

Effective Participation and Free, Prior and Informed Consent

Forest Peoples Programme March 2016

Executive Summary

This briefing note highlights the following key points:

Effective participation is essential to achieving the objectives that the Bank has set itself for safeguarding social and environmental harm for indigenous peoples

Bank approaches to consultation and securing effective participation have historically been found lacking, as noted in Inspection Panel, Compliance Advisor Ombudsman, and civil society reports and criticized by indigenous peoples' organisations

The current Safeguard Review provides an opportunity for the Bank to reconsider and reformulate its approach to development with indigenous peoples

Implementation failures have been significant for the Bank in regards to its policies on indigenous peoples, first OD4.20 and later OP4.10.

Significant attention is needed to ensure that past implementation failures are reviewed and new revisions to procedures and policies are specifically designed to overcome these failures. Ensuring effective participation and consent would go a long way to addressing longstanding compliance problems by redefining the relationship between Bank finance and indigenous peoples' communities.

Free, prior and informed consent of indigenous peoples is required under international law and forms current good practice in both public and private finance.

Any possible return to a Bank standard for 'broad community support' is widely rejected by indigenous peoples because it is not consistent with policy objective of respecting the human rights and dignity of indigenous peoples

Recommended for the World Bank safeguard update and review, among others:

Ensure that the standard of Free, Prior and Informed Consent currently in the Second Draft of ESS7 is retained in the final version adopted by the World Bank and strengthened to comply with international law.

Institute requirements for the direct participation of indigenous peoples and their organisations and authorities in the *verification* of baseline studies, social and environmental impact assessments, indigenous peoples' development plans and other relevant project documentation.

Ensure that the proposed requirement for FPIC set out in the Second Draft of ESS7 is triggered for projects that impact on the lands, resources, lives or livelihoods of indigenous peoples, including: projects that use or impact on cultural or traditional knowledge; projects that impact on subsistence or livelihood activities; projects that may involve dislocation from, or restriction of access to, traditional lands and resources; and projects that impact on the relationship indigenous peoples maintain with the lands and resources traditionally owned or otherwise occupied and used by them.

Make explicit reference to UN Declaration on the Rights of Indigenous Peoples in the Bank's proposed Environmental and Social Policy and ensure that the final version of ESS7 is fully consistent with the minimum standards contained therein.

Ensure that standards for the protection of the rights of indigenous peoples are uniformly implemented across all forms of Bank financing, including the establishment of specific implementation guidelines for Investment Lending, Programme for Results lending, Development Policy Loan lending and all forms of financing provided by the Bank.

The WB introduces its existing OP4.10 on indigenous peoples with the objective of “ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples”.¹ The IFC 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”.² This preliminary focus on the human rights of Indigenous peoples, on the dignity, cultures and aspirations of indigenous peoples is a highly positive element in the operational policies. However, none of these essential policy objectives can be met without the effective participation of indigenous peoples in every step of the development process and without robust operational standards for full and effective compliance with the FPIC safeguard (which are currently lacking in both OP4.10 and draft ESS7). In recognition of this need to ensure effective participation by indigenous peoples to achieve these ends, the WBG developed the idea of ‘free, prior and informed consultation’, a concept that emphasizes that the process of discussion with indigenous peoples is key in ensuring that their rights are respected as per the policies objectives. OP4.10 requires that such high quality consultation occurs in three circumstances and that in these project types, consultation should lead to something referred to as ‘Broad Community Support’. **The creation of the concept of ‘free, prior and informed consultation’ by the Bank in 2004 has been soundly rejected by indigenous peoples’ organisations and the Bank has not managed to achieve clear assessment that Broad Community Support (as the positive result of a process of FPICon) does indeed exist.**³

As will be discussed here, 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. This has led to the proposal of Free, Prior and Informed Consent in the new proposed World Bank ESF released in 2015.⁴ However this language may be threatened in the final stage of the World Bank Safeguard Review so we return in this briefing note to the substantive reasons why such a standard is essential to ensuring the rights and interests of indigenous peoples, and a participatory and effective development process. This submission is intended to inform and add to that discussion.

Effective participation

The World Bank provides a range of guidance as to what ‘free, prior and informed consultation’ should include to achieve the aim of ensuring effective participation.⁵ 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.⁶

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. Isolating and undermining traditional authorities has a divisive and damaging effect on indigenous peoples’ cohesiveness, as the Bank learnt in mistakes made under the previous OD4.20. In the Honduras Land Administration claim, the Panel

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

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

³ World Bank, OPCS Working Paper, *Implementation of the World Bank’s Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*, August 2011: pg 23

⁴ World Bank, (draft) *Environmental and Social Framework*, August 2015

⁵ 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

⁶ World Bank, OPCS Working Paper, *Implementation of the World Bank’s Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*, August 2011

found that Bank Management had 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 OD4.20.”⁷

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.”⁸ 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.⁹

In 2011 the World Bank released a desk review of the implementation of OP4.10 over the period of 2006 – 2008. Leaving aside the three-year delay in releasing the results of the desk review, its findings are very interesting in terms of understanding where weaknesses have been identified in the current standard of Broad Community Support. A desk review covering 132 projects approved and implemented between 2006 and 2008 concluded: “**The desk review did not find clear and well documented examples of broad community support.**”¹⁰ A key challenge in the desk review generally was the lack of effective information and record keeping, with 16 additional projects which triggered OP4.10 being excluded from the review data analysis “due to insufficient information”.¹¹ A specific requirement of OP4.10 is that where indigenous peoples are present in, or have collective attachment to, the lands impacted an Indigenous Peoples Plan should be developed. Yet this was complied with in only 59 of the analyzed projects, demonstrating an extraordinary failure in planning by Bank staff.

For the 59 projects where such plans were developed, the following findings bear attention: in projects which were assessed as possibly impacting on rights to lands, water or other natural resources (34 in the total 59), only 8 addressed the issue adequately – less than a ¼ of the total (page 26); for projects involving the commercial development of the lands and resources (natural or cultural) under the ownership of indigenous peoples, in nearly 1/3 of all these projects “this issue *was not mentioned*” (emphasis added, page 26); **only ¼ of the projects that developed IPP/IPPF disclosed the project documents in-country in an appropriate manner**, form and language to ensure they were accessible to the impacted indigenous peoples (15 projects only); a clear lack of monitoring of specific indicators for indigenous peoples, and the lack of information collected or provided (page 26) with only 21 projects addressing this satisfactorily; a low level (66%) of the 59 projects that had proper planning documents, showed adequate attention to the legal framework in which the project would take place (this means 39 projects in a total of 139 paid attention to this key issue); high scores for FPICon – which mean a good consultation process – were unmatched by good scores for the existence of broad community support (BCS), **which was able to be evidenced and confirmed in**

⁷ Inspection Panel, Investigation Report: Honduras Land Administration Project (2007), para. 183.

⁸ Inspection Panel at 15 Years, 2009: p. 72.

⁹ 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.

¹⁰ World Bank, OPCS Working Paper, *Implementation of the World Bank’s Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*, August 2011: pg 23.

¹¹ These projects are: Indonesia (P096813), Papua New Guinea (P102792), Philippines (P106443), Bolivia (P106449), Bolivia (P109057), Brazil (P101359), Honduras (P102474), Honduras (P103094), Panama (P105555), Andean Countries (P09824), Bangladesh (P110281), India (P095901), Nepal (P103979), Nepal (P113002), Central African Republic (P113221), World (P100198). World Bank, OPCS Working Paper, footnote 1.

NONE of the projects for which planning documents were available (page 23); an extremely low level of grievance mechanisms established for indigenous peoples (20 of the 59), and if we assume that where an IPP/IPPF was not written, a specific grievance mechanism was not established, this gives us a figure of 20 of 132.

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

Free, Prior and Informed Consent

FPIC is an internationally guaranteed standard for the protection of indigenous peoples' rights.¹² The need to adopt robust standards to ensure application of FPIC in Bank policies and operations affecting indigenous peoples is clear. 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.

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. 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.¹³ 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 scope of FPIC is limited and not in line with UNRIP 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". The assessment of the scale of risk and hence triggering of the FPIC standard is the responsibility of the Bank.¹⁴

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.¹⁵ The International Finance Corporation followed with the inclusion of FPIC as an operational requirement

¹² 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.

¹³ "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?

¹⁴ IADB Operational Policy 765 on indigenous peoples at 4.4 (a) (iii)

¹⁵ 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>

in its Performance Standard 7 adopted in 2012.¹⁶ The Asian Development Bank's 2009 policy on Indigenous Peoples states that the ADB requires borrowers to seek the consent of affected indigenous peoples and would not fund projects without such consent, a positive step.¹⁷ However **the ADB defined 'consent' as 'broad community support', a formulation that was firmly rejected by indigenous peoples.**¹⁸ Any repetition of this formulation by the World Bank would face the same condemnation by indigenous peoples.

Agencies of the United Nations too are turning to FPIC requirements to ensure that the funds they disburse result in socially, environmentally and culturally responsible development processes. In 2010, the FAO adopted its own specific policy on indigenous peoples that incorporates the FPIC standard and a clear commitment to uphold UNDRIP.¹⁹ In 2012, the Committee on World Food Security adopted FPIC with the FAO in the passage of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) in 2012.²⁰ In doing so they joined the UN Development Programme²¹, the International Fund for Agricultural Development (IFAD)²² and the UN REDD Programme.²³ Additionally, UNREDD has carefully documented the international legal basis for the core FPIC standard applicable to indigenous peoples.²⁴

Further to this, private sector and business groups have also increasingly adopted FPIC as a standard for dealing with indigenous peoples. The Forests Dialogue, where the WBG is a member, has established that FPIC is a key principle for forest management and is currently conducting an on-going dialogue on FPIC.²⁵ The Roundtable on Sustainable Palm Oil, of which the IFC is a member, has adopted FPIC as a principle, with attendant criteria and indicators, which must be met prior to any new plantings by RSPO members.²⁶ Importantly the RSPO has recognized 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.²⁷ The recently adopted Aluminium Stewardship Initiative's Performance Standard for the aluminium supply chain similarly requires companies to respect the rights of indigenous peoples and in the case of activities impacting on the lands and territories of indigenous peoples, for companies to seek and obtain the FPIC of the affected peoples and communities.²⁸

¹⁶ International Finance Corporation, Performance Standard 7: Indigenous Peoples, 2012

¹⁷ Asian Development Bank, *Safeguard Policy Statement*, Indigenous Peoples, para. 30-32 (2009).

¹⁸ Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008. Available at www.forestpeoples.org

¹⁹ <http://www.fao.org/docrep/013/i1857e/i1857e00.pdf>

²⁰ FAO, *Voluntary Guidelines on the Responsible Governance of Tenure*, Rome, 2012: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

²¹ UNDP, *Social and Environmental Standards*, 2015: <http://www.undp.org/content/undp/en/home/librarypage/operations1/undp-social-and-environmental-standards.html>

²² IFAD, *Policy on Engagement with Indigenous Peoples*, 2009: <https://www.ifad.org/documents/10180/14e50d95-2c58-423e-8ac6-3023359173b6>

²³ UNREDD Programme Guidelines on Free, Prior and Informed Consent, January 2013: http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/

²⁴ UNREDD (2013) *Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC) International Law and Jurisprudence Affirming the Requirement of FPIC*, UNREDD Secretariat, New York

²⁵ See: <http://environment.yale.edu/tfd/dialogue/free-prior-and-informed-consent/scoping-dialogue-on-free-prior-and-informed-consent/>

²⁶ In addition to the RSPO similar standards have also been adopted by: the Forest Stewardship Council, the Roundtable on Sustainable Biofuels, the International Council on Mining and Metals and many other private sector and supply chain focused initiatives and standard setting bodies.

²⁷ Round Table on Sustainable Palm Oil, Principles and Criteria, October 2006: Criterion 7.5 Available at: http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf

²⁸ ASI Performance Standard, Principle 9, criterion 9.3 and 9.4 <http://aluminium-stewardship.org/wp-content/uploads/2014/12/ASI-Performance-Standard-v1.pdf>

With the principle of FPIC being progressively adopted and guidelines for its realization developed within public finance institutions, by international agencies and increasingly also by industry bodies in the private sector, the WBG risks falling behind in its protective standards for indigenous peoples. The inclusion of a draft requirement for FPIC in the second draft of the proposed Environmental and Social Framework currently under consultation was a welcome development. Efforts to withdraw from this proposed requirement would be deeply damaging not only to the reputation of the World Bank when compared with its peer institutions but also to the quality and nature of the development processes championed by the Bank.

Is 'Broad Community Support' enough?

The World Bank has 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 recognized right of indigenous peoples to FPIC.²⁹ If this was so, there would be no reason for the World Bank not to adopt the same language as all the other institutions mentioned above. However, **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.**³⁰ Given the assertion by the Bank of functional equivalency between BCS and FPIC, we will focus in this briefing note on the differences between these two standards.

We will turn first to the application of the requirement for 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 specialized agency of the United Nations, to support the implementation of the Declaration³¹ 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 peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.³²

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'.³³ Consent is also required under the Declaration where cultural property is concerned,³⁴ and more broadly when legislative or administrative measures are adopted that may affect indigenous peoples.³⁵ In requiring consent in these cases, the Declaration restates articles of international law, standards and jurisprudence regarding the applicability of FPIC

²⁹ 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

³⁰ See, for instance, 'Indigenous Peoples Submission to the ADB Safeguard Policy Review, December 4, 2008' available at www.forestpeoples.org and note 25 above. See also: <https://www.dropbox.com/sh/zdtpf5u9ae0un55/AAmpxEIWsHq1sOIAKZpjTeka?dl=0>

³¹ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), article 42 (2007) (hereinafter "the Declaration"), Article 42

³² Ibid. at article 32 paragraph 2

³³ Ibid. at article 10

³⁴ Ibid. at article 11 paragraph 2

³⁵ Ibid. at article 19

to resource exploitation,³⁶ resettlement or relocation from lands and resources,³⁷ policy formulation³⁸ and use of cultural knowledge.³⁹

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. 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.⁴⁰ In the case of the DRC 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 been recently reviewed, and the updated version of the PS does now require FPIC for certain categories of projects. Prior to this change, the IFC shared the IBRD/IDA position that 'Broad Community Support' was functionally equivalent to FPIC. However, review of the way in which BCS was used by the IFC clearly demonstrated the BCS is a standard almost impossible to effectively use as a tool of establishing certainty of support for a given project. For the IFC, the applicability of the Performance Standard itself "is established during the Social and Environmental Assessment process"⁴¹ when the client determines whether a process of free, prior and informed consultation is necessary (hence creating a serious potential conflict of interest in effective policy compliance). 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.⁴²

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.⁴³ 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

³⁶ 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').

³⁷ 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.

³⁸ *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.'

³⁹ 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.

⁴⁰ 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.

⁴¹ IFC, Policy on Social and Environmental Sustainability, at para. 7 (2006).

⁴² IFC Environmental and Social Review Procedures 2007 at para 3.2.12 (f)

⁴³ This is an internal FPP review paper available on request.

Community Support is not required.”⁴⁴ This response is in direct conflict with the PS7 requirement 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.⁴⁵ As noted above, 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”.⁴⁶ The Performance Standards 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.⁴⁷ The same has been the case for the implementation of OP4.10 by IBRD and IDA, and the internal Bank review of the implementation of this policy faced significant challenges in merely accessing the required information to conduct a desk review of the policy.

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. Independent observers have identified key weaknesses in the implementation of the BCS standard in OP4.10⁴⁸, and the findings of the Bank’s own Internal Review of the implementation of OP4.10 could not be clearer. The BCS standard is not working. In the case of the IFC, the CAO released its review in May 2010 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.⁴⁹

Who determines if consent exists?

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.⁵⁰ The Bank then reviews the documentation to satisfy itself that BCS exists.⁵¹ For the IFC, before it adopted FPIC, BCS was determined by the IFC based on the results of the consultations run by the client.⁵² 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

⁴⁴ Communication between the IFC and FPP, correspondence available at: http://www.forestpeoples.org/documents/ifi_igo/ifc_fpp_let_perf_std7_oct07_eng.pdf

⁴⁵ IFC, Policy on Social and Environmental Sustainability, at para. 9 (2006).

⁴⁶ 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

⁴⁷ 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.

⁴⁸ 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

⁴⁹ CAO, Review of IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, May 2010

⁵⁰ World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 11.

⁵¹ “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.

⁵² IFC, Policy on Social and Environmental Sustainability, at para. 15 (2006).

assessment and process of consultation.⁵³ This includes no discussion about the need for a positive affirmation from the peoples concerned, made through their representative organizations or authorities. Given the lack of available guidance on what constitutes ‘support’ the assessment of BCS is rendered ambiguous and opaque.

It is worth reviewing also the implementation of the BCS standard by the IFC before it moved to adopting the standard of FPIC in 2012. The IFC was been more detailed in its guidance on determining BCS than IBRD/IDA, 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 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.⁵⁴

The latitude provided by this array of possible indicators of support is considerable. There was no requirement to inform the affected communities that the IFC was making an assessment of BCS for the 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.⁵⁵ Such a process retained full control with the IFC and denied 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.⁵⁶ 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.

The IFC determination process contained 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.⁵⁷

⁵³ 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.

⁵⁴ IFC Environmental and Social Review Procedures 2007 at page 38

⁵⁵ 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

⁵⁶ 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

⁵⁷ 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

The case of the Lanco thermal power project points also to a third weakness of the BCS standard, the fact that as it stands, it is an assessment of a certain moment in time. The assessment is made, both for OP4.10 and the pre-2012 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.

Recommendations

We recommend that the Bank:

1. Ensure that the standard of Free, Prior and Informed Consent currently in the Second Draft of ESS7 is retained in the final version adopted by the World Bank and strengthened to comply with international law.
2. Institute requirements for the direct participation of indigenous peoples and their organisations and authorities in the **verification** of baseline studies, social and environmental impact assessments, indigenous peoples' development plans and other relevant project documentation.
3. Ensure that the proposed requirement for Free, Prior and Informed Consent set out in the Second Draft of ESS7 is triggered for projects that impact on their lands, resources, lives or livelihoods, including projects that use or impact on cultural or traditional knowledge, projects that impact on subsistence or livelihood activities, projects that may involve dislocation from, or restriction of access to, traditional lands and resources and projects that impact on the relationship indigenous peoples maintain with the lands and resources traditionally owned or otherwise occupied and used by them.
4. Make explicit reference to UNDRIP in the Bank's proposed Environmental and Social Policy and ensure that the final version of ESS7 is fully consistent with the minimum standards contained therein (which is currently not the case in the second draft of ESS7)
5. Ensure that standards for the protection of the rights of indigenous peoples are uniformly implemented across all forms of Bank financing, including the establishment of specific implementation guidelines for Investment Lending, Programme for Results lending, Development Policy Loan lending and all forms of financing provided by the Bank.