p>
Dispute resolution	<p>In the Process Agreement, it is recommended that the Certifying Entity and the affected Indigenous Peoples establish a dispute resolution mechanism. A dispute resolution process is a mutually agreed-upon</p>

	<p>proactive measure to resolve disagreements under an existing agreement and/or prevent negotiations from collapsing. It is also the Entity's responsibility to inform all affected Rightsholders/Indigenous Peoples about the ASI Complaints Mechanism.</p> <p>Things to consider when developing this conflict resolution model:</p> <ul style="list-style-type: none"> • Keep it simple and accessible. • Mutually agree on a process that is manageable for and culturally appropriate to the affected Indigenous Peoples • One approach is to jointly choose a neutral Third Party to support and guide the dialogue if/when conflict arises • When the parties cannot resolve the conflict, a contact with ASI/IPAF is recommended, which, guided by the current ASI Complaint Mechanism, can contribute to creating the conditions for a conflict resolution.
Documentation	<p>The process agreement is a documentation, but it can be good to document which meetings and processes have preceded the Process Agreement itself.</p>

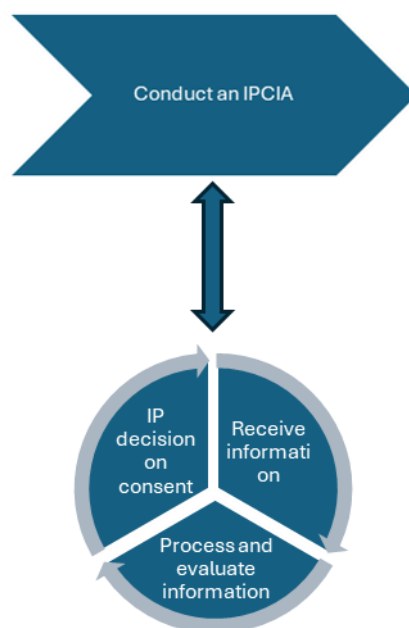
If the joint efforts to design a Process Agreement acceptable to both parties have succeeded, the process moves on to the next step.

If the negotiations to create a process agreement have stalled, this means that the FPIC process, in the absence of consent, has stopped. The Certifying Entity cannot implement planned measures if the Entity wants to continue to conduct its business in accordance with the ASI Performance Standard. The Entity should therefore make great efforts, in good faith, to resume negotiations and arrive at a solution that the affected Indigenous Peoples support.

Carrying out a planned activity if FPIC has not been obtained is a very serious decision by a Certifying Entity that is not in good faith with the process and can lead to serious consequences such as sanctions. Such a decision risks infringing upon Indigenous Peoples' rights and failing to meet ASI's Performance Standard. In criterion 9.3, the Certifying Entity is required to respect the rights of Indigenous Peoples as they are described in ILO Convention 169 and the UNDRIP. Criterion 9.1 requires that the Entity not cause any Human Rights violations.



2.4.3.3 Step 3 – Conduct an Indigenous Led Participatory cumulative Impact Assessment IPCIA.



Carrying out a comprehensive Impact Assessment is a crucial condition for the FPIC process; it creates the basis for the affected Indigenous Peoples to make an informed decision regarding consent.

Many Indigenous Peoples have experience with such impact assessments, and the results of these investigations rarely take full account of the Affected Population in a way that protects and understand their rights, culture, and Traditional Ecosystem Services.

ASI and IPAF have previously drawn attention to the fact that Impact Assessments that affect Indigenous Peoples are often carried out by international consulting companies with limited insight and knowledge about Indigenous Peoples. These investigations often miss the cumulative and far-reaching impact that may affect Indigenous Peoples.

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In collaboration with a Sámi organization from Norway, Protect Sápmi, ASI and Indigenous Peoples Alliance for Rights and Development (IPARD) have participated in developing a guidance document on how Impact Assessments should be carried out in Indigenous Peoples' land. This methodology is called Indigenous-Led Participatory and Cumulative Impact Assessment (IPCIA) on Indigenous Cultural Landscapes and Traditionally Practiced Ecosystem Services.¹²

The IPCIA methodology is characterized by:

- The Impact Assessment is carried out by skilled Indigenous Peoples who can combine traditional knowledge with Western investigation methodology.
- The Impact Assessments are carried out with consideration of cumulative impacts
- The Impact Assessments are always carried out in a participatory perspective where the affected Indigenous Peoples have a central role.
- The Impact Assessments contain a participatory mapping activity, often based on geographic information systems (GIS), which describes the land that is

¹² The IPCIA manual is available for download from ASI's website.

<https://aluminium-stewardship.org/asi-ipaf-work-with-the-protect-sapmi-foundation-norway-supporting-broad-dissemination-of-indigenous-led-participatory-and-cumulative-impact-assessment-ipcia>

affected as well as the impact of planned disturbances on current ecosystem services¹³.

- The Impact Assessments are based largely on traditional knowledge supplied by the affected Indigenous Peoples.
- The Impact Assessments summarize the direct, indirect, and cumulative impact of possible disturbances on the landscape in question (Indigenous Cultural Landscapes), the Indigenous People who are affected and their Traditionally Practiced Ecosystem Services.

Within the FPIC process, Impact Assessments must consider cumulative impacts. The cumulative impact of an activity considers the way it, together with other past, present, and future activities, affects the land, the Indigenous Peoples, and their Traditionally Practiced Ecosystem Services. Cumulative impacts are not limited to the impact of the Certifying Entity alone but include all impacts regardless of who caused them.

Impact Assessments must be carried out in a true participatory manner. The issue of participation in Impact Assessments is more complex simply ensuring the participation of the affected Indigenous Peoples. Indigenous Organizations such as Protect Sápmi have shown that even when Indigenous Peoples participated in analyses, this did not guarantee that their values, knowledge, and right to Self-Determination were integrated into subsequent processes. Often, those who carried out these analyses, usually external consultants, did not have sufficient knowledge and linguistic understanding to be able to value what came out of the processes. For example, in the Sámi language, there are nearly 600 words for snow, which are all significant in explaining their Traditionally Practiced Ecosystem Services, Reindeer Husbandry. An external consultant may know three or four words for snow, which is not enough to accurately describe an impact. Therefore, in Impact Assessments, affected Indigenous Peoples must not just be referents but rather should be active informants and knowledge providers who participate in the entire process.

When conducting participatory mapping, it is important to determine the terminology used to name the area to be mapped. This terminology often refers to land areas or territories. However, such terminology tends to be one-dimensional, and a land area where Indigenous Peoples live always will have a more multidimensional description

¹³ Traditional Practiced Ecosystem Services are the on-going accumulation of knowledge, practice and belief about relationships between living beings in a specific ecosystem that is acquired by Indigenous Peoples over hundreds or thousands of years through direct contact with the environment, handed down through generations, and used for life-sustaining purposes. This knowledge includes the relationships between people, plants, animals, natural phenomena, landscapes, and the timing of events for activities such as hunting, fishing, trapping, herding of animals, agriculture, and forestry. It encompasses the world view of a people, which includes ecology, spirituality, human and animal relationships, and more.

These land areas may be described based on:

- The consideration of multiple values (environmental, social, cultural, spiritual and economic).
- Identification with the area that is relationship-based (both to the living and to the dead).
- Culturally important landscape features that are tangible and intangible.
- Evidence of stewardship activities based on collectively held responsibilities for the territory.

Today, the term Indigenous Cultural Landscape (ICL) is used to better understand the landscapes where Indigenous people live.

Indigenous Cultural Landscapes (ICL) are living landscapes to which Indigenous Peoples attribute environmental, social, cultural, spiritual and economic value because of their enduring relationship to the land, water, flora, fauna and spirit as well as their present and future importance to their cultural identity. An ICL is characterized by features maintained through long-term interactions based on land-care knowledge and adaptive livelihood practices. They are landscapes over which Indigenous Peoples exercise responsibility for stewardship.

Traditional Knowledge¹⁴ refers to the knowledge, innovations, and practices of Indigenous Peoples. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is often transmitted orally from generation to generation. It tends to be collectively owned and can be expressed in stories, songs, folklore, proverbs, cultural values, beliefs, rituals and so on. It is also the foundation of Indigenous Peoples' traditional use and management of lands, territories, and resources. Traditional knowledge underlines Indigenous Peoples' holistic approach to life, which is a central element of their cultural identity. It is assumed that Impact Assessments will be carried out with the full endorsement of traditional knowledge. It is assumed, that the Impact Assessments, in step 3, should be carried out with full endorsement of traditional knowledge.

Recommendations	How and why
Study the IPCIA guidance document that can be found at the ASI web site.	The document has been developed by an Indigenous organization with more than 10 years of experience in carrying out the IPCIA methodology. The methodology

¹⁴ <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/04/Traditional-Knowledge-background-FINAL.pdf>

	has been sanctioned by ASI/IPAF and there is increasing interest in several countries in it.
The selection of consultants/advisors for the IPCIA process	<p>The question of which advisors with an Indigenous background who, together with the concerned Indigenous Peoples, will carry out the planned IPCIA activity is a question that should have already been dealt with during the process agreement.</p> <p>However, this is an issue that requires some consideration. Today, there are relatively few Indigenous organizations that can undertake the task of implementing a full IPCIA. Within ASI, however, work is underway to introduce the IPCIA methodology to different parts of the world. So far it has been applied in Europe and India, but Australia is also on the way. Within ASI and IPAF there are currently plans to start an IPCIA academy to train Indigenous consultants in this methodology.</p> <p>If it proves impossible to find an Indigenous organization that can take on the task of carrying out an IPCIA, then an alternative could be to train a Western consultant using the prepared IPCIA manual and to offer supervision and/or quality control via IPAF. Provided that affected Indigenous Peoples agree.</p> <p>The choice of consultants/advisors is a matter that must be decided by consensus among the parties.</p>
Create a budget	<p>Implementing an IPCIA is an extensive project that will take both time and resources. The Certifying Entity must create the budget space required for this. This budget must be sufficient to finance:</p> <ul style="list-style-type: none"> • The consultants/advisors who will be hired to lead the process as well as the circumstances that may arise for travel, gatherings, and do on. • The costs involved in giving the affected Indigenous Peoples the opportunity to participate. These costs may include hiring substitutes to carry out their daily activities and providing a daily allowance during the IPCIA process. • The costs of technical equipment. It cannot be taken for granted that the concerned Indigenous

	<p>Peoples have access to the tools required for GIS mapping. Although the hired Indigenous consultants will account for much of the specialist knowledge in this regard, it may be necessary for example, to provide computers to store the results of the completed mapping activity.</p>
<p>Trust that the affected Indigenous Peoples will be able to actively participate in the IPCIA process</p>	<p>There can be a tendency to undervalue Indigenous Peoples in terms of their ability to participate in Impact Assessments on their own land while at the same time overvaluing the capacities of commercial consulting firms and government officials in this. Keep in mind that projects can be improved by the participation of Indigenous Peoples. There are examples where Indigenous Peoples, in various instances of encroachment, through their unique knowledge of their own land, have proposed solutions that both reduced the negative impact on them and provided the developer with a better outcome.</p>
<p>Be patient</p>	<p>IPCIA investigations with the active participation of Indigenous Peoples will take time, which is to be expected because the goal is to engage as many different groups among the affected Indigenous Peoples as possible. These groups include women, men, the elderly, children, and those who are Vulnerable and At-Risk.</p> <p>The investigative work must also adapt to the annual cycle that may prevail in the Traditionally Practiced Ecosystem Services among the affected Indigenous Peoples.</p> <p>The work must also adapt to the traditional and customary decision-making processes that prevail among the affected Indigenous Peoples. To show patience for these processes is to show respect for their culture.</p>
<p>Respect and understand the cumulative perspective</p>	<p>Today, many Indigenous communities experience increased pressure on their lands. Not least, the ongoing climate crisis has created additional burdens, such as making it difficult to carry out Traditionally Practiced Ecosystem Services at the same time as adaptation measures. The green industrial transition</p>

	<p>has created a situation where many Indigenous Peoples talk about a new "green colonialism." The need to find new minerals, biomass, and renewable energy often becomes an issue in areas where there are Indigenous Peoples. A Certifying Entity may be just one of several other companies and organizations planning activities within the same landscape. The affected Indigenous Peoples must therefore weigh up the combined impact of these activities in a cumulative analysis and decide what will enable them to live on as a distinct people in the current landscape.</p> <p>The issue of conducting investigations while considering cumulative impacts is beginning to gain support within the judicial system. For example, Norway's Supreme Court decided in the so-called Fosen case that impact analyses in an Indigenous Peoples' land must be done with consideration of historical, present-day, and future impacts on the affected Indigenous Peoples.¹⁵</p>
Respect and understand Traditional Knowledge	<p>Indigenous Peoples Traditional Knowledge should be treated with the same respect and validity as western, scientific knowledge. Traditional Knowledge holders are experts in their own field.</p> <p>The World Intellectual Property Organization defines Traditional Knowledge as follows:</p> <p><i>"Traditional knowledge refers to the body of knowledge that is the result of intellectual activity and insight in a traditional context. This includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle with Indigenous Peoples in a community or is contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental, and medicinal knowledge, and knowledge associated with genetic resources"</i>¹⁶</p>

¹⁵ <https://www.domstol.no/en/supremecourt/rulings/2021/supreme-court-civil-cases/hr-2021-1975-s/>

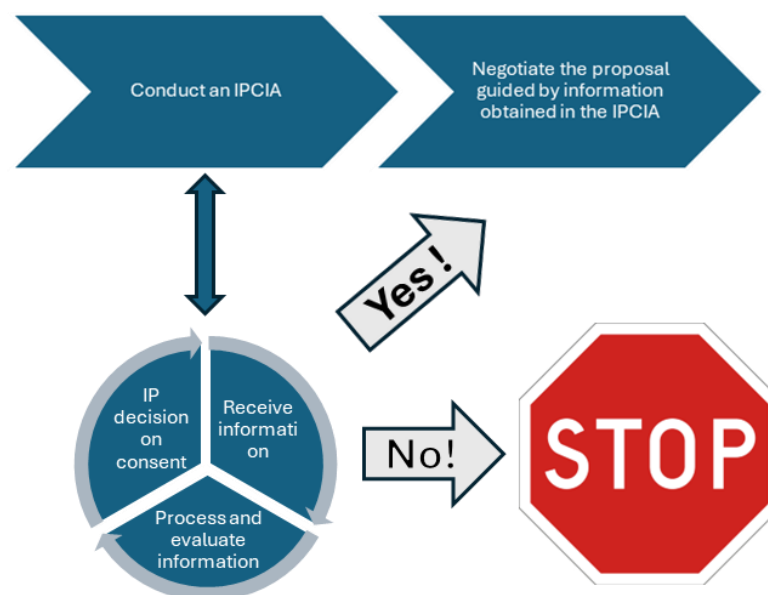
¹⁶ World Intellectual Property Organization

<p>Be aware of and respect Indigenous Peoples intellectual property rights</p>	<p>In an IPCIA, information may emerge that the concerned Indigenous People do not want to share with an outside group. This information is often tied to sensitive elements of the beliefs and cultural core of the concerned Indigenous Peoples. Such information is to be considered intellectual property and must be respected.</p> <p>The right to this intellectual property is based, among other things, on the UNDRIP, a declaration that a Certifying Entity, in accordance with the ASI Performance Standard, must respect.</p> <p>The UNDRIP states that:</p> <p><i>"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."</i>¹⁷</p>
<p>Handle conflict with authorities</p>	<p>Authorities in some nations or regions may grant industrial development permits, often based on simplistic impact analyses, without consulting Indigenous Peoples or obtaining consent through a FPIC process. However, if an authority gives a Certifying Entity a concession to conduct its business does not mean that the need for an FPIC process with its IPCIA becomes obsolete. A FPIC process must normally have been started prior to the possible decisions that the authorities may give. If the authorities have, in connection with their decision,</p>

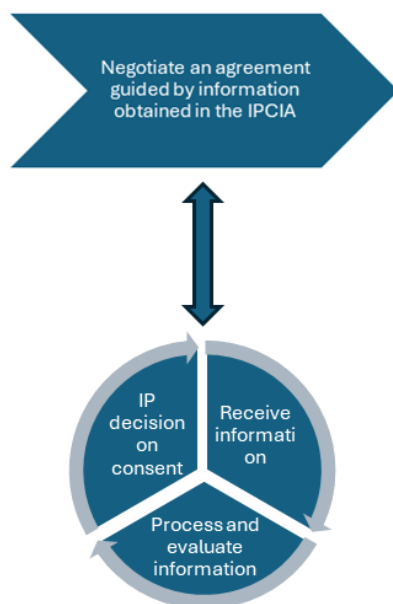
¹⁷ United Nations Declaration on the Rights of Indigenous Peoples, Article 31, 2007

	<p>demand a special form of impact analysis, this will likely be conducted in parallel with the IPCIA process.</p> <p>In some cases, conflicts may arise with authorities that do not recognize either Indigenous Peoples or the need to carry out an FPIC process. The Certifying Entity must then remember that ASI's Performance Standard requires that an FPIC process be carried out regardless of authorities' opinions on the matter.</p>
Documentation	Document the meetings and the process that led to an IPCIA.

After the completed IPCIA investigation, the concerned Indigenous people are now sufficiently informed to either proceed into a negotiation or to end the FPIC process. A decision in either direction is in this case unequivocally based on informed grounds. The decision of the affected Indigenous Peoples can be a yes to continue the FPIC process or a no. A yes can also consist of a modified counter proposal or a yes with certain conditions. If the Certified Entity cannot accept such a modified positive decision, this likely leads to a negative decision, a no to the future process.



2.4.3.4 Step 4 – Negotiate an agreement guided by the information obtained in the IPCIA process



When an IPCIA's results are available, and if the Rightsholders want to proceed with a negotiation, the fourth step in the FPIC process begins. A negotiation is best carried out in a smaller group. If the affected Indigenous Peoples have not already appointed a negotiating group, the Certifying Entity should recommend that the affected Indigenous Peoples do so. The Certifying Entity's personnel who have been involved with the FPIC process should also be active in this part of the process if they have a mandate to negotiate and enter into agreements and contracts.

Even if the negotiating group appointed by the Indigenous Peoples has a mandate to negotiate, a negotiated agreement will still be anchored in the traditional decision-making process that prevails among the affected Indigenous Peoples.

A negotiation may contain many components where the following can/should be included:

- Adaption and modification of initial plans
- Mitigation measures
- Compensations measures
- Benefit sharing,
- Rehabilitation at closure
- Confidential information
- Implementation plan
- Monitoring plan
- Communication and information plan
- The forms for a future agreement

- Complaint mechanism

Recommendations	How and why
Adaption and modification of initial plans	After an IPCIA has been carried out, there may be parts of the original plan/proposal need to be modified. Modification may be warranted by a proposal from the Indigenous Peoples or as a result of the Entity receiving new knowledge under the guidance of the completed IPCIA. It is important to discuss these changes because they will inform subsequent discussions about mitigation, adaptation, or compensatory measures.
Mitigation measures	<p>Mitigation measures are means to prevent, reduce, or control adverse impacts on Indigenous Peoples, and include restitution through replacement, restoration, compensation, or other means for any damage caused. In general, risks with a high probability of harming Indigenous Peoples' Rights and damaging their Traditionally Practiced Ecosystem Services should be avoided.</p> <p>The most common mitigation strategy is risk limitation, which can involve the Certifying Entity taking action to address a perceived risk and regulate their exposure. Risk limitation usually employs some negotiated risk acceptance and some negotiated risk avoidance.</p>
Compensations measures	<p>If mitigation measures are not possible to take or are not the most effective way to deal with negative impact, compensatory measures can be taken.</p> <p>Compensation measures involve the Entity compensating the Indigenous Peoples and their community for the damage and infringements that it causes and/or the damages that arise as a result of its operations. These measures may include financial compensation.</p>

	<p>As a compensation measure, the parties may agree in a negotiation that measures shall be implemented that do not constitute damage prevention or damage compensation, such as development, research, and training efforts. Here, it can also be brought up to date that compensation is paid to the Indigenous Peoples and their community without connection to a special measure, for example as compensation for infringement of tenure rights</p>
Benefit sharing	<p>Benefit sharing agreements are privately negotiated and legally enforceable agreements that establish formal relationships between Indigenous Peoples and the Certifying Entity. Indigenous Peoples and local communities increasingly call for more equitable benefit sharing by the extractive industries, alongside the effective management of environmental and social risks of industrial activity. Within international law, the concept of ‘fair and equitable benefit sharing’ is increasingly accepted as a norm in a range of sectors, including the extractive industries.</p> <p>The term ‘benefit sharing’ can encompass taxation and revenue distribution, job creation, ownership of companies and shares, negotiated agreements and community development programmes.</p> <p>Benefit sharing differs from the unidirectional (top-down) flows of benefits and, rather, aims at developing a common understanding of what the benefits at stake are and how they should be shared. In this connection, it has been argued that benefit sharing is geared towards consensus building. It entails an iterative process, rather than a one-off exercise, of good-faith engagement among different actors that lays the foundation for a partnership among them.¹⁸</p>

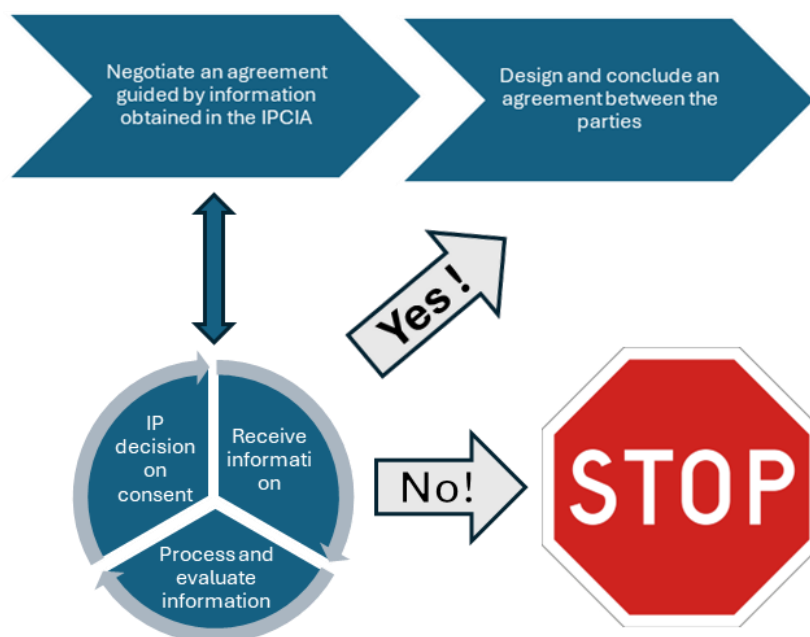
¹⁸ Morgera, E. “The need for an international legal concept of fair and equitable benefit sharing.” *The European Journal of International Law*, 2016, 27, pp. 353–383

Rehabilitation at closure	<p>Countless environmental, social, and economic issues can arise from the closure of mines and other industrial operations without rehabilitation. Such post-extractive landscapes often have a disproportionately negative effect on Indigenous Peoples who continue to live in these often remote areas on their traditional lands. The extent of these damages to the ICL is not well documented today, as many times the Indigenous people who are affected have lacked opportunities to document and spread knowledge about these problems.</p> <p>The issue of rehabilitation of the ICL following the closure of an ASI-Certified operation, including mining operations, is a theme that will most likely come up in an FPIC negotiation. Experiences from Australia, among others, point here to the importance of involving the concerned Indigenous Peoples in this rehabilitation work, as they are the experts on the landscape to be rehabilitated.</p>
Confidential information	<p>The issue of confidentiality is directed in two directions. One direction concerns confidentiality regarding the affected Indigenous Peoples, the other direction concerns the Certifying Entity. It is important that this issue is considered in the ongoing negotiations and then also included in a future agreement. Confidential Information refers to any information about the Indigenous Peoples and/or their community that may be sensitive for social, economic, cultural or other reasons. In the area of confidential information, there may also be information that is related to intellectual property rights – regardless of whether the information is documented.</p> <p>In addition, confidential information refers to any information relating to the Certifying Entity – technical, commercial, scientific, research results, formulas, methods, processes, specifications or of any other kind – regardless of whether it is documented.</p>

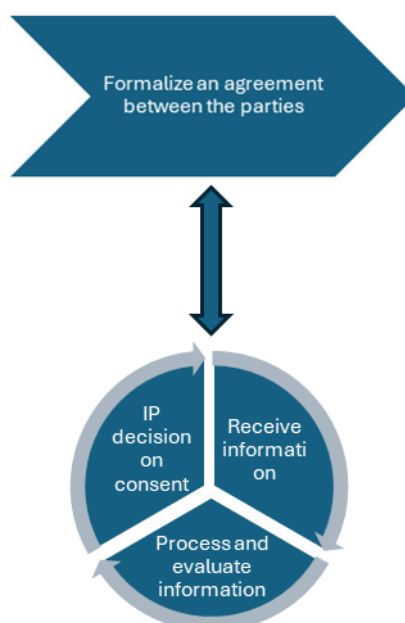
	<p>The exception of confidential information can be:</p> <ul style="list-style-type: none"> • Information that upon receipt was already known to the receiving Party, whereby it is incumbent on the receiving Party to prove such knowledge; • The information is or has become publicly available or known without the Party breaching the confidentiality commitment; • Information duly obtained from a third party, provided that this party is not bound by a confidentiality obligation, or; • Information that is the responsibility of the Party to make publicly available by regulation in law or court ruling.
Implementation plan	<p>In all negotiations, it is important to translate negotiation results into concrete plans, especially in FPIC negotiations. A plan for the implementation of achieved negotiation results should be simple, clear and contain a schedule, responsibility issues, funding and measurable results, key performance indicator (KPI), which will allow a quantifiable measure of performance over time for a specific objective.</p> <p>Both the concerned Indigenous Peoples and their representatives as well as representatives of the Certifying Entity should have equal influence on this plan and its implementation. This may mean that an organization for the implementation is established and where the Entity ensures that the representatives of the Indigenous Peoples have the capacity and opportunity to participate.</p>
Monitoring plan	<p>A monitoring plan can be part of the implementation plan. The important thing is that the parties agree on how to follow up on the results that the negotiations have led to and how to proceed in the event of a goal not being fulfilled, whether this is deliberate or unintentional. The planning of this will have a direct impact on Step 6 in the FPIC process—monitoring of concluded agreements.</p>

Communication and information plan	In a communication and information plan, the parties take a position on how communication and the exchange of information should take place after an agreement is in place. It is advisable for both parties to appoint people responsible for communication and information. Language issues and the Indigenous protocol should be considered. It may be appropriate to agree on the forms of communication and information exchange so that this can be conducted in a culturally appropriate manner.
Complaint mechanism	This issue will be discussed in next step.
Documentation	<p>In order to create the basis for an FPIC agreement, all meetings must be documented in detail. Detailed notes are needed to remind the parties of what they agreed to and will be integrated into the agreement in Step 5. It is important that all these notes, regardless of the form in which they are presented, are approved by both parties. Careful filing of notes ensures they can be found when needed.</p> <p>Usually this type of documentation must be produced in several languages so that they are accessible to everyone. It is important that those carrying out these translations have the sufficient professional background and cultural knowledge to understand all the nuances of the respective languages, otherwise the results could be misleading and cause unnecessary conflicts.</p>

If the Indigenous Peoples now are content with the negotiation the process will proceed to the next step – the forming of an agreement. If there is no consent the process stops here.



2.4.3.5 Step 5 – Formalize an agreement between the parties



After a successful negotiation, the next step is to formalize a binding agreement using a mutually agreed-upon form of consent—be it written, oral, a traditional ceremony, or perhaps a combination of these.

If affected Indigenous Peoples are reluctant to enter a legally binding agreement with the Entity, due to potential repercussions for any legal position or negotiation status with

the state, alternative forms of agreement can be used like Memorandums of Understanding or Protocol Agreements. These alternatives should explicitly state objectives to respect the right to grant, withhold or withdraw FPIC. It's useful to address this scenario early in the development of the Process Agreement under step 2.

Once an FPIC agreement is reached, all parties are bound by it and consent cannot be withdrawn arbitrarily. The agreement should specify the conditions under which consent is granted and the grounds on which it may be withdrawn. A withdrawn consent may be due to the Certifying Entity withholding important information about its industrial activities, violating the current agreement, and not respecting the rights of the affected Indigenous Peoples. Such a situation also triggers the conflict management mechanism that the parties should have agreed upon.

The format of a consent agreement may include the following:

- Agreed signatory parties and information on the right by which they represent the parties.
- Mutually agreed material evidence of consent.
- Description of the geographical location and the traditional ecosystem services practiced at the site. This likely constitutes the IPCIA carried out during Step 3 of the FPIC process.
- Description and naming of affected populations/Indigenous Peoples/Local Communities.
- Description of the Certifying Entity.
- Description of contract details. For project implementation agreements, this may include a project plan and implementation plan.
- Agreed adaptation measures, compensation measures, responsibilities and financing for these.
- Financial agreements between the parties
- Benefit sharing for the concerned Indigenous Peoples.
- Rules and restrictions imposed on the parties (such as limiting the use of certain areas of the ICL)
- Duration/Period.
- Follow-up and monitoring plan
- Conditions for the withdrawal of consent
- Grievance mechanism/conflict management.
- Confidentiality agreements
- Attachments such as the IPCIA, management plans/details of agreed economic development activities/associated detailed processes for implementation.

Recommendations	How and why
<p>Agreed signatory parties and information on the right by which they represent the parties.</p>	<p>It is important to ensure that those who sign the agreement have a mandate to do so. In the case of an Indigenous Peoples, this means that the traditional and customary decision-making process has given the mandate to sign the agreement. This is to avoid that someone who does not have the trust of the entire concerned Indigenous Peoples and their community should enter into an agreement on their own.</p>
<p>Conditions for withdrawal of consent</p>	<p>A withdrawal of consent does not have to be negative. This may mean that after the implementation of adaptation and compensation measures, a previously given consent that imposed certain limitations is re-evaluated; some of the previous limitations may then be removed, creating a modified consent. To achieve such a development, the parties to the FPIC agreement must have a close and trusting dialogue not only during the FPIC process but above all after an agreement is in place.</p> <p>The negative side of a withdrawal of consent can arise when a Certifying Entity does not adhere to the existing agreement. In this case, the affected Indigenous Peoples can withdraw consent.</p>
<p>Grievance mechanism/conflict management.</p>	<p>When discussing conflict management and complaints mechanisms within FPIC processes, one must recognise the overlap of various legal areas. An agreement under the ASI Performance Standard may also contain civil law elements impacting Indigenous Peoples. Therefore, conflict resolution mechanisms may need to be both separate and integrated, combining ASI developed methods and civil law approaches.</p> <p>While the agreement may be enforceable in civil law, it's beneficial to set up a less formal preliminary mechanism where disputes can be resolved before they escalate. Considering that Indigenous Peoples may lack resources for lengthy and costly battles, and that for a Certifying Entity, lawsuits are time-consuming and reputationally damaging, a non-</p>

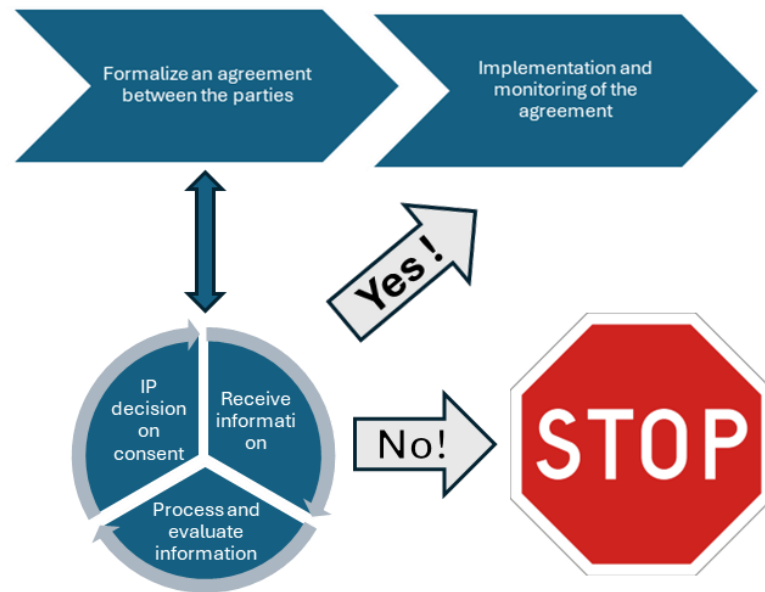
	<p>legal, mediation-focused grievance mechanism is advisable. This mechanism should address disputes related to the agreement and general company-community relations, ensuring it does not replace the right to legal redress but offers a practical, accessible alternative.</p> <p>The ASI Complaints Mechanism follows FPIC principles when managing complaints under the ASI Complaints Mechanism.</p>
Documentation	<p>The work of drawing up an agreement may require several meetings and the involvement of advisers from both parties. It is then important to keep notes so that the entire process of drawing up the agreement is recorded. This can be a help if later conflicts arise about how the agreement should be interpreted.</p>

If the parties have now agreed on a consent agreement, the FPIC process now moves to its last step, Step 6.

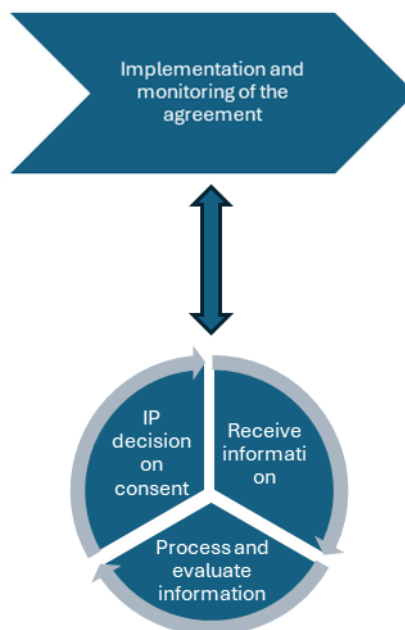
However, if the parties have not been able to agree, we now end up in a state where the Certifying Entity cannot proceed with its plans without risk seriously violating the requirements in the ASI Performance Standard. When you have come this far in the FPIC process, it is worth trying to get back to the negotiating table to find a common solution, using some of the conflict resolution tools that have been developed in this process.

Some tools to avoid negotiation failure and reluctance to sign an agreement could be:

- Guaranteeing that the affected Indigenous Peoples have sufficient resources to participate in the entire FPIC process, including the possibility, financially and practically, of hiring their own experts/advisors.
- Establishing an independent review committee which, with the support of ASI and IPAF, can provide people who can review whether the process has been carried out in good faith and followed directives and recommendations.
- Decision to establish a mediation function with independent mediators. These can likely be provided by ASI.



3.4.3.6 Step 6 – Implementation and monitoring of the agreement



The FPIC agreement that the parties have signed then enters step 6 where, the activity impacts and agreements should be monitored going forward. This includes setting up processes for monitoring and evaluation, as well as protocols for complaints in case there are different perceptions about the implementation of the agreement.

The task of forming a joint mechanism for implementation should have been discussed in the completed negotiation in Step 4 and cemented in the agreement in Step 5. This mechanism includes a shared understanding between the parties of the implementation and monitoring methodology, including which activities are to be

implemented and monitored and which KPIs (key performance indicators) are to be followed up. How the results are to be documented and reported to the affected Indigenous Peoples and what human and financial resources will be required to implement this should also be considered.

By establishing a mutually agreed mechanism, an organization can promptly and transparently address concerns that may arise throughout the life of a project and support the quality assurance imperatives for project management.

Recommendations	How and why
Monitoring, evaluation, and learning (MEL)	A process for ensuring that implementation takes place in a desirable and predictable way is monitoring, evaluation, and learning, also known as MEL. This includes customizable frameworks with processes, best practices, and tools that are strategically tailored to the FPIC process. MEL helps the parties to clarify intent, gather critical data to assess effectiveness against impact goals, and monitor levers for change. Ideally, MEL processes should also include realistic assessment of capabilities, internally and externally across the landscape, to respond and adapt with real-time agility.
Monitoring	Before monitoring the FPIC process, the established MEL organization should ask itself some basic questions: <ul style="list-style-type: none"> • What are the major risks and challenges in the planned project that may threaten Indigenous Peoples rights and create potential Human Rights violations? • What goals have been set or implemented to meet that challenge, and are they specific, realistically achievable, and measurable within a given timeframe? • Is there any upcoming implementation of new processes and initiatives from the Entity that may affect these goals? What will the change look like in six months? One year? Two years? At the end of the initiative?
Evaluations	Once an organization establishes what it needs to monitor, the focus then shifts to designing

	<p>processes for collecting data for evaluation. Evaluation refers to the periodic assessment and analysis of on-going or completed projects.</p> <p>Although evaluation techniques may change, the end-result is the same: Evaluation gives the parties in an FPIC process an opportunity to regularly, check how effective this process with its subsequent programs/projects is. This ensures that money spent, and resources invested, will contribute to achieving desired outcomes for the Indigenous Peoples as well as the Entity.</p>
Learning	<p>Learning is the process through which information gathered through MEL is contemplated and used to continuously improve a project and the FPIC process. This allows both parties to be better able to reach joint desired results.</p> <p>It must be remembered that an FPIC process is not a one-off process but a long and extensive relationship between an ASI Certified Entity and the affected Indigenous Peoples. The first FPIC process will be followed by new ones as new needs and wishes emerge in the relationship. Iterative learning in these processes can create a more flexible way of working while the ongoing relationship can be deepened. It is important to see this learning as an opportunity not a threat.</p>
Independent evaluator	<p>To avoid conflicts between the parties, it may be beneficial to connect an independent evaluator to the established MEL organization. Such an evaluator should be jointly recruited by both parties. If the parties themselves cannot come up with a suitable person for this task, ASI and IPAF can help to find such a person. The cost of this effort is financed by the Certifying Entity, but it is important that the hired resource is not considered biased as a result.</p>
Documentation	<p>Following up the implementation and fulfilment of the agreement is a long-term endeavour that involves many moving parts and potential discussions regarding compliance and deviations.</p>

	Note-taking is therefore crucial. Both parties should take part in documenting the process while considering linguistic and cultural understanding within and between the parties.
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Appendix 1: Who are Indigenous Peoples?

Globally, there are an estimated 476.6 million indigenous peoples, of whom 238.4 million are women and 238.2 million are men. Overall, the indigenous population represents 6.2 % of the global population.¹⁹

Indigenous Peoples own, occupy, or use a quarter of the world's surface area. Indigenous Peoples conserve 80 percent of the world's remaining Biodiversity and recent studies reveal that forestlands under collective Indigenous Peoples and Local Community stewardship hold at least one quarter of all tropical and subtropical forest above-ground carbon. They hold vital ancestral knowledge and expertise on how to adapt, mitigate, and reduce climate and disaster risks.²⁰

Along with their distinct social, cultural, economic, and political characteristics, Indigenous Peoples are the holders of unique languages, knowledge systems, traditions and worldviews. More than 5,000 distinct indigenous communities are believed to exist, speaking around 4,000 different languages²¹ and living in around 90 countries.²² In general, indigenous cultures, social institutions and ways of life bear a close relationship with the lands and territories that indigenous communities have traditionally occupied or used. Yet there is no single, universally agreed definition of Indigenous Peoples.

In the long history of indigenous issues at the United Nations considerable thinking and debate have been devoted to the question of the definition or understanding of "Indigenous Peoples". But no formal definition has ever been adopted by any United Nations-system body. One of the most cited descriptions of the concept of "indigenous" was outlined in the study of the Special Rapporteur José R. Martínez Cobo's on the Problem of Discrimination against Indigenous Populations.²³

After long consideration of the issues involved, Martínez Cobo offered a working definition of "indigenous communities, peoples and nations". In doing so, he expressed several basic ideas forming the intellectual framework for this effort, including the right of Indigenous Peoples themselves to define what and who Indigenous Peoples are. The working definition reads as:

¹⁹ https://www.ilo.org/global/publications/books/WCMS_735607/lang--en/index.htm

²⁰ <https://www.worldbank.org/en/topic/indigenouspeoples>

²¹ International Work Group for Indigenous Affairs (IWGIA) 2018

²² UN, 2009

²³ Martínez Cobo, José R. "Study of the problem of discrimination against indigenous populations." *Report of the Sub-commission of Prevention of Discrimination and Protection of Minorities*, 1987.

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a. Occupation of ancestral lands, or at least of part of them*
- b. Common ancestry with the original occupants of these lands*
- c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)*
- d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)*
- e. Residence in certain parts of the country, or in certain regions of the world*
- f. Other relevant factors.*

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference”.

In 1989 the International Labour Organization in its convention ILO no 169 on Indigenous and Tribal Peoples sets out criteria for identifying the peoples concerned:

“Indigenous Peoples are descendant from populations who inhabited the country or geographical region at the time of conquest, colonization, or establishment of present State boundaries. They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status. The status of belonging to an Indigenous Peoples is achieved through self-identification”.

Considering the diversity of Indigenous Peoples, an official definition of “Indigenous” has not been adopted by any UN-system body. Instead, the system and the United

Nations Permanent Forum on Indigenous Issues have developed a modern understanding of this term based on the following²⁴:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

This is also the interpretation that ASI has applied in its Performance Standard, which thereby must be applied by Certifying Entities.

The world's 476 million indigenous people do not form a homogeneous group. Among the Indigenous Peoples you find, on the one hand, well-educated professors at Scandinavian universities and, on the other hand, isolated tribes in the Amazon. Here you find Māori forest managers and impoverished communities. Here there are Russian pastoralists who carry out their traditional reindeer husbandry at the same time as First Nations in Alaska carry out industrial activities in the billiard class. Regardless of differences in material, cultural, civil and political conditions, the world's Indigenous Peoples share a Cosmovision that binds them together.



Illustration: The Cosmovision of the Indigenous world

²⁴ https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

In Indigenous Peoples' Cosmovision, land, territory, and resources are fundamental to the continuity and fullness of life. They integrate elements including spirituality with social, cultural, economic, and political development in a deep connection with Mother Earth. This worldview shapes their identity and links them to their past, community, and the world. Indigenous traditions embrace a holistic philosophy where the world is viewed as a whole. This rich heritage includes diverse practices, representations, expressions, knowledge, and skills.

This approach can be exemplified by Chief Seattle who in 1854 wrote in a letter to the President of the United States:

All things share the same breath, the beast, the tree, the man. The air shares its spirit with all the life it supports... The Earth does not belong to us: we belong to the Earth. There is no death, only a change of worlds. Humankind has not woven the web of life. We are but one thread within it.

Attention, awareness, acknowledgement, and respect for this Cosmovision is an important element of an Entity's work and commitment in an initial FPIC process.

Of the world's approximately 470 million Indigenous people, far from all are recognized as Indigenous by the governments of the countries where Indigenous people live their lives. For the Indigenous Peoples themselves, this is of course a big problem that often means that the rights associated with Indigenous Peoples are not respected including forced displacement, loss of land, resources and the traditional ecosystem.

1. Indigenous Peoples in Africa

In various African countries, efforts to support Indigenous Peoples are advancing, Uganda, the is developing an Affirmative Action Program for Indigenous Peoples; the Republic of the Congo, has adopted a law for the promotion and protection of the rights of Indigenous Populations and has launched a national action plan for 2022–2025; and in Democratic Republic of Congo (DRC), a law on the promotion and protection of the rights of Indigenous Peoples has been adopted and the concept of “Indigenous Pygmy people” is accepted and approved by the government and civil society organizations in the DRC focusing on the Mbuti, Baka and Batwa peoples. Burundi is in the process of preparing a national strategy for the socioeconomic integration of the Batwa for sustainable development. In several African countries, ministries in charge of climate change programmes have taken on board key provisions of the UNDRIP, including consultation²⁵

²⁵ “Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good practices and lessons learned – 2007–2017.” *Report of the Expert Mechanism on the Rights of Indigenous Peoples*, <https://documents-ddsny.un.org/doc/UNDOC/GEN/G17/233/33/PDF/G1723333.pdf?OpenElement>

The question of who the “indigenous peoples” of Africa has been the subject of significant discussion, with resistance to the concept resting on the fact that a significant majority of Africans are indigenous to their countries, and most others are indigenous to the continent. As a result, unlike in settler colonies, the notion of indigenous peoples as ‘first inhabitants that were invaded by foreigners’ has little traction. The African Commission on Human and Peoples Rights has attempted to dispel misunderstandings around the concept stating that:

“Rather than aboriginality, the principle of self-identification is a key criterion for identifying indigenous peoples. This principle requires that peoples identify themselves as indigenous, and as distinctly different from other groups within the state.”²⁶

The Commission also recognizes three main characteristics of Indigenous Peoples in Africa:

“The focus should be on the more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.”²⁷ (original emphasis)”

This experience of subjugation was elaborated on by the Commission noting that:

“Domination and colonization have not exclusively been practiced by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address.”²⁸

The Commission has also identified some of the groups which fall under the rubric of indigenous peoples in Africa. Among these are:

- *The Pygmies of the Great Lakes Region,*

²⁶ African Commission on Human and Peoples’ Rights, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), pp.11

²⁷ *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (Eks/Skolens Trykkeri, Copenhagen: ACHPR, IWGIA, 2005), pp. 92-3, http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf

²⁸ African Commission on Human and Peoples’ Rights, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s Work on Indigenous Peoples in Africa*

- *the San of South Africa,*
- *the Hadzabe of Tanzania and*
- *the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples.*
- *Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hinda of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa.*²⁹

2. Indigenous Peoples in Latin America

Most Latin American states have ratified ILO Convention 169, and many of them were active in the negotiation of the UNDRIP. In recent years many of these States have enacted legislation recognizing Indigenous Peoples and their rights, and in some cases, constitutional recognition has been afforded to indigenous peoples. In Chile and Guatemala, Indigenous Peoples' rights were included in country constitutions³⁰ and discussions on the recognition of Indigenous Peoples and their rights are ongoing in other countries³¹. The elaboration of legislation to operationalize the state duty to consult Indigenous Peoples and the implementation of FPIC is an ongoing process in several countries in Latin America including Peru, Colombia, Costa Rica, Guatemala, and Honduras. El Salvador has recently adopted a national Policy on Indigenous Peoples, which considers the UNDRIP as its framework³². Dialogue processes with Indigenous Peoples on public policies are ongoing in Costa Rica and Paraguay³³.

At a regional level, the Inter- American Commission and Court on Human Rights have developed an important body of legal interpretation around indigenous peoples' rights. The scope of ILO Convention 169, which covers both indigenous and tribal peoples, extends to groups such as Afro-descendants who do not self-identify as indigenous, but share many characteristics. In this regard the Inter-American Court

²⁹ African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 10

³⁰ Chile Constitutional Convention, 2021,

³¹ In an historic resolution, a Guatemalan Appeals Court ruled that the government must take into account the right to free, prior and informed consent when granting mining licenses on the lands of indigenous communities.

³² Política Pública para los Pueblos Indígenas de El Salvador (Public Policy for Indigenous peoples of EL Salvador), 2017: <https://derechodelacultura.org/wp-content/uploads/2019/06/Pol%C3%ADtica-para-PueblosInd%C3%ADgenas-MICULTURA.pdf?view=download>.

³³ Report of the UN Special Rapporteur on the Rights of Indigenous peoples to the UN General Assembly 2017: Implementation of the United Nations Declaration on the Rights of Indigenous peoples and the work of the Special Rapporteur on the rights of Indigenous Peoples (<https://documents-ddsny.un.org/doc/UNDOC/GEN/N17/224/61/PDF/N1722461.pdf?OpenElement>); The Indigenous World 2020 -2021 and 2022, IWGIA. <https://iwgia.org/en/resources/indigenousworld.html>

on Human Rights has clarified that the rights recognized under the international framework of Indigenous Peoples' rights, including the requirement to obtain FPIC for mining and energy projects, also apply to these tribal peoples. The shared characteristics between the two groups include social, cultural, and economic traditions different from other sections of the national community, identification with their ancestral territories, and self-regulation, at least partially, by their own norms, customs, and traditions; both groups meet the UN and ASI criteria.

Nevertheless, governments in the region continue to resist full compliance with international standards related to the recognition and protection of Indigenous Peoples' rights. From the perspective of the Certifying Entity's obligation to respect human rights, a thorough mapping process should go beyond national nomenclature issues and respect the inherent collective and individual rights of peoples and groups based on their historical and contemporary realities, identities, and necessities.

3. Indigenous Peoples in Asia

In Asia, few states including the Philippines, Japan, and Nepal, have adopted legal provisions that recognize Indigenous Peoples' rights, lands, territories, resources, and traditional tenure systems. Even where legal provisions exist³⁴ their implementation is delayed by complex administrative procedures, uncoordinated and understaffed authorities, and contradictory sectorial legislation on land use, such as conflicting provisions on forestry and mining. In Cambodia, a 2009 Policy on the registration of the right to use the land of Indigenous Peoples' communities bolstered the 2001 Cambodian Land Law, which had laid the ground for community land titling among indigenous communities.³⁵ As in Africa, the argument put forward by States is that all the people of Asia are indigenous to their countries. However, this argument has been soundly refuted by Asian Indigenous groups, academics, and UN human rights bodies.

Unlike Africa and Latin America, Asia lacks a region-wide human rights mechanism to address the issue.³⁶ At the sub-regional level, the Association of South East Asian

³⁴ In the Philippines the Indigenous Peoples' Rights Act of 1997, in India, the Forest Rights Act of 2006, in Cambodia, specific provisions have been adopted on Indigenous Peoples' rights over lands and natural resources (2009), in Malaysia, customary law is recognized as a basis for granting land rights in Sabah and Sarawak. In Thailand, the vast majority of Indigenous peoples live in protected areas. Three national laws on natural resource management that entered into force in November 2019 could potentially play a role in addressing the persistent tensions between the authorities and communities living in or adjacent to forests in Thailand.

³⁵ "Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good practices and lessons learned – 2007-2017." *Report of the Expert Mechanism on the Rights of Indigenous Peoples*, <https://documents.un.org/doc/undoc/gen/g17/233/33/pdf/g1723333.pdf?OpenElement>

³⁶ Sub-regional groups, such as the Association of South East Asian Nations (ASEAN), have formed sub-regional human rights mechanisms but these do not address the rights of indigenous peoples

Nations (ASEAN) has established a human rights mechanism, but its mandate is limited to the promotion of the ASEAN Declaration on Human Rights (ADHR) which does not explicitly address the rights of indigenous peoples.³⁷ Region-wide guidance has, however, been provided by the UN Special Rapporteur on the rights of indigenous peoples following a 2013 consultation held with representatives of indigenous peoples in Asia.

The Special Rapporteur's report on the situation of Indigenous Peoples in Asia explains that there are particular groups, such as those referred to as "tribal peoples", "hill tribes", "scheduled tribes" or "Adivasis", which "distinguish themselves from the broader populations of the Asian countries and fall within the scope of the international concern for indigenous peoples".³⁸ These groups have "*distinct identities and ways of life, and face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression*". They continue to be "*among the most discriminated against, socially and economically marginalized, and politically subordinated parts of the societies of the countries in which they live*". A non-exhaustive list of groups from the various Asian countries represented in the consultation, were listed by the Rapporteur to illustrate this reality:

The Rapporteur provided a non-exhaustive list of groups from the various Asian countries represented in the consultation to illustrate this reality, which included the following:

- **Bangladesh:** Chakma, Marma and Tripura (collectively known as Jumma), and Santal, and Mandi, commonly referred to as Adivasi and officially referred to as tribes (upajati), minor races (khudro jatishaotta), ethnic sects and communities (nrigoshthi o shomprodai);
- **Cambodia:** Broa, Bunong, Chhong, Jarai, Kachak, Kavet, officially referred to as ethnic minority groups, indigenous minority peoples and Khmer-Loeu (hill tribes);
- **India:** Gond, Oraon, Khond, Bhil, Mina, Onge, Jarawa, Nagas, officially referred to as Scheduled Tribes or Adivasi (original inhabitants);
- **Indonesia:** Masyarakat adat communities, including groups such as the Dayak Benuaq, the Orang Tengger and the Orang Badui, a subset of whom are officially referred to as komunitas adat terpencil;

³⁷ The ASEAN Declaration on the Elimination of Violence Against Women and Violence Against Children does however include a reference to "women and children belonging to ethnic and/or indigenous groups"

³⁸ Anaya Asia Consultation A/HRC/24/41/Add.3 para 6

- **Japan:** Ainu, officially referred to as Indigenous Peoples, and the Ryukyans or Okinawans, who have sought similar recognition as Indigenous Peoples.
- **Lao People's Democratic Republic:** The majority of the Mon-Khmer, Sino-Tibetan and Hmong-Mien grouping, officially referred to as ethnic minorities and non-ethnic Lao.
- **Malaysia:** Orang Asli (original peoples) of peninsular Malaysia, the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks groups of Sarawak, and the natives of Sabah, officially referred to as aborigines and natives.
- **Myanmar:** Shan, Kayin (Karen), Rakhine, Kayah (Karenni), Chin, Kachin and Mon, commonly known as ethnic nationalities and officially referred to as national races.
- **Nepal:** Magar, Tharu, Tamang, Newar, Rai, Gurung and Limbu, commonly known as Adivasi Janajati and officially referred to as indigenous nationalities.
- **The Philippines:** Aeta, Ati, Ibaloi, Kankanaey, Mangyan, Subanen, officially referred to as indigenous peoples and indigenous cultural communities.
- **Thailand:** Karen, Hmong, Lahu, Mien, commonly known as ethnic minorities and officially referred to as "chao khao" or "hill tribes", and the nomadic sea gypsies or "Chao Lay".
- **Viet Nam:** Tay, Thai, Hmong, Muong and Khmer, officially referred to as ethnic minorities (Dân tộc thiểu số or Dân tộc ít người)

4. Indigenous Peoples in North America

Indigenous Peoples in USA are mainly Native American peoples or Alaskan Native peoples. In May 2016, 567 tribal entities were federally recognized, and most of these have recognized national homeland in the United States. Not all Native American tribes are recognized by the Federal government, with a degree of recognition afforded to inherent indigenous sovereignty under United States' jurisprudence. As a result, tribes are free to determine their membership. However, while self-identification as a tribe is necessary for recognition, it is not considered sufficient under the law. As a result, some tribes remain unrecognized and consequently lack legal protection. Likewise, the rights of tribes, or members of tribes, who reside outside of reservation lands are afforded lesser protections under the law. Furthermore, federally recognized tribal governments exist in parallel with traditional governance structures, a reality that should be addressed during corporate Human Rights Due Diligence and has implications for inclusive consultations and consent-seeking processes.

The size of the Indigenous groups living in the United States today can be difficult to ascertain as the statistics are not always reliable. The country's largest groupings of Indigenous Peoples are Indigenous Mexican Americans, Navajo, Cherokee, Sioux,

Ojibwe, Choctaw, Apache, Lumbee, Pueblo, Muskogee, Haudenosaunee, Inuit, and Blackfeet.

Native American land ownership is complex. It involves a patchwork of titles, restrictions, obligations, statutes, and regulations. Natural resources are extracted from Native American lands. The associated revenue from extraction is then disbursed. This is a unique process and involves many Stakeholders. Today, there are two major types of Native American land and natural resource ownership. Trust land, in which the federal government holds legal title, but the beneficial interest remains with the individual or tribe, The other is fee land purchased by tribes, in which the tribe acquires legal title under specific statutory authority. In general, most Native American lands are trust land.

The Indigenous Peoples of Canada are collectively known as "Aboriginal Peoples". The Constitution Act of 1982 recognizes three groups of Aboriginal Peoples: Indians, Inuit/First Nations) and Métis. Aboriginal peoples in Canada are challenged by the slow implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

In Canada, Indigenous Peoples' existing rights are afforded Constitutional protection since 1982 and a complex, and often slow and inefficient, land claims system exists to ensure recognition and protection of those rights. First Nations' reserves tend to be smaller and more numerous than Native American reservations, and issues also exist around the non-recognition of First Nations that are not registered under the 1951 Indian Act, with the Inuit and Metis' rights only recently recognized. Legal rulings continue to play a significant role in shaping government Policy in relation to indigenous self- governance, land rights and the requirement for consultations and consent.

The Government of Canada has highlighted four important principles that govern its relations with Indigenous Peoples. These are the recognition of rights, respect, cooperation, and partnership. So far, these principles according to many First Nations, seem to come with little more than political rhetoric. In addition, Canada has not ratified ILO Convention 169.

According to the 2016 Canadian Census, there were 1,673,785 Aboriginal Peoples in Canada, accounting for 4.9 percent of the total population. 977,230 people identified as a First Nations person. First Nations (defined as "Indians" in the Indian Act (R.S.C., 1985, 1985, c. I-5) and the Constitution Act (1982)) are diverse Nations and peoples representing more than 600 distinct First Nations and encompassing more than 60 languages.

The Métis constitute a distinct Aboriginal nation, number 587,545 in 2016, many of whom live in urban centers. The Inuit represent an Indigenous Peoples who have occupied Inuit Nunangat in Canada's north and numbered 65,025 in 2016.

Indigenous Peoples in Canada are represented by a number of representative organizations regionally, provincially and nationally. National Indigenous representative organizations include, but are not limited to, the Assembly of First Nations, the Congress of Aboriginal Peoples, the Inuit Tapiriit Kanatami, the Métis National Council, and the Native Women's Association of Canada.

5. Indigenous Peoples in Oceania

Australia's Indigenous Peoples, referred to as Aboriginals and Torres Strait Islanders, lacked citizenship under the Constitution until 1967. The aboriginal population in Australia is estimated at 745,000 individuals or 3.3 percent of the total population. Geographically, 62 percent of the Indigenous population live outside of Australia's major cities, including 12 percent in areas classified as very remote. The first recognition of their native title rights at the national level was in 1982 in the landmark Mabo case. In 1993, the Native Title Act was enacted to give effect to the ruling. Indigenous rights are also recognized to varying degrees in legislation at the federal and state level. A variety of institutions exist to represent Aboriginal peoples, ranging from a national representative body to large land councils, such as those established under land rights acts, to corporate-like native title representative bodies. The relationship between these representative bodies and traditional landowners can be complex at times, and indigenous groups have pointed to the need for an improved institutional framework that ensures the voice of Traditional Owners are heard and respected.

In 2017 a group of Aboriginal Peoples presented to the non-Indigenous Australia The Uluru Statement from the Heart,³⁹ the Statement calls for substantive reform to help realise Indigenous rights, through the establishment of an Indigenous Voice to Parliament and a Makarrata Commission. The proposal led to a nationwide referendum in October 2023 where a majority of the Australian voted against the proposal.

The Māori are the Indigenous People of Aotearoa (New Zealand). Although New Zealand has adopted the UNDRIP, the rights of the Māori population remain unfulfilled. In addition, New Zealand has not ratified ILO Convention 169.

³⁹ <https://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/USFH%20Full%20Statement.pdf>

Te Tiriti o Waitangi (the Treaty of Waitangi) was signed between the British Crown and Māori in 1840 and governs the relationship between the Crown and the Māori. Te Tiriti granted a right of governance to the British over their subjects, promised that Māori would retain *tino rangatiratanga* (self-determination or full authority) over their lands, resources and other treasures and conferred the rights of British citizens on Māori. Te Tiriti has limited legal status, however; accordingly, protection of Māori rights is largely dependent upon political will and ad hoc recognition of Te Tiriti.

The first stage of the two-stage engagement process for the development of a plan to take action on the implementation of the UNDRIP was completed early in 2022 but progress on the second stage has since stalled. A draft Declaration Plan – developed in partnership between the government, the National Iwi Chairs Forum’s Pou Tikanga and the Human Rights Commission – was set to be released for public consultation but this did not happen. Initial targeted engagement with Māori on the plan identified 12 key and far-reaching themes for the plan, including *rangatiratanga*, participation in government, equity and fairness. The concern is that a public backlash regarding Māori rights, particularly in relation to co-governance arrangements with Māori, has chilled the government’s commitment to the plan.

An important and much-anticipated judgement from New Zealand’s highest court on the place of *tikanga Māori* (Māori law and custom) in State law was released in 2022. The Supreme Court unanimously confirmed that “*tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant*”; that it frequently “forms part of New Zealand law as a result of being incorporated into statutes and regulations” and that it “*may be a relevant consideration in the exercise of [judicial] discretion*”. The question is now to what extent the Supreme court decision will be implemented, so far there is little evidence that this will be the case.

6. Indigenous Peoples in Russia

Of the more than 160 groups of Indigenous Peoples inhabiting the territory of contemporary Russia, 40 are officially recognised as “Indigenous Minority Peoples” of the “the North, Siberia and the Far East”. While the Russian constitution and national legislation set out the rights of “indigenous minority peoples of the North”, there is no such concept as “Free, Prior and Informed Consent” enshrined in legislation and thus, Indigenous Peoples are not recognised by Russian legislation as such. Russia has a multitude of regional, local, and interregional indigenous organisations, but the national umbrella organisation, RAIPON, operates under tight state control. On July 25, 2024, the Russian authorities designated several Russian Indigenous Peoples’ and

national minorities' rights organizations as "extremist organizations", which in practice makes it impossible for these organizations to operate in Russia.

Larger peoples, for example the Tuvans and Yakuts, are not officially considered Indigenous Peoples, and their self-identification varies. Since the Russian annexation of Crimea, several ethnic groups who self-identify as Indigenous have come under Russia's control: the Crimean Tatars, the Krymchaks and the Karaim; however, Russia has not recognised this self-identification.

Russia has not endorsed the UNDRIP, nor has it ratified ILO Convention 169. The country has inherited its membership of the major UN Covenants and Conventions from the Soviet Union: the ICCPR, ICESCR, ICERD, ICEDAW and ICRC. It also has ratified the Framework Convention for the Protection of National Minorities (FCNM) of the Council of Europe.

Indigenous Peoples are not recognized by the Russian legislation as such; however, Article 67 of the current constitution guarantees the rights of "Indigenous Small-Numbered Peoples". The 1999 Federal Act "On Guarantees of the Rights of the Indigenous Small-Numbered Peoples of the Russian Federation" specifies that Indigenous Small-Numbered Peoples are groups of less than 50,000 members, perpetuating some aspects of their traditional ways of life. According to this and two other framework laws that were enacted during the late 1990s, Indigenous Small-Numbered Peoples have rights to consultation and participation in specific cases.

The law on Territories of Traditional Nature Use (TTNU) from 2001 is the only federal law affording some form of recognition of Indigenous Peoples' land tenure. However, the federal government has never confirmed any of the several hundred Territories of Traditional Nature Use (TTNU) created by regional and local administrations, in cooperation with Indigenous communities, despite repeated calls from UN treaty bodies, Indigenous organizations and Human Rights experts to do so. Thus, the regionally- and locally established TTNU has no guaranteed legal status and can be dismantled at any time.

7. Indigenous Peoples in Europe /Sápmi

Sápmi is the Sámi people's own name for their traditional territory. The Sámi people are the Indigenous people of the northern part of the Scandinavian Peninsula and large parts of the Kola Peninsula, and they live in Sweden, Norway, Finland and Russia. They are the only recognized Indigenous Peoples of Europe (outside Russia). There is no reliable information on the population of the Sámi people; they are, however, estimated to number between 50,000-100,000. The Sámi people are recognized by the

separate Nordic governments being the only Indigenous Peoples in the Nordic European countries.

The United Nations Special Rapporteur on the rights of Indigenous Peoples, Ms. Victoria Tauli-Corpuz, reviewed the Human Rights situation of the Sámi in Norway, Sweden, and Finland in 2016. This review was based on information received during her visit to the Sápmi region, including a conference organized by the Sámi Parliamentary Council in August 2015, as well as independent investigations. The report emphasizes that the three states do not meet their stated objectives of guaranteeing the Human Rights of the Sámi people. Today, there are ongoing truth and reconciliation processes in Finland, Norway, and Sweden where the purpose of these processes is to identify and assess historical and current discrimination, including the assimilation policies of the states and violations of rights, and how they have affected and continue to affect the Sámi and their communities. Only Norway has ratified ILO Convention 169.

Politically, the Sámi people are represented by three Sámi parliaments, one in Sweden, one in Norway and one in Finland, while on the Russian side they are organized into non-governmental organizations (NGOs). In 2000, the three Sámi parliaments established a joint council of representatives called the Sámi Parliamentary Council.

Appendix 2: FPIC in International Law and Regulations

1. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The Entity shall:

a. Implement Policies and processes that ensure respect for the rights and interests of Indigenous Peoples, consistent with international standards, including ILO Convention 169 and **UN Declaration on the Rights of Indigenous Peoples**. (ASI Performance Standard 9.3)

Many articles of the United Nations Declaration on the Rights of Indigenous Peoples⁴⁰ are related to, and affirm, the Right of Self-Determination and Free, Prior, Informed Consent (FPIC) over development affecting Indigenous lands, territories and resources and the obligations of State governments, as well as corporations, to implement the Declaration and respect the UNDRIP minimum standards in their relations with Indigenous Peoples.

UNDRIP's key articles are summarized below, including those mentioning FPIC:

- ❖ **Article 3:** Right of Self-determination.
- ❖ **Article 10:** Indigenous Peoples shall not be forcibly removed or relocated from their lands or territories without their **Free, Prior, and informed Consent**.
- ❖ **Article 18:** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
- ❖ **Article 19:** States shall obtain **the Free, Prior, and Informed Consent** of Indigenous Peoples before adopting legislative or administrative measures that may affect them.
- ❖ **Article 26:** States shall recognize and protect Indigenous lands, territories, and resources.
- ❖ **Article 27:** States shall establish and implement, in conjunction with Indigenous Peoples concerned, a fair, independent, impartial, open, and transparent process, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.

⁴⁰ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

- ❖ **Article 28:** Indigenous peoples have the right to redress, including restitution or, when this is not possible, just, fair, and equitable compensation for lands, territories and resources, which have been confiscated, taken, occupied, used or damaged without their **Free, Prior and Informed Consent**.
- ❖ **Article 29:** Indigenous Peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. 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:** States shall obtain **Free, Prior, and Informed Consent** prior to the approval of any development project affecting Indigenous Peoples' lands and resources including water and minerals.
- ❖ **Article 37:** States shall observe and respect Treaties, agreements and other constructive arrangement and state obligations.
- ❖ **Article 42:** States and UN agencies "shall promote respect for and full application of the provisions of this Declaration."
- ❖ **Article 43:** The rights recognized herein constitute the minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the world.
- ❖ **Article 45:** Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.
- ❖ **Article 46.1:** Nothing in this Declaration may be interpreted as implying for any State, people, group, or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

A question that often arises in connection with FPIC is whether it can be considered a veto right for Indigenous Peoples. This issue has been discussed by, among others, the UN special rapporteurs on Indigenous Peoples.

The term "veto" implies an absolute power, meaning that Indigenous Peoples could block a proposed development regardless of the facts, information, and laws in any given case. However, Human Rights, including the rights of Indigenous Peoples, are generally relative. International and regional Human Rights bodies have been clear that the interpretation of FPIC is not absolute; FPIC must be applied on informed grounds and based on consideration of the Indigenous Peoples' rights at stake and the importance of their protection.

Several international experts have noted that framing the debate in terms of whether indigenous peoples have veto rights over development projects *"undermines the legitimacy of the concept of free, prior and informed consent"*⁴¹.

As the UN Special Rapporteur on the Rights of Indigenous Peoples has noted.

*"Consent is not a stand-alone legitimating device ... The principle of Free, Prior, and Informed Consent ... contemplates not merely a yes to a predetermined decision, or a means of validating an agreement on that disadvantage affected indigenous peoples"*⁴².

FPIC will sometimes, but not always, mean that a project cannot proceed.⁴³ As with the requirements of the FPIC process itself, this is very much dependent on the circumstances, particularly the extent of the impact on Indigenous Peoples. The Special Rapporteur on Indigenous Peoples expressed it this way:

*"The strength or importance of the goal of obtaining consent will necessarily vary according to the circumstances and the domestic interests involved. A significant, direct impact on the lives or territories of Indigenous Peoples establishes a strong presumption that the proposed action should not be implemented without the consent of Indigenous Peoples. In some contexts, that presumption can harden into a ban on the measure or project in the absence of domestic consent"*⁴⁴.

However, one requirement placed on affected Indigenous Peoples that could potentially have negative consequences is that refusing to give consent must have an informed basis. This means that the decision should not be made arbitrarily. The basis on which the decision is made should be evident. This can be a previously carried out Impact Assessments or an IPCIA that points out a proposed area as important for culture and/or, Traditionally Practiced Ecosystem Services or spiritual significance.

⁴¹ EMRIP (2018), note 3, para 26(a); see also Report of the Special Rapporteur (2009), note 8, para 48.

⁴² Report of the UN Special Rapporteur on the rights of Indigenous Peoples, James Anaya (2013), Extractive industries and indigenous peoples, A/HRC/24/41, para 30.

⁴³ For examples of where a strict requirement of consent has been applied, see *Saramaka Peoples v Suriname* (2007) Inter-American Court of Human Rights, paras 134ff, *Saramaka Peoples v Suriname* (interpretation decision) (2008), Inter-American Court of Human Rights, para 17; *Endorois Peoples v Kenya* (2009), African Commission of Human and Peoples' Rights, para 226. Several United Nations treaty bodies have implicitly upheld FPIC as a strict requirement by requiring the return lands of which indigenous peoples were deprived without their free, prior and informed consent: see, e.g., CERD (1997), note 1, para. 5; CESCR, General Comment No. 21. Other national courts have held that projects that have proceeded without FPIC have violated the land or cultural rights of indigenous peoples or others with collective customary rights, see e.g. *Statnett SF et al. v. Sør-Fosen sjite et al. (the Fosen Vind case)*, 11 October 2021, Supreme Court of Norway

⁴⁴ Report of the UN Special Rapporteur (2009), note 8, para 47.

FPIC should not be considered a veto based on arbitrary grounds. Consent or rejection of a proposal that affects Indigenous land or resources must be respected if it has an informed basis.

2. ILO – Indigenous and Tribal Peoples Convention, 1989 (No. 169)

The Certifying Entity shall:

a. Implement Policies and processes that ensure respect for the rights and interests of Indigenous Peoples, consistent with international standards, including **ILO Convention 169** and UN Declaration on the Rights of Indigenous Peoples. (ASI Performance Standard 9.3)

The Indigenous and Tribal Peoples Convention, 1989 is an International Labour Organization Convention, also known as ILO Convention 169. It is the major binding international convention concerning Indigenous Peoples and Tribal Peoples, and a forerunner of the UNDRIP. Today, ILO Convention 169 is ratified by 24 countries worldwide. The Convention is based on the right to self-determination of Indigenous and tribal peoples' such as exercising control over their own institutions, culture, economic development and ways of life, within the framework of their residing country.

⁴⁵ The first country to ratify the convention was Norway in June 1990.

When this convention was drawn up, the concept of FPIC had not yet been established in a broader sense. In paragraph 16, however, FPIC is described but in slightly different terms.

⁴⁵ <https://www.ilo.org/resource/convention-169-and-international-day-worlds-indigenous-people>

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.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

This is particularly relevant for ASI Certified Entities where a relocation of Indigenous Peoples is proposed to be able to carry out, for example, the opening or expansion of a Bauxite mine. Implementing such a plan without having followed the requirements found in the ASI Performance Standard regarding the implementation of an FPIC process is a very serious deviation from these requirements that can lead to a Critical Breach in the Entity's ASI certificate.

The ASI Performance Standard criteria is not dependent on whether a country has ratified the Convention, but rather uses the Convention as a benchmark for Certifying Entities.

Below is a list of articles within ILO Convention 169, besides Article 16, with relevance to consultation and FPIC:

- **Article 4:** stipulates those special measures “for safeguarding the persons, institutions, property, labour, cultures and environment” shall not be “contrary to the freely expressed wishes of the peoples concerned”.
- **Article 6:** sets out the parameters for all consultations. Those must be “in good faith and in a form appropriate to the circumstances” and undertaken with the “objective of achieving agreement or consent to the proposed measures”.
- **Article 7:** explains that when development projects are planned that may affect Indigenous Peoples, governments should ensure proper social, cultural, spiritual, and environmental Impact Assessments in cooperation with the affected Indigenous Peoples.

- “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social, and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”.
- **Article 13:** emphasizes the special spiritual relation that indigenous peoples have with their lands including its “collective aspects” and that the term ‘lands’ covers “the total environment of the areas of which the peoples concerned occupy or otherwise use”
- **Article 14:** contains the most central provision on land rights and calls for recognition of both ownership and possession as well as for special attention for non-exclusive ownership and Nomadic Peoples.
- **Article 15:** describes the right of indigenous peoples to the natural resources on their lands which includes “rights to participate in the use, management, and conservation of those resources”.
- **Article 17:** refers to consulting indigenous peoples whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

FPIC, consultation, and participation are interrelated and interdependent tools to operationalize Indigenous Peoples’ right to self-determination. ILO Convention 169 focuses to a greater extent on the importance of consultation compared to UNDRIP. Together, they constitute a strong regulatory framework for the need to carry out consultations that lead to Indigenous Peoples’ FPIC.

3. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is of great importance in preserving and securing indigenous rights. Article 27 is of specially importance in this context:

In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The interpretation of Article 27 should include full consideration of FPIC.

There are various committees that interpret texts that could otherwise be difficult to understand. In the case of the ICCPR, it is the UN Human Rights Committee. At its meeting in April 2009, the committee wrote⁴⁶:

*7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation **but the free, prior and informed consent** of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.*

Article 27 of the ICCPR has, through practice, become the most important international provision on the protection of Indigenous Peoples' cultural practices. This is particularly so because the Human Rights Committee has recognized Article 27 as the key Human Rights provision protecting against interferences in Indigenous Peoples' areas. Today, there are several major court cases concerning Indigenous Peoples that refer to Article 27.⁴⁷

4. International Covenant on Economic, Social and Cultural Rights.

The convention text in the International Covenant on Economic, Social and Cultural Rights is not entirely clear regarding FPIC. However, the UN CESCR Committee's interpretation of the convention has created greater clarity in this matter.⁴⁸

*Indigenous cultural values and rights associated with their ancestral lands and their relationship to nature should be treated with respect and protection in order to prevent the deterioration of their special way of life, including their livelihoods, the loss of their natural resources and, ultimately, their cultural identity ... **one must respect the principle of free informed consent from indigenous people in all matters covered by their specific rights.***

⁴⁶ ; HUMAN RIGHTS COMMITTEE 95th session 16 March–3 April 2009

⁴⁷ ICCPR Article 27 was central to the Norwegian Supreme Court's consideration of the case concerning wind power plants on the Fosen peninsula, on traditional Sámi land, in October 2021. A grand chamber of the Supreme Court unanimously found a violation of Article 27 and stated that the licence and expropriation decisions were invalid.

⁴⁸ U.N. CESCR, General Comment No. 21, Right of everyone to take part in cultural life, (43rd Session, 2009), E/C.12/GC/21, at para. 36–37.

5. Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination contains no specific text on FPIC. The committee responsible for the convention, CERD, has, however, considered that this convention must also be interpreted with FPIC integrated.⁴⁹

*The Committee for the Elimination of Racial Discrimination (CERD) has issued a recommendation that calls on member states to ensure that "(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken **without their informed consent**.*

6. European Union and Free Prior and Informed Consent

The new EU Deforestation Regulation (EUDR)⁵⁰ is an important turning point in the global fight against deforestation. It will start to apply on 30 December 2024. Many countries around the world have made significant efforts over the past decade to reduce deforestation, for example by introducing moratoria or measures to improve transparency in the supply chain, yet deforestation and forest degradation continue at an alarming rate contributing more than 10 percent of global greenhouse gas emissions.

Because of this, the EU has now decided on a Regulation that covers all EU countries' import and export of goods that may be linked to deforestation. An interesting development in this regulatory framework, which is now mandatory for all trade in Europe, is that Indigenous Peoples and FPIC are highlighted as important parts in the implementation of the EUDR:

In the preamble to the EUDR, the European Union writes:

•.... *the Commission should fully recognise the role and rights of indigenous peoples and local communities in protecting forests, considering the principle **of free, prior and informed consent (FPIC)**.*

⁴⁹ General Recommendation No. 23: Indigenous Peoples: . 08/18/1997. Gen. Rec. No. 23. (General Comments)

⁵⁰ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Text with EEA relevance)

- Respecting the rights of indigenous peoples regarding forests and **the principle of FPIC**, including as set out in the UN Declaration on the rights of indigenous peoples, contributes towards protecting Biodiversity, mitigating climate change and addressing the related public interest concerns.
- The **concept of FPIC** of indigenous peoples has been developed over the years following the approval of the International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No 169), and it is reflected in the UN Declaration on the Protection of the Rights of Indigenous Peoples. It aims to be a safeguard to ensure that potential impacts on indigenous peoples will be considered in the decision-making process of projects affecting them.
- In Article 2 concerning definitions: relevant legislation of the country of production' means the laws applicable in the country of production concerning the legal status of the area of production in terms of: g) the **principle of free, prior and informed consent (FPIC)**, including as set out in the UN Declaration on the Rights of Indigenous Peoples.

The EUDR is primarily written with forestry and deforestation in mind, but similar discussions also appeared to rare minerals in the so-called EU Critical Raw Material Act⁵¹. On 23 May 2024, the EU's Critical Raw Materials Act (CRMA), published as Regulation (EU) 2024/1252, entered into force following its adoption by the Council of the EU and European Parliament on 11 April 2024 and its publication in the EU's Official Journal earlier. However, the explicit and binding recognition of the Indigenous Peoples' right to Free, Prior, and Informed Consent (FPIC) as proposed by the European Parliament and demanded by Indigenous Peoples organisations was not included in the final text.

With more than half of the raw materials deemed as strategic being located on or near Indigenous Peoples' territories, Indigenous Peoples' rights need to be put front. This is a discussion that will continue within the EU. The fact that the EU in its EUDR highlights FPIC as an important instrument suggests that this is an issue that is not settled as far as rare minerals are concerned.

⁵¹ https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials/critical-raw-materials-act_en

Appendix 3: FPIC as a mandatory principle in the ASI Performance Standard

In this appendix, ASI Performance Standard Principle 9 is described and commented.

Criterion 9.1 Human Due Diligence

9.1 Human Rights Due Diligence.

The Entity shall respect Human Rights and observe the UN Guiding Principles on Business and Human Rights in ways appropriate to its size and circumstances including, as a minimum:

- a. A gender-responsive Policy commitment to respect Human Rights, with:
 - i. Review of the Policy commitment at least every 5 years.
 - ii. Review of the Policy commitment on any changes to the Business that alter Material Human Rights risk(s).
 - iii. Review of the Policy commitment on any indication of a control gap.
 - iv. Public disclosure of the latest version of the Policy commitment.
- b. A gender-responsive Human Rights Due Diligence process that is developed in Consultation with and, where possible, with the participation of Affected Populations and Organisations, and seeks to identify, prevent, mitigate and account for how it addresses its actual and potential impacts on Human Rights, including any Material Legacy Impacts for the Entities' own operations and for products or services provided through Business relationships with:
 - i. Review the Human Rights Due Diligence process at least every 5 years.
 - ii. Review the Human Rights Due Diligence process after any changes to the Business that alter Material Human Rights risk(s).
 - iii. Review the Human Rights Due Diligence process on any indication of a control gap.
- c. A mapping of Affected Populations and Organisations to ensure Affected Populations and Organisations are:
 - i. Engaged by the Entity
 - ii. Consulted about operational activities and potential significant Human Rights impacts and informed of the operation's Complaints Resolution Mechanism.
- d. Where the Entity identifies, through Due Diligence and/or grievances, as having caused or contributed to adverse Human Rights impacts, it shall provide for or cooperate in their remediation through legitimate processes.

Criterion 9.1 applies to all ASI Certified Facilities but where Indigenous Peoples are involved, FPIC (Criterion 9.4) will apply.

This criterion states that the Certifying Entity must, at minimum, follow the regulations set up by the United Nations, namely the UN Guiding Principles on Business and Human

Rights,⁵² which have become the primary reference for many organizations' Corporate Social Responsibility (CSR) engagement.

These Guiding Principles are grounded in recognition of:

- a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms.
- b) The role of business enterprises as specialised organs of society performing specialised functions, is required to comply with all applicable laws and to respect Human Rights.
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Guiding Principles definition of respecting Human Rights are:

- Avoid causing or contributing to (e.g., causing in part) adverse Human Rights impacts through your own activities, and address such impacts where they occur.
- Seeking to prevent or mitigate adverse Human Rights impacts that are directly linked to your operations, products or services by your business relationships, even if you have not contributed to those impacts.

The criterion also states that an Entity must design a Human Rights policy that must be gender responsive. The Policy must be available and must be revised every five years.

Within the framework of the criterion, affected populations, which can be Indigenous Peoples, must also be mapped to ensure that the Entity is engaged with these peoples.

If the Entity proves to have breached its responsibility for Human rights and caused an adverse impact, the Entity must participate in remediation work through legitimate processes.

Where Indigenous Peoples are present, the Entity should ensure that remediation mechanisms and measures are culturally appropriate and consistent with FPIC principles (see criterion 9.4). This may include acts to remedy harm through traditional means under Indigenous Peoples' customary activities.

⁵² https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

Criterion 9.3 Indigenous Peoples

9.3 Indigenous Peoples.

The Entity shall:

- a. Implement Policies and processes that ensure respect for the rights and interests of Indigenous Peoples, consistent with international standards, including ILO Convention 169 and UN Declaration on the Rights of Indigenous Peoples.
- b. Develop and document a process for identifying Indigenous Peoples based on their linguistic, social, governance and resource-linked characteristics rather than state recognition.
- c. Demonstrate internal capacity (personnel, resources) to implement the process through evidence-based analysis that includes meaningful stakeholder engagement.
- d. Review the Policies and processes at least every 5 years.
- e. Review the Policies and processes after any changes to the Business that alter risks to the rights and interests of Indigenous Peoples.
- f. Review the Policies and processes on any indication of a control gap.
- g. Publicly disclose the latest versions of the Policies and processes.
- h. Demonstrate internal capacity to map indigenous communities by their cultural characteristics, rather than legal designations, and to engage meaningfully.
- i. Inform Indigenous Peoples of the relevant ASI Performance Standard requirements and the ASI Certification Audit process, including their involvement, in a manner that is accessible, timely and understandable.

Criterion 9.3 applies to all Facilities where the presence of Indigenous Peoples or their land territories and/or resources are identified through a meaningful Rightsholders engagement and assessment process. It is important to remember that Indigenous Peoples can appear under different names and concepts; ASI's Performance Standard mentions Affected Populations and Local Communities that can constitute Indigenous Peoples. It is also not uncommon for there to be groups who, for various reasons, do not want to use the term Indigenous to refer to themselves. If these groups can be identified using the definition included in the ASI Glossary, then they must also be considered Indigenous Peoples.

It is important to be aware of the legal and customary rights of Indigenous Peoples who may exist in affected lands where ASI certified operations are conducted or planned. Today, several countries that do not accept the concept of Indigenous Peoples. For a Certifying Entity, this must not affect how the ASI Performance Standard is interpreted and applied. Regardless of whether a particular state recognizes their existence, if Indigenous Peoples can be identified as such according to the ASI definition, then regulatory framework, including the right to FPIC applies to them.

The question of whether the impact on Indigenous Peoples should be limited to the direct Area of Influence is relevant here. Indigenous Peoples' "presence" refers not only to their physical presence in the Area of Influence, but also to Indigenous Peoples with ties to traditional lands and territories that may be affected by the company's operations in nearby areas.

A Certifying Entity must analyse the direct and indirect impacts of its operations within its Area of Influence, including the impact Associated Facilities have both upstream and downstream on Indigenous Peoples and their land, resources, and Traditionally Practiced Ecosystem Services.

Associated Facilities can include agreements with subcontractors regarding electricity supply from wind power or hydropower and infrastructure in the form of roads, railways, and ports. If Associated Facilities are necessary for the Certifying Entity's operations, it does not matter if they are not owned directly by the Certifying Entity.

The characteristics used within ASI to designate Indigenous Peoples are as follows ⁵³:

- Self-identification as Indigenous Peoples at the individual level and accepted by the community as their member
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic, or political systems
- Distinct language, culture, and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

Indigenous Peoples establish their belonging to a specific group through self-identification. However, some groups meeting the Permanent Forum's criteria (and ASI), may choose not to identify themselves as Indigenous for various reasons. This could be due to risks to personal or collective well-being in societies with sensitive political climates. Alternatively, in contexts where tribal identity prevails, belonging to an overarching Indigenous identity may not have been considered.

⁵³ The United Nations Permanent Forum on Indigenous Issues has developed this modern understanding; https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

Many different terms fall under the concept of Indigenous Peoples. For example, in North America, Indigenous Peoples often call themselves First Nations and in India, over 100 million Indigenous Peoples call themselves Adivasi (original inhabitants). In parts of the world, Indigenous Peoples might call themselves Tribal Peoples, Scheduled Tribes, Aboriginals, Original Peoples, Native Peoples, or Autochthon Peoples. ASI's Performance Standard takes this variety of terminology into consideration.

The term "Affected Populations" appears in a large part of ASI's criteria. When a criterion refers to "Affected Populations", the relevant ASI Certifying Entity must assess whether this refers to Indigenous Peoples.

Groups/Peoples who meet the criteria for being Indigenous warrant the requirements prescribed by the Performance Standard regardless of how they identify themselves.

In **Appendix 1**, "Who are Indigenous Peoples", there is a more detailed description of Indigenous Peoples, their number and distribution across our earth, as well as descriptions of their beliefs and cosmovision.

A Certifying Entity needs to develop an internal capacity to assess whether an affected population is an Indigenous People based on their cultural characteristics rather than legal designations. Sufficient competence to be able to perform a culturally appropriate engagement is also necessary.

A Certifying Entity is responsible for informing the affected Indigenous Peoples of the content of the ASI Performance Standard, including FPIC and the Certification process, in a way that is understandable, accessible, and transferable to their cultural and linguistic context. It should not be assumed that Indigenous Peoples know the regulations, rights, and principles that govern the planning and execution of an FPIC process.

Criterion 9.4 Free Prior and Informed Consent (FPIC)

9.4 Free, Prior and Informed Consent (FPIC).

The Entity 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 (FPIC):

- a. For New Projects or Major Changes to existing projects that may have Material impacts on the Indigenous Peoples associated culturally and living on the relevant lands within the Entity's Area of Influence, 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, energy or other resources.
- b. Where engaged in Bauxite Mining:
 - i. Prior to commencing a new phase of operations affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
 - ii. Prior to altering an existing Mine Rehabilitation and closure plan affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
- c. Where FPIC is required in 9.4 a or b: Demonstrate that the consent is supported by the Indigenous Peoples community.

Criterion 9.4 is most relevant to the application of FPIC within ASI-Certified operations.

Where the presence of Indigenous Peoples or their lands, territories and resources is identified, FPIC processes are mandatory for New Projects or Major Changes, initiated from 1 January 2022 onwards. This criterion applies to all those projects but only to those projects initiated after the Entity joined ASI if that happened after the 1 of January 2022.

Where the presence of Indigenous Peoples or their lands, territories, and resources is identified, FPIC processes are mandatory for existing projects or Facilities that may have significant impacts on affected Indigenous Peoples. For Entities engaged in Bauxite Mining, this obligation is linked to situations where the start of a new phase of operations is imminent and prior to altering an existing Mine rehabilitation and closure plan.

Where there is an obligation to conduct FPIC processes, the Certifying Entity has a mandatory obligation to ensure that any consent to the relevant operations has the support and confirmation of the concerned Indigenous Peoples and their community.

There are many situations where an FPIC process is necessary, including:

- ❖ Impacts on lands, natural resources, and traditional ecosystem services subject to traditional ownership or under customary use.
- ❖ Resettlement⁵⁴ of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use.
- ❖ Any impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples
- ❖ Use of cultural heritage, including traditional knowledge, innovations/intellectual property, or practices of Indigenous Peoples for commercial purposes.

Criterion 9.4 stipulates that the Certifying Entity shall consult and cooperate in good faith with the Indigenous Peoples concerned. Good faith (*bona fide*) is a key component of most historic and modern legal orders and a general principle of international law. The principle requires parties *“to deal honestly and fairly with each other (...) and to refrain from taking unfair advantage”*⁵⁵.

Criterion 9.3 mandates that Certifying Entities adhere to the rights outlined in ILO Convention 169 for Indigenous Peoples. Article 6(2) of the Convention requires that consultations are carried out *“in good faith and a form appropriate to the circumstances, to achieve agreement or consent”* to the proposed measure.

FPIC is based on cooperation, established through good faith processes, **which goes beyond consultation**. Consultation merely facilitates the process of seeking consent from the affected Indigenous Peoples, which may involve acceptance or rejection of the proposal or the introduction of a modified proposal.

Article 6(2) of ILO Convention 169 imposes an additional obligation for effective consultations. According to this provision, state authorities and the Indigenous communities participating in the consultation process should act not only in good faith but also in a culturally appropriate manner, allowing effective interaction with State authorities and other third parties. Negotiations should be conducted with

⁵⁴ ‘Resettlement’ in this context may refer to both physical displacement – relocation or loss of shelter, and economic displacement – loss of assets, or access to assets, that lead to loss of income sources or other means of livelihood, as a result of project-related land acquisition and/or restrictions on land use (Adapted from IFC Performance Standards, 2012).

⁵⁵ Zouari, Mohamed., (2020), The “Bonafide” (Good Faith) Principle
<https://jusmundi.com/en/document/wiki/en-bona-fide-principle>, accessed on 30 May 2021.

cultural sensitivity to Indigenous Peoples, specifically *“through their own representative institutions”* (Article 19), which means *“through representatives chosen by themselves in accordance with their own procedures”* (Article 18). Consultations should take place with the genuine objective of achieving consent or reaching an agreement regardless of the result obtained.

For the Certifying Entity, this means:

- ❖ Willingness to engage in a process at reasonable times and frequency in a way that is culturally appropriate for the concerned Indigenous Peoples
- ❖ Possession of appropriate expertise, which includes expertise in sociology/anthropology and knowledge of the local context, culture, and language of the affected Indigenous Peoples. Equally important is ensuring that the Indigenous Peoples have sufficient capacity to participate equally in the process. It is the responsibility of the Certifying Entity to ensure that this capacity is established via the Indigenous People's own selection of advisors and experts.
- ❖ Provision of the information necessary for an informed negotiation, including informing the affected Indigenous Peoples about their rights in accordance with ASI's Performance Standard and the meaning of FPIC.
- ❖ Presentation of important issues in a language and via media that the affected Indigenous Peoples prefer and can understand.
- ❖ Usage of acceptable, agreed-on, procedures for informational meetings and negotiations This may involve moving meetings to places that the Indigenous Peoples are comfortable with and scheduling them at times that suit their needs
- ❖ The right to give, withhold, or modify consent during the FPIC process must be made clear to the affected Indigenous Peoples. It must also be clear to all parties that a given consent need not be final. If conditions change in the ongoing industrial project or in its immediate surroundings, the consent presented may be reconsidered. **A yes can become a no, and a no can become a yes.**
- ❖ Special attention should be paid to ensure that women, youth, elders and Vulnerable or At- Risk people can participate meaningfully in the FPIC process.
- ❖ Willingness to change initial position and modify offers.
- ❖ Provision of sufficient time for decision-making governed by the traditions of the affected Indigenous Peoples. Whatever decision they come to must be respected.

ASI's Performance Standard and its guidance document contain many references to Indigenous Peoples and FPIC, as well as the term "Affected Populations and Organizations." According to ASI's Glossary, Affected Populations and Organizations can include Indigenous Peoples, Local Communities, Other Rightsholders, and Stakeholders.

Before contact with Affected Populations and Organizations, the Certifying Entity must consider whether this includes Indigenous Peoples according to the definition in ASI's Performance Standard. If this is the case, then FPIC must be applied in all relevant matters.

ASI's Performance Standard and its guidance document also refer to "Local Communities" on several occasions. While Indigenous Peoples are often Local Communities and Local Communities can contain Indigenous Peoples, the two groups are not always identical, and their rights are often distinct. It is important to tease out the distinctions, where they exist, between these two groups when discussing FPIC.

The term **Local Communities** is used to ensure that groups who fall into the definition of Indigenous, but do not self-identify as such, are considered and protected under the ASI Performance Standard, therefore ensuring that a Free, Prior and Informed Consent process is carried out. The concept of Local Communities can vary from place to place. Hence, the recommendation is to ensure that these communities are identified by credible and knowledgeable local community members and experts to ensure they are effectively represented in relevant activities. The definition of Local Community

Local Communities are made up of groups of people living together with strong ties to the locality where they live who may or may not have originally come from that locality. This could include local communities such as Quilombo's in Brazil and other Latin American countries. However, Indigenous Peoples typically originate from a particular locality and have ancestral ties to that locality. The term Local Community also applies in countries like Guinea.

The use of the term Local Communities should not be used to weaken recognition of Indigenous Peoples' affirmed rights and identities. Whilst Indigenous Peoples and Local Communities often overlap, they are not always the same and may have distinct rights. Local Communities *may* include Indigenous Peoples who have not identified themselves as Indigenous.

If a Local Community is inhabited by Indigenous Peoples according to the definition applied in the Performance Standard, then FPIC must be applied in all relevant matters that the Standard prescribes for Indigenous Peoples. In this context, it cannot be taken

for granted that the current residents of the current Local Community call themselves Indigenous. However, the Certifying Entity should still assess whether affected Local Communities include Indigenous Peoples.

FPIC is a high-status issue in ASI's Performance Standard; incorrect handling of FPIC can lead to a Critical Breach situation,⁵⁶ which can be identified during an Audit or through the ASI Complaints Mechanism. When ASI is made aware of potential Critical Breaches, ASI will determine the process and consequences, including whether any existing Certifications should be suspended or revoked during the investigation. For a Certifying Entity, this can be devastating concerning customers and partners.

Criterion 9.5 Cultural and Sacred Heritage

9.5 Cultural and Sacred Heritage.

The Entity shall:

- a. In Consultation with and, where possible, with the participation of Affected Populations and Organisation, identify sacred or cultural heritage sites and values within the Entity's Area of Influence and take appropriate action to avoid or remedy impacts, as well as to ensure continued rights of access to such sites or values.
- b. Where a project may significantly impact on cultural, historical or spiritual heritage that is essential to the identity of Indigenous Peoples, priority shall be given to the avoidance of such impacts. Where the impacts are unavoidable, the Entity shall obtain the Free, Prior and Informed Consent of Indigenous Peoples.

Places holding cultural, historical, and spiritual significance are invaluable to Indigenous Peoples. These places are often part of the local understanding of their Cosmovision or similar and form the foundation of their identity and worldview. Encroachment upon such areas represents more than land loss; it signifies the loss of irreplaceable spiritual values, an existential catastrophe, and alienation from one's culture and identity. Traditional knowledge of these places is almost always passed down from generation to generation over a long period of time. Due to the nature of how knowledge about the importance of such areas is shared among Indigenous Peoples, descriptions of these places are rarely found in written form or via reports from authorities.

⁵⁶ Section 6.3, ASI Assurance Manual (V.2.1)

Criterion 3.5 describes the responsibility of a Certifying Entity to avoid any damage to a location containing cultural and/or sacral heritage. If this is unavoidable, an FPIC process must be initiated and the result of such a process must be respected.

The affected Indigenous Peoples will likely reject the proposal quickly. A rapid decision does not mean that it lacks an informed basis. Knowledge of the culturally important and sacred site has existed for generations among the Indigenous Peoples concerned, so their decision must be respected.

Criterion 9.6 Displacement

9.6 Displacement.

The Entity shall:

- a. Consider feasible alternatives in project designs to avoid or minimise physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and Vulnerable or At-Risk, including women.

When physical or economic displacement is unavoidable the Entity shall:

- b. In Consultation with and, where possible, with the participation of Affected Populations and Organisations, develop a Resettlement Action Plan that covers, at a minimum:
 - i. the applicable requirements of IFC Performance Standard 5 (Land Acquisition and Involuntary Resettlement)
 - ii. compliance with Applicable Law regardless of the number of people affected
 - iii. living conditions and income generating options, which should equal or exceed those prior to displacement.
- c. Review the Resettlement Action Plan at least every 5 years
- d. Review the Resettlement Action Plan after any changes to the Business that Materially alter the conditions under which the plan was created.
- e. Review the Resettlement Action Plan on any indication of a control gap.
- f. Publicly disclose the latest version of the Resettlement Action Plan, including the number of people impacted.
- g. Progress against the Resettlement Action Plan shall be shared with Affected Populations and Organisations annually for the duration of its implementation or in the event of a deviation from the Resettlement Action Plan.
- h. Obtain the Free, Prior and Informed Consent of Indigenous Peoples where Indigenous Peoples are involved in the displacement.
- i. Publicly disclose the Free, Prior and Informed Consent, where relevant and obtained or not obtained.

Displacement, whether voluntary or involuntary, refers to both physical displacement, such as relocation or loss of shelter and land, and economic displacement, including loss of assets or access to assets such as Traditionally Practiced Ecosystem Services,

which in turn compromises sources of income and other livelihoods. Project-related land acquisition and/or restrictions on land use can lead to displacement.

Involuntary displacement occurs when Affected Populations or Local Communities do not have the right to refuse land acquisition or restrictions on land use. This occurs in cases of (i) legal expropriation or temporary or permanent restrictions on land use and (ii) negotiated settlements where the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.

Displacement is usually the biggest impact to which Affected Populations can be exposed. Losing one's home is traumatizing, as is losing the opportunity to exercise the Traditionally Practiced Ecosystem Services associated with one's cultural identity. This applies to farmers, gatherers, hunters, fishermen, and nomads.

The criterion applies to New Projects and Major Changes initiated pre-2022, but the criterion applies only to those projects initiated after the Entity joined ASI. For New Projects and Major Changes initiated from 1 January 2022 onwards the criterion applies to all projects.

Criterion 9.6 requests that Certifying Entities avoid or minimize displacement. If displacement is deemed necessary, then a Resettlement Action Plan will be drawn up for the Affected Population.

However, the criterion applies differently if the Affected Population includes Indigenous Peoples. If this is the case, an FPIC process must be conducted. A Resettlement Action Plan can be drawn up with the Indigenous Peoples' consent.

From an international law perspective, one should refer to the ILO Convention 169, which details the issue of displacement (Article 16). A Certifying Entity must remember that clause 9.3 of ASI's Performance Standard obliges the Entity to respect the rights and interests of Indigenous Peoples, consistent with ILO Convention 169.

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.*

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

- 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.*
- 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.*

Criterion 9.7 Affected Populations and Organisations.

9.7 Affected Populations and Organisations.

The Entity shall respect, in ways appropriate to its size and circumstances, the legal and customary rights and interests of Affected Populations and Organisations in their lands, livelihoods and use of natural resources, including, as a minimum:

- a. Implement a plan to identify, prevent, monitor, mitigate and account for any significant impacts, including health and safety, social and cultural Human Rights and environmental impacts resulting from its activities.
- b. Develop the plan in Consultation with and, where possible, with the participation of Affected Populations and Organisations.
- c. In accordance with the plan, commit resources to Local Community development.
- d. Review the plan at least every 5 years.
- e. Review the plan after any changes to the Business that alter Material environmental, social and governance risk(s).
- f. Review the plan on any indication of a control gap.
- g. Publicly disclose the latest version of the plan.
- h. Explore with Affected Populations and Organisations opportunities to respect and support their livelihoods.

This criterion highlights the obligation to respect the legal and customary rights of Affected Populations and Organizations, which can consist of Indigenous Peoples. In that case, criterion 9.3 is valid.

Customary or traditional rights are rights and obligations held by an individual, group, or community that are rooted in custom. Customary rights are different from laws in their origin and are generally unwritten but are nonetheless true rights that exist on their own merit. Thus, they have the force of law according to the legal doctrine of

most, if not all, States. It is common for Local Communities and Indigenous Peoples to lack legal titles to land but to use it based on customary rights.

Custom is the result of practices and usages which have the following characteristics:⁵⁷

- ❖ They are consistently used and regularly repeated
- ❖ They are old (at least one generation of 20 years)
- ❖ They are general and widespread within the group or community
- ❖ They are seen by the individual, group, or community as creating rights and obligations among themselves

In practice, today, customary law often coexists with formal state law. Such situation corresponds to legal pluralism.

⁵⁷ <https://faolex.fao.org/docs/pdf/lao6293.pdf>

Appendix 4: Company Policy Example

An example of the content of a company Policy for a Certifying Entity could look like the proposal below:

As an Entity certified by the ASI Performance Standard, we pledge to adhere to the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention 169 as a reconciliation framework and to apply its principles, norms, and standards to corporate Policy and core operational activities involving Indigenous Peoples and their lands and resources. This would include, but not be limited to, the following:

- (i) Developing strong relationships and formal robust agreements in good faith with Indigenous Peoples.
- (ii) Ensuring a meaningful consultation, and obtaining the Free, Prior, and Informed Consent of Indigenous Peoples before proceeding with any activity that might have an adverse impact on Indigenous Peoples affected by the Entity's activities.
- (iii) Mitigating power imbalances by ensuring the affected Indigenous Peoples are sufficiently resourced to effectively negotiate agreements and/or have access to independent legal and technical advice.
- (iv) Providing comprehensive training for management and staff on the history, culture, rights, and Cosmovision of Indigenous Peoples, aligning with international law such as the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention 169.
- (v) Providing training for management and staff on the current ASI Performance Standard and its provisions regarding Indigenous Peoples.
- (vi) Conducting effective external risk assessments, integrating Indigenous People's perspectives, and considering impacts on their lands, communities, and cultural heritage. The risk assessment should integrate Indigenous Peoples' own assessment of risk.
- (vii) Implementing effective internal risk management and embedding ongoing engagement with Indigenous Peoples into Policies and risk management frameworks. This includes appropriate Board oversight of Policies and practices, and having accountability mechanisms in place, where their effectiveness is regularly assessed.
- (viii) Adopting a Human Rights-based approach to engagement with Indigenous Peoples, conducting robust Due Diligence to identify, prevent,

mitigate, and address Human Rights risks associated with their operations and supply chains. The Entity respect the right of Indigenous Peoples to self-determination.

- (ix) Monitoring performance: The Entity will set transparent targets and KPIs that reflect international standards and establish accountability mechanisms. Performance against agreement terms and KPIs will be overseen by the Board, who should be satisfied that assessment is appropriately independent. Indigenous Peoples' involvement in the monitoring process is vital. The Entity evaluates how it learns from past mistakes and improves its practices on an ongoing basis, including through regular staff training.
- (x) Establishing dispute resolution and grievance mechanisms to remedy any adverse impacts caused or contributed to by the Entity.

Providing transparent disclosure for investors to assess the quality of the Entity's engagement with Indigenous Peoples. Disclosure should provide a genuine explanation of the Entity's risks, implementation, and approach, and how its Policies, agreements, timelines, challenges, and discrepancies with Indigenous Peoples' positions are implemented in practice. This should include having a system in place to enable the Board to assess risk, as well as targets and performance, over time. Disclosure should also include the nature and scope of agreements, timelines, and any key challenges. Where an Entity has relied on government approval or a dispute resolution determination that does not reflect the position of Indigenous Peoples, this should be disclosed.

Glossary and abbreviations (Supplement to the ASI Glossary)

Cosmovision	Cosmovision is the way in which an individual and/or a society perceive and interpret the world. In Indigenous Peoples' cosmovision, land, territory and resources are fundamental to the historical continuity and fullness of life, integrating elements including spirituality with social, cultural, economic, and political development in a deep connection with Mother Earth. This worldview shapes their identity and links to their past, community, and the wider world. Indigenous traditions embrace a holistic philosophy that contrasts with the Western focus on reductionism, where the world is viewed in parts rather than as a whole. This rich heritage includes diverse practices, representations, expressions, knowledge, and skills that continue to be relevant and provide meaning in everyday life.
Collective Decisions in a FPIC process	The right to decide, and to give consent, in a FPIC process is a collective decision for affected Indigenous Peoples. A decision based on the traditional way of making decisions among the concerned Indigenous Peoples. It is important that the Entity checks that the decision in a FPIC process is made as a collective decision and is not a decision based on the will of any individual.
Cumulative Impact	Cumulative Impact can be described as how an activity or measure together with other ongoing, past, and future activities/measures affects the land, the Indigenous Peoples, and their Traditionally Practiced Ecosystem Services.
EMRIP	The United Nations Expert Mechanism on the Rights of Indigenous Peoples
Good Faith	A process of engagement where the parties make every effort to reach an agreement, conduct genuine and

	constructive negotiations, avoid delays in negotiations, respect agreements concluded and under development, and give sufficient time to discuss and settle disputes
ILO Convention C169 – on Indigenous and Tribal Peoples Convention, 1989	<p>ILO Convention 169 is the major binding international convention concerning Indigenous Peoples and Tribal Peoples, and a forerunner of the Declaration on the Rights of Indigenous Peoples (UNDRIP).</p> <p>The ILO 169 convention is one of the most important operative international law guaranteeing the rights of Indigenous and Tribal Peoples. Its strength, however, is dependent on a high number of ratifications among nations. Today 24 countries have ratified the convention</p>
Indigenous Cultural Landscape (ICL)	Indigenous Cultural Landscapes (ICL) are living landscapes to which Indigenous Peoples attribute environmental, social, cultural, spiritual and economic value because of their enduring relationship to the land, water, flora, fauna and spirit as well as their present and future importance to their cultural identity. An ICL is characterised by features maintained through long-term interactions based on land-care knowledge and adaptive livelihood practices. They are landscapes over which Indigenous Peoples exercise responsibility for stewardship.
Indigenous Led Participatory and Cumulative Impact Assessment on Indigenous Cultural Landscapes and Traditional Ecosystem Services – IPCIA	<p>The IPCIA is an assessment methodology is characterised by:</p> <ul style="list-style-type: none"> • The Impact Assessment is carried out by skilled Indigenous Peoples who can combine traditional knowledge with Western investigation methodology. • The Impact Assessments are carried out in a cumulative perspective. • The Impact Assessments are always carried out in a participatory perspective where the affected Indigenous Peoples have a central role.

	<ul style="list-style-type: none"> • The Impact Assessments always contain a participatory mapping activity, often based on geographic information systems (GIS), which describes the land that is affected as well as the impact of planned disturbances on current Ecosystem Services⁵⁸. • The Impact Assessments are based largely on traditional knowledge supplied by the concerned Indigenous Peoples. • The Impact Assessments summarise the direct, indirect, and Cumulative Impact of possible disturbances on the landscape in question (Indigenous Cultural Landscapes), the Indigenous Peoples who are affected and the Traditionally Practiced Ecosystem Services that may be affected.
Mediation	A procedure in which the parties discuss their dispute with the assistance of a trained impartial person who assists them in reaching a settlement/agreement. The mediator is a facilitator who has no power to render a resolution to the conflict
Mother Earth	A deep and genuine relationship with the Earth has long been a central tenet of Indigenous Peoples' worldviews and philosophy. Long before the mainstream construct of "Mother Earth" became popular, Indigenous Peoples truly connected with the Earth as their Mother. The natural world is considered home, and the rightful stance to take upon her is a respectful, interconnected one of stewardship and gratitude.
Process Agreement	A bond between the Entity and affected Rightsholder that affirms a mutually agreed to approach for negotiating the terms and conditions of an FPIC agreement.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)	<p>UNDRIP is a legally non-binding Declaration passed by the United Nations in 2007. It delineates and defines the individual and collective rights of Indigenous Peoples, including their ownership rights to cultural and ceremonial expression, identity, language, employment, health, education, and other issues. Their ownership also extends to the protection of their intellectual and cultural property. The declaration emphasises the rights of Indigenous Peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations. It prohibits Discrimination against Indigenous Peoples, and it promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development.</p> <p>UNDRIP is the international law instrument that most clearly introduces Indigenous Peoples' right to Free Prior and Informed Consent (FPIC).</p>
Traditional Knowledge	<p>Traditional knowledge refers to the knowledge, innovations, and practices of Indigenous Peoples. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is often transmitted orally from generation to generation. It tends to be collectively owned and can be expressed in stories, songs, folklore, proverbs, cultural values, beliefs, rituals etc. It is also the source for the traditional use and management of lands, territories and resources – traditional knowledge underlines Indigenous Peoples' holistic approach to life, which is a central element of their cultural diversity.</p>
Traditional Peoples	<p>Traditional peoples are social groups or peoples who do not self-identify as indigenous and who affirm rights to their lands, forests and other resources based on long established custom or traditional occupation and use</p>

Traditionally Practiced Ecosystem Services	<p>Traditional practiced Ecosystem Services are the ongoing accumulation of knowledge, practice and belief about relationships between living beings in a specific ecosystem that is acquired by Indigenous Peoples over hundreds or thousands of years through direct contact with the environment, handed down through generations, and used for life-sustaining ways. This knowledge includes the relationships between people, plants, animals, natural phenomena, landscapes, and the timing of events for activities such as hunting, fishing, trapping, herding of animals, agriculture, and forestry. It encompasses the worldview of a people, which includes ecology, spirituality, human and animal relationships, and more.</p>
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