

# **Memo on the International Finance Corporation**

## **Review of the Sustainability Policy, Performance Standards and the Access to Information Policy**

### **Forest Peoples Programme March 2011**

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### **3<sup>rd</sup> Round of the Review of the Sustainability Policy, Performance Standards 1 – 8 and the Access to Information Policy**

It has been a lengthy process of review for the IFC suite of standards and the final stages are now in sight. Such a lengthy process is appropriate for a set of standards that provides guidance and leadership to the private sector far beyond the clients which whom the IFC is directly involved. While there have been some significant improvements in the framework provided by the IFC there also remain some areas of significant concern. Continuing concerns and associated recommendations for improvement are discussed below in selected key areas. All references in this memo are to the document entitled IFCAnnexA7. We thank colleagues for feedback from consultations in Mumbai and Lima to these recommendations and others.

Language recommendations that address the key issues raised in this memorandum are provided as an annex to this document.

## Issue One: Free, Prior and Informed Consent

The inclusion of the terminology of ‘free, prior and informed consent’ in the place of the previous standard of ‘good faith negotiation’ which is ‘successfully concluded’ is a positive development which provides the IFC with a potential opportunity to lead the field in the development of consent processes. The use of the term FPIC also removes a significant source of confusion for indigenous peoples and for clients of the IFC in regards to what is required for certain project types to proceed and we look forward to the inclusion of this language in the final policy paper. We also welcome the placement of a requirement for FPIC in the hands of the client through its inclusion in PS7.

However there remain serious concerns with the way the standard is applied in Performance Standard 7, the scope of activities where it is applied, the level of significance of impact at which it will be triggered, disclosure requirements and finally the guidance provided in the accompanying Guidance Note 7 which appears to weaken the standard downwards to something akin to ‘broad support’. Many of these issues may be simply drafting points, easily corrected, however others point to a more central dissonance in understanding about what FPIC is.

Performance Standard 7 states in paragraph 6 that there is no universally accepted definition of FPIC.<sup>1</sup> It is certainly the case that FPIC, by its nature, must be a *sui generis* process of decision-making defined and autonomously managed by the indigenous peoples themselves, and therefore not defined by external agencies. However the meanings of the terms themselves are clear and have been authoritatively outlined by entities such as the UN HCHR Working Group on Indigenous Populations and the Inter-American Court of Human Rights in specific judgements.<sup>2</sup> Without referencing existing broadly accepted principles of FPIC and defining the terms of the standard, the IFC risks opening up a space in which each client can define for themselves what FPIC will entail, without reference to autonomy of decision making or other key principles.

The inclusion of FPIC provides a key opportunity for the IFC to address the confusion and lack of clarity and transparency which has previously surrounded attempts to secure ‘support’ from indigenous peoples for projects impacting on them. However for this to occur it is necessary for the Performance Standard to state unambiguously (which is currently only stated in relation to relocation) that without FPIC having been obtained, the project will not go ahead. To state this in relation to relocation but not in regards to the other ‘Special Circumstances’ simply confuses the issue.

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<sup>1</sup> IFCAnnexA7, Performance Standard 7, p. 91 paragraph 4

<sup>2</sup> See Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources. Submitted to the UNHCHR Working Group on Indigenous Populations, Antoanella-Iulia Motoc and Tebtebba Foundation, 8 July 2004. E/CN.4/Sub.2/AC.4/2004/4 Para 14 and 21 – 25 (relevant sections are reproduced as an annex here). See also *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185 at paragraph 17, wherein the Court notes that in certain circumstances “the State has a duty not only to consult ... but also to obtain their free, prior, and informed consent in accordance with their customs and traditions”. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_185\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

## Full Application of FPIC

The current proposed text to PS7 applies the standard of FPIC to three specific circumstances, (i) impacts on lands and natural resources subject to traditional ownership or under customary use, (ii) relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use, and (iii) the use of cultural resources for commercial purposes.<sup>3</sup> There are similarities between this list and the areas protected by the UN Declaration on the Rights of Indigenous Peoples and other international legal standards.<sup>4</sup>

However the text appears more restrictive as the detail emerges. In the first instance, ‘impacts on lands and natural resources subject to traditional ownership or under customary use’ (herein ‘impacts on lands and resources’), the client only need apply special provisions for projects that are actually located on, or commercially develop natural resources on the lands of indigenous peoples.<sup>5</sup> The title, encompassing ‘impacts on lands and natural resources’ is misleadingly broad given the tight restriction then applied to limit application to projects actually on or commercially developing resources on indigenous peoples’ lands.

The paragraph also restricts application to projects in which ‘adverse impacts’ can be expected on the lands and/or natural resources of indigenous peoples. Indigenous peoples have repeatedly stated to the IFC that ANY IMPACT on their lands and their resources requires their free, prior and informed consent.<sup>6</sup> Judgements on scale and nature of impacts have been flawed in previous IFC loan operations (including the recent case against Wilmar Trading). Further, the restriction of FPIC to areas with potentially negative impacts deviates from the standards for FPIC laid out in the UN Declaration on the Rights of Indigenous Peoples.

Furthermore, the text of paragraph 18 (regarding impacts on lands and resources) does not actually make a specific mention of a need to obtain FPIC from affected indigenous peoples. Instead it details a list of steps that clients must take, largely concerned with research, assessment and informing indigenous peoples of various aspects of the project. The list is not in any form an approach to obtaining consent, nor does it contain a requirement to obtain FPIC.

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<sup>3</sup> IFCAnnexA7: p. 94-96

<sup>4</sup> Article 10 “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Article 11 (2) “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” Article 28 (1) “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” And Article 32 (2) “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources”, *United Nations Declaration on the Rights of Indigenous Peoples*, General Assembly Resolution, September 2007

<sup>5</sup> IFCAnnexA7: p. 94 paragraph 18

<sup>6</sup> AIDSESEP statements, Lima Consultation, January 24 2011

There is also a lack of clarity to the requirements under ‘impacts on lands and resources’. It appears that footnote 7 may restrict the application of special circumstances by providing for a separate process for the acquisition and/or leasing of lands with legal title. Specifically the footnote provides that “the acquisition and/or leasing of lands with legal title is addressed in Performance Standard 5 Land Acquisition and Involuntary Resettlement”.<sup>7</sup> It should be clarified that both Performance Standards would concurrently apply in any instance in which indigenous peoples are facing a process of voluntary relocation, and PS5 in no way replaces the requirement for FPIC.

Likewise, when discussing the relocation of indigenous peoples from their lands, the Performance Standard notes (again in a footnote): “Where members of Affected Communities of Indigenous Peoples individually hold legal title, or where the relevant national law recognizes customary rights for individuals, the requirements of Performance Standard 5 will apply...”.<sup>8</sup> This division between cases in which indigenous peoples have no recognized title over their lands, or where communal title is recognized, and where some level of title has been provided on an individual bases is extremely problematic.<sup>9</sup> Application of Performance Standard 5 *in the place of* Performance Standard 7 implies that incomplete, partial or inappropriate recognition of traditional lands – as long as there is some individual legal title that accompanies such recognition – is sufficient to fully and sufficiently protect the rights of indigenous peoples. The global experiences of indigenous peoples shows that land tenure issues remain, in every region of the world, the single biggest threat to the survival of indigenous peoples. The provision of some recognition by the government in the form of an individual legal title is no guarantee that such recognition is sufficient, and indeed in many cases exists only because the government does not accept communal land rights. The Performance Standard is intended to apply wherever a collective attachment to lands and resources is maintained (paragraph 6) and this principle must not be overturned where individual legal titles may have been provided to some members of the people concerned.<sup>10</sup>

Finally the protections in place for cultural resources prove to be similarly restricted. Where impacts on cultural resources that ‘*are central to the identity and/or cultural, ceremonial or spiritual aspects of indigenous peoples’ lives*’ are expected, the only requirement is that priority is given to avoiding such impacts.<sup>11</sup> It is only ‘where *significant* project impacts on cultural property are unavoidable’ that FPIC is required.<sup>12</sup> It has long been the position of indigenous peoples that FPIC applies in any instance in which their lands, resources or any part of their cultural property and heritage will be affected. Setting the requirement that such impacts must be both ‘significant’ and ‘unavoidable’ ensures that the application of FPIC in this instance will be minimal, restricted and insufficient to meet the requirements of UNDRIP and other international standards.

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<sup>7</sup> IFCAnnexA7, PS7, paragraph 17, footnote 7

<sup>8</sup> IFCAnnexA7, PS7, paragraph 18, footnote 13

<sup>9</sup> See Guidance Note 7 – V2 for explanatory notes “G40. The requirements under Performance Standard 7, paragraph 18, are intended for situations where traditional owned lands or customary usage of resources is held and used by Indigenous Peoples communally. Where individual members of the affected communities of Indigenous Peoples hold legal title, or where relevant national law recognizes customary rights for individuals, the requirements of Performance Standard 5 will apply. However, even where individuals within the affected communities of Indigenous Peoples hold legal title to land individually, the client should be aware that the decision of relevant individuals to cede title and to relocate may still be subject to a community-based decision making process, as these lands may be not be considered private property but ancestral lands.”

<sup>10</sup> IFCAnnexA7, PS7, paragraph 6

<sup>11</sup> IFCAnnexA7: p. 94, paragraph 20 (emphasis added)

<sup>12</sup> Ibid. (emphasis added)

Turning from the Performance Standards to the Guidance Notes, there are further and more serious areas for concern. Guidance provided on FPIC in these notes fails to provide adequate reference to existing international law and standards on FPIC, and instead provides definitions and guidance very different from generally accepted norms of consent processes.

Guidance Note 7	Internationally accepted norms
G31: FPIC is defined as “the combination of: (i) mutually accepted process between the Client and Indigenous Peoples, and (ii) evidence of agreement between the parties regarding the outcome of the negotiations.”	FPIC is by nature an autonomous process (‘free’) of decision-making among and within the indigenous peoples concerned, not a negotiation. The process of securing FPIC may well involve mutually accepted processes of negotiation, but FPIC is itself autonomous and this should be reflected in the guidance provided to ensure clarity for clients and others
G32: FPIC is established through a process involving (in part) “(vii) agreement on proposed compensation framework, mitigation measures and development interventions”	FPIC involves consideration of, and possible consent to, all details of the project design, implementation, compensation, benefit sharing and whether or not the project goes ahead. The definition provided here in G32 is thus inappropriately restricted.
G33: “In cases involving FPIC, IFC will review the client’s documentation of the negotiation process and its agreed outcomes, and engage Affected Communities of Indigenous Peoples to verify that the affected communities of Indigenous Peoples are broadly in support of the project”	FPIC is not broad community support, and guidance that suggests it is will only serve to obscure the requirements of the Performance Standard which clearly states that FPIC requires “agreement by the culturally appropriate decision-making body within the affected indigenous peoples, representing and communicating an agreement seen as legitimate” (PS7 paragraph 15)
G36: “Whether the project should proceed with the potential adverse impacts on these lands should be subject to securing the FPIC of the affected communities of Indigenous Peoples.”	G36 relates to projects with impacts on lands and resources, and uses the weaker term of ‘should’ rather than ‘must’ in relation to the securing of consent (this weaker language is not used in passages related to relocation).
G38: “In case the host government has made the decision to relocate Indigenous Peoples, consultation with relevant government officials would be important to understand the rationale for such relocation, and whether a good faith negotiation based on informed participation of the Indigenous Peoples has been implemented and successfully concluded regarding the aspects of the project and the relocation affecting communities of Indigenous Peoples, prior to the decision to finance the project.”	In cases where the relocation decision is taken by the government, a weaker standard is required where consent does not need to be in evidence. There is no rationale for weakening the standard simply because it is the government making the decision rather than the client, the funding source remains the IFC.
G40: “...the client <b>should</b> seek the informed consent of the owner(s) before using it, and in any event, enable the relevant communities to continue to use the genetic materials for customary or ceremonial purposes.” (emphasis added)	G40 relates to the use of cultural property, and again uses weaker terms that imply FPIC is an aim, not a requirement.

1. **FPIC should not be restricted to negative or adverse impacts on lands and natural resources, relocation or the commercial use of cultural resources, but should be applied whenever the lands, natural resources, livelihoods and/or cultural resources of indigenous peoples are likely to be impacted in any way**
2. **FPIC should not be restricted to projects actually located on, or commercially developing resources on, the lands of indigenous peoples, but must encompass any project likely to impact on those lands and/or resources.**
3. **In cases of relocation, both Performance Standard 5 and Performance Standard 7 should apply concurrently, with the requirement for FPIC applying to all instances in which indigenous peoples face relocation including where indigenous lands are held, in part or in whole, under individual titles**
4. **The requirement for FPIC should state, for every circumstance for which it is required, that proposed projects cannot proceed without securing FPIC. This includes guidance provided in the accompanying Guidance Note 7.<sup>13</sup>**
5. **FPIC should not be restricted to instances in which there will be *significant* project impacts on cultural property, but where any impacts are expected to occur**

#### ***Disclosure of the requirement for FPIC***

Although it is clear that the IFC has improved relative to the existing sustainability and safeguard framework, and many improvements in access to information have been provided, there remains no requirement to disclose the fact that FPIC is being sought or will be required for a particular project. This type of lack of transparency has, in the past, contributed to the “rare and non transparent” application of the Broad Community Support standard (to quote the CAO).<sup>14</sup> This lack of transparency has been rectified with regards to BCS, however there is no equivalent requirement to disclose the need for FPIC opening up the real risk that implementation of this standard may not always be open to public scrutiny.

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<sup>13</sup> Guidance Note 7 – V2, G36 “Whether the project should proceed with the potential adverse impacts on these lands should be subject to securing the FPIC of the affected communities of Indigenous Peoples.” Likewise in G43 in reference to the exploitation and development of the knowledge, innovations and practices of indigenous peoples, “the client should seek the informed consent of the owner(s) before using it, and in any event, enable the relevant communities to continue to use the genetic materials for customary or ceremonial purposes”.

<sup>14</sup> CAO, Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010 at page 16 states that the review “found that IFC’s application of its BCS commitment has been rare and not transparent. IFC neither discloses which projects have triggered the commitment, nor how it has determined Broad Community Support”.

- 6. Where Free, Prior and Informed Consent is required for a project to be approved, such a requirement must be disclosed in the Summary of Investment Information (SII) and Environmental and Social Review Summary (ESRS) prior to Board consideration.**

## ***International human rights law***

We also note that the IFC safeguard standards do not reference or cite the appropriate international human rights laws and standards that govern State responsibilities to protect human rights, nor existing and emerging standards for companies and non-state entities in the Performance Standards themselves. As a specialised agency of the United Nations, the WBG has an obligation to respect internationally recognised human rights, and to ensure that its lending practices do not undermine its member's international legal commitments.<sup>15</sup> In the case of the UN Declaration on the Rights of Indigenous Peoples, the UN General Assembly specifically called on all Specialized Agencies of the UN, such as the WBG, to “promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”<sup>16</sup>

At a minimum, the World Bank Group as a whole, and the IFC specifically, must provide appropriate guidance to clients in its binding policies and standards on the obligations that the international community places on companies not to violate the human rights of people potentially impacted by company investments or actions. Such guidance should also include relevant operating standards such as the framework developed by the UN Special Representative of the UN Secretary-General on the issue of human rights and transnational and other business enterprises (UN SRSG) in his 2008 report *Protect, Respect and Remedy: a Framework for Business and Human Rights*.<sup>17</sup>

### **7. The Performance Standards and Sustainability Policy should provide references to appropriate international human rights law and standards, including the UN Declaration on the Rights of Indigenous Peoples.**

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<sup>15</sup> See *inter alia* C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996); Henry G. Schermers & Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 3rd rev. ed. (The Hague: Kluwer Law International, 1995); Sigrun Skogly, *The Human Rights Obligations of the World Bank and International Monetary Fund* (London: Cavendish Publishing, 2001), 84-87; Mac Darrow, *Between Light and Shadow. The World Bank, The International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing, 2003), and Philippe Sands & Pierre Klein (eds.), *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), 458-59.

<sup>16</sup> See UNDRIP, at Art. 42.

<sup>17</sup> Available at: <http://www.business-humanrights.org/Links/Repository/965591>

## Issue Two: Broad Community Support

The inclusion of a new proposed requirement to disclose the basis on which Broad Community Support (BCS) was established responds to a key recommendation of indigenous peoples and civil society in Round Two of this review process.<sup>18</sup> We also note the expansion of the requirement for BCS to all projects with potential adverse impacts on indigenous peoples.<sup>19</sup>

However concerns remain with the approach to BCS in the new draft. It is worth remembering that the implementation of the standard of BCS was an area that was highly criticized by the Compliance Advisor Ombudsman (CAO) in their official advice, noting that the IFC's use of BCS is not transparent; BCS was applied only to few high risk projects, and that the IFC has changed its application of BCS over time.<sup>20</sup> In the same review, the CAO noted that in some instances in the past, BCS has been judged to exist without the communities being aware that their support for a project was being requested or judged.

Indigenous peoples and support organisations have consistently recommended two key changes to the treatment of BCS which would address the concerns highlighted by the CAO: (i) there is a requirement for the affected communities to verify that the standard has been met, and (ii) that the client is made aware of the requirement for BCS in the relevant Performance Standard. Neither of these recommendations has been accepted in the current draft. It is our view that it is only through increased transparency that the BCS standard can be improved from past experience. For this to happen, clients must be aware that such a standard is being applied, and communities must be aware not only of the application of the standard, but also the extent to which such support is judged to exist.

Related to the standard of Broad Community Support is the process of 'Informed Consultation Process (ICP)' which is intended to lead to the securing of BCS. In the context of large, often multi-lateral investments, the discussions between a client company and the impacted peoples or communities (indigenous or not) take place with an asymmetry in power that is difficult to overcome. For ICP to be effectively realized, the IFC should provide support from a fund independent from the project for communities to engage their own consultants or support to better engage in such a process of 'informed' participation and consultation.

- 8. The requirement for Broad Community Support should be placed in Performance Standard 1 to ensure that the client is aware of this requirement and aims to secure such an outcome, with subsequent verification by the IFC**
- 9. The standard of BCS be verified through a written agreement document outlining the conditions on which support is provided by those segments of the communities that have provided such support**

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<sup>18</sup> IFCAnnexA7, Access to Information Policy para.31

<sup>19</sup> IFCAnnexA7, Sustainability Policy para. 28

<sup>20</sup> CAO, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010 at page 16 - 17

**10. An independent fund should be established to support communities to have access to independent sources of information and support during project design and implementation phases**

**Issue Three: Treatment of high risk sectors and complex supply chains**

The treatment of high-risk sectors has been a difficult area of the IFC for some time. Both increasing investments in resource-based commodities with complex supply chains such as palm oil and bio-fuels and the increasing use of financial intermediaries have presented challenges to the appropriate use of the Sustainability Policy, Performance Standards and Access to Information Policy. It has been clearly demonstrated through past experience that incorrect categorization of projects has an immediate and deleterious effect on the social and environmental performance of companies.<sup>21</sup>

Indigenous peoples and civil society have consistently argued that certain high risk sectors any investment agreement by the IFC should routinely be given a Category A rating, category B if it can be demonstrated that it is appropriate in the circumstances. These sectors, including resource-based commodities, mining and large scale infrastructure, typically have complex and multi-faceted impacts in the immediate, the short-term and in the longer term that cannot be adequately assessed at a single point of time. Although a welcome amendment has been made requiring the disclosure of the rationale for the category assigned to a given project, this does not include any project assigned a Category C, only A and B projects, and therefore fails to adequately provide protection for projects with complex supply chain issues or high risk sectors in which significant impacts may not be immediately apparent but are potentially severe in scope.

It is difficult to see under what circumstances a project with such high inherent risks could be assigned a category C, but experience has shown that it can occur, and complaints to compliance and grievance bodies have been necessary to ensure that the IFC and clients take adequate consideration of risk.

**11. High-risk sectors and investments in natural resource based commodities must routinely be given a category A or B rating, with appropriate explanatory notes. In any rare instance in which a category C may be appropriate, an accompanying detailed assessment must be provided.**

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<sup>21</sup> Forest Peoples' Programme Submission to the IFC's Policy and Performance Standards on Social and Environmental Sustainability, 15 July 2010 available at: <http://www.forestpeoples.org/topics/international-finance-corporation-ifc/publication/2010/ifc-review-its-sustainability-policy-a> , CAO, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010

## Issue Four: Financial Intermediaries

The scope of the application of the Performance Standards (the requirements for clients) in the context of investments through financial intermediaries continues to be a source of considerable concern. The newest iteration of the draft policy proposes that for FI's with portfolio's that 'present moderate to high social or environmental risk' the Performance Standards will be applicable to 'high risk' activities. As the requirement for seeking the FPIC of indigenous peoples is contained within Performance Standard 7 this means that FPIC is not required in any but the highest risk of activities funded by financial intermediaries. Where such risk is judged solely by the client this creates a strong incentive for FI clients to downplay risk. Overreliance on the information provided by clients without effective and thorough verification by the IFC and the affected communities has been a long-term concern, not only of civil society and indigenous peoples' organisations but by the Bank's own review processes.<sup>22</sup>

It also appears to be the case that for FI projects and sub-projects, the IFC role in verifying the existence of FPIC would no longer be active, thereby leaving the client responsible for obtaining and then verifying FPIC. Needless to say, removing the requirement for the IFC to verify the outcome of FPIC processes risks stripping the requirement of any real authority or certainty.

- 12. Risks presented by FI projects should be treated in the same way as risks presented by other forms of investments. Moderate to high level risks must require the application of the Performance Standards. Anything less would risk side-lining the Performance Standards altogether as FI investments increase as a proportion of the IFC overall lending rates.**
- 13. Verification of FPIC by the IFC must be maintained for all investments channelled through FIs.**

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<sup>22</sup> The IEG notes that for the IFC "the crucial question is whether this self-assessment by the private sector clients captures public concerns" *Safeguards and Sustainability Policies in a Changing World: an independent evaluation of World Bank Group Experience*, World Bank Independent Evaluation Group (IEG), Washington 2010: p. P. xix

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**Annex I: Proposed Language Changes**

**Proposed Language Changes**

**International Finance Corporation Review Process**

**Sustainability Policy, Performance Standards and Access to  
Information Policy**

**Prepared by the Forest Peoples Programme**

**Submitted 4<sup>th</sup> March 2011**

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## Proposed language changes

### *Sustainability Policy*

Language proposed for deletion is marked ~~XXXX~~ and language proposed for insertion is marked **[XXXX]**

Delete ‘adverse’ from paragraph 28 as follows:

28. In cases where the business activity to be financed is likely to generate potential significant ~~adverse~~ impacts on Affected Communities or is likely to generate potential ~~adverse~~ impacts on Indigenous People, IFC expects clients to engage in a process of Informed Consultation and Participation (ICP). In such cases, through its own investigation, IFC will determine whether the client’s community engagement is one that involves ICP and enables the participation of the Affected Communities, ~~leading to~~ **[and will verify the existence of]** Broad Community Support (BCS) for the business activity by Affected Communities, before presenting it for approval to IFC’s Board of Directors.

Insert additional text into paragraph 29 for clarification of requirements as follows:

29. In addition, where a proposed business activity triggers the Performance Standard 7 requirement of Free, Prior and Inform Consent (FPIC), IFC will undertake an in-depth review of the process conducted by the client as part of its environmental and social due diligence **[, and disclose the requirement for, and positive verification of, FPIC]**.

Amend paragraph 33, bullet point four as follows:

- FIs with portfolio and/or prospective business activities that present moderate to high social or environmental risks will require **[moderate and]** high risk business activities they support to apply relevant requirements of the Performance Standards.

Amend paragraph 41 as follows to ensure that supply chains are incorporated into categorization:

41. Where the use of proceeds of IFC financing and the associated social and environmental footprint of the business activity are known at the time of the decision to invest, IFC will determine the business activity’s social and environmental category based on its potential social and environmental risks and/or impacts. For an existing operation, this will include its known operational impacts. In its determination of the risk category, IFC will also consider: **(a)** inherent environmental and social risks related to a particular sector in the context of the business activity’s setting **[and; (b) in high-risk sectors, the social and environmental risks posed by primary suppliers]**.

## ***Performance Standard 1***

Language proposed for deletion is marked ~~XXXX~~ and language proposed for insertion is marked [XXXX]

Add text to paragraph 9 to account for supply chain risks to land tenure systems:

9. Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with supply chains, as defined in Performance Standard 2 (paragraphs 27 and 28) ~~and~~ Performance Standard 6 (paragraphs 30 and 31) **[and Performance Standard 7 (paragraph 24)].**

OR

9. Where the client can reasonably exercise control, the risks and impacts identification process will also consider those risks and impacts associated with supply chains, **[including but not restricted to those]** ~~as~~ defined in Performance Standard 2 (paragraphs 27 and 28) and Performance Standard 6 (paragraphs 30 and 31)

Delete text from paragraph 31 as follows:

If communities may be affected by risks or ~~adverse~~ impacts from the project, the client will provide them with (i) access to information on the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant elements of the management program; (iv) the envisaged stakeholder engagement process; and (v) the grievance redress mechanism.

Amend paragraph 34 regarding informed consultation processes to ensure that it is consistent with the descriptions provided in the Sustainability Policy paragraph 28, as follows:

34. For projects with significant ~~adverse~~ impacts on Affected Communities, **[and for projects with impacts on indigenous peoples]** the consultation process will be an informed consultation process (ICP), which is free, prior, and informed and will facilitate the Affected Communities informed participation. Informed participation involves a more in-depth exchange of views and information, and an organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The client will document the process, in particular the measures taken to avoid or minimize risks to and adverse impacts on the Affected Communities **[and will determine whether the affected peoples provide their Broad Community Support to the project, providing written agreements or documentation demonstrating such support].**

Add text, and amend text, in paragraph 35 as follows:

35. ... This involves a mutually accepted process of Good Faith Negotiation between the client and ~~the community of~~ **[the affected]** Indigenous Peoples, and evidence of **[written]** agreement between the parties as the outcome of the negotiations. The special circumstances requiring FPIC relate to potential relocation of Indigenous Peoples, project impacts on lands and natural resources lands **[traditionally owned, occupied or otherwise used or acquired by]** ~~subject to traditional ownership or under customary use~~, and projects which propose to use cultural resources for commercial purposes. The special circumstances requiring FPIC are described in more detail in Performance Standard 7.

## Performance Standard 7

Language proposed for deletion is marked ~~XXXX~~ and language proposed for insertion is marked [XXXX]

Amend the Objectives, bullet point 4:

- To ensure the free, prior, and informed consent (FPIC) of the Affected Communities of Indigenous Peoples **[for business activities]** ~~on project design, implementation, and expected outcomes~~ when the special circumstances described in this Performance Standard are present.

Amend Paragraph 4 regarding definition of FPIC:

4. There is no universally accepted definition of “Indigenous Peoples” ~~or “FPIC.”~~ Indigenous Peoples may be referred to in different countries by such terms as “Indigenous ethnic minorities,” “aboriginals,” “hill tribes,” “minority nationalities,” “scheduled tribes,” “first nations,” or “tribal groups.”

Amend paragraph 8 with the insertion of additional text clarifying the need to involve indigenous peoples in the impact identification and assessment process:

8. The client will identify, through a social and environmental risks and impacts identification process, all communities of Indigenous Peoples who may be affected by the project within the project’s area of influence, as well as the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on them. **[Cumulative impacts of projects on Indigenous Peoples’ rights and interests must be addressed. The full and effective participation of Indigenous Peoples in the determination of these impacts must be ensured. Where it is determined that project may potentially impact on a community in voluntary isolation the project should not proceed.]<sup>23</sup>**

*Informed Consultation and Participation*

10.

- Provide sufficient time for Indigenous Peoples’ decision-making processes **[and ensure respect for Indigenous Peoples’ customary laws, community protocols and procedures. Ensure that access to independent experts for ESIA scrutiny is available to Indigenous Peoples.]\***

15. In projects with special circumstances described below, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples **[for the business activity.]** ~~on project design, implementation, and expected outcomes.~~

16. The special circumstances requiring FPIC are when projects (i) are to be located on or make commercial use of natural resources on lands **[traditionally owned, occupied or otherwise used or acquired]** ~~subject to traditional ownership and/or under customary use~~ by Indigenous Peoples; (ii) require relocation of Indigenous Peoples from **[traditionally owned, occupied or otherwise used or acquired]** ~~traditional or customary~~ lands; or (iii) involve commercial use of Indigenous Peoples’

<sup>23</sup> This language and 10\* below was provided by Cathal Doyle, Middlesex University

cultural resources. ***[Clients will not proceed with any projects that meet these special circumstances unless FPIC has been obtained.]***

Add text to Footnote 7 (Para 17): ***[FPIC is required regardless of formal legal titling regime.]***

18. If the client proposes to locate a project on, ~~or~~ commercially develop natural resources on, **[or impact] lands [traditionally owned, occupied or otherwise used or acquired by] ~~traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected,~~** the client will **[obtain the FPIC of affected Indigenous Peoples]** and take the following steps:

- Document efforts to avoid and otherwise minimize the area of land proposed for the project.
- Document efforts to avoid and otherwise minimize impacts on natural resources and natural areas of importance to Indigenous People.
- If the client intends to purchase or lease land, the client will identify and review all property interests and traditional uses, including those associated with activities described in Paragraph 6, and confirm that the seller/lessor of the property is the true owner of the land.
- Ensure that Affected Communities of Indigenous Peoples are informed of their rights with respect to these lands under national ***[and applicable international]*** laws, including any national law recognizing customary use rights.
- ***[Ensure that the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples has been secured, without which the project will not proceed. A collaborative relationship with the affected Indigenous Peoples must be maintained throughout the life of the business activity to ensure that FPIC remains.]***
- Document the Indigenous Peoples' land use with the assistance of one or more experts in collaboration with the Affected Communities of Indigenous Peoples without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources.
  - The client will offer Affected Communities of Indigenous Peoples compensation and due process in the case of commercial development of their land and natural resources, together with culturally appropriate sustainable development opportunities.
  - Land-based compensation or compensation-in-kind will be offered in lieu of cash compensation where feasible.
  - Project development may be associated with the loss of access to and the loss of natural resources independent of project land acquisition. In such circumstances, clients should identify measures to ensure continued access to natural resources, identify the equivalent of replacement resources, or, as a last option, provide compensation and identify alternative livelihoods.
  - Where the client intends to utilize natural resources that are central to the identity and livelihood of Indigenous People and their usage thereof exacerbates livelihood risk, the client will explore mechanisms to ensure fair and equitable sharing of benefits associated with project usage of the resources.
  - The client will also consider providing Affected Communities of Indigenous Peoples with access, usage and transit on land it is developing subject to overriding health, safety, and security considerations.

19. The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from ~~communally held~~ lands and natural resources **[traditionally owned, occupied or otherwise used or acquired]. ~~subject to traditional ownership or under customary use.~~** If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained

as described above. Any relocation of Indigenous Peoples will be consistent with the Resettlement Planning and Implementation requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the cause of their relocation cease to exist.

Add text to Footnote 12 (Para 19): ***[FPIC is required regardless of formal legal titling regime.]***

20. Where a project may impact upon cultural resources that are central to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, priority will be given to avoidance of such impacts through retention of cultural resources. Where ~~significant~~ project impacts on cultural property are unavoidable, the client will obtain the FPIC of the Affected Communities of Indigenous Peoples ***[, without which the project will not proceed.]***

21. Where a project proposes to use the cultural resources, knowledge, innovations, or practices of Indigenous Peoples for commercial purposes, the client will inform the Indigenous Peoples of (i) their rights under national law; (ii) the scope and nature of the proposed commercial development; and (iii) the potential consequences of such development and obtain their FPIC. ***[Without FPIC the project will not proceed]***. The client will also ensure fair and equitable sharing of benefits from commercialization of such knowledge, innovation, or practice, consistent with the customs and traditions of the Indigenous Peoples.

Add full new paragraph to address risks posed through supply chains:

***[Supply Chain***

***24. When there is the potential for impacts on the lands and resources traditionally owned, occupied or otherwise used or acquired by indigenous peoples by the client's primary suppliers, the client should give preference to purchasing from suppliers that can demonstrate that they are not adversely impacting on the land and resource rights of indigenous peoples.]***

## Access to Information Policy

Language proposed for deletion is marked ~~XXXX~~ and language proposed for insertion is marked **[XXXX]**

Amend paragraph 30, sub-section (a) (i) as follows:

The ESRS includes:

(i) reference to the Performance Standards **[applied to the business activity, including a determination of 'special circumstances' pursuant to Performance Standard 7 if applicable]** and any applicable grievance mechanisms, including the CAO.

Add the following text in paragraph 31:

31. **Broad Community Support [and Free, Prior and Informed Consent]**. Where applicable, IFC will disclose the process outlining how it made a determination of Broad Community Support **[or, if applicable, a positive verification of the presence of Free, Prior and Informed Consent]** prior to consideration of the investment by IFC's Board of Directors. IFC will update the ESRS to include this information once it becomes available to present to IFC's Board of Directors. For projects where BCS cannot be determined prior to consideration by IFC's Board of Directors, **[or where FPIC cannot be verified prior to consideration by IFC's Board of Directors]** for example, because a project site is not yet defined or is a pre-development phase investment, IFC will disclose the process outlining how BCS was determined **[or a positive verification of FPIC]** for the project as it becomes available.

## **Annex II: FPIC Principles**

### **FPIC Standard Setting Exercise of the UN Working Group on Indigenous Populations, 2004**

In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:

- (a) Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- (b) That their consent is sought and freely given prior to the start of development activities;
- (c) That indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- (d) That their choice to give or withhold consent over developments affecting them is respected and upheld.

...

The principle of free, prior and informed consent contains the elemental terms “free”, “prior”, “informed” and “consent” which need to be interpreted in order to operationalize the concept

Free:

It is a general principle of law that consent is not valid if obtained through coercion or manipulation. While no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.

Prior:

To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.

Informed:

A procedure based on the principle of free, prior and informed consent must involve consultation and participation by indigenous peoples, which includes the full and legally accurate disclosure of information concerning the proposed development in a form which is both accessible and understandable to the affected indigenous people(s)/communities regarding, inter alia:

- The nature, size and scope of the proposed development or activity;
- The duration of the development (including the construction phase) or the activity;
- The locality of areas that will be affected;
- A preliminary assessment of the likely impact of the development;
- The reasons/purpose for the development;

- Personnel likely to be involved in both construction and operational phases (including local people, research institutes, sponsors, commercial interests and partners – as possible third parties and beneficiaries) of the development process;
- Specific procedures the development or activity would entail;
- Potential risks involved (e.g. entry into sacred areas, environmental pollution, partial destruction of a significant site, disturbance of a breeding ground);
- The full implications that can realistically be foreseen (e.g. commercial, economic, environmental, cultural);
- Conditions for third-party involvement;
- Provision of misleading or false information should result in a penalty or denial of consent for the proposed development to proceed.

#### Consent:

This involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. As such, consultation and meaningful participation are fundamental components of a consent process. There may also be negotiation involved to reach agreement on the proposal as a whole, certain components thereof, or conditions that may be attached to the operationalization of the principle of free, prior and informed consent. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisers, including legal counsel of their choice.

Indigenous peoples need to specify which entity will express consent on behalf of the affected people(s)/communities. This may vary depending on the activity in question. For example, the traditional authorities of a particular community may, under the relevant customary law, be the entity to give or withhold consent. In other cases, it may be the indigenous people(s) as a whole or a combination of entities.

The consent process should also be time bound so as to ensure that the affected people(s)/communities have enough time to understand information received, to request additional information or clarification, to seek advice, and to determine or negotiate conditions, as well as to ensure that the process does not serve as an undue impediment for the proponent seeking consent. The appropriate amount of time needed may vary depending on the number of affected persons, communities or peoples, the complexity of the proposed activity, the amount of information provided or requested, etc. Whatever the amount of time needed, a predetermined and clearly understood deadline is critical.

Prior informed consent must be based on specific activities for which consent has been granted. While prior informed consent may initially be granted for one set of activities, any intended change of activities will require a new appeal for prior informed consent.

Finally, the successful operationalization of the principle of free, prior and informed consent is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full

recognition of indigenous peoples' territorial rights, the principle will not provide the protection it is designed to provide.