Indigenous Peoples and International Financial Institutions

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We have learnt that in order ... to enable indigenous peoples to pursue their own self-determined development, we must first actively listen to them. We need to listen to what poverty means for indigenous peoples, how it affects their well-being – or indeed their ill-being. We know that poverty is more than low income. It is about historical processes of dispossession and discrimination. It is about lack of respect for indigenous peoples’ political, cultural and economic rights. It is about decisions on territories and on the use and misuse of natural resources being imposed, without the participation of those whose livelihoods are at stake, and without their free, prior and informed consent. If we collectively fail to listen to what indigenous peoples can tell us about poverty and about their solutions to overcome it, as primary stakeholders of development initiatives in their territories, then any action we take will be meaningless, or possibly even counterproductive.¹

I. Introduction

The statement above was made in April 2008 on behalf the International Fund for Agricultural Development (“IFAD”) not, unfortunately, on behalf of all international financial institutions (“IFIs”). Indeed, with few exceptions, indigenous peoples maintain that the IFIs have persistently failed to listen to and, more importantly, respect their perspectives, and they have registered serious complaints about how IFI activities affect their rights and well-being. It is no coincidence that the World Bank Group’s (“WBG”) first formal policy on indigenous peoples – the 1982 Operational Manual Statement 2.34 Tribal People in Bank-Financed Projects (“OMS 2.34”) – was adopted in response to “internal and external condemnation of the disastrous experiences of indigenous groups in Bank-financed projects in the Amazon region.”²

These experiences are not confined to the past: abuses have been identified in recent WBG performance evaluations³ and in reports by NGOs and United Nations human rights bodies.⁴ WBG studies also have recognized that indigenous peoples “have often been on the losing end of the development process.”⁵

OMS 2.34 was preceded by a study entitled Economic Development and Tribal Peoples: Human Ecologic Considerations, which sought to provide guidelines for WBG operations.⁶ It argued that the WBG should avoid “unnecessary or avoidable encroachment onto territories used or occupied by tribal groups;” ruled out

⁴ See for instance Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57. UN Doc. E/CN.4/2002/97, at para. 56 (observing that "...resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues ... and some national legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades"). See also K. Horta, Rhetoric and Reality: Human Rights and the World Bank, 15 HARVARD HUMAN RIGHTS J. 227 (2002).
involvement with projects not agreed to by tribal peoples; required guarantees from borrowers that they would implement safeguard measures; and advocated respect for indigenous peoples’ right to self-determination. 7 Although OMS 2.34 did not incorporate these recommendations, this study is noteworthy because, as discussed below, its key recommendations presciently track the main demands made by indigenous peoples today. Sustained criticism of WBG projects by indigenous peoples, NGOs and others 8 led to the replacement of OMS 2.34 by the 1991 Operational Directive 4.20 on Indigenous Peoples (“OD 4.20”). 9 Criticism continued, particularly in relation to inconsistent compliance with the policy, 10 and OD 4.20 was revised and replaced in May 2005 by Operational Directive 4.10 on Indigenous Peoples (“OP 4.10”). 11

OD 4.20 and OP 4.10 both failed to incorporate the key recommendations of the 1982 Economic Development and Tribal Peoples study. Both policies also have been largely rejected by indigenous peoples for being incompatible with their rights and, therefore, ineffective as safeguards. This view is supported at least with respect to OD 4.20 by an internal WBG evaluation, which found that only 38 percent of a sample of WBG projects that satisfactorily applied that policy mitigated adverse impacts and ensured benefits for indigenous peoples. 12 OP 4.10 is scheduled for its first review in April 2009.

The adoption of OP 4.10 in 2005 marked the beginning of a wholesale re-evaluation and revision by the IFIs of their ‘safeguard’ policy instruments pertaining to indigenous peoples, a process that is still ongoing. The International Finance Corporation (“IFC”), the private sector arm of the WBG, and the Inter-American Development Bank (“IDB”) adopted new policies in 2006, as did the European Bank for Reconstruction and Development (“EBRD”) in May 2008. The Asian Development Bank (“ADB”) commenced its (still ongoing) policy revision in 2006. Additionally, the UN Food and Agriculture Organisation, IFAD, the UN Development Programme, the UN Development Group, the European Commission, and a series of bilateral donors have all either adopted new policies on indigenous peoples during this period or are in the process of doing so. The African Development Bank is a conspicuous absentee, having never adopted a policy on indigenous peoples despite the recognition that such peoples exist in Africa by human rights bodies 13 and by other IFIs in their projects in Africa. 14

7 Id. at 3, 27.
Indigenous peoples have proactively sought to influence IFI operational policies, and by extension the conduct of IFI projects, while also being acutely aware that these policies do not extend to structural adjustment programmes and most technical assistance projects. The latter, particularly where focused on liberalising the extractive industries sector, have had profound and mostly negative impacts on indigenous peoples. Indigenous representatives explain that in many cases they continue to experience severe negative impacts and human rights abuses in relation to IFI projects and, therefore, a strong and effective safeguard regime that is grounded in and consistent with international human rights law is needed.

Indigenous peoples’ engagement with the IFIs is thus based on a consistent set of demands that draws primarily on human rights standards. Their main demands are that IFI policies guarantee the right to free, prior and informed consent (“FPIC”), that they respect indigenous peoples’ right to own and control their traditional territories, that they prohibit involuntary resettlement, and that they respect indigenous peoples’ right to self-determination. The United Nations Permanent Forum on Indigenous Issues (“PFII”), the body responsible for overall coordination of UN system activities relating to indigenous peoples, has echoed these demands, recommending in 2003 that the IFIs:

Continue to address issues currently outstanding, including Bank implementation of international customary laws and standards, in particular human rights instruments, full recognition of customary land and resource rights of indigenous peoples, recognition of the right of free, prior informed consent of indigenous peoples regarding development projects that affect them, and prohibition of the involuntary resettlement of indigenous peoples.

These issues were again discussed by the PFII at its 2006 session under the theme of ‘Redefining the Millennium Development Goals’. In her background paper, the Chair of the PFII explains that a rights-based approach to the Millennium Development Goals (“MDGs”) is essential, and that for indigenous peoples it is difficult to talk about development without also addressing rights to lands and resources, identity and culture, and self-determination. She further highlights the importance of moving beyond mitigation measures to concerted support for indigenous peoples’

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17 See Summary Report of World Bank Round Table Discussion of Indigenous Representatives and the World Bank on the Revision of the World Bank's Indigenous Peoples Policy, 18 October 2002. Available at http://forestpeoples.gn.apc.org/Briefings/World%20Bank/wh_ip_round_table_summary_oct_02_en.pdf. See also Indigenous Peoples Statement at the 19th Session of the UNWGIP (July 29, 2001) at: http://forestpeoples.gn.apc.org/briefings.htm (criticizing that draft OP 4.10: “fails to incorporate many of the key recommendations made by indigenous peoples during previous consultations on the Bank’s ‘approach paper’ on the revision process; uses language that confuses consultation with effective participation; lacks binding provisions that seek to guarantee indigenous land and resource security; fails to recognize the right to free, informed prior consent; does not prohibit the involuntary resettlement of indigenous peoples; is not consistent with existing and emerging international standards on human rights and sustainable development; and does not advance international standards for dealing with indigenous peoples in development”).


own development choices if pursuit of the MDGs is to benefit, rather than prejudice, indigenous peoples.20 These same conclusions were also emphasized in two recent UN expert meetings on the Millennium Development Goals, Indigenous Participation and Good Governance21 and on Indigenous Peoples and Indicators of Well-Being.22

In addition to highlighting rights issues, indigenous peoples also point to the IFIs’ internal evaluations that demonstrate that IFIs repeatedly fail to adequately adhere to their policy prescriptions. A 1987 internal WBG implementation review of OMs 2.34, for example, found that only two out of 33 WBG projects substantially complied with the policy.23 Similarly, a 2003 review of OD 4.20, found that it was only fully or partially applied in 50 percent of projects affecting indigenous peoples, and of those only 14 percent had the required ‘Indigenous Peoples Development Plan’.24 For this reason, indigenous peoples’ representatives argue that compliance, enforcement and grievance mechanisms must be built into policies and incorporated into project instruments and loan agreements if safeguards are to be meaningful and effective. In this vein, the World Bank’s Extractive Industries Review recommended (without result) that there be tri-partite (IFI-government-indigenous peoples) covenants included in loan agreements so that indigenous peoples will have standing to directly challenge violations of their rights with the WBG and government.25

When talking about rights in relation to the IFIs today, indigenous peoples often refer to the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), adopted by the United Nations General Assembly in September 2007.26 The UNDRIP sets out in 46 articles the views of the vast majority of the international community with regard to the rights of indigenous peoples, rights which are declared to be “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”27 It affirms that indigenous peoples hold the right to self-determination — and hence the right to freely pursue their own economic, social and cultural development — and elaborates on components of that right such as the right to own and control traditional lands, territories and resources and the right to participate in and consent to decision-making that may affect them. This right to consent extends to the adoption of legislative or administrative measures that may affect indigenous peoples as well as to activities defined as development initiatives by the state.28

While it is technically a non-binding statement of principle, the UNDRIP in many respects restates existing international law norms pertaining to indigenous peoples’

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20 Id.
24 Implementation of Operational Directive 4.20 on Indigenous Peoples: An independent desk review, supra note 3. This study also found that participation by indigenous peoples in decision-making in WBG projects affecting them was “low” and that just 20 percent of projects had included clear benchmarks to measure impacts on indigenous communities. For a discussion of institutional constraints in relation to safeguard policy compliance, see N. Bridgeman, World Bank Reform in the “Post Policy” Era, 13 GEOGETOWN INT’L ENVIRO. L. REV. 1013 (2001).
25 Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review, Vol. I, December 2003, at p. 50 (stating that it is “necessary to include covenants in project agreements that provide for multiparty negotiated and enforceable agreements that govern various project activities, should indigenous peoples and local communities consent to the project”).
27 Id. Art. 43.
28 Id. Art. 19 and 32(2).
Forthcoming: D. Bradlow & D. Hunter (eds.), INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW

rights, both as set forth in international human rights instruments and associated jurisprudence and in customary international law. The UN Committee on the Elimination of Racial Discrimination, for instance, holds that states should use the UNDRIP “as a guide to interpret [their] obligations under the Convention [on the Elimination of All Forms of Racial Discrimination] relating to indigenous peoples.”

Articles 41 and 42 of the UNDRIP directly address United Nations bodies and specialised agencies, and intergovernmental organisations more generally, which is understood to include the IFIs. Article 41 calls on these entities to contribute to the “full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance;” and to establish “[w]ays and means of ensuring participation of indigenous peoples on issues affecting them.” Article 42 adds that these entities, “including the Permanent Forum on Indigenous Issues, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

The PFII, which has an oversight and coordination mandate in relation to UN agencies, including some of the IFIs, comprehends Article 42 to entail an extension of its mandate in relation to the UNDRIP. An important 2008 PFII report proposes in this respect that the PFII establish a standing Committee to promote and oversee the implementation of the UNDRIP. As the majority of the IFIs report annually to the PFII, and some are members of the PFII’s Inter-Agency Support Group, it can be expected that these bodies will also be questioned in the future about their efforts to apply and ensure the effectiveness of the standards set forth in the UNDRIP. Further, IFI responsibilities in relation to the UNDRIP will also likely come to the attention of the Human Rights Council’s recently established Expert Mechanism on the Rights of Indigenous Peoples.

On 14-17 March 2008, a workshop was held with indigenous peoples, UN bodies and some IFIs to discuss how the latter could promote the UNDRIP in their policies, programmatic activities and projects, or otherwise. Many responded positively to the need to ensure that UNDRIP is a key reference point or more, and some indicated that they have already taken steps towards this end. IFAD, for instance, states that its forthcoming policy on indigenous peoples will be based on the UNDRIP. The
World Bank’s representative explained that its legal department had conducted a review of OP 4.10 in relation to UNDRIP and was of the opinion that its policy is inconsistent on only two points: rights to lands, territories and resources and the right to consent (a highly debatable conclusion, if only on the basis of the interdependency of human rights).

With this background in mind, the remainder of this chapter focuses on whether IFI policies on indigenous peoples incorporate human rights norms, explicitly or implicitly. This question can be answered either by locating provisions in these policies that explicitly refer to or directly incorporate human rights norms, or through a comparative analysis of the various provisions in relation to human rights norms where there is no explicit reference or incorporation. Section II thus looks at the extent to which the new IFI policies explicitly acknowledge the applicability or relevance of ‘human rights’ or specific rights norms to the conduct of their activities as they relate to indigenous peoples. It concludes that although some IFI policies incorporate explicit references to human rights or specific human rights norms, the effect, with one important exception, is little more than oratory.

Section III analyzes the extent to which the various policy instruments incorporate and guarantee indigenous peoples’ right to give or withhold FPIC. FPIC is important because it lies at the heart of indigenous peoples’ demands, relating as it does to the exercise and enjoyment of the right to self-determination and particularly territorial rights and freedom from involuntary resettlement. Generally speaking, this analysis reveals that while the content of some human rights norms is reflected to varying degrees in the IFI policies, these policies nevertheless fall short in some important respects, the absence of clear affirmations of FPIC in all but one instance being a prime example. Also, deficiencies are especially apparent if rights to effective remedies for violations of the policies or harm otherwise caused in project activities are considered.

II. IFI Policies on Indigenous Peoples and Human Rights

The IFIs have generally maintained – in some cases, insisted – that their constituent instruments define a role for them that does not obligate them, legally or otherwise, to account for human rights issues. Indigenous peoples counter that IFIs cannot simply exempt themselves from compliance with generally applicable rules of the international legal system, including those pertaining to human rights. They also observe that the international community has repeatedly affirmed that respect for

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40 In her December 2001 Presidential Fellow’s Lecture at the World Bank, former UN High Commission for Human Rights Mary Robinson explains this inter-dependency argument. She states that “economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by a recognition of indigenous peoples’ own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.” Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance. Lecture by Mary Robinson, UN High Commissioner for Human Rights, World Bank, Washington D.C., December 2001, at p. 3.


human rights is a fundamental part of sustainable development.\textsuperscript{43} Therefore, while the IFIs should not become human rights enforcement agencies, they do need to ensure that their operating policies are consistent with human rights norms, including through the provision of effective remedies in relation to their own acts and omissions.

Indigenous peoples’ views are informed and supported by a growing number of legal scholars who have concluded that IFIs do indeed have legal obligations with regard to human rights.\textsuperscript{44} For example, Bowett’s Law of International Institutions states that it “has been suggested, for example, that the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds....”\textsuperscript{45} A number of UN expert studies have also looked at this issue and reached the same conclusion.\textsuperscript{46} One of these studies concludes in relation to the WBG that, “[n]o entity that claims international legal personality can claim exemption from [the human rights] regime. ... If such a claim were to be considered legitimate, it would seriously erode the international rule of law.”\textsuperscript{47}

The relationship of the IFIs to international law, and particularly the nature and extent of any obligations that the IFIs may have under international law, is discussed in detail elsewhere and will not be covered further here. Instead, the remainder of this section will look at whether IFI policies on indigenous peoples explicitly refer to or incorporate ‘human rights’ or specific human rights norms. As discussed below, five of these policies do contain such explicit references: the World Bank, IFC and the ADB in their general objectives; the 1998 ADB policy (currently being replaced) also has an extensive section on international human rights instruments pertaining to indigenous peoples; the EBRD policy references the UNDRIP; and the IDB directly incorporates the substantive provisions of human rights instruments and associated jurisprudence into its policy and the associated project approval process. What is the effect of these references?

The World Bank’s OP 4.10 and the IFC’s Performance Standard 7 on Indigenous Peoples (“PS7”) both assert that a general objective of the policies is to ensure that

\textsuperscript{43} See for example Report of the World Summit for Social Development. UN Doc. A/CONF.166/9 (1995), at para. 26 (stating that sustainable and equitable development must include economic development, environmental protection, transparent and accountable governance, and universal respect for, and observance of, all human rights). See also Organisation for Economic Co-operation and Development, Development Assistance Committee, On Common Ground: Converging Views on Development and Development Co-operation at the Turn of the Century (Feb. 2000) (surveying basic international principles of development and sustainable development and stating that, “to achieve sustainable development, it is necessary to address economic and financial issues on the one hand, with structural, social and human issues, on the other, in a balanced way, thereby integrating the following key elements: ... good governance and public management, democratic accountability, the protection of human rights and the rule of law”).


the development process fosters “full respect for the dignity [and] human rights...” of indigenous peoples.\textsuperscript{48} This objective can be read in two ways: first, concluding that the policies on their face ensure that the development process fully respects indigenous peoples’ rights; or, second, as a forward looking statement, requiring that interpretation and implementation of the policies should be consistent with indigenous peoples’ rights. However, and irrespective of which may be the correct interpretation, in meetings with indigenous peoples’ representatives, World Bank legal staff have explained that this language is merely ‘preambular’ and should not be read into the mandatory requirements set forth in OP 4.10.\textsuperscript{49}

The IFC policy explains how it understands PS7’s general objective to foster respect for indigenous peoples’ rights. This explanation is set forth in the non-binding Guidance Notes issued with PS7 and, as with OP 4.10, it should not be read into the mandatory requirements. It is nonetheless symbolically significant in as much as it represents an important statement by an IFI on human rights issues in the private sector context. Guidance Note 1 to PS7 provides that the:

IFC recognizes that the rights of Indigenous Peoples are being addressed under both national and international law. Under international law, key UN human rights conventions ... form the core of international instruments that provide the rights framework for the world’s indigenous peoples. In addition, some countries have passed legislation or ratified other international or regional conventions for the protection of Indigenous Peoples (for example, ILO Convention 169...). While such legal instruments establish responsibilities of states, it is increasingly expected that private sector companies conduct their affairs in a way that would uphold these rights and not interfere with states’ obligations under these instruments. It is in recognition of this emerging business environment that IFC expects that private sector projects financed by IFC foster full respect for the dignity, human rights, aspirations, cultures and customary livelihoods of Indigenous Peoples.

What this language may mean in practice remains to be seen, particularly as it is non-binding and the IFC has yet to monitor whether corporations uphold indigenous peoples’ rights and avoid interferences with states’ obligations in IFC-funded projects. Together with the International Business Leaders Forum and the UN Global Compact, the IFC has however developed a Human Rights Impact Assessment (“HRIA”) tool, which could be used to identify human rights risks and impacts in project design and implementation.\textsuperscript{50} HRIA tools are an important part of ensuring that IFI operations respect human rights, but, to be effective, they must adequately reflect the specific rights of indigenous peoples and be developed and implemented with indigenous peoples’ informed and effective participation.

The IFC-developed HRIA tool, which is currently being ‘road-tested’, was not developed with indigenous participation (neither was PS7, at least not formally), and it is also not ideal on substantive grounds. For example, while the HRIA tool does recognise that indigenous peoples have a set of specific collective rights in addition to the individual rights of their members, it then falls into the common trap of discussing these rights almost exclusively in the context of the 1989 International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples.\textsuperscript{51} Ratified by only 19 states, this instrument is widely seen by indigenous peoples as

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\textsuperscript{49} Author’s notes of the legal roundtable held by the World Bank’s legal department and indigenous peoples’ representatives, New York, 05 May 2005.


\textsuperscript{51} Id. at p.77-8.
\end{footnotesize}
substantially inadequate, particularly when viewed in the light of contemporary international jurisprudence and the UNDRIP.\textsuperscript{52} Also, in the HRIA tool, FPIC is not included as a 'key right' of indigenous peoples. Instead, FPIC is listed as a 'key emerging issue', even though the HRIA tool observes that this right is "high on the agenda of international human rights."\textsuperscript{53} As discussed in the following section, FPIC is certainly a 'key right', and the IFIs and their borrowers or private sector clients face a number of serious risks if they ignore it.

The 1998 ADB policy on indigenous peoples states that the "international community has shown increasing concern for the protection of the rights of indigenous peoples," and contains a large section outlining some of the requirements contained in relevant international conventions and declarations.\textsuperscript{54} Respect for indigenous peoples' rights is also highlighted in the objectives section of the policy, which provides that "Initiatives should be conceived, planned, and implemented, to the maximum extent possible, with the informed consent of affected communities, and include respect for indigenous peoples' dignity, human rights, and cultural uniqueness."\textsuperscript{55} These statements are not however made effective by inclusion in the mandatory sections of the policy. The policy is also adamant that implementation will take place "within the context of country-level legal frameworks," rather than with reference to human rights norms where national laws may be inconsistent.\textsuperscript{56} Consequently, as indigenous peoples from the Asia-Pacific region have explained on many occasions, ADB-funded operations often do not respect their rights and certainly do not seek their informed consent.\textsuperscript{57}

The 1998 ADB policy is currently being revised. The most recent draft of the new policy is dated October 2007 and is presently the subject of (contentious) consultation meetings with indigenous peoples and others. The draft does not contain the prior language about international conventions and declarations, but it does state that its aims include safeguarding “Indigenous Peoples' rights to maintain, sustain and preserve their cultural identities, practices and habitats, and ensure that projects affecting them will take into consideration necessary measures to protect these rights.”\textsuperscript{58} The policy will also be triggered if “a project impacts directly or indirectly on the dignity, human rights, livelihood systems, or culture of Indigenous Peoples, or affects the territories, natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain or asset.”\textsuperscript{59} However, as with the 1998 policy, this language is not adequately operationalized in the mandatory requirements. Moreover, the mandatory requirements themselves appear to contravene indigenous peoples’ rights. For example, the new policy has basically

\begin{thebibliography}{99}
\bibitem{} \textit{Id.} at para. 32.
\bibitem{} \textit{Id.} at para. 62 (see also para. 22, stating, in relation to human rights laws, that “the Bank must respect the will of governments, including legislation and policy that exists and the power of eminent domain that governments possess”).
\bibitem{} \textit{Id.} at para. 7.
\end{thebibliography}
adopted the World Bank’s language pertaining to indigenous lands and territories, language that the World Bank itself acknowledges is inconsistent with UNDRIP.\textsuperscript{60}

The EBRD’s 2008 Performance Requirement 7 on Indigenous Peoples (“PR7”), which applies to private sector financing, contains largely the same language as the World Bank and IFC concerning fostering respect for indigenous peoples’ rights in its objectives.\textsuperscript{61} This policy is substantially based on the IFC’s PS7 and replaces the EBRD’s 2003 policy on indigenous peoples. According to the EBRD, the reasons for the revision include advances in environmental and social issues since 2003, such as an increased focus on the impacts of financial intermediaries on human rights, and the need to better address social issues, including indigenous peoples’ concerns, which are implicit in the “sustainable development component of our mandate....”\textsuperscript{62} Most importantly, PR7 contains an explicit reference to the UNDRIP, stating that, “this PR 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 the project-related activities identified in paragraphs 31-37 below, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.”\textsuperscript{63} As discussed below, FPIC is operationalized in relation to the referenced paragraphs in the EBRD policy and therefore this statement is not merely rhetorical.

The IDB’s 2006 Operational Policy 7-65 on Indigenous Peoples (“OP 7-65”) goes far beyond the other IFI polices.\textsuperscript{64} It requires special safeguards for indigenous peoples in projects that directly or indirectly affect their traditional lands, territories and resources, and specifies that “one of those safeguards is respect for the rights recognized in accordance with the applicable legal norms.”\textsuperscript{65} The definition of ‘applicable legal norms’ includes ratified international treaties “as well as the corresponding international jurisprudence of the Inter-American Court of Human Rights or similar bodies whose jurisdiction has been accepted by the relevant country.”\textsuperscript{66}

Apart from explicitly incorporating human rights norms into the IDB’s operating requirements, OP 7-65 provides indigenous peoples with strong grounds to insist that proponents of IDB projects that affect indigenous peoples assess, document, and respect their rights. Importantly, in addition to the norms and jurisprudence developed in the UN system, the Inter-American Commission and Court of Human Rights have developed, and can be expected to continue to develop, substantial jurisprudence on the rights of indigenous peoples, some of which is discussed below. This jurisprudence sets out concrete rules that states must abide by when conceiving and implementing IFI-funded or other activities.

In principle at least, explicit incorporation of human rights standards into IDB operating requirements goes far toward addressing indigenous peoples’ demand that IFI-funded activities respect their rights. The EBRD’s reference to the UNDRIP is also important and goes beyond the largely rhetorical statements made by the ADB, IFC and the World Bank. Many indigenous leaders would, however, also point out that the ‘proof is in the pudding’ and the IDB, as with all other IFIs, need to

\textsuperscript{60} See id. para. 45 and OP 4.10, para. 17 (both requiring measures to regularise indigenous land rights only in two limited circumstances (land titling projects and involuntary takings), and also providing for the possibility of granting individual titles to collectively held indigenous lands).


\textsuperscript{63} Id. at p. 57.

\textsuperscript{64} Inter-American Development Bank, Operational Policy 7-65 on Indigenous Peoples, adopted 22 February 2006. Available at: http://www.iadb.org/sds/ind/site_401_e.htm.

\textsuperscript{65} Id. at 8.

\textsuperscript{66} Id. at 5.
demonstrate a stronger commitment to ensure that their policies are complied with (by their own staff and by borrowers or clients) if indigenous peoples’ rights are to be respected in fact.

Finally, it is not strictly necessary that IFI policies explicitly refer to ‘human rights’ or to specific norms – they can and should, for instance, translate these norms into operational policy language suited to the IFIs’ activities. It is nonetheless important that the IFIs explicitly acknowledge that indigenous peoples and others are rights-holders and that their rights and respect for their rights are a valid, if not indispensable, part of the development process, and the most obvious place to do so is in their operating policies. The following section looks at whether the IFIs have translated FPIC into the operational language contained in their policies.

III. IFI Policies and the Right to Free, Prior and Informed Consent

FPIC has been highlighted by indigenous peoples as a fundamental element of the exercise of their right to self-determination; as stated before the UN General Assembly, “Free, prior and informed consent’ is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.” FPIC means the consensus or consent of indigenous peoples determined in accordance with their customary laws and practices. In some cases, indigenous peoples may choose to express their consent through procedures and institutions that are not formally or entirely based on customary law and practice, such as statutory councils or tribal governments. Regardless of the nature of the process, the affected indigenous people(s) retain the right to refuse consent or to withhold consent until certain conditions are met. Consent must be obtained without coercion, prior to the approval of permits and commencement of activities, and after the project proponent’s full disclosure of the intent and scope of the activity in a language and process understood and accepted by the affected indigenous peoples.

The UNDRIP explicitly affirms FPIC in three provisions. Article 10 provides in part that “No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation....” Article 19 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, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Last, but not least, Article 32(2) 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.”

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These provisions of the UNDRIP in most respects restate the jurisprudence of the UN Committee on the Elimination of Racial Discrimination (“CERD”), the UN expert body that oversees the convention of the same name (it has 173 state parties as of April 2008). CERD emphasizes indigenous peoples’ right, effectuated through their own freely identified representatives or institutions, to give their informed consent, in general and in connection with specific activities, including: mining, oil and gas operations; logging; the establishment of protected areas; dams; agro-industrial plantations; resettlement; compulsory takings; and other decisions affecting the status of land rights. For example, in 2003, CERD stated with regard to exploitation of subsoil resources in indigenous territories “that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured.”

FPIC is also in principle required pursuant to the right to self-determination as set forth in common article 1 of the International Covenants on Human Rights as a logical corollary of indigenous peoples’ right to freely determine their political status,

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See for instance Letter to the Permanent Mission of the Philippines, Urgent Action and Early Warning Procedure, 24 August 2007, at para. 2. Available at: http://www.ohchr.org/english/bodies/cerd/docs/philippines_letter.pdf (expressing concern about alleged manipulation of the right to consent related to a government agency’s “creation of a body with no status in indigenous structure and not deemed representative” by the affected people).

*Inter alia, General Recommendation XXIII on Indigenous Peoples, adopted by the Committee on the Elimination of Racial Discrimination at its 51st session, 18 August 1997, at para. 4(d) (explaining that “no decisions directly relating to their rights and interests are taken without their informed consent”); Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending that Australia “take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII”).

*Inter alia, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana “seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities”); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 19; and Suriname, 18/08/2005, Decision 1(67), CERD/C/DEC/SUR/4, para. 3

*Inter alia, Cambodia, 31/03/98, CERD/C/304/Add.54, at para. 13 and 19 (observing that the “rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations” and recommending that Cambodia “ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent”).


*Inter alia, India, 05/05/2007, CERD/C/IND/CO/19, at para. 19 (stating that the India “should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities”).

*Inter alia, Indonesia, 03/07/2007, CERD/C/IND/CO/9, at para. 17 (recommending that Indonesia “ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan”); and Cambodia, 31/03/98, CERD/C/304/Add.54, para. 13 and 19

*Inter alia, India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (stating that the “State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation…”); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12 (recommending that the state “study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned”). See, also, Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 18.

Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 17 (recommending that Guyana “confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent…”).

Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending “that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land”); and United States of America, 14/08/2001, A/56/18, paras. 380-407, at para. 400 (concerning “plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples”).

*Ecuador, 21/03/2003, CERD/C/62/CO/2, at para. 16
freely pursue their economic, social and cultural development, and freely dispose of their natural wealth and resources. In this respect, the Human Rights Committee has "stress[ed] the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them...." 80 Similarly, the Committee on Economic, Social and Cultural Rights has noted "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem." 81 Its corresponding recommendation "urges the State party to consult and seek the consent of the indigenous peoples concerned...." 82

In line with the UN human rights treaty bodies, the Inter-American Commission on Human Rights ("IACHR") has consistently held that FPIC is required in relation to activities that affect indigenous peoples' traditional territories. As a general principle, it has observed that Inter-American human rights law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation." 83

Similarly, in the Awas Tingni case, the IACHR held that Nicaragua was responsible for violations of the right to property by granting a logging concession "on the Awas Tingni lands, without the consent of the Awas Tingni Community." 84 In the Maya Indigenous Communities case, it stated that the obligation to obtain indigenous peoples' consent is "applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories." 85 In its March 2006 decision in Twelve Saramaka Clans, the IACHR stated unambiguously that "in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law." 86 As early as 1984, the IACHR found that the "preponderant doctrine" holds that the principle of consent is of general application to cases involving relocation of indigenous peoples. 87

The Inter-American Court of Human Rights ("the Court") has also developed jurisprudence on FPIC. Judgments of the Court are binding on respondent states and may be executed in domestic courts. 88 In its 2007 judgment in Saramaka People v. Suriname, the Court held that indigenous and tribal peoples hold the right to self-determination, by virtue of which they may “freely pursue their economic, social and

81 Id. at para. 33. See, also, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador: 07/06/2004. UN Doc. E/C.12/1/Add.100, para. 35.
84 Report No. 40/04, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize), 12 October 2004, at para. 142 (footnotes omitted).
87 Article 67 of the American Convention on Human Rights provides that "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."
cultural development” and “freely dispose of their natural wealth and resources.”

The Court ruled that this right cannot be restricted when interpreting the property rights guaranteed under Article 21 of the American Convention on Human Rights. As a consequence, indigenous peoples have the right “to freely determine and enjoy their own social, cultural and economic development,” which in turn requires that recognition of their territorial rights must include recognition of “their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system.”

Having ruled that the Saramaka people has protected property rights with regard to its traditionally-owned territory and the traditionally-used natural resources within and under that territory, the Court examines if the state may restrict those rights pursuant to Article 21(1) of the American Convention, which provides that the “law may subordinate use and enjoyment [of property] to the interest of society.” On the basis of this provision, the Court has previously held that a state may restrict the use and enjoyment of the right to property only “where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.”

The same criteria apply to restrictions of indigenous peoples’ property rights. However, in the case of indigenous peoples, the Court holds that “another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.” Discussing the granting of logging and mining concessions, the Court explains that for the state to guarantee that such restrictions do not amount to “a denial of [the Saramaka people’s] survival as a tribal people,” the state must comply with three safeguards:

1) it must ensure their effective participation with regard to any development or investment project within their territory. A ‘development or investment’ is defined by the Court as “any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.”

2) the Saramaka people must receive a reasonable benefit from the project and;

3) independent environmental and social impact assessments must be undertaken.

In its concluding remarks, the Court adds a fourth element: a duty to implement “adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional Saramaka lands and natural resources...” This last requirement is highly important, although the Court did not explain what constitutes a ‘significant effect’ in this context. According to the Court these “safeguards are intended to preserve, protect and guarantee the special relationship

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90 Id. at para. 95.
91 Id. at para. 194.
92 Id. at para. 122.
93 Id. para. 129.
94 Id. at para. 129.
95 Id. at para. 128 (also stating that “under Article 21 of the Convention, the State may restrict the Saramakas’ right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people”).
96 Id. at para. 129, note 127.
97 Id. at para. 129.
98 Id. at para. 158.
99 In finding a violation, one of the criteria identified by the Court was that Suriname “failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities.” Id. at para. 154.
that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.” 100 In August 2008, the Court interpreted its judgment in *Saramaka People* at Suriname’s request, and explained that the language ‘survival as a tribal people’

must be understood as the ability of the Saramaka to “preserve, protect and guarantee the special relationship that they have with their territory”, so that “they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected.” That is, the term survival in this context signifies much more than physical survival.101

The majority of the Court’s analysis concerns the effective participation requirement. The Court explains that effective participation includes a duty to actively consult with affected communities, “according to their customs and traditions,” in relation to any proposed development or investment. In its August 2008 interpretation judgment, the Court adds that, "By declaring that the consultation must take place 'in conformity with their customs and tradition', the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal." 102 The same would also apply to obtaining FPIC given that the language is identical. It continues that “the Saramaka must inform the State which person or group of persons will represent them in each ... consultation process. The State must then consult with those Saramaka representatives to comply with the Court’s orders. Once such consultation has taken place, the Saramaka people will inform the State of the decisions taken, as well as their basis.” 103

The Court further explains that the duty to consult includes:

- a duty on the State and those authorized by it to accept and disseminate information;
- constant communication between the parties;
- consultations must be undertaken in good faith, through culturally appropriate procedures and with the objective of reaching an agreement;
- that indigenous peoples must be consulted, “in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community.... Early notice provides time for internal discussion within communities and for proper feedback to the State;”
- the state must ensure that indigenous peoples are aware of possible risks, including environmental and health risks, so that the proposed project is accepted knowingly and voluntarily; and,
- finally, consultation should take account of indigenous peoples’ traditional methods of decision-making.104

Some developments or investments however require a higher degree of participation than that described above. For these projects, the state has a duty not only to consult

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100 *Id.* at para. 129. The term ‘survival’ should not be read restrictively so as to exclude, for instance, indigenous and tribal peoples’ right to continue to benefit from their traditional economy and to be secure in their means of subsistence. In this respect, see *id.* para. 130 and the jurisprudence cited in the attendant footnotes.


102 *Id.* at para. 18.

103 *Id.* at para. 19.

104 *Saramaka People v. Suriname*, at para. 133.
with indigenous peoples, “but also to obtain their free, prior, and informed consent, according to their customs and tradition.” The developments or investments requiring FPIC are characterized as “large-scale” projects that may have a major or significant impact within indigenous peoples’ territories. The Court observes that this is consistent with the jurisprudence of other international human rights bodies which require FPIC in connection with projects that may have “a significant impact on the right of use and enjoyment of ancestral territories.” The Court cited Article 32(2) of the UNDRIP to support its ruling, and ultimately ordered that Suriname shall adopt legislative or other mechanisms “to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory.”

In its 2008 interpretation judgment, the Court explains again that FPIC is required in certain circumstances, stating that depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the state has a duty not only to consult with the Saramaka’s, but also to obtain their free, prior and informed consent in accordance with their customs and traditions.

Last but not least, the Court ordered that until the regularization of Saramaka territory has been completed, Suriname must abstain from acts which might “affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people.” The Court reiterated this order in its 2008 interpretation judgment and explained that it was also applicable in relation to “any other indigenous or tribal territory as well.” Similar orders were made in the Moiwana Village and Awas Tingni cases, and have also been made in the Court’s provisional measures jurisprudence. This is a much higher standard than the ‘large-scale project with major or significant impact’ test applied by the Court with respect to restrictions on indigenous property rights. Restrictions to property rights presuppose that those rights are first legally recognized and secured. Where these rights have yet to be secured, states, acting with or without IFI support, are enjoined from acting to a much higher degree, at least unless they obtain FPIC.

105 Id. at para. 134 (and at para. 137, explaining that consent is required for “major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory”). The Court has also required indigenous peoples’ consent in relation to delimitation, demarcation and titling of traditional lands in the Moiwana Village case. Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 210. In Yakye Axa, when traditional lands cannot be returned to indigenous peoples, the Court required that indigenous peoples’ consent be obtained with regard to the provision of compensation or alternative lands and “in accordance with their own consultation processes, values, uses and customary law.” Yakye Axa Indigenous Community v. Paraguay, 17 June 2005. Series C No. 125, para. 151 and; Sawhoyamaxa Indigenous Community v. Paraguay, 29 March 2006. Series C No. 146, para. 135.

106 Id.

107 Id. at para. 136.

108 Id. at para. 131.

109 Id. at para. 214(8).

110 Interpretation Judgment, at para. 17.

111 Saramaka People v. Suriname, at para. 194(a), 214(5).

112 Interpretation Judgment, at para. 54-55.

113 Moiwana Village Case, supra note 105, at para 211; and Mayagna (Sumo) Awas Tingni Community Case, 31 August, 2001. Series C No 79, para 164.

The Court is the first human rights body to make a distinction between situations where FPIC is required and those in which a lower standard of participation is required. CERD, for instance, makes no such distinction, requiring that “no decisions directly relating to [indigenous peoples’] rights and interests are taken without their informed consent.” As we shall see below, such distinctions are also employed by IFIs in their policies on indigenous peoples, although only explicitly in connection with FPIC in one instance. Similarly, the extent to which IFI policies on indigenous peoples apply is largely determined by the significance of impacts identified during screening and/or environmental and social impact assessments and, in some policies, different criteria are applied to ‘high risk’ projects.

How do the IFI policies measure up against the FPIC standard? Looking at the ADB, World Bank, IFC, EBRD, and the IDB, we see that only the EBRD explicitly acknowledges and requires that FPIC be obtained, and then only for ‘high risk projects’. The IDB and IFC both require some form of ‘agreement’ for some, but not all projects. The World Bank and ADB require ‘free, prior and informed consultation leading to broad community support’, a standard that the World Bank concedes is not equivalent to FPIC. While not discussed further herein, it should be noted that major donor institutions such as the UNDP, IFAD, the European Commission, and a number of large bilateral donors also require FPIC in their extant or draft policies on indigenous peoples.

The IFC’s PS7 includes the objective of fostering “good faith negotiation with and informed participation of Indigenous Peoples when projects are to be located on traditional or customary lands under use by the Indigenous Peoples.” PS7 consequently requires that IFC clients will enter into and successfully conclude good faith negotiations with indigenous peoples, but only for ‘high risk’ projects (see below). All IFC projects not falling into the high risk category require: consultation, impact assessment, benefit sharing, mitigation and avoidance measures, and compensation for adverse impacts, and, where there will be “adverse impacts,” verified ‘broad community support’ for the project. The existence of this ‘support’ is to be verified exclusively by the IFC.

According to the IFC, “Broad community support is a collection of expressions by the affected communities, through individuals and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project.” The IFC’s 2007 Environment and Social Review Procedure (“ESRP”), an internal staff manual setting out operating procedures, including compliance with PS7, provides some additional information about broad community support. Generally, the ESRP requires that staff determine the existence of broad community support by assessing two issues: 1) has the client conducted free, prior and informed consultation, and enabled the informed participation of affected communities; and 2) what is the level of support and dissent related to the project among the affected communities for the project?

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116 The United Nations Development Programme’s official policy on indigenous peoples provides that the “UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them.” UNDP and Indigenous Peoples: A Policy of Engagement, paras. 26-30 (2001). See also European Union, Council of Ministers Resolution, Indigenous Peoples within the framework of the development cooperation of the Community and Member States (1998) (providing that “indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas.”
118 Guidance Notes to Performance Standard 7, Guidance Note 19.
120 Id. p. 33-4.
On the second point, the ESRP explains that this will be assessed based on “an accumulation of ‘material considerations,’” which includes formal and informal expressions of support or objection to the project.\(^\text{121}\) The material considerations include minutes of meetings of elected local government, village councils, or council of elders; written agreements; client records, photographs, media reports, personal letters or third party accounts regarding support for or opposition to the project; and, somewhat bizarrely given voting behaviour, the results of local and community elections “won on popular mandates, with explicit reference in the manifesto and campaigning messages of the winning parties to a particular opinion about the project.”\(^\text{122}\) If nothing else, this convoluted assessment provides the IFC with considerable latitude when verifying if broad community support is present.

As noted above, PS7 requires that IFC clients will enter into and successfully conclude good faith negotiations with indigenous peoples for ‘high risk’ projects. The ‘high risk’ category is defined broadly by the IFC as projects:

- that may be on, or commercially develop natural resources within, indigenous peoples’ “traditional or customary lands under use, 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...”\(^\text{123}\)
- involving physical relocation;\(^\text{124}\)
- involving ‘economic displacement’ due to land acquisition or compulsory takings for project purposes;\(^\text{125}\) and,
- containing commercial use of cultural resources, or traditional knowledge, innovations and practices.\(^\text{126}\)

While there is no definition of the term ‘good faith negotiation’, the (non-binding) Guidance Notes explain that, at a minimum, it involves:

(i) willingness to engage in a process and availability to meet at reasonable times and frequency; (ii) provision of information necessary for informed negotiation; (iii) exploration of key issues of importance; (iv) mutually acceptable procedures for the negotiation; (v) willingness to change initial position and modify offers where possible; and (vi) provision for sufficient time for decision making.\(^\text{127}\)

There is similarly no definition of a ‘successful outcome’ of the good faith negotiations in PS7. However, it would be perverse to interpret the successful outcome of a negotiation to be anything other than some form of agreement. This is reflected in the Guidance Notes, which provide that documentation indicating a successful outcome includes: “a memorandum of understanding, a letter of intent, a joint statement of principles, and written agreements.”\(^\text{128}\) Therefore, while the IFC’s standards do not use the term FPIC or some variant thereof, in the case of broadly

\(^\text{121}\) Id. at p. 38.
\(^\text{122}\) Id. at 38-9.
\(^\text{123}\) Performance Standard 7, para. 13. Guidance Note 23 explains that “Customary use of land and resources refers to patterns of long-standing community land and resource use in accordance with Indigenous Peoples’ customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State. Cultural, ceremonial and spiritual uses are an integral part of Indigenous Peoples’ relationships to their lands and resources, are embedded within their unique knowledge and belief systems, and are key to their cultural integrity. Such uses may be intermittent, may take place in areas distant from population centers, and may not be site specific. Any potential adverse impacts on such use must be documented and addressed within the context of these belief systems.”
\(^\text{124}\) Id. para. 14 and Performance Standard 5, para. 19.
\(^\text{125}\) Performance Standard 5, para. 21. According to PS5, para. 1, ‘economic displacement’ includes “loss of assets or access to assets that leads to loss of income sources or means of livelihood ... as a result of project-related land acquisition.”
\(^\text{126}\) Performance Standard 7, para. 15.
\(^\text{127}\) Guidance Notes to Performance Standard 7, Guidance Note 25.
\(^\text{128}\) Id.
defined ‘high risk projects’, indigenous peoples’ agreement or consent is nonetheless a prerequisite for financing from the IFC. This standard has also been accepted by the so-called ‘Equator Principles’ banks in relation to any project costing over US$10 million.129 These large commercial banks cumulatively financed US$125 billion of direct foreign investment in 2005, around 80 percent of global private sector project finance.

The EBRD policy employs the same scheme as the IFC’s PS7, including the distinction between ‘high risk’ or ‘special requirement’ projects and other projects, which are defined in the same way as PS7. However, in the EBRD policy, the client is explicitly required to “obtain the prior consent” of indigenous peoples in addition to good faith negotiation for high risk projects.130 ‘Consent’ is defined by the EBRD as “the process whereby the affected community of indigenous peoples, arrive at a decision, in accordance with their cultural traditions, customs and practices, as to whether to become involved in the proposed project.”131

For all projects that may affect indigenous peoples, the IDB’s OP 7-65 requires: participatory impact assessments, consultation and informed participation, benefit sharing, mitigation and avoidance measures, and compensation for adverse impacts. For projects with “significant potential adverse impacts that carry a high degree of risk to the physical, cultural or territorial integrity of the affected indigenous peoples, the Bank will further require and verify that the project proponent demonstrates that it has, through a good faith negotiation process obtained agreements regarding the operation and the measures to address the adverse impacts.....”132 These agreements must be submitted to the IDB’s Board as part of its consideration of the approval of the project. Indigenous peoples’ “consent” is explicitly required by the IDB in relation to resettlement.133 Further, as noted above, inter-American and other human rights jurisprudence with regard to FPIC is incorporated by reference into the OP 7-65’s substantive and procedural requirements.

The World Bank and ADB policies require participatory impact assessment, benefit sharing, and mitigation and avoidance measures, and compensation for all projects that may adversely affect indigenous peoples. They additionally require “a process of free, prior and informed consultation134 with the affected Indigenous Peoples’ Communities at each stage of the project, and particularly during project preparation in order to fully identify their views and to ascertain their broad community support to the project....”135 These IFIs “will provide project financing only where free, prior and informed consultation results in broad community support to the project by the affected Indigenous Peoples.”136 The term ‘broad community support’ is not defined and the only indication of how to interpret it is found in Bank Procedures 4.10, a document that complements OP 4.10 and contains procedural instructions for World Bank staff. This instrument states that Bank staff shall “verify that the borrower has

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129 See http://www.equator-principles.com
130 EBRD, FR7, at para. 31 (see also para. 33 providing that “The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation.”
131 Id.
132 Inter-American Development Bank, Operational Policy 7-65 on Indigenous Peoples, adopted 22 February 2006, sec. IV.B.4.4.a.iii (the Borrower must provide, “no later than by the date of consideration of the operation by the Board”, evidence of the agreements reached with the affected people. See also sec. V.5.3.c and IV.B.4.4.e.
133 Inter-American Development Bank, Operational Policy 710 on Involuntary Resettlement (1998), Section IV, para. 4.
134 OP 4.10, para. 1, at note 4, defining ‘free, prior and informed consultation’ as “a culturally-appropriate and collective decision-making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a veto right for individuals or groups.”
135 Id. at para. 6.
136 Id. at para. 1.
gained the broad support from representatives of major sections of the community required under the policy.”

As noted above, World Bank lawyers have concluded that OP 4.10 does not incorporate FPIC and is therefore inconsistent with the UNDRIP on this point. Indeed, they would observe that the World Bank’s Board of Executive Directors rejected FPIC in relation to the recommendations of both the World Commission on Dams and the Extractive Industries Review and, instead, decided that the standard to be adopted and applied will be ‘free, prior and informed consultation resulting in broad community support’. Some of the Executive Directors cited a legal opinion on FPIC written by the WBG’s General Counsel to justify their opposition. This opinion maintains that recognition of FPIC by the WBG would contravene the Bank’s Articles of Agreement as this would give “the equivalent of a veto right to parties other than those specified in the countries’ legal framework. This would be inconsistent with the Bank Group’s governance structure, which establishes the critical role of member governments in Bank Group financing.”

The logic employed here is obscure given that the WBG’s member states are all represented on its Board of Executive Directors and the Board, subject to the rules of international treaty law, has ultimate authority to interpret the Articles of Agreement. Also, as with any other policy statement adopted by the WBG, the member governments would be involved in determining the conditions of WBG financing through their participation in the Board, which typically reaches decisions by consensus. Moreover, the WBG has long required safeguard measures in policies that may not be included in national laws (OD 4.20’s requirement of informed participation, for example). Similarly, OP 4.10’s (elusive and opaque) ‘broad community support’ requirement is certainly not a common principle of national legislation, and the World Bank states that it will not finance projects without such support.

To sum up, while good faith negotiation resulting in some form of agreement could be tantamount to FPIC in practice, it is important to consider that the latter is an iterative process that demands full respect for indigenous peoples’ culture and traditions, particularly as related to decision-making processes and reaching consensus. These decision-making processes are frequently diffused and extended.

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140 Legal Note on Free, Prior and Informed Consultation, Senior Vice President and General Counsel, World Bank, General Counsel IFC and Vice President and General Counsel MIGA (unpublished World Bank doc.), 2 August 2004, para. 3 (footnote omitted). The omitted citation states that the “primary role of member governments in Bank Group operations is reflected, for instance, in the requirement for Bank lending to or with the guarantee of the member (IBRD Article III, Section 4) and in the specific prohibition on IDA financing or IFC financing if the member objects (IDA, Article V, Section 1(c); IFC Article III, Section 3(jj)).”

141 International Bank for Reconstruction and Development, Articles of Agreement, art. 9 (describing the process of review for any question of interpretation of the provisions of the Agreement). See, also, J. Head, For Richer or for Poorer: Assessing the Criticisms Directed at Multilateral Development Banks, 52 U. KAN. L. REV. 241, at 271 (2004) (stating that “the charters place with the MDBs’ own governing bodies the complete authority to decide questions of charter interpretation or application”). For the views of two former General Counsels, see, I. Shihata, Human Rights, Development, and International Financial Institutions, 8 AM. U. INT’L L. & POLY 27, 29-30 (1992) and; K-Y. Tung, Shaping Globalization: The Role of Human Rights – Comment on the Grotius Lecture by Mary Robinson, 19 AM. U. INT’L L. REV. 27, 41-2 (2003), at 34 (stating “It should be noted that while the General Counsel’s opinions carry enormous weight, the ultimate authority in interpreting the Articles of Agreement rests with the Bank’s Executive Directors, of whom there are twenty-four representing the 184 member countries”).
Formal meetings are generally only a small part of the process and such meetings are not normally the locus for decision-making. For FPIC to be validly obtained there must be a demonstrable understanding of the project, its risks and potential benefits, among most affected community members. FPIC is thus in part about attempting to bridge a culture-divide between indigenous peoples and states, IFIs and the private sector, and about fostering meaningful and mutually beneficial relationships in addition to serving a protective function. FPIC is not checking boxes in an administrative process or obtaining a signed piece of paper, it is much more than that. It is, as IFAD acknowledges in the quote that begins this chapter, about actively listening to indigenous peoples and, more so, actively respecting their perspectives, values and decisions.

**Concluding Remarks**

A discrete body of human rights norms in international law adheres to indigenous peoples as self-determining collectivities. These rights are recognized and guaranteed by a number of universal and regional human rights instruments, both those specifically addressing indigenous peoples and those of general application. Many of these rights have been codified in the UNDRIP, which is a primary reference point for comprehending the nature and scope of indigenous peoples’ rights. Because the UNDRIP in many respects restates existing rules of international law, it should not be discounted as merely an aspirational or ‘soft law’ instrument. The UNDRIP also calls on the IFIs to promote “respect for and full application” of its provisions as well as to “follow up the effectiveness of this Declaration.”

The UNDRIP and other international norms recognize that indigenous peoples have the right to freely determine and pursue their own development choices through their own institutions and within the framework of autonomy and self-government regimes. Indigenous peoples refer to this as ‘self-determined development’, meaning development that is based on but not limited by indigenous custom and tradition. These rights are intended to be exercised within existing states rather than through the creation of new entities. Therefore, in addition to rights that define the nature and extent of autonomy and self-government regimes, there is a set of rights that defines relationships between indigenous peoples and states. FPIC is a governing principle in these relationships and stipulates that consent is the basis for the vast majority of indigenous-state interactions.

Indigenous peoples insist that the IFIs must respect their rights, both in terms of their policies and their activities. As the IFIs primarily fund activities implemented by states or invest in private sector operations authorized by those states, this includes respecting FPIC and the relationship that it in principle establishes between indigenous peoples, the state and private sector entities. While there are discernable improvements in recent years, the response of the IFIs remains mixed and, with the exception of the IDB, none of the IFIs has convincingly addressed their role in relation to human rights law. In the case of the IDB, it remains to be seen exactly how it will understand and implement its new found appreciation for human rights.

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143 UNDRIP, Art. 42.

or what lessons may be drawn from its experience. This failure to account for human rights norms stands in stark contrast to the manner in which the IFIs have regarded international environmental law, including through policy-based conditions relating to compliance with international environmental instruments.\textsuperscript{145} It also contrasts with generally accepted understandings about the role of human rights as a fundamental condition for achieving sustainable development.

This is not to say that IFI policies are entirely inconsistent with indigenous peoples’ rights; they are not, but at the same time significant deficiencies at a minimum raise serious questions about their ultimate effectiveness as safeguards. The World Bank’s Extractive Industries Review raised this issue and concluded that, “[t]o be legitimate and effective, a Safeguard Policy must be seen by the intended beneficiaries to provide adequate safeguards and must be consistent with their internationally guaranteed rights. This is presently not the case [with OP 4.10].”\textsuperscript{146} One major discrepancy is the manner in which the IFIs have addressed FPIC.

Only one of the IFIs reviewed here, the EBRD, has explicitly adopted FPIC into its policy on indigenous peoples. The IFC and IDB both require some form of agreement with indigenous peoples for high risk projects, which include a large percentage of projects that may affect indigenous peoples. That said, there is little extant evidence from actual projects to verify if this is the case in practice or whether the IFC and IDB are employing a restrictive or inconsistent interpretation. Obtaining agreements through negotiation is also not necessarily the same as obtaining FPIC. The World Bank and the ADB have adopted a standard that is elusive conceptually and purposely is not equivalent to FPIC. In my opinion, this ‘broad community support’ standard is simply not amendable to coherent application in practice and is likely to foment serious community divisions and conflicts. This is also the standard that the IFC and EBRD apply to non-high risk projects.

In the Americas at present, IFI and state decisions may be subject to review in cases brought before the Inter-American Court of Human Rights, including on the grounds of failing to secure FPIC in the case of large-scale projects with a significant impact. The Court has the authority to order that states refrain from violative activities and compensate indigenous peoples for material and immaterial damages. In the future, this may also be the case in the human rights courts of the African and European systems, and perhaps in the Asia Pacific region should discussions within ASEAN about establishing a human rights body bear fruit. Failure to respect indigenous peoples’ rights may therefore translate into legal, commercial and other risks to IFI investments in addition to reputation risks, especially in private sector operations. Indigenous peoples will continue to insist that respect for their rights is not simply a discretionary option for the IFIs or a function of risk, but an obligation that is incumbent on all subjects of international law.
