



INDIAN LAW
RESOURCE CENTER

**Comments and Recommendations on the IFC's proposed
*Policy on Social and Environmental Sustainability and
Performance Standards***

By
Leonardo A. Crippa and Rebecca Aleem

July, 2010

602 North Ewing Street
Helena, Montana 59601
ph. (406) 449-2006 ph | fax (406) 449-2031

www.indianlaw.org

601 E Street, SE
Washington, DC 20003
ph. (202) 547-280 | fax (202) 547-2803

With the generous support of the C.S. Mott Foundation

Comments and Recommendations on the IFC's proposed
Policy on Social and Environmental Sustainability and
Performance Standards

By Leonardo A. Crippa* and Rebecca Aleem**
July, 2010

Table of Contents

I INTRODUCTION.....	1
II SUMMARY OF PRINCIPAL RECOMMENDATIONS	3
III GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT.....	4
III.1 Incorporating the Guide into the Policy on Environmental and Social Sustainability.....	4
III.2 Incorporating the Guide into the Performance Standards 1, 5, 6, 7 and 8	6
IV PERFORMANCE STANDARDS.....	7
IV.1 PS 5 Land Acquisition and Involuntary Resettlement.....	7
IV.2 PS 6 Biodiversity Conservation and Sustainable Natural Resource Management	9
IV.3 PS 7 Indigenous Peoples	11
IV.4 PS 8 Cultural Heritage.....	17
V CONCLUSION.....	18

* JD 2001, Universidad Nacional de Tucuman, Argentina; LLM 2008, American University; Attorney, Indian Law Resource Center.

**JD 2010, University of British Columbia, Canada; Legal Assistant, Indian Law Resource Center

ACRONYMS AND TERMS

ADB	Asian Development Bank
Center	Indian Law Resource Center
FPIC	Free, Prior and Informed Consent
Guide	Guide to Human Rights Impact Assessment and Management
HRIAM	Human Rights Impact Assessment and Management
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labor Organization
MDB	Multilateral Development Banks
OAS	Organization of American States
PS	Performance Standards
Policy	Policy on Social and Environmental Sustainability
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WBG	World Bank Group

I | INTRODUCTION

1. The International Finance Corporation (IFC) is reviewing its Sustainability Framework, including the Policy on Social and Environmental Sustainability (Policy), the Performance Standards (PS), and the Policy on Disclosure of Information. While the Policy defines the IFC's responsibility in providing financing for projects, the PS establish the IFC's clients' roles and responsibilities for managing projects and the requirements for receiving IFC support. In May 2010, after several months of preliminary consultations, the IFC publicly released the first draft of its revised Sustainability Framework.

2. This paper offers comments and recommendations on the proposed Sustainability Framework from a legal perspective addressing indigenous peoples' particular human rights concerns. The IFC's work is of critical importance to indigenous peoples, because the IFC funds members of the private sector whose projects often result in environmental damage and human rights abuses that disproportionately affect indigenous communities, such as resource extraction and large-scale infrastructure projects. Our submission reflects critical developments in human rights law over the past four years, including the widespread adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ In particular, our submission focuses on the proposed Policy and PS 1, 5, 6, 7 and 8. Our main points and recommendations are summarized below and are followed by a detailed analysis and suggestions for language changes. We have included relevant text from the Policy and PS below, with suggested language changes in bold.

3. We recommend that the IFC adopts the UNDRIP as the universal minimum standard on the rights of indigenous peoples, in order to adequately reflect the many changes that have taken place in international law since the Sustainability Framework was first produced. The UNDRIP is an appropriate starting point because it codifies what were already accepted practices and standards on indigenous peoples, and it represents the most authoritative statement on the rights held by and the obligations owed to indigenous peoples. Its importance has been recognized by other multilateral development banks (MDB), such as the Asian Development Bank (ADB), which in its Safeguard Policy on Indigenous Peoples, acknowledges that many countries in Asia and the Pacific voted in favor of UNDRIP. As a result, the ADB recognizes the rights of indigenous peoples to direct the course of their own development.²

4. The Center's overall concern with respect to the IFC's Policy is the lack of reference to the IFC's own human rights responsibilities. As we have pointed out in our paper entitled "*Principles of International Law for Multilateral Development Banks: The obligation to respect Human Rights*", the IFC, like all MDB, is legally bound to respect, protect, and promote human rights and should be held accountable for these obligations.³ We believe international law imposes these obligations on all MDB today, though some MDB deny this, and though this principle needs clarification in

¹ United Nations Declaration on the Rights of Indigenous Peoples, Art. 26, G.A. Res. 61/295, Annex, U.N. Doc.A/RES/61/295/Annex (Sept. 13, 2007)

² Safeguard Requirements 3: Indigenous Peoples, Safeguard Policy Statement, Asian Development Bank (June 2009), ADB Policy Paper/Appendix 3, para. 1. *available at* <http://www.adb.org/Documents/Policies/Safeguards/Safeguard-Policy-Statement-June2009.pdf>

³ Robert T. Coulter, Leonardo Crippa, and Emily Wann, *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights*, Indian Law Resource Center (2009).

international law. The IFC is an international intergovernmental organization,⁴ whose member states have legal obligations to protect human rights, and it should act consistently with those obligations by ensuring that IFC investments do not violate human rights. The IFC Policy should include a clear statement that it will not support activities that are likely to cause or contribute to human rights abuses. In addition, it should ensure that the IFC exercises due diligence regarding its own human rights obligations, as well as those of its clients, in a manner that reflects international human rights law standards. This due diligence should include a preliminary human rights impact assessment conducted by the IFC to identify potential project impacts, rather than relying on client provided information, as the current policy provides.

5. The Center is also concerned about the overall absence of human rights language in the IFC's Policy and PS. For example, the IFC uses: (1) "involuntary resettlement" instead of forced relocation in proposed PS 5; (2) "free, prior and informed consultation" instead of free, prior and informed consent in proposed PS 7; and (3) "social and environmental impacts" rather than "human rights violations". This practice not only confuses IFC clients, but also the developing countries in which the IFC is meant to operate according to its Articles of Agreements.⁵ Most of these countries are parties to regional human rights systems and have international human rights obligations, which include the requirement to adjust domestic law to reflect international standards. It is because of this obligation that many countries are developing laws or have already adopted laws concerning consultation with indigenous communities and free, prior and informed consent. By using human rights language, the IFC would help its clients to better understand the issues reflected in its Sustainability Framework when engaging with states and their agencies who are legally bound to consider human rights issues.

6. The Center is also concerned about the IFC's failure to take into account the particular circumstances of indigenous peoples in the Americas and its failure to adopt related safeguard measures in the PS. Two particularities relevant for the IFC PS are: (1) indigenous peoples in voluntary isolation or initial contact in the Amazon region; and (2) indigenous peoples' property rights to land based on possession. These regional particularities have obliged countries to adopt particular domestic laws and the Organization of American States (OAS) to elaborate a regional instrument on indigenous peoples' rights: the Draft American Declaration on the Rights of Indigenous Peoples. These particularities also led regional human rights organs and the regional development bank to adopt specific measures, which will be discussed later in this paper.

7. Finally, because of the above-mentioned gaps in addressing regional particularities, some of the proposed PS fall below domestic law standards with respect to indigenous issues. This is particularly critical because, if not addressed, the IFC might lead its clients to break domestic laws and violate indigenous peoples' rights. The IFC might even compromise its member states' international responsibility. For instance, the proposed PS 6 does not take into account the situation of indigenous peoples in voluntary isolation or initial contact in the Amazon region, which is a matter specially regulated by law in Peru,⁶ Ecuador,⁷ and Brazil,⁸ among other states.

⁴ See Articles of Agreement (As amended through Apr. 28, 1993), International Finance Corporation, Art. 1 Purpose. (acknowledging that IFC's purpose is to further economic development by encouraging the growth of productive private enterprise in member countries)

⁵ *Ibid.*

⁶ See generally Ley 28736 para la Protección de Pueblos Indígenas u Originarios en Situación de Aislamiento Voluntario y en Situación de Contacto Inicial [Law 28736 for the Protection of Indigenous or First Peoples in Isolation and Initial Contact], Peru, May 16, 2006. (establishing a legal framework to protect indigenous peoples in voluntary isolation or initial contact located in the Peruvian Amazon region)

⁷ See Presidential Decree 2187, Ecuador, Jan. 3, 2007. (creating protected areas where indigenous peoples in voluntary isolation live and prohibiting infrastructure and extractive industry projects in such areas)

Moreover, the proposed PS 7 does not consider the rights of indigenous peoples to participate in the benefits derived from the development or commercialization of the natural resources pertaining to their lands and territories, which is also covered by special legislation in Nicaragua,⁹ among other states.

II | SUMMARY OF PRINCIPAL RECOMMENDATIONS

- I. As an international intergovernmental organization, the IFC should reflect existing international human rights law standards in both the Policy and the PS.
- II. The Policy should expressly acknowledge the obligations on the part of the IFC to take due diligence measures, including a human rights impact assessment, to ensure that the projects that it will support or is supporting are assessed according to internationally accepted human rights standards and that they will not cause or contribute to human rights abuses.
- III. The Guide to HRIAM should be a central component of the social and environmental risk and impact identification process required in the Policy and the PS where any significant human rights impact is possible, especially in proposed PS 1, 5, 6, 7 and 8.
- IV. The IFC should adopt the UNDRIP as the universal minimum standard on the rights of indigenous peoples for PS 1, 5, 6, 7 and 8.
- V. The IFC should not try to redefine well-recognized international human rights law standards within its Sustainability Framework, such as equating indigenous communities' free, prior and informed consent with consultation.
- VI. The indigenous communities' free, prior and informed consent should be required under proposed PS 7 when a project (a) takes place in its lands or involves its natural/cultural resources; and/or (2) not on their lands, but which may substantially affect their lands, territories and natural/cultural resources or may infringe their human rights.
- VII. The indigenous communities' free, prior and informed consent should also be required under proposed PS 5 and 7 with regard to those projects that may result in relocation from their lands and territories.
- VIII. The proposed PS 6 and 7 must require sharing of benefits with the indigenous communities when a project implicates the development/commercialization of their natural resources, and not limit benefit sharing to cultural resources.

⁸ See Lei 6001 Dispoee sobre o Estatuto do Indio [Law 6001 on Indians], Brasil, Dec. 19, 1973, Art. 14, 18. (recognizing the existence of indigenous peoples in voluntary isolation and declaring that their lands are free from resource extraction)

⁹ See Ley 445 Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Law 445 on Indigenous Peoples' Collective Property Rights in the Atlantic Coast and the Bocay, Coco, India and Maiz Rivers], Nicaragua, January 22, 2003, Art. 34. (including indigenous communities as one of the direct beneficiaries of the benefits derived from the development/commercialization of the natural resources pertaining to their lands and territories)

- IX. The proposed PS 7 “special requirements” concerning projects on lands subject to traditional ownership or under customary use should also apply to those lands under the indigenous communities’ current possession.
- X. The proposed PS 8 should acknowledge the importance of and include indigenous peoples’ sacred sites as cultural heritage.

III | GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT

8. The IFC has clearly acknowledged that the private sector, including its clients, has a responsibility to prevent and respect human rights.¹⁰ As a result, the IFC should have mechanisms in place to diligently ensure that IFC projects do not cause or contribute to human rights abuses. The current review of the IFC Sustainability Framework provides an opportunity to integrate human rights into the IFC’s risk management system.

9. It should be mandatory for the IFC and its clients to prevent and address the human rights abuses resulting from development projects. This is because the IFC not only supports large-scale projects that can have widespread environmental and human rights impacts, but also because the countries in which the IFC sponsors projects often experience difficulties in ensuring effective human rights protection. Usually, states are either unable or unwilling to regulate private sector activities and hold companies accountable for human rights violations.

10. The IFC has developed a tool for incorporating human rights impact assessments (HRIA) into its risk assessment model: The Guide to Human Rights Impact Assessment and Management (Guide). The Guide, prepared by the IFC and the International Business Leaders Forum, was produced to give businesses, including IFC clients, a tool for assessing and managing the risks associated with potential human rights violations related to projects proposed for funding by the IFC. This Guide was recently launched at the United Nations Global Compact Leaders Summit on June 25, 2010.¹¹

III.1 | Incorporating the Guide into the Policy on Environmental and Social Sustainability

11. It is generally accepted that the IFC must operate in a manner that is consistent with the human rights obligations of its member states. In order to fulfill these obligations and the broader “corporate responsibility to respect human rights...to act with due diligence to avoid infringing on the rights of others,”¹² the IFC should adopt a policy and practice that requires it to not only rely on the due diligence conducted by its clients, but also to exercise its own due diligence to review project impacts.

¹⁰ See Progress Report on IFC’s Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information. Review and Update Process, IFC, Apr. 14, 2010, page 24, *available at* [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/\\$FILE/Compounded+CODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Phase2_CODEReport/$FILE/Compounded+CODE_Progress+Report+on+IFC%27s+Sustainability+Framework_Review+and+Update.pdf)

¹¹ See Guide to Human Rights Impact Assessment and Management, International Business Leaders Forum and International Finance Corporation, 2010, *available at* <https://www.guidetohriam.org/welcome>

¹² See John Ruggie. Report of the UN SRSG on business and human rights to the UN Human Rights Council, 9 April 2010, Doc. A/HRC/14/27.

12. Given that the Policy is the primary framework that governs the responsibilities and action of the IFC (as opposed to clients) it should be revised to reflect the obligations that the IFC has under international human rights law.

Suggested Change in Language

Policy on Environmental and Social Sustainability

2. Through this Policy, IFC puts into practice its commitments to social and environmental sustainability **and to fulfilling its human rights obligations.**

6. While managing **social, human rights and environmental impacts** in a manner consistent with the Performance Standards is the responsibility of the client, IFC seeks to ensure, through monitoring and supervision, that the business activities it finances are implemented in accordance with the requirements of the Performance Standards **and the Guide to Human Rights Impact Assessment and Management.** As a result, the outcome of IFC's **social, human rights and environmental** due diligence of a proposed business activity is an important factor in its investment decision and will determine the scope of the **social, human rights and environmental** conditions of IFC financing.

10. IFC recognizes the responsibility of the private sector **and the IFC,** to respect human rights. Although it is well understood that states have the primary duty to protect human rights, **the IFC and** companies meet their responsibility to respect human rights by undertaking due diligence in order to identify adverse human rights risks, and by avoiding or addressing them as appropriate. In addition, meeting the responsibility to respect human rights means creating access to an effective grievance mechanism that can facilitate early identification of and prompt remediation for those who believe they have been harmed by a company's actions. IFC's Performance Standards and **the implementation of the Guide to Human Rights Impact Assessment and Management** support this responsibility of the private sector.

15. IFC assumes several roles and responsibilities under this Policy. It conducts a due diligence review of the business activity to be financed against requirements of the Performance Standards **and the Guide to Human Rights Impact Assessment and Management.** IFC (i) assesses the client's social and environmental management system to verify its appropriateness in accordance with the nature and scale of the business activity and level of **social, human rights and environmental impacts;** (ii) assists the client in developing measures to avoid, reduce, restore or compensate/offset for **social, human rights and environmental risks and impacts;** (iii) categorizes the proposed business activity based on potential **social, human rights and environmental risks and impacts;** (iv) identifies **social, human rights and environmental risks and/or impacts** and defines conditions under which IFC financing for the business activity could proceed; and (v) monitors and supervises clients' ongoing performance in relation to those conditions throughout the life of IFC's investment.

13. In addition to ensuring that the Policy generally acknowledges the IFC's human rights obligations, the Policy must particularly state that the IFC will assure clients will fully implement the Guide, as part of IFC's own due diligence. In this regard, the Policy should incorporate the Guide as a required element of the social and environmental risk and impact identification process. This Guide should be an intrinsic part of the risk identification process, and not stand alone as a voluntary tool for IFC clients. As a development institution receiving public financing and support,¹³ the IFC should require its clients to incorporate the Guide to more effectively identify and address human rights risks that may affect communities. It would constitute a significant step forward towards preventing human rights abuses, which in turn responds to IFC's mission to improve people's lives without worsening them.

Suggested Change in Language

¹³ See Articles of Agreement, *supra* note 4, Art. II Sec. 2 Capital Stock and 3 Subscriptions. (regulating IFC's capital stock, as well as its member countries' subscription and contribution)

14. IFC requires clients to assess and manage the social and environmental risks and impacts of their business activities. This entails client implementation of measures to meet the requirements of the Performance Standards **and the Guide to Human Rights Impact Assessment and Management**. An important component of the client's management of its social and environmental performance is its engagement with Affected Stakeholders through disclosure of relevant information, consultation, and informed participation in accordance with Performance Standard 1.

III.2 | Incorporating the Guide into the Performance Standards 1, 5, 6, 7 and 8

14. The current formulation of the Policy and the PS address some of the social and environmental impacts that can result from projects by requiring clients to conduct social and environmental risk assessments. The idea of a "social" assessment, however, fails to adequately address the human rights that are implicated in IFC's work. Human rights are distinguishable from social values in general, because they constitute a legal guarantee of a minimum standard of treatment with a correlative right to seek a remedy when these standards of treatment are breached. Where human rights are concerned, the obligatory decision to be made is to not violate rights, whereas "social" impacts, according to the current IFC Sustainability Framework, may be mitigated, compensated, offset, or reduced.¹⁴

15. In order to reflect the critical difference between "social" impacts and human rights the Guide should be incorporated into the social and environmental risk identification process required in proposed PS 1, 5, 6, 7 and 8 and should be mandatory for clients. The current use of "social impact" language is vague and abstract, and countries are unlikely to have legislation regulating how to effectively conduct a social impact assessment. The social impact concept needs to be bolstered by an explicit requirement that the client conduct a HRIA as part of the PS risk management process. The Guide would provide clients with concise guidelines on how to identify and manage social issues, including human rights. By including a HRIA directly into the PS, IFC clients would be better placed to fulfill their legal obligations to ensure projects will not violate human rights and to take appropriate steps in the project design to avoid these impacts.

16. The proposed PS 1 outlines the requirements for Social and Environmental Assessment and Management Systems but does not address human rights. This section should be revised to require human rights due diligence in the form of a human rights impact assessment. This is particularly important because the Social and Environmental Assessment is a required part of the financing decision-making process, and as it currently stands, a human rights impact assessment does not appear to be a required part of the IFC review process. Other PS that currently refer to "social and environment risk and impact identification process" should also be revised to incorporate a human rights assessment. This human rights impact assessment should be a requirement for the client, not a voluntary process referred to only in the voluntary Guidance Notes.

Suggested Change in Language

PS 1 Assessment and Management of Social and Environmental Risks and Impacts

4. The client, in coordination with other responsible government agencies and third parties as appropriate, will conduct a process of social and environmental assessment and establish and maintain a management system appropriate to the nature and scale of the project and commensurate with the level of its social and environmental risks and impacts. **The client will identify and manage human**

¹⁴ See Performance Standard 1-Rev-0.1 Assessment and Management of Social and Environmental Risks and Impacts, International Finance Corporation, Apr. 14, 2010, Objectives, page 1.

rights issues by using the Guide to Human Rights Impact Assessment and Management. The management system will incorporate the following elements: (i) Policy Statement; (ii) Identification of Risks and Impacts (social and environmental assessment system); (iii) Management Systems, Plans and Agreements; (iv) Organizational Capacity and Competency; (v) Emergency Preparedness and Response; (vi) Stakeholder Engagement; and (vii) Monitoring and Review.

PS 5 Land Acquisition and **Forced Relocation**

4. The applicability of this Performance Standard is established during the social and environmental risks and impacts identification process, while the implementation of the actions necessary to meet the requirements of this Performance Standard are managed through the client's social and environmental management system. The assessment and management system requirements are outlined in Performance Standard 1, **including the Guide to Human Rights Impact Assessment and Management.**

PS 6 Biodiversity Conservation and Sustainable Natural Resource Management

2. The applicability of this Performance Standard is established during the social and environmental risks and impacts identification process, while the implementation of the actions necessary to meet the requirements of this Performance Standard is managed through the client's social and environmental management system. The assessment and management system requirements are outlined in Performance Standard 1, **including the Guide to Human Rights Impact Assessment and Management.**

PS 7 Indigenous Peoples

9. The client will identify through a social and environmental risks and impacts identification process all communities of Indigenous Peoples who may be affected by the project within the project's area of influence, as well as the nature and degree of the expected direct, indirect, and cumulative social, cultural (including cultural heritage²), and environmental impacts on them. **The client will identify and manage human rights issues by using the Guide to Human Rights Impact Assessment and Management.**

PS 8 Cultural Heritage

2. The applicability of this Performance Standard is established during the social and environmental risks and impacts identification process, while implementation of the actions necessary to meet the requirements of this Performance Standard is managed through the client's social and environmental management system. The impact and risk identification process and management system requirements are outlined in Performance Standard 1, **including the Guide to Human Rights Impact Assessment and Management.**

IV | PERFORMANCE STANDARDS

17. The PS determine the IFC's clients' roles and responsibilities for managing projects and the requirements for receiving IFC support. The Center believes that certain PS should be improved in order to better address the rights of indigenous peoples as a whole. We are particularly concerned about the proposed PS 1, 5, 6, 7, and 8.

IV.1 | PS 5 Land Acquisition and Involuntary Resettlement

18. The proposed PS 5 deals with projects that can result in the "involuntary resettlement" of persons or a group of persons, including indigenous communities. On this issue, the Center has two comments to make: (1) indigenous communities must not be relocated from their lands and territories without their free, prior and informed consent; and (2) if relocated with their free, prior

and informed consent, the indigenous communities must be compensated in the form of lands, territories and resources equal in quality, size and legal status.

No forcible relocation of indigenous communities

19. The proposed PS 5 fails to reflect the governing principle that indigenous communities shall not be forcibly relocated from their lands and territories because of development projects. Several international human rights law instruments prohibit such relocation. The UNDRIP Art. 10 states that “indigenous peoples shall not be forcibly removed from their lands or territories.” In addition, the International Labor Organization Convention 169 “Indigenous and Tribal Peoples Convention” (ILO Convention 169) establishes that “the [indigenous] peoples shall not be removed from the lands which they occupy.” Finally, the United Nations Guiding Principles on Internal Displacement also prohibits such relocation with respect to indigenous peoples.¹⁵

20. The proposed PS 5 also fails to reflect the principle that relocation of indigenous communities is only possible with their free, prior and informed consent (FPIC). According to the UNDRIP Art. 10, “no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned.” The ILO Convention 169 also establishes that “such relocation shall take place only with their free and informed consent.” The proposed PS 7 and the Resettlement Planning and Implementation requirements of proposed PS 5 need to be revised accordingly, in order to explicitly include the consent requirement.

Suggested Change in Language

PS 5 Land Acquisition and **Forced Relocation**

9. The client will consider feasible alternative project designs to avoid or reduce physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits. **Indigenous communities shall not be forcibly relocated from their lands and territories. Such relocation shall take place only with their free, prior and informed consent.**

Compensation in the form of lands, territories and resources equal in quality, size and legal status

21. The proposed PS 5 also fails to include compensation in the form of lands, territories and resources equal in quality, size and legal status for indigenous communities that are relocated from their traditional lands. Because of their distinctive relationship with their traditional lands, international human rights law protects and preserves indigenous peoples’ unique attachment to their lands in various ways. Referring to the forced relocation of indigenous communities from their traditional lands, UNDRIP Art. 28(2) states that “compensation shall take the form of lands, territories and resources equal in quality, size and legal status.” We strongly believe that in those circumstances where an indigenous community agrees to relocation, compensation should not be restricted to money.

Suggested Change in Language

PS 5 Land Acquisition and **Forced Relocation**

10. When **relocation** cannot be avoided, the client will offer **relocated** persons and communities compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods, as provided in this Performance Standard. Standards for

¹⁵ United Nations Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 6(2)(c).

compensation will be transparent and applied consistently to all persons and communities affected by the displacement. Where livelihoods of **relocated** persons are land-based, or where land is collectively owned, the client will, where feasible, offer the **relocated** land-based compensation. **If indigenous communities are relocated from their traditional lands, and unless otherwise freely agreed upon by the peoples concerned, compensation shall take place in the form of lands, territories and resources equal in quality, size and legal status.** The acquisition of land and related assets may happen only after compensation has been paid and, where applicable, resettlement sites and moving allowances have been provided to the **relocated** persons. The client will also provide opportunities to **relocated** persons and communities to derive appropriate development benefits from the project.

IV.2 | PS 6 Biodiversity Conservation and Sustainable Natural Resource Management

22. The proposed PS 6 deals with environmental protection, particularly in relation to areas with high biodiversity values and pristine natural resources. These areas are of critical importance for indigenous peoples, who are frequently located within them and depend on the existing natural resources for their physical and cultural survival. From the perspective of indigenous peoples, two recommendations are relevant to this performance standard: (1) there should be no investment in natural habitats where indigenous peoples in voluntary isolation live; and (2) there should be additional requirements with respect to projects in protected areas created on indigenous lands.

No investment in natural habitats where indigenous peoples in voluntary isolation live

23. When addressing natural habitats, the proposed PS 6 does not address the highly vulnerable situation of indigenous peoples living in voluntary isolation and the obligations to prevent human rights abuses against these populations. Voluntary isolation is a regional particularity in South America that must be reflected in proposed PS 6. Within the Amazon region there are several indigenous peoples living in voluntary isolation. This situation led Peru,¹⁶ Ecuador¹⁷ and Brazil,¹⁸ among others countries, to adopt domestic laws to protect them. Likewise, the Inter-American Development Bank adopted a safeguard to prevent any contact with them as a consequence of a project.¹⁹ The proposed PS 6 falls short in this regard and does not even meet the above-mentioned domestic legal standards.

24. The IFC should not support projects that will affect communities in voluntary isolation. Such projects have the potential to infringe several human rights, including the right to life, right to health, right to humane treatment, land and natural resource rights, etc. The Draft American Declaration on the Rights of Indigenous Peoples, a regional instrument currently under development, affords special protection to indigenous peoples in voluntary isolation under Art. XXVI.²⁰ This provision has been agreed upon by indigenous representatives and state officials in the

¹⁶ See generally Law 28736 for the Protection of Indigenous or First Peoples in Isolation and Initial Contact, *supra* note 6. (establishing a legal framework to protect indigenous peoples in voluntary isolation or initial contact located in the Peruvian Amazon region)

¹⁷ See Presidential Decree 2187, *supra* note 7. (creating protected areas where indigenous peoples in voluntary isolation live and prohibiting infrastructure and extractive industry projects in such areas)

¹⁸ See Law 6001 on Indians, *supra* note 8. (recognizing the existence of indigenous peoples in voluntary isolation and declaring that their lands are free from resource extraction)

¹⁹ Operational Policy on Indigenous Peoples, Inter-Amer. Development Bank (OP-765), Febr. 22, 2006, page 9.

²⁰ Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 5, 3 Dec. 2009, Art. XXVI (emphasis added)

Article XXVI. Indigenous peoples in voluntary isolation or initial contact

OAS. The importance of protecting communities in voluntary isolation has also been emphasized by the Inter-American Human Rights Commission, which has ordered precautionary measures, against countries such as Ecuador²¹ and Peru²² advising them to adopt protective measures to prevent human rights violations against indigenous peoples in voluntary isolation or initial contact. The best way to protect these natural habitats and these peoples who preserved them is by preventing clients from developing projects that may force contact with them.

Suggested Change in Language

PS 5 Land Acquisition and Involuntary Resettlement

11. Natural habitats are those (i) composed of viable assemblages of plant and/or animal species of largely native origin, and/or (ii) where human activity has not essentially modified the area's primary ecological functions. **Proposed projects in natural habitats where indigenous peoples in voluntary isolation live shall not be supported.**

Additional requirements with respect to projects in protected areas created on indigenous lands

25. The designation and creation of protected areas on indigenous lands is a matter of considerable concern for indigenous peoples. States usually designate and create such areas without respecting indigenous peoples' collective property rights to land and natural resources, their right of self-determination, and their right to self-government. States violate these rights either by not recognizing indigenous ownership based on possession of traditional lands or by not respecting indigenous control and management of their natural resources. This is an issue where environmental protection must be consistent with international human rights law standards.

26. The proposed PS 6 does not address these facts and therefore does not provide guidance for clients proposing projects in protected areas. The Center therefore recommends that clients proposing projects in a protected area designated or created on indigenous lands must fulfill additional safeguard requirements as follows: First, clients must seek the free, prior and informed consent of the indigenous communities concerned in order to respect their right to control their lands and natural resources. UNDRIP Art. 26(2) recognizes that indigenous peoples have the right to develop and control the lands, territories and resources that they possess. Where a project is affecting the land or territories and other resources, Art. 32 states that a consultation needs to be carried out with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project. A more detailed discussion about FPIC can be found later in this paper when addressing the proposed PS 7 at paragraphs 30-35 and PS 5 at paragraphs 18-20.

27. Second, clients must include the indigenous communities concerned in the management and control of the relevant protected area. This is a natural consequence of indigenous peoples' right of self-determination and self-government as recognized in international law. The UNDRIP

1. Indigenous peoples in voluntary isolation or initial contact have the right to remain in that condition and to live freely and in accordance with their cultures. (Agreed upon by consensus in October, 2005 – Sixth Meeting of Negotiations in the Quest for Points of Consensus)

2. The states shall adopt adequate policies and measures with the knowledge and participation of indigenous peoples and organizations to recognize, respect, and protect the lands, territories, environment, and cultures of these peoples as well as their life, and individual and collective integrity. (Agreed upon by consensus in October, 2005 – Sixth Meeting of Negotiations in the Quest for Points of Consensus)

²¹ The Tagaeri and Taromenami Indigenous Peoples v. Ecuador, Inter-Amer. HR Comm., Precautionary Measures, 2006.

²² Indigenous Peoples of Mascho Piro, Yora, and Amahuaca in voluntary isolation v. Peru, Inter-Amer. HR Comm., Precautionary Measures, 2007.

Art. 3 emphasizes that the right to self-determination gives indigenous peoples the right to “freely determine their political status and freely pursue their economic, social and cultural development.” According to Art. 4, in exercising the right to self-determination, indigenous peoples have the right to autonomy and self-government in matters relating to their internal and local affairs, as well as the ways and means for financing their autonomous functions. Moreover, ILO Convention 169 asserts indigenous peoples should control their ownership and possession of lands, environmental development, and livelihoods.²³

28. Finally, clients must share the eventual benefits with the indigenous communities concerned. Such benefit sharing should be done as equal partners in conservation efforts.²⁴ Indigenous peoples’ traditional knowledge and customary practices have preserved and will continue to preserve nature in protected areas, which means that they should receive credit and compensation for their knowledge and practice, including the equitable sharing of benefits derived from protected areas.²⁵ “Benefits” include any and all benefits associated with protected areas on indigenous lands, including territorial defenses like barriers, legal protection of the territory, demarcation of the territory, technical or financial support for the management, capacity-building actions, etc.²⁶

Suggested Change in Language

PS 5 Land Acquisition and Involuntary Resettlement

17. In circumstances where a proposed project is located within a legally protected area or an internationally designated area, the client, in addition to the applicable requirements of paragraphs 12, 13 and 15 above, will:

- Demonstrate that any proposed development in such areas is legally permitted
- Act in a manner consistent with any government recognized management plans for such areas
- Consult protected area sponsors and managers, local communities, ~~Indigenous Peoples~~ and other key stakeholders on the proposed project, as appropriate
- **If the project is located in a protected area on indigenous lands, the client shall: (1) obtain indigenous peoples’ free, prior and informed consent; (2) assure indigenous peoples manage and control such protected area; and (3) share the benefits with indigenous peoples.**
- Implement additional programs, as appropriate, to promote and enhance the conservation aims and effective management of the protected or designated area

IV.3 | PS 7 Indigenous Peoples

29. The proposed PS 7 is designed to address indigenous issues arising from IFC funded projects, including indigenous peoples’ physical and cultural survival as distinct peoples often located in developing countries in which the IFC operates. However, the proposed PS 7 does not afford sufficient protection, because the client requirements are weak in three critical areas: (1) seeking indigenous communities’ consent; (2) benefit sharing with the indigenous communities due

²³ See generally International Labor Organization, Convention 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Part II.

²⁴ International Union for the Conservation of Nature and Natural Resources (IUCN), *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*, BEST PRACTICE PROTECTED AREA GUIDELINES SERIES NO. 4, (Javier Beltrán and Adrian Phillips, eds., 2000), at Principles 1 and 4.

²⁵ Report of the United Nations Conference on the Human Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., *Statement of Principles for the Sustainable Management of Forests*, Annex III, Principle 10, A/CONF.151/26 (Vol. III).

²⁶ International Union for the Conservation of Nature and Natural Resources (IUCN), *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*, BEST PRACTICE PROTECTED AREA GUIDELINES SERIES NO. 4, (Javier Beltrán and Adrian Phillips, eds., 2000), at Principle 4.

to development/commercialization of their natural resources; (3) absence of “special requirements” regarding lands under indigenous communities’ possession.

Indigenous communities’ consent

30. The proposed PS 7 does not adopt free, prior and informed consent (FPIC) as the governing requirement for clients when projects affect indigenous peoples’ lands, territories and resources. Instead, it proposes free, prior and informed *consultation*. Since the adoption of the UNDRIP in September 2007,²⁷ we believe there has been increased recognition by international human rights organs that FPIC should be required in all cases affecting indigenous peoples’ lands, territories and resources. We believe this interpretation is essential to upholding the rights of indigenous peoples to exercise self-determination and self-governance in development processes and to ensure the preservation of their culture and traditional ways of life. For example, in the *Saramaka case* (October 2007), the Inter-American Court on Human Rights considered that, “regarding large-scale development or investment projects that would have a major impact within [indigenous] territory, the State has a duty, not only to consult with the [indigenous peoples concerned], but also to obtain their free, prior, and informed consent, according to their customs and traditions.”²⁸ Similarly, in the *Endorois case* (2010), the African Commission on Human and Peoples’ Rights recognized that, “in terms of consultation, the threshold is especially stringent in favor of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent-or to compensate-ultimately results in a violation of the right to property.”²⁹ The IFC itself has acknowledged that FPIC has been proposed as a guiding principle through various international fora,³⁰ and has been endorsed by the UN and other MDBs, such as: the Asian Development Bank and the European Bank for Reconstruction and Development.³¹

31. Despite the international trend toward accepting the FPIC requirement, the IFC has maintained its own approach to consulting with affected indigenous communities by requiring the client to engage in a process of “free, prior and informed consultation.” The client is required to conduct a further form of consultation called “good faith negotiation”³² only when the projects are to be located on traditional or customary lands under use by indigenous peoples. By using the standard of “consultation” the first revised draft of proposed PS 7 still does not fully reflect the FPIC standard best codified by UNDRIP and recognized by international human rights organs.

32. The proposed PS 7 must require clients to obtain FPIC of indigenous peoples prior to the approval and initiation of any IFC-funded project in three concrete situations: (1) when the project takes place on indigenous peoples’ lands or involves their natural and cultural resources; (2) when the project does not take place on their lands, but which may significantly affect their lands, territories and resources or may affect their human rights; or (3) when the project would require relocation of indigenous communities. We believe the UNDRIP establishes the consent requirement in these situations. With regard to the first two, Art. 32(2) states that “States shall consult and

²⁷ The UNDRIP is currently being considered for support by the United States and Canada. Further information on the U.S. Policy Review available at <http://www.state.gov/s/tribalconsultation/declaration/>

²⁸ Case of the Saramaka People v. Suriname, Inter-Amer. HR Court (Serie C No. 172), Nov. 28, 2007, para. 134

²⁹ In the Matter of The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. The Republic of Kenya, decision issued by the African Commission on Human and Peoples’ Rights in May 2009, endorsed by the African Union on February 4, 2010, para. 226.

³⁰ For example, the World Commission on Dams (2000) and the Extractive Industries Review (2004). See Progress Report on IFC’s Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information, *supra* note 10, page 25.

³¹ *Id.*, at 10, 25.

³² *Id.*, at 10.

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.” Finally, Art. 10 determines that no relocation shall take place without the FPIC of the indigenous peoples concerned.

33. Apart from the UNDRIP, there are other international human rights instruments and authorities that support the application of FPIC in these three situations. The U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects”.³³ In the *Saramaka case*, the Inter-American Court on Human Rights stated “[t]he safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the [indigenous] people to a large part of their territory must be understood to additionally require [their] free, prior, and informed consent... in accordance with their traditions and customs.”³⁴

34. The analysis and suggestions of language with regard to the consent requirement regarding forced relocation of indigenous communities were made under the proposed PS 5 section of this paper, *supra*.

Benefit sharing with indigenous communities

35. The proposed PS 7 also fails to reflect the rights of indigenous peoples to participate in the benefits (economic and otherwise) derived from the development or commercialization of natural resources pertaining to their lands. Where project activities take place on indigenous lands or involve their natural and cultural resources, indigenous peoples are more than merely stakeholders. They are rights holders. Therefore, indigenous peoples must participate in the benefits derived from such activities. Both international law and domestic laws in several countries recognize this principle. The IFC proposed PS 7 must not fall below such standards.

36. Proposed PS 7 is currently out of step with international law and practice, because it only recognizes the benefit sharing requirement for the use and development of cultural resources (see paragraph 18), not of natural resources located on the community's lands (see paragraph 16). In addition, in its “Objectives”, proposed PS 7 requires “good faith negotiation” only when projects involve commercial use of indigenous peoples’ cultural resources but not their natural resources (see bullet point 5). The reason for the difference treatment of cultural and natural resources is neither clear nor justifiable. Any benefits that result from the development or commercialization of natural resources on indigenous lands or over which indigenous peoples have use must be shared equitably with indigenous peoples. We strongly recommend that the IFC revise the sections mentioned above to reflect these critical principles.

37. According to international law, the development of natural resources located on indigenous lands requires benefit sharing. Indigenous communities must share in any of the benefits that result from the development of both the natural resources on their lands as well as their cultural

³³ U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session), U.N. Doc. E/CN.4/2003/90, January 21, 2003, para. 66.

³⁴ Case of the Saramaka People v. Suriname, *supra* note 28, para. 137.

resources. The ILO Convention 169 Art. 15 affirms that where exploration or exploitation of natural resources pertaining to indigenous peoples' lands is to take place, the peoples concerned must participate in the benefits of such activities. In the *Saramaka case*, the Inter-American Court on Human Rights stated that indigenous peoples must participate in the benefits derived from their lands.³⁵ In the *Endorois case*, the African Commission on Human and Peoples' Rights determined that the absence of benefit-sharing with indigenous peoples violates the right to development, which is protected under the African Charter of Human and People's Rights Art. 14.³⁶ This is a fundamental principle that must be acknowledged by the IFC and its clients in its project planning processes, and it must be included in the proposed PS 7.

38. Domestic laws as well require benefit sharing with indigenous peoples with regard to development or commercialization of their natural resources. For example, Art. 34 of Nicaragua's Law 445 on Indigenous Peoples' Collective Property Rights in the Atlantic Coast and the Bocay, Coco, India and Maiz Rivers includes indigenous communities as one of the direct beneficiaries of the benefits derived from the development of natural resources located on the indigenous communities' lands.³⁷

"Special requirements" for lands under indigenous communities' possession

39. The proposed PS 7 does not recognize the rights of indigenous peoples in relation to lands in their possession. The proposed PS 7 "special requirements" only apply to those indigenous lands "traditionally owned or under customary use", not to those lands in traditional possession. We believe the IFC should rectify this gap under the PS 7 "special requirements" section.

40. As a matter of law, indigenous peoples may have three distinct connections with lands and territories that are not currently reflected in PS 7, which only refers to connections based on "traditional ownership" and "customary use". The first and most straightforward relationship is where indigenous peoples have a legal land title that recognizes their full and absolute ownership rights to the land. This is comparable to "traditional ownership" as used in PS 7. The second is where the indigenous peoples do not have the formal legal title but traditionally possess the land. A community is in possession ("posesión" in Spanish)³⁸ of land when it functions on the understanding that the land is theirs and that, as a result, they may assert legal claims to the land. In civil-law countries, indigenous peoples can claim full ownership rights over lands in their possession via adverse possession claims before domestic courts ("prescripción adquisitiva" or "usucapión" in Spanish).³⁹ Many countries, including Argentina⁴⁰ and Paraguay,⁴¹ have created land

³⁵ *Id.*, at 129.

³⁶ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, *supra* note 29, para. 228.

³⁷ Law 445 on Indigenous Peoples' Collective Property Rights in the Atlantic Coast and the Bocay, Coco, India and Maiz Rivers, *supra* note 9, Art. 34.

³⁸ See Argentina's Civil Code Art. 2351 (stating that there is possession when a person holds a thing with the intention to exercise ownership rights)

³⁹ See Argentina's Civil Code, Art. 3948 (determining that adverse possession is a remedy in order to acquire full ownership rights based on the possession of land)

⁴⁰ For example, in 1996 Argentina created the Programa de Regularización y Adjudicación de Tierras a la Población Aborigen de la Provincia de Jujuy [Land Titling Program for Indigenous Peoples of Jujuy], in order to grant official land titles to the indigenous communities located in the Jujuy Province.

⁴¹ Because of the lack of effective protection of indigenous peoples' full ownership rights to land, the Inter-American Human Rights Court issued two decisions against Paraguay, in which the Court ordered Paraguay to provide the land titling procedure with more resources to grant land titles to indigenous communities possessing lands in a timely fashion. See Case of the Sawhoyamaya Indigenous Community v. Paraguay, Inter. Amer. H.R. Court (Series C No. 146), Mar. 29,

titling procedures for indigenous peoples in order to grant an official legal title with respect to those “public” lands under indigenous peoples’ traditional possession. This relationship is not currently reflected in PS 7. The third relationship that may exist is where indigenous peoples do not have formal legal title, but are occupying particular lands. Occupancy (“tenencia” in Spanish)⁴² does not afford indigenous peoples the possibility of seeking the recognition of their full ownership rights in the same way provided by possession. Occupancy may be comparable to the IFC’s term “customary use”, which refers to the use of land for livelihoods, or cultural, ceremonial, or spiritual purposes that can be substantiated and documented.

41. International law recognizes the collective property rights of indigenous peoples to the lands and territories they traditionally possess. For instance, the UNDRIP⁴³ and the ILO Convention 169⁴⁴ recognize the property rights of indigenous peoples based on or derived from their traditional possession. There is also legal authority developed by the Inter-American Court on Human rights since the *Awás Tingni case* (2001), which acknowledges that “[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”⁴⁵ Accordingly, in the *Endorois case*, the African Commission on Human and Peoples’ Rights concluded that: “(1) traditional possession of land by indigenous peoples has the equivalent effect as that of a state-granted full property title; [and] (2) traditional possession entitles indigenous peoples to demand official recognition and registration of property title.”⁴⁶

Suggested Change in Language

PS 7 Indigenous Peoples

Objectives

- To ensure that the development process fosters full respect for the human rights and the dignity, aspirations, cultures, and natural resource-based livelihoods of Indigenous Peoples
- To avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not feasible, to reduce, restore, and/or compensate for such impacts
- To provide opportunities for benefit sharing and sustainable development outcomes, in a culturally appropriate manner
- To establish and maintain an ongoing relationship with the Indigenous Peoples affected by a project throughout the project’s life-cycle
- To foster good faith negotiation with, and informed participation of, Indigenous Peoples **in order to obtain their consent** when projects (i) are to be located on **indigenous lands, territories or involves their natural and cultural resources** ~~under traditional or customary use~~ by Indigenous Peoples; or (ii) **are not located on indigenous lands, but which may significantly affect their lands, territories and resources or may affect their human rights; or (iii)** require relocation of Indigenous Peoples from their traditional ~~or customary~~ **lands and territories; (iii)** or **(iv)** when projects involve **development or commercialization** ~~commercial use~~ of Indigenous Peoples **natural and/or** cultural resources
- To respect and preserve the culture, knowledge, and practices of Indigenous Peoples

2006. See also *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 125), June 17, 2005.

⁴² See Argentina’s Civil Code Art. 2352 (stating that occupancy exists when a person has a thing, while recognizing someone else’s ownership)

⁴³ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 26.

⁴⁴ International Labor Organization Convention 169, *supra* note 23, Art. 14.

⁴⁵ *Case of the Awás Tingni (Sumo) Community v. Nicaragua*, Inter-Amer. HR Court (Serie C No. 79), para. 151.

⁴⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra* note 29, para. 209.

Information Disclosure, Consultation, **Consent** and Informed Participation

10. The client will establish a relationship with the affected communities of Indigenous Peoples from as early as possible in the project planning and maintain it throughout the project life-cycle. In projects with adverse impacts on affected communities of Indigenous Peoples, the consultation process will ensure their free, prior, and informed **consent in all cases affecting their lands, territories and resources** ~~consultation~~ and facilitate their informed participation on matters that affect them directly, such as the project's direct and indirect adverse impacts, proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The process of community engagement will be culturally appropriate and commensurate with the risks and potential impacts to the Indigenous Peoples. In particular, the process will include the following:

- Involve Indigenous Peoples' representative bodies and organizations (e.g., councils of elders or village councils), as well as members from the communities of Indigenous Peoples
- Enable members of Indigenous Peoples' communities to become aware of, have access to, and understand project information (including the project's social and environmental impacts) and have the opportunity to engage with the client
- Be inclusive of both women and men and of various age groups in a culturally appropriate manner
- Provide sufficient time for Indigenous Peoples' collective decision-making processes
- Facilitate the Indigenous Peoples' expression of their views, concerns, and proposals in the language of their choice, without external manipulation, interference, or coercion, and without intimidation
- Ensure that the grievance mechanism established for the project, as described in Performance Standard 1, is culturally appropriate and accessible for Indigenous Peoples

Impact on Lands **and Natural Resources** Subject to Traditional Ownership, **Under Possession** or Under Customary Use

15. Indigenous Peoples are often closely tied to their lands and natural resources on these lands whether these lands are traditionally owned, **under possession** or under customary use. While these lands may not be under legal ownership pursuant to national law, use of these lands, including seasonal or cyclical use, by communities of Indigenous Peoples for their livelihoods, or cultural, ceremonial, or spiritual purposes that define their identity and community, can often be substantiated and documented. Paragraphs 16 and 17 below specify the requirements that the client will follow when traditional or customary lands are under use in a manner described in this paragraph.

16. If the client proposes to locate the project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of Indigenous Peoples, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples, the client will respect their **rights and** use by taking the following steps:

- **The client will carry-out a consultation and obtain the free, prior and informed consent of the indigenous community**
- **The client will provide for fair and equitable sharing of benefits with the indigenous peoples concerned from the development or commercialization of their natural resources consistent with their customs and traditions**
- The client will document its efforts to avoid or reduce the size of land proposed for the project
- The Indigenous Peoples' land use will be documented by one or more experts in collaboration with the affected communities of Indigenous Peoples without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources
- When purchasing or leasing land, the Client will identify all legitimate property interests and ensure that the seller/lessor of the property is the true owner of the land
- The affected communities of Indigenous Peoples will be informed of their rights with respect to these lands under national laws, including any national law recognizing customary rights, **possession** or use
- The client will offer affected communities of Indigenous Peoples compensation and due process in the case of commercial development of their land under national laws, together with culturally appropriate development opportunities. Land-based compensation or compensation-in-kind will be offered in lieu of cash compensation where feasible. The client will also consider the land passage and usage practices of local communities of Indigenous Peoples on land it owns or controls subject to overriding health, safety, and security considerations

Customary Use

17. The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from their communally held traditional or customary lands under use. If such relocation is unavoidable the client will not proceed with the project unless it enters into a good faith negotiation with the affected communities of Indigenous Peoples, ~~and~~ documents their informed participation and the successful outcome of the negotiation, **and obtains their free, prior and informed consent**. Any relocation of Indigenous Peoples will be consistent with the Resettlement Planning and Implementation requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the reason for their relocation cease to exist.

IV.4 | PS 8 Cultural Heritage

42. The purpose of proposed PS 8 is to set requirements for clients regarding the protection of cultural heritage. Surprisingly, PS 8 does not consider indigenous peoples' sacred sites as a part of cultural heritage. We strongly encourage IFC to not only refer to indigenous peoples' sacred sites as cultural heritage, but to also include sacred sites in the list of "critical cultural heritage" to ensure they benefit from the strongest level of protection. In so doing, the proposed PS 8 would be in line with the safeguards adopted by the World Bank⁴⁷ and the UNESCO.⁴⁸

43. The protection of indigenous cultural heritage involves respect for indigenous peoples' religions, spirituality, cultural rights, land rights, and self-government rights. We recommend the IFC require clients to avoid any impacts on sacred sites, and to respect indigenous peoples' ownership and custody of them. According to the UNDRIP Art. 11(1), indigenous peoples' cultural rights "include the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites." Moreover, Art. 12(1) states that indigenous peoples have "the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains." Finally, the UN Special Rapporteur on the Cultural Heritage of Indigenous Peoples stated that "[i]ndigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people."⁴⁹

44. By protecting indigenous peoples' sacred sites as cultural heritage, PS 8 will also be in line with relevant emerging customary international law principles. These principles impose extensive obligations on states to respect and protect indigenous peoples' sacred sites, their rights to access and use of these sites, and their cultural, spiritual, and religious practices. In the *Endorois case*, the African Commission on Human and Peoples' Rights stated that "protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for,

⁴⁷ See The World Bank Operational Manual, Operational Policy on Indigenous Peoples, World Bank (OP-4.10), July 2005, para 21. (stating that involuntary restrictions on indigenous peoples' access to their sacred sites should be avoided)

⁴⁸ See UNESCO, Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, Nov. 19, 1968 (highlighting that member states should give due priority to measures required for the preservation in situ of cultural property endangered by private works to preserve historical associations and continuity); Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, Dec. 11, 1962 (determining that preventive measures should protect sites from the dangers posed by mines and the disposal of their waste products).

⁴⁹ United Nations H.R. Comm., Protection of the heritage of indigenous peoples, Final Report of the Special Rapporteur Ms. Erica-Irene Daes, E/CN.4/SUB.2/1995/26, June 21, 1995, Annex: Revised texts and principles and guidelines, Guidelines on Definition of Heritage of Indigenous Peoples, para. 5, 6.

and protection of, their religious and cultural heritage essential to their group identity.”⁵⁰ Apart from the UNDRIP, other international instruments impose these state obligations, such as: the ILO Convention 169;⁵¹ the International Covenant on Civil and Political Rights;⁵² and the Convention concerning the Protection of the World Cultural and Natural Heritage,⁵³ among others.

Suggested Change in Language

PS 8 Cultural Heritage

3. For the purposes of this Performance Standard, cultural heritage refers to tangible forms of cultural heritage, such as tangible property and sites having archaeological (prehistoric), paleontological, historical, cultural, artistic, and religious values, as well as unique natural environmental features that embody cultural values, such as sacred groves. **Cultural heritage also includes indigenous peoples’ sacred sites.** However, for the purpose of paragraph 13 below, intangible forms of culture, such as cultural knowledge, innovations and practices of communities embodying traditional lifestyles, are also included. The requirements of this Performance Standard apply to cultural heritage regardless of whether or not it has been legally protected or previously disturbed.

Critical Cultural Heritage

10. Critical cultural heritage consists of (i) the internationally recognized heritage of communities who use, or have used within living memory the cultural heritage for long-standing cultural purposes; ~~and~~ (ii) legally protected cultural heritage areas, including those proposed by host governments for such designation; **and indigenous peoples’ sacred sites.**

V | CONCLUSION

45. In addition to the specific recommendations made herein, the IFC should be clear about whom it was created to serve and to frame all of its activities and policies accordingly. The IFC’s mandate is to “promote sustainable economic development through the private sector,”⁵⁴ and its stated mission is to “promote private sector investment in developing countries, helping to reduce poverty and improve peoples’ lives.”⁵⁵ On this basis, IFC policies and practice should be designed to address the interests of affected communities and those for whom the investments are being made. As such, the IFC’s primary responsibility should be to ensure safe and effective poverty reduction initiatives for marginalized people, not to create policies or circumstances that make it easier for the private sector to invest in developing countries with limited human rights accountability mechanisms and safeguards.

46. We thank the IFC for the opportunity to submit comments as part of the Phase II consultation. We look forward to our continued involvement with the IFC as it proceeds to the final stages of the review and update process.

⁵⁰ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, *supra* note 29, para. 241.

⁵¹ International Labor Organization Convention 169, *supra* note 23, Art. 14.

⁵² International Covenant on Civil and Political Rights, Art. 18, 27.

⁵³ Convention concerning the Protection of the World Cultural and Natural Heritage, UNESCO, Nov. 16, 1972, Art. 5(d).

⁵⁴ “IFC at a Glance” Online: <http://www.ifc.org/ifcext/careers.nsf/Content/IFCataGlance>

⁵⁵ *Ibid.*

For further information on our submissions or questions regarding the recommendations herein, please do not hesitate to contact:

Leonardo A. Crippa
Staff Attorney
Indian Law Resource Center
Email: lcrippa@indianlaw.org
Tel. (202) 547 2800
Fax (202) 547 2803
www.indianlaw.org