



Forest Peoples Programme

**Submission to
Independent Evaluation
Group Regarding the
World Bank Group
Safeguard and
Sustainability
Frameworks**

June 2010

Summary

This paper has been prepared by Forest Peoples Programme (FPP) for the Independent Evaluation Group (IEG) in relation to its evaluation of the World Bank Group's (WBG) experience with safeguard and sustainability policies across the WBG. It covers persistent problems and gaps in safeguard policy standards and their implementation throughout the WBG with an emphasis on safeguards relating to indigenous peoples.

The analysis deals in detail with normative and practical concerns in the safeguard policies and procedures. Some of the serious issues noted from field experiences around the world, including issues with project categorization, are generally applicable across the WBG while some issues, such as information disclosure requirements with the private sector, are directly relevant to the International Finance Corporation's (IFC) requirements. The discussion also addresses the broader need to improve WBG consistency with international law, including indigenous peoples' right to free, prior and informed consent (FPIC).

The FPP urges the IEG to ensure that the final review pinpoints the necessary steps to bring the WBG into conformity with international standards and good practice by adopting the standard of FPIC in safeguard systems for its loan operations and other finance e.g. blended grants and loans under the Global Environment Facility (GEF) and grants administered under the Forest Carbon Partnership Facility (FCPF).

Specifically, IEG advice on ways to improve and strengthen WBG safeguard systems must include recommendations for:

- measures to ensure meaningful participation by indigenous peoples' freely chosen representatives in current and future safeguard revisions and in the development of new safeguards tools and procedures, including an urgent recommendation to the ongoing IFC/Multilateral Investment Guarantee Agency (MIGA) review process to effectively and rapidly consult with and secure meaningful participation by indigenous peoples' representatives;
- upgrading both Operational Policy 4.10 - International Bank for Reconstruction and Development (IBRD)/International Development Association (IDA) - and Performance Standard 7 - IFC/MIGA - to ensure conformity with the minimum standards enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and related human rights instruments, including explicit provisions to fully uphold, protect and ensure the right to free, prior and informed consent (FPIC);
- adoption of a benchmark safeguard for operational rules, procedures and due diligence across WBG lending practices requiring the need for loan and grant operations to uphold the international obligations of borrower/recipient countries under international treaties they have ratified, including obligations under human rights instruments;

- identification and removal of perverse incentives within safeguards systems and procedures that may lead Bank staff to minimise risks, or even deliberately circumvent and misrepresent, environmental and social due diligence;
- adoption of positive incentives to reward Bank staff for effective application of the safeguard policies and rigorous due diligence, including accurate risk analysis and project categorisation during the preparation phase and better monitoring of implementation to ensure compliance;
- establishing stronger guidance on appropriate and effective participation by indigenous peoples in all WBG investments, loans and projects which may impact on them, especially regarding the requirement to involve the decision-making processes of the affected peoples – such guidance must be established in collaboration and cooperation with affected indigenous peoples and indigenous peoples' authorities and organisations;
- a clear binding prohibition on any Bank finance for forced resettlement throughout the Bank group and a Bank-wide review of projects involving forced displacement;
- application of the full suite of Bank safeguards to Development Policy Loans (DPL);
- additional remedial measures at the project and country level to address grievances within project implementation, designed in full collaboration with the affected indigenous peoples and established independently from project management; and,
- establishing effective systems to ensure that lessons learned from previous claims to the Bank's accountability mechanisms are shared and incorporated into staff practices throughout the Bank, through both review of agreed measures to be undertaken by the Bank in response to specific problem projects and through raising awareness among staff of the key issues identified in previous claims.

Specific to the on-going IFC review of its Performance Standards, Sustainability Policy and Information Disclosure Policy, the IEG should urgently advise the IFC:

- to proactively and effectively engage with indigenous peoples' organisations and representatives on the review and revision of Performance Standard 7 (in particular) and on all other policies and procedures relevant to indigenous peoples;
- to address deficiencies in the Information Disclosure Policy of the IFC, requiring the public disclosure of (i) any IFC involvement or potential involvement in a planned project; (ii) the rationale for the IFC's choice of categorisation of a project; and (iii) contact details of IFC staff (that must be made available to affected people and other relevant organisations).

In addition to these recommendations to the World Bank Group, we also strongly urge the IEG to undertake a focused review of the IFC's good faith negotiation (GFN) and the WBG's broad community support (BCS) standards, in close collaboration with

indigenous peoples' representatives and organisations, and other affected people. It has recently been claimed by the Bank that the BCS standards are equivalent to FPIC, a position that is rejected by indigenous peoples and others.¹ This claim also stands in stark contrast to the previous argument of Bank management that BCS was adopted because the WBG's board had concerns about FPIC. An impartial review of the implementation of these Bank standards would enable further consideration of whether BCS could be legitimately equated with FPIC and could further reveal those areas in which the Bank's policies and procedures hinder or respect indigenous peoples' right to FPIC.

¹ See, for instance, 'Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008', available at www.forestpeoples.org.

I. Introduction

For thirty years, the World Bank Group has been developing its safeguard and accountability frameworks to mitigate negative environmental and social impacts from the Bank's portfolio. The development of 'safeguard' policies on indigenous peoples, involuntary resettlement, forests, environmental assessment, biological diversity and cultural heritage (among others) at both IBRD/IDA and IFC/MIGA has gone some way to systematising Bank investments to avoid the most egregious forms of development harm and sparked similar processes in other multilateral finance institutions.² In addition, the establishment of the Inspection Panel (1993) and the Compliance Advisor Ombudsman (CAO) (1999) has helped ensure that these safeguard and sustainability policies cannot be ignored by providing a forum to affected people to have their concerns heard at the highest levels.

The development and implementation of these environmental and social safeguard policies and systems of accountability at the World Bank Group (hereinafter 'WBG' or 'Bank') have been marked by significant differences across the WBG in terms of willingness to engage with indigenous peoples and other relevant groups in both establishing and reviewing these standards. Whilst the original process of establishing OP4.20 (now superseded by OP 4.10) saw direct engagement with indigenous peoples, the on-going review of the performance standards of the IFC has seen near zero outreach to indigenous peoples' organisations and representatives globally.

More widely, the same institutional failure to effectively engage with indigenous peoples and respect their internationally-recognised rights has, both historically and recently, resulted in Bank projects and policy development that deny, violate or ignore indigenous peoples' rights despite repeated calls by indigenous peoples for this to be addressed.³ As an earlier review noted: "World Bank policy processes have failed to address demands that indigenous peoples have made for the last 15 years e.g., in relation to human rights and free, prior and informed consent (FPIC) ... Meaningful indigenous participation remains absent or superficial in the Bank's adjustment and programmatic loans that now form a growing part of its portfolio."⁴

² The adoption of the IADB safeguards in 2006, Asian Development Bank standards from 1994 onwards, the IFC specific safeguards in 2006, safeguards for the European Bank of Reconstruction and Development in 2008

³ Since the first policy on "Tribal Peoples" was elaborated in 1982, indigenous peoples have urged the WBG to meaningfully recognize their priorities and concerns. For example, prior to the revision of the policy into Operational Directive 4.20 (issued in 1991), indigenous organizations: ... made clear recommendations to the World Bank demanding a policy which included (i) recognition of indigenous rights as set out in international law (ii) *direct consultations with indigenous peoples* in the elaboration of the policy (iii) no development projects in indigenous areas without the informed consent of the peoples affected (iv) participation of the indigenous organisations, which represent the affected peoples, throughout the full project cycle (v) establishment of tripartite commissions, including governments, funders and the affected peoples, to oversee project implementation and (v) prioritisation of indigenous development alternatives.³

⁴ See, for instance, Tom Griffiths, "Indigenous Peoples and the World Bank: Experiences with participation" (Forest Peoples Programme, July 2005), p. 1; available at

FPP is concerned that this review by the IEG is also marred by a failure to engage with indigenous peoples, and that there has been insufficient effort to consult with rights-holders to determine the impacts of these policies, and to more completely understand the causes and implications of compliance and non-compliance by the WBG. This is illustrated in the indicative list of “overarching questions” for the review which failed to ask how affected peoples and communities have been impacted by the social and environmental safeguard policies of the WBG (positive and negative impacts, costs and benefits).⁵ Instead, there is a disturbing emphasis on lowering the ‘costs’ associated with the safeguards including the question: “What are the benefits as well as costs of safeguards, and how might the benefits be strengthened and costs reduced going forward?”⁶ In its review and reporting, the IEG should recognise that an emphasis on reducing costs risks undermining the core objectives of the Bank’s safeguards policies: to avoid or minimise harmful impacts.

A narrow focus on cost-reduction may be particularly damaging to due diligence given that the most effective short-term measure to reduce transaction costs for safeguard work is to mis-categorise projects as low risk and thereby circumvent the more stringent requirements placed on high-risk projects (see below). Such mis-categorisation leads to skewed risk and cost/benefit analyses and the preparation of invalid budgets for prevention and mitigation safeguard measures.⁷ Systemic problems that encourage Bank staff to strive to lower transaction costs for due diligence and speed up project preparation time are consistent with the long-standing Bank ‘culture of approval.’⁸ We are concerned that the system of internal incentives within the WBG still appears to reward Bank staff for taking decisions that shorten the time needed for project preparation and approval at the expense of effective due diligence on safeguard issues.

The discussion that follows will use examples of cases brought to the Inspection Panel and the CAO to draw out systemic underlying policy compliance issues for consideration by the IEG.

II. Compliance and Accountability

In terms of the institutional effectiveness of the safeguard and accountability systems, some things have improved over time and with practice, such as the growing acceptance of the functioning and importance of the Inspection Panel by the Bank’s Board of

http://www.forestpeoples.org/documents/ifi_igo/wb_ips_and_particip_jul05_eng.pdf Independent sector reviews referenced in the quote are the World Commission on Dams and the Extractive Industries Review.

⁵ *Evaluation of the World Bank Group’s Experience with Safeguard and Sustainability Policies (1999 – 2008)*, Independent Evaluation Group, World Bank, February 26, 2009 p. 7-8

⁶ *Id.*, p. 8

⁷ See, for instance, Inspection Panel Report, Chad-Cameroon Petroleum and Pipeline Project, Petroleum Sector Management Capacity Building Project, and Management of the Petroleum Economy’, available at the World bank website

⁸ World Bank. 1992. *Effective implementation: Key to development impact*. Report of the Portfolio Management Task Force, Washington, DC

Executive Directors. The President of the WBG has also historically supported the accountability mechanisms and sometimes taken strong measures to intervene or respond to their findings.⁹ However, recent cases submitted to those mechanisms make clear that the safeguard policies are still not well integrated into project design and implementation. At the same time, basic problems remain in relation to access to information that compromise the ability of affected people to assert their rights under the safeguard policies or demand accountability for violations of those policies.

A. Flawed Project Scoping and Improper Categorization

The Bank has demonstrated a regular failure to recognize the broader economic, social, and environmental risk and potential impacts of Bank-supported projects, policies, or programs.¹⁰ A recent IEG report is direct on this failure in the case of the Chad-Cameroon Pipeline where the social and environmental risks associated with extractive industries in developing countries with weak governance were not recognised in the face of economic arguments for resource exploitation and the IEG recognised that 'the logic was sound, but reality interfered'.¹¹ This 'reality' is that on-the-ground conditions impact directly on a project's ability to deliver foreseen development benefits.

Projects that are under-categorised fail to prepare indigenous peoples' development plans or involuntary resettlement plans which are required only under high categories of risk. Without such plans there is no basis for understanding the local dynamic, or for ensuring that potential negative impacts are avoided or mitigated, or to allow project benefits flow to affected people.

DRC and Wilmar: Improper Categorization

Recent cases brought to the accountability mechanisms of the WBG show that even in sectors that have previously exhibited significant and serious adverse impacts on the lives and livelihoods of indigenous and forest dwelling peoples as well as critical forest habitat -- such as oil palm in Indonesia and the forestry sector in the Democratic Republic of Congo – the WBG is failing to categorise such projects appropriately. As a result, the WBG is providing financing to, and thereby fueling, sectors that are widely known to carry high environmental and social risks, without learning about, avoiding or

⁹ Examples include cancelling Bank involvement in the Arun III dam in Nepal following the very first inspection panel report; establishing the Compliance Advisor Ombudsman role at the IFC following a inspection panel claim on an IFC-financed dam on the BioBio river in Chile; and imposing a moratorium on WBG lending to the palm oil sector following the CAO report on the Wilmar agribusiness operations in Indonesia.

¹⁰ See Steve Berkman, *The World Bank and the Gods of Lending*, 2008 for an account of failures to take into account economic risks, and Independent Evaluation Group, "The World Bank Group Program of Support for the Chad-Cameroon Petroleum Development and Pipeline Construction, Report N° 50315, The World Bank Group, November 20, 2009 for failures regarding environmental and social risks, among others.

¹¹ Independent Evaluation Group, "The World Bank Group Program of Support for the Chad-Cameroon Petroleum Development and Pipeline Construction, Report N° 50315, The World Bank Group, November 20, 2009, p. viii.

appropriately mitigating the serious negative impacts of such projects on forests, and the peoples who depend on them.

In the case of the Transitional Support for Economic Recovery Credit Operation (TSERO) loan to the Democratic Republic of Congo (DRC), the Inspection Panel found that the Bank had failed to apply the required Environmental Assessment analysis to a component of the project that involved forest concessions, in violation of OP 4.01, and that this component should have been Category A. This disregard for the significant environmental and social implications of the loan is especially disturbing in light of the fact that “the Project was closely involved in a process which could end up officially approving industrial concession rights in millions of hectares of primary tropical forest where many local communities and indigenous peoples are found. These concessions undoubtedly have severe environmental and social impacts.”¹²

The Panel also found that “there was a failure during project design to carry out the necessary initial screening to identify risks and trigger the safeguard policies so that crucial steps would be taken to address needs of the Pygmy peoples and other local people.” Project documents presented to the Board for approval did not mention indigenous peoples, much less address the risks to them, “even though the presence of Pygmy peoples in the forest areas of DRC was well known and documented,” and gave “only limited attention...to the fact that, as a consequence of conflict and economic breakdown, the current rural population of about 40 million people relies heavily on the forest for subsistence.”¹³

Underlying these failures, the Panel found that:

...the Bank’s early interest in the potential tax and revenue-generating value of increased industrial logging led to **a focus on developing a Project that would facilitate increased levels of industrial forest exploitation**. The Panel finds that there was inadequate consideration of the many important socio-economic and environmental issues of forest use, embedded within Bank safeguard policies, and that this distorted the actual economic value of the country’s forests. This, in turn, contributed to problems of Bank compliance with its social and environmental policies at the stage of Project design and appraisal.¹⁴

In the case of International Finance Corporation (IFC)’s support to the Wilmar Group, a major agribusiness company that is a dominant player in the palm oil industry, FPP, Sawit Watch and Serikat Petani Kelapa Sawit, representing many other organisations in Indonesia, filed a complaint with the CAO in 2007. The complaint alleged that the project was improperly categorised, failed to account for the significant impacts of the palm oil supply chain, and was in violation of most of the IFC’s environmental and social policies (both the newer Performance Standards and the earlier versions of those policies). In her 2009 Audit Report, the Ombudsman found that:

¹² Inspection Panel, Investigation Report, Democratic Republic of Congo, Report No. 40746-ZR (Aug. 2007), para. 360 (hereinafter Inspection Panel, DRC Report).

¹³ Inspection Panel, DRC Report, p xvi.

¹⁴ Id. xv (emphasis added).

IFC applied a *de minimis* approach towards assessing each project's supply chain. For each investment, **commercial pressures were allowed to prevail and overly influence the categorization and scope and scale of environmental and social due diligence**. As a result, IFC's development mandate and mission were not robustly represented in the decision-making process. This had the effect of **insulating IFC from obtaining key information** as to how each project would impact the palm oil supply chain. Because commercial pressures dominated IFC's assessment process, **the result was that environmental and social due diligence reviews did not occur as required.**¹⁵

Importantly, the CAO also found that “although IFC's policy provisions became more stringent in April 2006, IFC approved two Wilmar investments after 2006 without any significant change in the scope of its due diligence compared to its investments prior to 2006.”¹⁶

When ‘red flag’ sectors and projects which are clearly known to present significant environmental and social risks, such as oil palm in Indonesia or the forest sector in the DRC, are nonetheless categorised as “C” instead of “A”, or not categorised at all, this should serve as a significant warning about the efficacy of the safeguard systems within the World Bank Group.

There is a need to examine and test more closely the reasons why Bank staff has chosen to overlook core social and environmental concerns. It is possible that such concerns are sidelined because of a lack of knowledge and competence among staff in assessing risk and applying safeguards or because of decisions to disregard known indirect, cumulative and supply chain risks and impacts in order to more easily process projects. The interpretation provided by the CAO in the Wilmar case is that such flawed decision-making on safeguard issues indicates that WBG staff members are, in some instances, choosing to mis-categorise projects in order to avoid the additional due diligence and safeguard budgets that would be required from accurate classification. The CAO findings noted that the IFC had recognized in its initial contacts with Wilmar that there might be possibilities for future business opportunities for IFC with this particular client and that a successful first investment would set a precedent for likely future investments in Wilmar. In this context, a Category C rating would, according to the IFC, greatly improve the chance of successfully closing the first deal.¹⁷

The CAO is clear on this point, noting that by applying a Category C designation to its second Wilmar investment, the IFC “excluded the supply chain from its investment decision making process,” and “[t]he effect of this was that applicable Performance Standards were not triggered.”¹⁸ In addition to this failure to appropriately evaluate the social and environmental issues inherent in the supply of palm oil, the incorrect categorisation eliminated the ability of affected indigenous peoples to be appropriately consulted in the design or implementation of a project that had significant adverse

¹⁵CAO Audit of IFC, C-I-R6-Y08-FO96, p. 2 (June 19, 2009) (emphasis added).

¹⁶Id. at 27.

¹⁷Id. at 21.

¹⁸Id. at 25, 27.

impacts on them. This resulted in a situation, as noted by Sawit Watch, where “Wilmar subsidiaries were illegally using fire to clear primary forests and high conservation value areas and seizing indigenous peoples’ lands without their free, prior and informed consent (FPIC), triggering serious conflicts” seemingly without IFC knowledge.¹⁹

In our view such mis-categorisation will only cease to occur when staff is properly incentivised to effectively apply the safeguard framework. To eliminate the failings in due diligence identified above, there is a pressing need to separate the assessment of potential social and environmental risks from commercial considerations and institute positive incentives for staff to effectively use the safeguard and accountability frameworks currently in place in both IBRD/IDA and the IFC.

Development Policy Loans

Not only are the safeguards insufficiently and inappropriately applied in traditional project finance but also in newer forms of lending. In recent years, the Bank has increasingly shifted its lending to “development policy operations,” or “development policy lending (DPLs)” which are intended to support “a country’s economic and sectoral policies and institutions.” DPLs are distinct from the Bank’s project-based lending, which is subject to the full suite of safeguard policies, as they are usually disbursed rapidly, in a single tranche.²⁰ Although there is a policy applicable to DPLs, OP 8.60, they are considered to be separate from the safeguard policy framework. OP 8.60 requires only an assessment of “the borrower’s systems for reducing ...adverse effects” and does not require the application of the Bank’s own suite of safeguards.²¹

The Inspection Panel’s investigation of loans to the Democratic Republic of Congo, discussed above, included a review of the use of DPL’s in forest sector loans. The Panel’s investigation report raised some serious concerns about the use of these loans:

The Panel notes that there appears to be a trend in the Bank that DPLs are very frequently determined to have no significant environmental or social impacts....This trend is evident in the 27 DPLs which include forest sector reform, most of which have been in Africa. This is rather surprising because the forest sector has long been identified as one of the most likely sectors to cause environmental impact, and the need for careful analysis in such sectors appears to be well understood....The Panel finds that there are potential risks of including components such as forests in DPLs, which lack safeguards. The Panel notes that formerly such forest components were generally handled as projects, subject to safeguard policies. The Panel observes that the use of DPLs for other natural resource components could raise similar issues.²²

¹⁹ Forest Peoples Programme, Press Information, “World Bank violates its own standards in palm oil sector in Indonesia,” (10 August 2009).

²⁰ See Nancy Alexander, “Fostering Impunity or Accountability: Sweeping Changes at the World Bank-IDA,” (2010).

²¹ World Bank OP 8.60

²² Inspection Panel, DRC Report, *supra* note 4, at xviii.

With respect to the DPL issued for the DRC, the Panel found it to be non-compliant with OP 8.60 noting that any assessment of 'the borrower's systems for reducing ... adverse effects' "would have concluded that the systems were non-existent or extremely debilitated and ineffective. **That might have led to some different discussions in the approval process.**"²³

The relative lack of transparency of DPLs when compared to conventional loan operations is of direct concern to all potentially affected communities and indigenous peoples have raised their concerns directly with the Bank before.²⁴ The IEG should pay specific attention in the review to the challenge of how to effectively ensure that safeguards are applied and implemented to this form of lending. FPP urges the IEG to recommend that the WBG fully apply safeguard provisions to all forms of financing and business activities undertaken by the Bank.

II. Effective Participation and Consent

The WB introduced its OP4.10 with the objective of "ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples".²⁵ PS7 similarly seeks to "ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples".²⁶ In recognition of the need to ensure effective participation by indigenous peoples to achieve these ends, the WBG has developed the idea of 'free, prior and informed consultation', a concept that emphasizes the process of discussion with indigenous peoples as key in ensuring that their rights are respected as per the policies objectives.

As will be shown below, the concept of free, prior and informed consultation as defined and implemented by the Bank has failed to ensure the effective participation that is needed. Further, the Bank has refused, to date, to incorporate the right of indigenous peoples to free, prior and informed consent, preferring instead to use the standard of 'broad community support'. We will show here that failure to develop effective procedures to ensure local approval processes by indigenous peoples affected by projects or activities funded by the Bank has consistently lead to a failure to meet the objectives of the safeguard policies.

A. Effective participation

²³ Id. at xvii (emphasis added).

²⁴ "...indigenous organisations monitoring the World Bank point out that much of the Bank's business is now channeled through country-wide programmatic loans. Many of these new loans directly or indirectly promote unsustainable, top-down development based on foreign direct investment, export-led growth, structural adjustment and the industrial extraction of natural resources. Indigenous peoples complain that these largely unaccountable development interventions continue to have severe negative consequences for indigenous peoples and their territories throughout the world. They point out that these operations lack transparency and are largely unaccountable to the public." Griffiths, *supra* note 3, at 16:

²⁵ World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 1

²⁶ IFC Performance Standard 7 on Indigenous Peoples at para. 2

The World Bank provides a range of guidance as to what ‘free, prior and informed consultation’ should include in order to achieve the aim of ensuring effective participation.²⁷ However the standards and guidance currently in place have largely not resulted in the sort of effective participation that the Bank itself seeks to ensure.

The guidance provided by the WBG for OP4.10 lacks reference to respecting or using the existing decision-making bodies and authorities of the indigenous peoples concerned and the provision of sufficient time for effective decision-making to occur. An important illustration of this is the Honduras Land Administration claim, where the Panel found that Bank Management had actually circumvented a body that was specifically designed to provide representation to indigenous peoples on land titling issues, and had instead created a separate institution. “The Panel considers that a consultation framework for Garifuna people in which their leading representative body or bodies are not part and do not give their support and guidance cannot ensure genuine representation of the Garifuna people, as required by OD 4.20.”²⁸

In its 15-year review of its operations, the Inspection Panel has also drawn attention to failings in consultations conducted by Bank clients and noted that its investigations have “revealed noncompliance in application of the Bank’s Policy on Indigenous Peoples ... a significant issue has been shortcomings in consultations with the affected populations, and in particular, failure to adequately account for local structures of representation.”²⁹ In addition, indigenous peoples and civil society groups that have taken the time and effort to engage with the WBG are often frustrated by the institutions’ failure to take into account their recommendations.³⁰

Adjustment and review of the WB guidelines on consultation could go some way towards mitigating the problems that have occurred in the past and continue to characterise many World Bank loans affecting indigenous peoples and local communities. FPP recommends

²⁷ The WB requires that the borrower: “a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples’ communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples’ communities; (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples’ communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and (c) provides the affected Indigenous Peoples’ communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples’ communities) in a culturally appropriate manner at each stage of project preparation and implementation” World Bank, Operational Policy 4.10 Indigenous Peoples, para. 10

²⁸ Inspection Panel, Investigation Report: Honduras Land Administration Project (2007), para. 183.

²⁹ Inspection Panel at 15 Years, p. 72.

³⁰ A recent study found in this respect that: “Indigenous peoples share a widespread perception that instead of acting on indigenous priorities, the revisions to the World Bank safeguard policies have mainly addressed the concerns of borrower governments and private sector clients – thus greatly diminishing their credibility as safeguards for indigenous peoples. While sector reviews have been comparatively more effective at enabling inputs, the Bank’s refusal to adopt progressive recommendations that have stemmed from these participatory reviews has left indigenous peoples and indigenous activists increasingly skeptical of the Bank’s so-called “consultation” processes.” Griffiths, *supra* note 1, at 12.

that guidance and rules pertaining to effective participation are reviewed and strengthened in collaboration with indigenous peoples and their authorities and organisations.

B. Free, Prior and Informed Consent

FPIC is an internationally-guaranteed right for indigenous peoples.³¹ The need to adopt robust standards to ensure application of FPIC in Bank policies and operations affecting indigenous peoples should be a core recommendation of the IEG review. The incorporation of FPIC into WBG standards must be done with indigenous peoples' full collaboration and with full regard for the applicable international norms and jurisprudence.

The World Bank has recently claimed that there is no significant difference between the Bank's standard of free, prior and informed consultation leading to Broad Community Support (adopted in 2006 based on WBG Management and Board responses to the Extractive Industries Review) and the internationally recognised right of indigenous peoples to FPIC.³² This view has been comprehensively rejected by indigenous peoples, through the UN Permanent Forum on Indigenous Issues and in other fora, and it is our view that the Bank's claims in this respect do not stand up to scrutiny.³³ Given the assertion by the Bank of functional equivalency between BCS and FPIC we will focus here first on these two standards, and leave aside for the moment the higher standard of good faith negotiation (GFN) required by the IFC for certain projects.

³¹ See for reference, United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), Articles 10, 11, 19 and 32. *Concluding observations of the Human Rights Committee: Canada*. 07/04/99, para. 8. UN Doc. CCPR/C/79/Add.105. (*Concluding Observations/Comments*) (1999) and *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*. 10/12/98. E/C.12/1/Add.31, para. 18. See also *Angela Poma Poma v Peru*, Human Rights Committee Communication No. 1457/2006 UN Doc. CCPR/C/95/D/1457/2006 (wherein "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."), *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission for Human and Peoples' Rights Decision, 276 / 2003 (wherein the Commission states that "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.") and *Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172 (wherein the Court states, regarding large-scale development projects with impacts on territories, that "the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.")

³² See, for instance, Charles Di Leva's comments to the 9th Session of the UN Permanent Forum on Indigenous Issues, 2010, that the view of the Bank is that 'current operational policy is not out of step with the Declaration. In response, the Forum "expressed concern that its standard was "free, prior and informed consultation", rather than the "free, prior and informed consent", that indigenous peoples had fought so hard for" available at: http://presszoom.com/story_154683.html

³³ See, for instance, 'Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008' available at www.forestpeoples.org and note 25 above.

We will turn first to the application of the requirement for broad community support (BCS) and the application of FPIC under international law. The United Nations Declaration on the Rights of Indigenous Peoples provides important guidance to the WBG. The Declaration not only highlights the responsibility of the Bank, as a specialised agency of the United Nations, to support the implementation of the Declaration³⁴ it further specifies areas of action for which FPIC area required. Most directly relevant to the Bank as a development agency is Article 32(2) that specifically provides that:

States shall consult and cooperate in good faith with the indigenous people 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 mineral, water or other resources.³⁵

The Declaration goes on to affirm that ‘indigenous peoples shall not be forcibly removed from their lands or territories’ and that ‘no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned’.³⁶ Consent is also required under the Declaration where cultural property is concerned,³⁷ and more broadly when legislative or administrative measures are adopted that may affect indigenous peoples.³⁸ The Declaration restates articles of international law, standards and jurisprudence regarding the applicability of FPIC to resource exploitation,³⁹ resettlement or relocation from lands and resources,⁴⁰ policy formulation⁴¹ and use of cultural knowledge.⁴²

³⁴ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), article 42 (2007) (hereinafter “the Declaration”), Article 42

³⁵ Ibid. at article 32 paragraph 2

³⁶ Ibid. at article 10

³⁷ Ibid. at article 11 paragraph 2

³⁸ Ibid. at article 19

³⁹ Among others, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, paras. 111-19, 141. G. Handl, Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem, in *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation* 85-110, at 95 (footnotes omitted) (M. Bowman and A. Boyle eds., OUP 2002)(arguing ‘there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups’ survival as culturally distinct peoples and communities’).

⁴⁰ Among others, ILO Convention 107, art. 12, ILO Convention No. 169, art. 16(2), draft UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII.

⁴¹ *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee’s 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4 requires that ‘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.’

⁴² Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, at 11.

In contrast to this range of applicable areas for FPIC, IBRD and IDA do not require the application of their BCS standard for non-traditional project financing, including the DPL's discussed earlier. Legislation or policy formulation with direct impacts on indigenous peoples can proceed with Bank financing without any requirement to provide for the effective participation of indigenous peoples and without any requirement to ensure their support for such actions.⁴³ In the case of the DRC (see footnote below) this has enabled the WBG to fund widespread reforms of the forestry sector in the DRC with potential devastating impacts on the livelihoods of millions of indigenous people.

IFC Performance Standard 7 on Indigenous Peoples has proved even more problematic in terms of when BCS is judged necessary. The applicability of the Performance Standard itself "is established during the Social and Environmental Assessment process"⁴⁴ when the client determines whether a process of free, prior and informed consultation is necessary. The client is not required to establish BCS itself, but rather the IFC assures itself that in any project where the client has established a process of free, prior and informed consultation with indigenous peoples, that BCS has been the result.⁴⁵

A review conducted by FPP in 2008 of projects funded by the IFC and impacting on indigenous peoples revealed great variety regarding when a BCS determination was made.⁴⁶ In response to queries on a particular project with direct impacts on indigenous peoples, the IFC responded that "this is a Category B project with limited impacts on the affected community. Therefore, this project does not require free, prior and informed consultation and because of this, an IFC determination of Broad Community Support is not required."⁴⁷ This response is in direct conflict with the PS7 requirement is that any project with adverse impacts on indigenous peoples – no matter the extent of such impacts – a process of free, prior and informed consultation is required and therefore a determination of BCS.⁴⁸ Leaving the assessment as to whether free, prior and informed consultation is required up to the client and determination of BCS up to IFC has resulted, in our view, in a restricted and wholly inadequate application of the standard.

This was confirmed by a CAO review in 2010 which "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".⁴⁹

⁴³ As noted above, the Inspection Panel has drawn attention to this issue in the case of DPL financing provided to the DRC and drawn wider conclusions: "The Panel notes that there appears to be a trend in the Bank that DPLs are very frequently determined to have no significant environmental or social impacts....This trend is evident in the 27 DPLs which include forest sector reform, most of which have been in Africa. This is rather surprising because the forest sector has long been identified as one of the most likely sectors to cause environmental impact, and the need for careful analysis in such sectors appears to be well understood" Inspection Panel, DRC Report, *supra* note 4, at xviii.

⁴⁴ IFC, Policy on Social and Environmental Sustainability, at para. 7 (2006).

⁴⁵ IFC Environmental and Social Review Procedures 2007 at para 3.2.12 (f)

⁴⁶ This is an internal FPP review paper available on request.

⁴⁷ Communication between the IFC and FPP, correspondence available at: http://www.forestpeoples.org/documents/ifi_igo/ifc_fpp_let_perf_std7_oct07_eng.pdf

⁴⁸ IFC, Policy on Social and Environmental Sustainability, at para. 9 (2006).

⁴⁹ 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

The Performance Standards (PS) and associated policies provide the client and IFC with sole discretion in determining the extent to which consultation and support for the project is required and implementation of this provision has demonstrated that without stringent and transparent processes for applying protective standards, they have been applied in far fewer instances than a first reading of the standards would suppose.⁵⁰

A standard that was functionally equivalent to FPIC would require that the standard was applied for all project activities with potential impacts, positive or negative, on indigenous peoples. This requires a comprehensive application of BCS by the IFC to all business activities impacting on indigenous peoples and a widening of the application of OP4.10 to all business activities undertaken by IBRD and IDA. Anything less than this comprehensive application would undermine the right of indigenous peoples to determine the path of their own development and their right to FPIC.

Where the need for BCS processes have been identified, for both IBRD/IDA projects and activities funded by the IFC, examination of the implementation of the standard reveals significant shortcomings when compared to the procedural requirements to achieve FPIC for indigenous peoples. Despite the lack of any review by the World Bank of its implementation of the BCS standard in OP4.10, independent reviews have identified key weaknesses.⁵¹ In the case of the IFC, the CAO released its review in May this year of the use of the performance standards, including a review of the use of the BCS requirement and the findings of this report are important in understanding the problems inherent in the current safeguard framework employed by that agency.⁵²

For IBRD and IDA broad community support is determined by the borrower based on their social assessment and the process of consultation undertaken with the affected indigenous peoples.⁵³ The Bank then reviews the documentation to satisfy itself that BCS exists.⁵⁴ For the IFC, BCS is determined by the IFC based on the results of the consultations run by the client.⁵⁵ Guidance on how to determine the existence of BCS is very difficult to access for clients of IBRD and IDA. There is no direct information for clients about what constitutes ‘support’ for the project that we have been able to access, but rather the ambiguous statement that it is determined based on the social assessment

⁵⁰ The review conducted by FPP in 2007 examined a total of 357 projects, and found that in 10 the IFC had applied Performance Standard 7 on Indigenous Peoples, a further 39 projects that had a high likelihood of impacting directly or indirectly on indigenous peoples within which 9 were of particular concern. This group included the Wilmar investment that has been investigated by the CAO.

⁵¹ This was supported by in early review by FPP of the 'First phase of the OED review of implementation of the World Bank Policy on Indigenous Peoples (OD4.20) – 1992 and 2001', Forest Peoples Programme, April 2003

⁵² CAO, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010

⁵³ World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 11.

⁵⁴ “The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples’ communities have provided their broad support to the project. The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior, and informed consultation with the affected Indigenous Peoples’ communities as a basis for ascertaining whether there is such support”. World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 11.

⁵⁵ IFC, Policy on Social and Environmental Sustainability, at para. 15 (2006).

and process of consultation.⁵⁶ This includes no discussion about the need for a positive affirmation from the peoples concerned, made through their representative organisations or authorities. Given the lack of available guidance on what constitutes ‘support’ the assessment of BCS is rendered ambiguous and opaque.

The IFC is more detailed, advising its staff that a determination of BCS can be made using a range of ‘material considerations’. Evidence which is acceptable in making such a determination includes both formal and informal expressions of support which can include evidence as diverse as the minutes of local meetings regarding the project, signed Memorandums of Understanding (MoUs) and other negotiation outcomes, formal referendums, local elections in which the project is mentioned or even client photographs media reports, personal letters or third party accounts.⁵⁷

The latitude provided by this array of possible indicators of support is considerable. There is no requirement to inform the affected communities that the IFC is making an assessment of BCS for a project, nor any of the implications of such an expression of support. The CAO found that in some cases where a successful determination of BCS had been made – ie. where the IFC considered that the communities were in support of the proposed project – the communities were not even aware that the IFC was making such an assessment nor what the result had been.⁵⁸ Such a process retains full control with the IFC and denies the communities concerned any control over the substance or process of a decision that they are being assessed as having made. Given that communities can be assessed as supportive of a project in cases where they are not even aware of such a determination being made, the process is divorced from any sense of participation or local control.

If FPIC were applied to this process then the requirement would be for a collaborative negotiation or dialogue between the proposing company or client and the affected indigenous peoples through their freely chosen representatives, and in a manner determined by the peoples themselves.⁵⁹ Such a dialogue or negotiations would be fully informed and would be entered into freely by both parties. Control over the decision making process would remain with the representative bodies selected by the peoples themselves. Without such control remaining with the peoples concerned, FPIC is not being achieved and BCS remains, as currently defined, a substandard protection for indigenous peoples.

⁵⁶ The World Bank is in the process of establishing a guidebook on OP4.10 which is intended to demonstrate good practice on the determination of BCS but this does not indicate requirements but rather non-binding guidance.

⁵⁷ IFC Environmental and Social Review Procedures 2007 at page 38

⁵⁸ 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

⁵⁹ Indigenous peoples’ representatives to the ADB policy review provided the following formulation of FPIC requirements: “For the purposes of policy application, consent refers to a collective agreement by the affected Indigenous Peoples communities, through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices.” Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008. Available at www.forestpeoples.org

The IFC determination process contains another significant flaw. It is an assessment made at a point in time so the IFC can then decide whether to finance a project or other business activity. However consent or approval for a certain project may alter over time, particularly if the context of the project alters. The case of the IFC-financed Lanco thermal power project in India is illustrative here, where despite IFC having determined BCS existed, community members reported that very few supported the power plant, and that those who had initially supported the project did so based on promises of benefits made by the company which turned out to be exaggerated or which never materialized.⁶⁰

The case of the Lanco thermal power project points also to a third weakness of the BCS standard, the fact that as it stands at the moment it is an assessment of a certain moment in time. The assessment is made, both for OP4.10 and PS7, to determine whether a project can be funded. However without review and assessment of the implementation of agreements made during the process of free, prior and informed consultation, it cannot function as a requirement akin to FPIC.

The IFC also has, as mentioned, a stronger protection for certain project types – the standard of successfully concluded good faith negotiation (GFN). PS7 states that this higher form of protection is required “because Indigenous Peoples may be particularly vulnerable to the project circumstances” and covers projects that may have adverse impacts on use or access to traditional or customary lands under use, projects that involve any form of relocation or projects that intend to use customary knowledge or innovations for commercial purposes.⁶¹ Given the broad applicability of this provision, it is difficult to imagine what project types would fall outside of this requirement yet still require the standard of BCS and thus it would be expected that this standard would be applied at a far higher rate than the standard of BCS.

It is difficult to make an accurate assessment of when and how the provision for GFN is applied relative to the application of BCS due to the opaque nature of IFC information disclosure on the use of Performance Standard 7. Our own review of IFC funded projects found that in the 357 projects reviewed, 10 were assessed by the IFC as requiring the application of PS7 although a further 39 were likely to result in some impact on indigenous peoples’ use and access to traditional lands.⁶² Of the 10 which applied PS7 – all of which involved the use of traditional lands – none could be assessed as having complied with the requirement for GFN.⁶³ During the conduct of this review, accessing information from the IFC and clients proved extremely difficult and revealed significant internal confusion within the IFC as to how to apply the standards of the PS.

⁶⁰ See Liam Taylor and Devit Nandji, “Sustainable development or business as usual? A critical evaluation of the IFC-funded Lanco Amarkantak Thermal Power Station Project in Chhattisgarh (India),” (Forest Peoples Programme 2008), available at http://www.forestpeoples.org/documents/ifi_igo/ifc_india_lanco_report_sept08_eng.pdf

⁶¹ IFC Performance Standard 7 on Indigenous Peoples, paragraphs 11-16

⁶² One of this group of 39 is the investment in Wilmar Group that has been the subject of a recently completed CAO complaint that lead to a moratorium on WBG funding to the palm oil sector.

⁶³ This is an internal FPP review paper available on request.

We recommend that the standard of BCS is removed from all Bank policies and replaced with a firm and direct commitment to respect FPIC for all projects impacting on indigenous peoples. Without a process that provides the self-selected representatives of indigenous peoples with the right to determine their own decision-making processes and to provide an affirmative agreement to the proposed activities through these processes, the rights of indigenous peoples are violated and their interests at risk.

We further recommend that the standard of GFN is clarified and the trigger for its application clearly explained to IFC staff. Public guidance as to the type of project that, for indigenous peoples, would require the BCS standard but would not require the GFN standard is essential for effective support of indigenous peoples impacted by IFC-funded projects and should be made public at the earliest available opportunity.

C. Need to Improve Information Disclosure

Failure to provide adequate prior information to affected communities blocks their effective participation and can hinder effective compliance with the participation requirements of the Bank's safeguard system. Failure to inform rights holders and stakeholders about the Bank's social and environmental policies and about its accountability mechanisms during the early stages of project preparation often weakens effective community engagement and undermines the Bank's public accountability.

The Inspection Panel noted in its 15-year review of operations that "Limitations on knowledge of and access to the Inspection Panel compromise the participatory nature of the Panel process from the outset."⁶⁴ Greater information disclosure in terms of Bank policies, contact points, and accountability systems will provide a better incentive for compliance with Bank policies, strengthen implementation, make it more likely that affected communities and other rights holders are involved in oversight of the project, and help improve development outcomes"⁶⁵

The IFC is now revising its Information Disclosure policy. In order to ensure that all relevant information is disclosed and readily accessible, the IEG should recommend that the IFC's revised policy include new requirements to ensure the disclosure of relevant and adequate information in a format that is understandable and readily accessible to affected peoples and communities. There must also be requirements for proactive dissemination of information that would allow affected communities to understand their rights under WBG policies and inform them about how to raise concerns or make complaints (see above). Such proactive disclosure should supplement the information that is already required to be disclosed under existing policies relating to affected peoples' rights (such as an explanation of community land rights as required by Performance Standard 7).

⁶⁴ Inspection Panel at 15 Years, p. 102.

⁶⁵ See, for example, ADB Knowledge Showcase, "Complaints from Beneficiaries: A Valuable Resource for Project Implementation" (2009), available at <http://www.adb.org/documents/information/knowledge-showcase/complaint-handling-systems.asp>

D. Challenges Regarding Remedial Measures.

In the context of other financial institutions indigenous peoples have raised the need for effective remedial measures arguing that:

Indigenous peoples must have the right to establish agreed terms and measures for addressing non-compliance with the agreed actions under the project, [and;] [t]he establishment of project level grievance mechanisms must include independent experts who are credible and acceptable to the affected indigenous peoples. ... Further in cases where indigenous peoples have sought legal redress from national processes, the grievance mechanism and Accountability Mechanism will still be applicable in assessing compliance with established agreements and ... policies and standards⁶⁶

Looking at a recent case from the CAO - the case of the Wilmar Group receiving financing from the IFC - remedial measures stemming from successful claims to the CAO are lacking. In response to the release of the CAO audit report on IFC's investments in the Wilmar Group (and Management's Response), FPP and civil society groups that had filed and supported the CAO complaint wrote to the President of the World Bank Group. The letter noted that the audit had confirmed many of the detrimental impacts of oil palm as alleged in the complaint, but argued that Management's response to that report was insufficient, noting in particular the following deficiencies:

- No actions were suggested to discipline IFC staff for systemic policy violations.
- No actions are recommended to stop IFC staff misleading the Board when controversial projects are presented for Board approval.
- No actions are proposed to remedy the wider problems still besetting the Wilmar group's operations in which the IFC has so heavily invested.
- No actions are proposed to address the fundamental problems that the current land tenure laws and land acquisition procedures in Indonesia deny customary rights and encourage companies to take over communities' lands without their free, prior and informed consent.
- No actions are proposed to address the problems raised in our complaint that companies are planting on peatlands and burning forests, despite global concern about climate change being exacerbated by deforestation and land use change,
- Indeed, no comprehensive action plan is presented to clarify what IFC staff will actually do to ensure future compliance with standards.⁶⁷

The organisations also called on President Zoellick to suspend WBG support for the palm oil sector in Indonesia. Zoellick agreed, and implemented a moratorium on new palm oil

⁶⁶ Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008. Available at www.forestpeoples.org

⁶⁷ Forest Peoples Programme, Lembaga Gemawan, and Sawit Watch, Letter to Robert Zoellick and Members of the IFC Board, 14 August 2009, available at http://www.forestpeoples.org/documents/ifi_igo/ifc_ngo_let_cao_wilmar_14aug09_eng.pdf

investments across the World Bank Group until such time as the issues could be more comprehensively addressed.⁶⁸

The IFC is now reviewing its oil palm portfolio more thoroughly, with an emphasis on Indonesia and including consideration of supply chain safeguard issues. The Bank is also "...planning to extend its review to the soy industry, with a focus on Central America, and the cocoa industry, with a focus on Africa."⁶⁹ This moratorium and review approach is an important outcome from the Wilmar complaint although the on-going review risks being a superficial analysis which will allow funding to the palm oil sector to begin prior to any meaningful reforms having been made.⁷⁰ Civil society and indigenous peoples' organisations in Indonesia and elsewhere maintain that any suspension of the moratorium would be premature prior to a careful review of the lessons learnt through the Wilmar complaint and others, and effective measures having been put into place to strengthen safeguard systems related to such high risk sectors.⁷¹

Some of the more systemic institutional issues identified in the above bullet points, which are resonant in other cases as well, have consistently lacked a comprehensive approach following Inspection Panel or CAO investigations and findings. There is a need for greater accountability for WBG staff that have been shown in various cases to have violated safeguards, misled the Board, and promoted risky projects despite valid concerns expressed about the impact on affected communities and the environment. There is also need for the WBG to confront the overriding pressures to be of service to a client (whether commercial or governmental) and other perverse incentives that lead staff to minimise, or possibly even circumvent, environmental and social due diligence. As noted above, perverse incentives need to be identified and eliminated within the Bank's safeguard systems, and replaced with incentives that reward staff for developing useful projects that are in compliance with the safeguard and sustainability policies.

In addition, in order to maximise the development impact of these systems of accountability and ensure high quality implementation of safeguard policies/performance standards, the WBG must also ensure that more effective remedial measures are developed and implemented after policy violations are identified. These may need to be undertaken at the sector level, as in the Wilmar case, but also at the project level in order to address and rectify the harm caused by violations of the safeguard policies.

⁶⁸ See 'Oil palm credit freeze extended to whole World Bank Group', Letter from the World Bank President to NGOs, November 2009 at:

http://www.forestpeoples.org/documents/ifi_igo/ifc_wb_palm_oil_let_nov09_eng.pdf

⁶⁹ E&E News, "FINANCE: World Bank unit to review palm oil and other carbon-intensive loans," Nov. 20, 2009, available at <http://www.bicusa.org/en/Article.11648.aspx>.

⁷⁰ See, 'World Bank in too much of a hurry to re-start palm oil funding', Press Release issued by Sawit Watch and Forest Peoples Programme, 10 May 2010

http://www.forestpeoples.org/documents/ifi_igo/ifc_wbg_palm_oil_press_rel_may10_eng.pdf

⁷¹ See 'World Bank Group standards and the palm oil sector - towards reform', Discussion Note, a submission by 12 indigenous and support organizations. Available at

http://www.forestpeoples.org/documents/ifi_igo/ifc_wbg_ngo_palm_oil_may10_eng.pdf

As noted in reviews of the effectiveness of the Inspection Panel, by outside observers and the Panel itself, a significant gap in the architecture of the Panel is the inability to monitor action plans that are developed in response to policy violations identified in projects that are in implementation.⁷² While deliberately excluding the Panel from any oversight of the Management action plans that are generated in response to Inspection Panel cases, the Board has also failed to establish any alternative mechanisms that can ensure that such action plans are properly implemented and that projects are brought into compliance with Bank policies.

As a result, there are many ‘lost cases’ – cases where the Inspection Panel finds violations of Bank policies resulting in harm to claimants, but where no effective remedy is provided. The lack of a system of redress is the key weakness in the Inspection Panel process and in the institutional architecture of the Bank.⁷³

To ensure that more effective remedial measures are available to Bank staff and to those suffering from impacts from Bank projects and activities, there is an urgent need to establish effective systems of (a) ensuring implementation of agreed actions emerging from previous claims to the accountability mechanisms and (b) disseminating weaknesses identified in claims to all relevant staff to ensure widespread understanding of previous mistakes.

Further, we recommend the mandatory establishment of remedial measures at the project and country level to address grievances within project implementation, designed in full collaboration with the affected indigenous peoples and established independently from project management.

III. Improving Consistency with International Law

Looking forward, the IEG should also take cognizance of areas where the WBG is not keeping pace with international human rights law and policy, including as it relates to the rights of indigenous peoples. 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 members international legal commitments.⁷⁴ In

⁷² “The key problem in projects involving action plans is that neither the Panel nor the claimants have an oversight role with respect to the implementation of remedial measures. The decision to exclude the Panel from supervision of remedial measures was a deliberate decision by the Board” Dana L. Clark, “The World Bank and Human Rights: The Need for Greater Accountability,” 15 *Harvard Human Rights Journal* 206, 219 (2002), available at <http://www.law.harvard.edu/students/orgs/hrj/iss15/clark.shtml>.

⁷³ *Id.* at 220. In this law review article, the author proposes the creation of a “Development Effectiveness Remedial Team (DERT),” a problem-solving unit that would report to the Board of Executive Directors and be tasked with helping to remedy social and environmental policy violations identified by the Inspection Panel. *Id.* at 224.

⁷⁴ 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 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.”⁷⁵

A. The World Bank and Human Rights

Several provisions in the WBG policy framework recognise the need for the WBG to be cognizant of and ensure respect for borrower obligations under international law. These include OP 4.01 on environmental assessment, OP 4.10 on indigenous peoples and OMS 2.20 on project appraisal. Operational Policy 4.01 requires that the Bank’s Environmental Assessment process should consider ‘natural’ and social aspects in an integrated way, specifically stating that it must include the obligations of the country under relevant international agreements and that the Bank will not finance activities that contravene these obligations.⁷⁶

The Bank also incorporates human rights into its positive objectives in development funding, stating one of its objectives as “ensuring that the development process fully respects the dignity, **human rights**, economies, and cultures of Indigenous Peoples”(emphasis added).⁷⁷ FPP has provided briefings elsewhere demonstrating that the Bank is obliged, as is any other subject of the law, to ensure that it neither undermines the ability of other subjects, including its members, to faithfully fulfill their international obligations nor facilitates or assists violation of those obligations.⁷⁸

This conclusion is amply supported in the reports of the Inspection Panel. For example, in the context of the Land Administration Project in Honduras, the Panel interpreted the requirements of Operational Manual Statement 2.20 on Project Appraisal as requiring due diligence to address the State’s international obligations relating to indigenous peoples.⁷⁹ The Panel observed that Honduras is a party to ILO Convention 169, which, among other

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.

⁷⁵ See UNDRIP, at Art. 42.

⁷⁶ The policy states specifically “...the variations in project and country conditions; the findings of country environmental studies; national environmental action plans; the country’s overall policy framework, national legislation, and institutional capabilities related to the environment and social aspects; and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. **The Bank does not finance project activities that would contravene such country obligations, as identified during the EA** (emphasis added)” World Bank, Operational Policy 4.01: Environmental Assessment, para. 3 (January 1999).

⁷⁷ World Bank, Operational Policy 4.10: Indigenous Peoples, para. 1 (July 2005).

⁷⁸ Forest Peoples Programme, “The World Bank and Human Rights,” Briefing Paper, para. 22 (2002), available at http://www.forestpeoples.org/documents/ifi_igo/wb_and_hr_fpp_brief_oct02_eng.shtml

⁷⁹ Operational Manual Statement 2.20, developed in 1984, states that:“... a project’s possible effects on the country’s environment and on the health and well-being of its people must be considered at an early stage....Should international agreements exist that are applicable to the project and area, such as those involving the use of international waters, the Bank should be satisfied that the project plan is consistent with the terms of the agreements” World Bank, Operational Manual Statement 2.20 – Project Appraisal, para. 24 (1984).

things, mandates respect and legal recognition of the land rights of indigenous and tribal peoples.⁸⁰

In the case of the Honduras Land Administration claim, the Garifuna people challenged a land titling and regularization project that they felt would harm their land rights and undermine their continuing struggle to assert their collective title over their lands. Part of the challenge was a claim that the project would lead to a violation of the government's commitments under ILO 169 to which Honduras is a party.⁸¹ The Panel determined that Bank Policy on Project Appraisal, Operational Manual Statement (OMS) 2.20, puts a responsibility on the Bank to ensure that the project plan was consistent with the terms of this international convention.⁸² The Panel found that OMS 2.20 requires that "Bank-financed projects respect international agreements addressed to human rights and indigenous peoples when the project country is a signatory...."⁸³

In addition to this case demonstrating the Inspection Panel's demonstration of the Bank's responsibility to ensure projects do not contravene a country's international obligation, the Panel has also found in the case of the Chad Petroleum Sector and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project that the Bank must determine whether human rights issues may impede compliance with Bank policies as part of its project due diligence.⁸⁴ Further, in the case of the Western Poverty Reduction project, the Panel also indicated that the Bank must interpret the requirements of OP 4.10 on Indigenous Peoples in accordance with that policy's human rights objective.⁸⁵

FPP supports the above cited conclusions of the Inspection Panel and urges the IEG to highlight the need for review of potential human rights violations in a comprehensive environmental and social review procedure, including the provision of references to applicable and relevant international instruments and obligations. Furthermore, FPP believes that these requirements need to be highlighted in each of the safeguard policies and rigorously adhered to in the interpretation and application of these policies by the WBG and those with which it does business.

B. Peer institutions treatment of FPIC

⁸⁰ Inspection Panel, *Investigation Report: Honduras Land Administration Project (IDA Credit 3858-HO)* (2007).

⁸¹ Inspection Panel, *Investigation Report: Honduras Land Administration Project (IDA Credit 3858-HO)* (2007).

⁸² Inspection Panel at 15 Years, p. 74 (2009).

⁸³ *Id.* at 75. It also noted that it had a 'serious' disagreement of interpretation with the Bank's General Counsel on this point. This disagreement is spelled out in paragraphs 243-258 of the Inspection Panel's Final Investigation Report for the Honduras Land Administration claim, *supra* note 15.

⁸⁴ Inspection Panel, *Investigation Report: Chad: Petroleum Sector and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (2002).

⁸⁵ Inspection Panel, *Inspection Report: China: Western Poverty Reduction Project* (Credit No. 3255-CHA and Loan No. 4501-CHA) (2000).

Since the passage of the UN Declaration on the Rights of Indigenous Peoples there has been significant and encouraging movement among public financing institutions and the private sector to respect its provisions. Some of these changes have been sub-par and disappointing, as was the case with the Asian Development Bank's 2009 policy on Indigenous Peoples where the Bank stated that it would require borrowers to seek the consent of affected indigenous peoples and would not fund projects without such consent.⁸⁶ However the ADB defined 'consent' as 'broad community support', a formulation that was firmly rejected by indigenous peoples.⁸⁷ Instead, the ADB retained the definition of consent as the above referenced 'support' and such support is to be judged by the ADB and its borrowers in clear contravention of core FPIC principles.

More positively the Inter-American Development Bank has included a provision in its involuntary resettlement policy prohibiting the forced evictions of indigenous peoples and that comes much closer to respecting FPIC, albeit in a restricted area of action.⁸⁸ More importantly for indigenous peoples, the IADB policy on indigenous peoples specifically requires 'agreement' reached through good faith negotiation with indigenous peoples for project activities where serious adverse impacts are expected. However the bar is set high as the projects must be judged to have "particularly significant potential adverse impacts that carry a high degree of risk to the physical, territorial or cultural integrity of the affected indigenous peoples or groups" and this assessment is the responsibility of the Bank.⁸⁹

The European Bank for Reconstruction and Development (EBRD) has also revised the applicable safeguards for indigenous peoples and 'recognises the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required' for specific types of projects, including those impacting on traditional lands or resources, those resulting in relocation and those using or applying cultural and traditional knowledge.⁹⁰

Further to this, private sector and business groups have surpassed the WBG in their adoption of FPIC as a standard for dealing with indigenous peoples. The Forests

⁸⁶ Asian Development Bank, Safeguard Policy Statement, Indigenous Peoples, para. 30-32 (2009).

⁸⁷ Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008. Available at www.forestpeoples.org

⁸⁸ "Those indigenous and other low income ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities, if the Bank can ascertain that: (i) the resettlement component will result in direct benefits to the affected community relative to their prior situation; (ii) customary rights will be fully recognized and fairly compensated; (iii) compensation options will include land-based resettlement; and (iv) the people affected have given their informed consent to the resettlement and compensation measures" Inter-American Development Bank, OP 7.10, Involuntary Resettlement (1998), available at http://www.iadb.org/aboutus/pi/OP_710.cfm?.

⁸⁹ IADB Operational Policy 765 on indigenous peoples at 4.4 (a) (iii)

⁹⁰ European Bank for Reconstruction and Development, Environmental and Social Policy, p, 55-57 Available at: <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>

Dialogue (where the WBG is a member) has established that FPIC is a key principle for forest management and is conducting an on-going dialogue on FPIC currently.⁹¹ The Round Table on Sustainable Palm Oil (RSPO) has adopted FPIC as a principle, with attendant criteria and indicators, which must be met prior to any new plantings by RSPO members. Importantly the RSPO has recognised that FPIC must be "dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions" thereby addressing one of the key difficulties that the WBG has encountered – that of alienating or ignoring existing decision making processes.⁹²

With the principle of FPIC being progressively adopted and guidelines for its realisation developed within public finance institutions and also increasingly by industry bodies in the private sector, the WBG risks falling behind in its protective standards for indigenous peoples. The IEG review must address the disconnect between Bank policies and international norms and the lack of harmonisation with other international financial institutions (IFIs) on FPIC. FPP urges the IEG to recommend that FPIC must be incorporated into the lending requirements for IBRD/IDA and IFC/MIGA at the earliest opportunity – such as the opportunity presented by the on-going review of the IFC's Sustainability Policy and Performance Standards.

C. Forced Displacement

Legal recognition and affirmation of FPIC is particularly well developed in three areas of activity, each recognised within the Declaration as well as within numerous standards, laws and procedures. These areas of activity are: (i) activities that impact on the traditional or customary lands and resources under use by indigenous peoples; (ii) activities that rely on or incorporate and use in any way the cultural and traditional knowledge or innovations of indigenous peoples; and (iii) any activity that involves the displacement (economic or physical) of indigenous peoples.

This third area of activity is particularly dangerous and is itself a *prima facie* violation of human rights. Involuntary resettlement has a long and documented record of forced impoverishment, and constitutes a violation of the WBG's mandate of poverty alleviation, as well as international human rights law regarding the right to an improved standard of living, the right to adequate housing, the right to property, the right to work, and the right to security of the person and the home.⁹³

⁹¹ See: <http://environment.yale.edu/tfd/dialogue/free-prior-and-informed-consent/scoping-dialogue-on-free-prior-and-informed-consent/>

⁹² Round Table on Sustainable Palm Oil, Principles and Criteria, October 2006: Criterion 7.5 Available at: http://www.rsपो.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf

⁹³ The International Covenant on Economic, Social and Cultural Rights provides in Article 11 that "everyone has the right to an adequate standard of living for himself/herself and his/her family, including adequate housing, as well as a continuous improvement of his /her living conditions." The Committee on Economic, Social and Cultural Rights issued General Comment No. 4 on the right to adequate housing and forced evictions in 1997, clarifying that "the Committee considers that instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances." U.N. Comm. On Economic, Social and Cultural Rights, 6th Sess., art 11(1),

A failure to ensure that displaced persons achieve an improved standard of living violates their right to development. In some cases, forced evictions can also violate the right to life. Furthermore, “[f]orced evictions intensify inequality, social conflict, segregation and ‘ghettoization,’ and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children, minorities and indigenous peoples.”⁹⁴

In 2007, the UN Special Rapporteur on the right to adequate housing presented the Basic Principles and Guidelines on Development-Based Evictions and Displacement to the UN Human Rights Council. The Basic Principles and Guidelines were developed following a comprehensive review of international law and practice regarding development-based evictions, and were designed to assist States in respecting their obligations under international law in the case of involuntary resettlement.⁹⁵

The Basic Principles and Guidelines note, among other provisions, that “[c]ash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.”⁹⁶ The requirement for land-for-land compensation must be strengthened across the WBG, and particularly by the IFC in the context of its upcoming revisions to its policy and performance standards.

A well-documented impact of WBG lending is the legacy of impoverishment as a result of involuntary resettlement. Despite clear evidence of failure, the WBG has not taken effective measures to remedy the problems and to more fully understand the impacts on affected communities. The last time that the WBG undertook a comprehensive review of all projects involving involuntary resettlement was sixteen years ago. The 1994 Bank-wide Review of Resettlement, completed by the Environment Department, found that “projects appear not to have succeeded in reestablishing re-settlers at better or equal living standard and that unsatisfactory performance still persists on a wide scale.”⁹⁷ Subsequent reviews by the Operations Evaluation Department⁹⁸ and the Inspection Panel have continued to document poor performance relating to involuntary resettlement.⁹⁹

General Comment 4, at para. 18 (1991), available at

<http://www.unhchr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument>

⁹⁴ Basic Principles and Guidelines on Development-Based Evictions and Displacement, A/HRC/4/18, para. 7 (2007) (hereinafter “Basic Principles”), available at

http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

⁹⁵ Basic Principles, supra note 46.

⁹⁶ Id., para. 60.

⁹⁷ World Bank, *Resettlement and Development: The Bank-wide Review of Projects Involving Involuntary Resettlement 1986-1993* (1994), at x.

⁹⁸ Operations Evaluation Department, *World Bank, Recent Experiences With Involuntary Resettlement* (1998).

⁹⁹ For a more complete discussion, see Clark, supra note 31, at 205-226.

The IEG should address both the known information regarding failures in performance as well as the information gaps. One way to do this would be to recommend another bank-wide review of projects involving involuntary resettlement. In addition, the IEG should recommend that the WBG be required to pay closer attention to monitoring the impacts of projects involving involuntary resettlement. Currently, the WBG doesn't keep track of the numbers of people displaced by WBG projects each year, nor does it monitor or report on their rehabilitation status over time. This is a key knowledge gap that is inexcusable in light of the history of poor performance; the devastating social, economic and environmental impacts of involuntary displacement; and the implications for violations of fundamental human rights.

First and foremost we recommend that the Group-wide prohibition is instituted against funding any project or any other form of investment lending that would result in forced displacement. Further, in the cases where economic or geographic displacement occurs with the consent of the affected peoples, the IEG should recommend that more robust reporting and monitoring be put in place in order to (a) keep accurate records of displacement; (b) ensure that displaced people are in fact having their standards of living improved and are receiving benefits from the projects; (c) track projects that are failing to meet the objectives of the resettlement policies and (d) ensure that they are brought into compliance as quickly as possible.

VI. Conclusions and Recommendations

While the WBG has adopted a social and environmental policy framework, it has not taken full responsibility for ensuring the accomplishment of the core objectives and specific requirements of those policies. Similarly, while the WBG has created systems of accountability, it has not taken enough responsibility for ensuring redress of known problems.

The Bank's failure to address patterns of institutional weaknesses has led to repeated violations of safeguard and sustainability policy objectives and requirements. Failure to undertake meaningful consultation and ensure effective participation of indigenous peoples has undermined project effectiveness and diminished the WBG's reputation around the world.

Furthermore, a systemic failure to adequately respond to findings of policy violations and impoverishment has meant that the impacts of non-compliance are multi-generational and systemic. As a result, the Bank has a long legacy of failed projects, and patterns of institutional weaknesses that have not been adequately addressed. The effectiveness of this IEG review will depend on the willingness of the IEG and the Board of Executive Directors to commit to making and implementing recommendations that lead to change.

Recommendations:

We urge the IEG to recommend that the World Bank Group address the following urgent priorities needed to ensure that the safeguard policies and accountability frameworks of

the Bank can more effectively meet the challenges of safeguarding and protecting those affected by Bank lending.

- Upgrade the safeguard policies and accountability frameworks in the Bank to ensure that they are in conformity with international standards and the international obligations of borrowers and recipient governments.
- Upgrade both Operational Policy 4.10 (IBRD and IDA) and Performance Standard 7 (IFC and MIGA) specifically to ensure conformity with the minimum standards enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and related human rights instruments, including explicit provisions to fully uphold, protect and ensure the right to free, prior and informed consent (FPIC).
- Ensure that operational rules and procedures for all WBG lending practices are in line with the obligations highlighted above and are able to provide operational guidance to ensure such standards are met.
- Establish positive incentives for Bank staff to effectively and fully apply the safeguard policies and accountability frameworks existing in the Bank including accurate risk analysis and project categorisation during the preparation phase and better monitoring of compliance by borrowers.
- Identify and remove the perverse incentives for Bank staff to minimize, or even deliberately circumvent and misrepresent, environmental and social due diligence.
- Address the problem of DPL financing falling outside of the existing safeguard policies and accountability frameworks by applying the full suite of Bank safeguards to this lending modality.
- Establish stronger guidance on appropriate and effective participation by indigenous peoples in all WBG investments, loans and projects which may impact on them, especially regarding the requirement to involve the decision-making processes of the affected peoples – such guidance must be established in collaboration and cooperation with affected indigenous peoples and indigenous peoples' authorities and organizations.
- Institute a clear prohibition on any Bank finance for forced resettlement throughout the World Bank Group.
- Institute effective and efficient remedial measures at the project and country level to address grievances within project implementation, designed in full consultation with affected indigenous peoples and established independently from project management.
- Ensure that lessons that are learned from previous claims to the accountability mechanisms are shared and incorporated into staff practices throughout the Bank through the establishment of transparent mechanisms to follow up the implementation of suggested actions in problem projects and a wider dissemination of such findings throughout the Bank to improve staff capacity in dealing with environmental and social risks.

- Ensure the full participation of affected people and relevant organizations, or authorities nominated by affected indigenous peoples, in the development of, or revisions to, the WBG's safeguard policies, including an urgent recommendation to the IFC/MIGA review process that is on-going, to effectively and rapidly consult with appropriate and self-nominated indigenous peoples' representatives

Specific to the on-going IFC review of its Performance Standards, Sustainability Policy and Information Disclosure Policy, the IEG should urgently advise the IFC:

- to proactively and effectively engage with indigenous peoples' organizations and representatives on the review and revision of Performance Standard 7 (in particular) and on all other policies and procedures relevant to indigenous peoples;
- to request that the on-going IBRD/IDA review of the implementation of OP4.10 be provided to the IFC and engaged stakeholders, in draft form if necessary, to enable the IFC review to benefit from lessons learnt in the implementation of OP4.10;
- to specifically address deficiencies in the Information Disclosure Policy of the IFC, instituting a presumption to disclose and requiring (i) the public disclosure of any IFC involvement or potential involvement in a planned project; (ii) the public disclosure of the rationale for the IFC's choice of categorization of a project; (iii) ensure contact is provided with responsible staff members by affected people and other relevant organizations, and (iv) require information about the CAO as an available recourse mechanism for concerns about breaches of those policies to be provided to affected communities and peoples.

We also strongly urge the IEG to undertake a focused review of the IFC's good faith negotiation (GFN) and broad community support (BCS) standards, in close consultation with indigenous peoples representatives and organisations and other affected people, in order to learn lessons to inform the development of effective free, prior and informed consent (FPIC) standards for the WBG recommended above.