



INDIAN LAW
RESOURCE CENTER

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

By
Leonardo A. Crippa and Mariel Murray

February 2011

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) 547-2800 | fax (202) 547-2803

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

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

By Leonardo A. Crippa* and Mariel Murray**
February 2011

Table of Contents

I INTRODUCTION.....	1
II SUMMARY OF PRINCIPAL RECOMMENDATIONS	2
III GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT.....	3
III.1 Incorporating the Guide into the Policy on Environmental and Social Sustainability.....	3
III.2 Incorporating the Guide into the Performance Standards 1, 5, 6, 7 and 8	5
IV PERFORMANCE STANDARDS.....	6
IV.1 PS 5 Land Acquisition and Involuntary Resettlement.....	6
IV.2 PS 6 Biodiversity Conservation and Sustainable Natural Resource Management	8
IV.3 PS 7 Indigenous Peoples	10
IV.4 PS 8 Cultural Heritage.....	12
V CONCLUSION.....	15

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

** Expected JD 2012, William and Mary School of Law, United States; Legal Intern, Indian Law Resource Center.

ACRONYMS AND TERMS

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

I | INTRODUCTION

1. The International Finance Corporation (IFC) is carrying out Phase III of consultations concerning its Sustainability Framework, including the Policy on Social and Environmental Sustainability (Policy), the Performance Standards (PS), and the Policy on Disclosure of Information. According to the second draft of Policy and PS released in December 2010, the IFC adopted the Indian Law Resource Center's (Center) recommendations regarding free, prior and informed consent and benefit sharing with indigenous communities. These issues are now policy requirements for IFC clients. However, IFC did not consider the Center's recommendations on human rights issues, indigenous peoples in voluntary isolation, protected areas on indigenous lands, indigenous lands under traditional possession and indigenous peoples' sacred sites. This paper briefly reflects on the adopted recommendations and further elaborates the ignored ones followed by suggestions for language changes in bold.

2. In July 2010, the Center offered *Comments and Recommendations on the IFC's proposed Policy on Social and Environmental Sustainability and Performance Standards*. These Comments addressed indigenous peoples' particular human rights concerns from a legal perspective and reflected 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 It should be noted that following the United States endorsement of UNDRIP, it is a consensus instrument in the world community. In particular, our submission focused on the proposed Policy and PS 1, 5, 6, 7 and 8. Our main points and recommendations were focused on specific issues and offered detailed analysis and concrete suggestions for language changes.

3. We commend the IFC for implementing our Recommendations V-VII concerning indigenous communities' free, prior and informed consent (FPIC). Under the second proposed PS 7, FPIC is now required when a project (1) takes place in their lands or involves their 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. Under PS 7, FPIC is now required with regard to those projects that may result in relocation from their lands and territories. These changes were essential in making the PS conform to the UNDRIP standards.

4. We also commend the IFC for implementing our Recommendation VIII regarding benefit sharing with indigenous communities. This Recommendation urged the IFC's proposed PS 6 and 7 to require benefit sharing with indigenous communities when a project implicates the development/commercialization of their natural resources, and not limit benefit sharing to cultural resources. Although benefit sharing was not actually mentioned in PS 6, it was mentioned in PS 7. Thus, although many of our Recommendations could have been adopted in PS 5 or 6, it was most essential for them to be adopted in PS 7, and in many respects they were.

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)

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 Human Rights Impact Assessment and Management 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 proposed PS 5 should include the governing principles of international law regarding forced relocation of indigenous communities. They are: (1) indigenous communities shall not be forcibly relocated from their lands; and (2) if relocated with their free, prior and informed consent, the indigenous communities shall be compensated in the form of lands, territories and resources equal in quality, size and legal status.
- V. The proposed PS 6 should address the question of indigenous peoples living in areas with high biodiversity values. PS 6 should incorporate the following safeguards: (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.
- VI. The proposed PS 7 should also address the question of indigenous lands under traditional possession. In this regard, 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.
- VII. The proposed PS 8 should expressly acknowledge the importance of and include indigenous peoples’ sacred sites as 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.

III | GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT

1. The IFC has clearly acknowledged that the private sector, including its clients, has a responsibility to prevent and respect human rights.² As a result, the IFC should have policy requirements 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.

2. 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.

3. 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, 2010.³

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

4. It is generally accepted that the IFC must operate in a manner that is consistent with the human rights obligations of its member states. The IFC is an international intergovernmental organization, whose member states have legal obligations to respect human rights, and it should act consistently with those obligations by ensuring that IFC investments do not violate human rights.⁴ 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,"⁵ 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.

² 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)

³ 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>

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 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.

5. 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,⁶ 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.

6. 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.

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.**

7. 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.

11. 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.

18. 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.

⁶ 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)

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

7. 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 the current IFC Sustainability Framework, may be mitigated, compensated, offset, or reduced.⁷

8. 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.

9. 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.

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 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.

⁷ 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.

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

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 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

8. The client will identify through a social and environmental risks and impacts identification process all communities of Indigenous Peoples who may be affected by the project within the project's area of influence, as well as the nature and degree of the expected direct, 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

10. 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

11. 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 forcibly relocated from their lands and territories; 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

12. Although the IFC added avoiding forced eviction as an objective in its revised version of PS 5, it also noted that forced evictions “are lawful when carried out in accordance with the law and in conformity with the provisions of this Performance standard.” Thus, the proposed PS 5 fails to reflect the governing principle of international law 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.” The UN has repeatedly held that forced relocation is unacceptable. For example, the UN Committee on Economic, Social and Cultural Rights held that “instances of eviction are *prima facie* incompatible with the requirements of the [International Covenant on Civil and Political Rights], and can only be justified in the *most exceptional circumstances*, and in accordance with the relevant principles of international law.”⁸ The UN Commission on Human Rights has also stated that forced evictions are gross violations of human rights (in particular the right to adequate housing).⁹ Finally, the UN Guiding Principles on Internal Displacement also prohibits such relocation with respect to indigenous peoples.¹⁰

PS 5 Land Acquisition and **Forced Relocation**

8. 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

13. 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.

PS 5 Land Acquisition and **Forced Relocation**

⁸ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

⁹ Commission on Human Rights resolution 1993/77, UN Doc. E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28 (2004).

¹⁰ UN Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 6(2)(c).

9. When **relocation** is unavoidable, the client will offer **relocated** communities and persons 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 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 client will take possession of acquired land and related assets only after compensation has been made available and, where applicable, resettlement sites and moving allowances have been provided to the **relocated** persons in addition to compensation, where applicable. The client will also provide opportunities to **relocated** persons and communities to derive appropriate development benefits from the project.

20. If people living in the project area are required to move to another location, the client will (i) offer **relocated** persons choices among feasible resettlement options, including adequate replacement housing, ~~or~~ cash, or **land** as compensation where appropriate; and (ii) provide relocation assistance suited to the needs of each group of displaced persons, with particular attention paid to the needs of the poor and the vulnerable. New resettlement sites built for displaced persons must offer improved living conditions. The displaced persons' preferences with respect to relocating in preexisting communities and groups will be taken into consideration. Existing social and cultural institutions of the displaced persons and any host communities will be respected.

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

14. 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

15. 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,¹¹ Ecuador¹² and Brazil,¹³ among others countries, to adopt domestic laws to protect them. Likewise, the Inter-American Development Bank (IDB) adopted a safeguard to

¹¹ 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)

¹² 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)

¹³ 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)

prevent any contact with them as a consequence of a project.¹⁴ The proposed PS 6 falls short in this regard and does not even meet the above-mentioned domestic legal standards. This gap leads IFC clients to break applicable domestic laws and violate the IDB's relevant safeguard measure.

16. 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.¹⁵ This provision has been agreed upon by indigenous representatives and state officials in the OAS. Accordingly, it is an international standard developed by all the countries in the Americas. 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: Ecuador¹⁶ and Peru¹⁷ 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.

PS 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources

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

Additional requirements regarding projects in protected areas created on indigenous lands

17. 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.

¹⁴ Operational Policy on Indigenous Peoples, Inter-Amer. Development Bank (OP-765), Febr. 22, 2006, page 9.

¹⁵ 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.

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)

¹⁶ The Tagaeri and Taromenami Indigenous Peoples v. Ecuador, Inter-Amer. HR Comm., Precautionary Measures, 2006.

¹⁷ Indigenous Peoples of Mascho Piro, Yora, and Amahuaca in voluntary isolation v. Peru, Inter-Amer. HR Comm., Precautionary Measures, 2007.

18. The proposed PS 6 does not address these facts and therefore does not provide guidance for clients proposing projects in protected areas. We believe that IFC 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 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.¹⁸

PS 6 Biodiversity Conservation and Sustainable Management of Living Natural Resources

20. In circumstances where a proposed project is located within a legally protected area or an internationally designated area, the client 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, Affected 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 area.

IV.3 | PS 7 Indigenous Peoples

19. 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 there are no delineated "special requirements" regarding lands under indigenous communities' possession.

"Special requirements" for lands under indigenous communities' possession

20. 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.

21. 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 may be comparable to

¹⁸ See generally International Labor Organization, Convention 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Part II.

“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)¹⁹ 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).²⁰ Many countries, including Argentina²¹ and Paraguay,²² have created land-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)²³ 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.

22. International law recognizes the collective property rights of indigenous peoples to the lands and territories they traditionally possess. For instance, the UNDRIP²⁴ and the ILO Convention 169²⁵ 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.”²⁶ Accordingly, and more recently in the *Endorois case* (2009), 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.”²⁷

¹⁹ 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)

²⁰ 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)

²¹ For example, in 1996 Argentina created the Programa de Regularización y Adjudicación de Tierras a la Población Aborígen 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.

²² 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 Sawhoyamaxa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 146), Mar. 29, 2006. See also *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter. Amer. H.R. Court (Series C No. 125), June 17, 2005.

²³ See Argentina’s Civil Code Art. 2352 (stating that occupancy exists when a person has a thing, while recognizing someone else’s ownership)

²⁴ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, Art. 26.

²⁵ International Labor Organization Convention 169, *supra* note 18, Art. 14.

²⁶ *Case of the Awás Tingni (Sumo) Community v. Nicaragua*, Inter-Amer. HR Court (Serie C No. 79), para. 151.

²⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra* note 29, para. 209.

PS 7 Indigenous Peoples

Informed Consultation and Participation

10. The client will establish ~~a relationship of informed consultation~~ **free, prior and informed consent** ~~of~~ with the Affected Communities of Indigenous Peoples from as early as possible in the project planning and maintain ~~it~~ **a relationship** throughout the project life-cycle. The process of engagement with the communities of Indigenous Peoples will be culturally appropriate and commensurate with the risks and potential impacts to the Indigenous Peoples. In particular, the process will:

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

17. 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.

18. If the client proposes to locate the project on, or commercially develop natural resources on lands traditionally owned by, or **under possession** of Indigenous Peoples, and adverse impacts can be expected, the client will respect their **rights and** use by taking the following steps:

IV.3 | PS 8 Cultural Heritage

23. 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 Bank²⁸ and UNESCO.²⁹ Moreover, the PS 8 would be in accordance with relevant international human rights law principles, arbitration tribunals' recent decisions and the United States law.

24. 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

²⁸ 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)

²⁹ 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); *see also* Convention concerning the Protection of the World Cultural Property and National Heritage, General Conference of the U.N. Educational, Scientific, and Cultural Organization, 17th Sess., Preamble, art. 5 (Nov. 16, 1972) (recognizing that the destruction of cultural sites impoverishes the heritage of the nations of the world and establishing the state duty to adopt protective measures).

indigenous peoples' ownership, access to 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."³⁰

25. 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. Apart from the UNDRIP, other international instruments impose these state obligations, such as: the ILO Convention 169;³¹ the International Covenant on Civil and Political Rights (ICCPR);³² and the Convention concerning the Protection of the World Cultural and Natural Heritage,³³ among others. In commenting on the ICCPR, the UN Human Rights Committee reinforced that minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture [which] may consist in a way of life which is closely associated with territory and use of its resources. *This may particularly be true of members of indigenous communities constituting a minority*" (emphasis added).³⁴

26. Many international human rights bodies have also recognized state obligations to protect sacred sites. The African Commission and the Inter-American Court have expressly held that the state should provide special measures to members of a tribal community to guarantee "the full exercise of their rights." ³⁵ 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, and protection of, their religious and cultural heritage essential to their group identity."³⁶ In that case, the African Commission recommended that Kenya grant the Endorois community the right to "unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites."³⁷ In the *Saramaka case*, the Inter-American Court on Human Rights ordered

³⁰ 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.

³¹ International Labor Organization, Convention 169, *supra* note 18.

³² International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 27/999 U.N.T.S. 171 (entered into force March. 23, 1976).

³³ Convention concerning the Protection of the World Cultural Property and National Heritage, General Conference of the U.N. Educational, Scientific, and Cultural Organization, 17th Sess., Preamble, art. 5 (Nov. 16, 1972).

³⁴ UNHRC, *General Comment No. 23: The rights of minorities* (Art. 27) (Fiftieth session, 1994), U.N. Doc.CCPR/C/21Rev.1/Add.5, August 4, 1994, para. 1 and 3.2.

³⁵ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para. 197; Case of the Suramaka People v. Suriname, Inter-Amer. HR Court (Serie C No. 172), Nov. 28, 2007, para. 86.

³⁶ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para. 241.

³⁷ *Id.* at Recommendation 1(b).

Suriname to grant the Saramaka tribal peoples community title to land. Specifically, the court stated that prior to any development or investment project within traditional Saramaka territory, the state must “implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people.”³⁸ This was because the court recognized that the Saramaka people’s lands were an integral part of their “social, ancestral, and spiritual essence.”³⁹

27. Even arbitration tribunals have recognized the need to protect sacred sites. For example, in *Gold Ltd. v. United States of America*, the Arbitral Tribunal of the North American Free Trade Agreement held that the United States federal government and the State of California were justified in protecting a Quechan sacred site spanning over 500 square miles despite a mining company’s allegations of expropriation.⁴⁰

28. Finally, in the United States, the government has recently decided to revise its policies to better protect sacred sites. Specifically, the Forest Service Office of Tribal Relations (part of the Department of Agriculture) is attempting to revise its policy of protecting sacred sites pursuant to a July 2010 directive of the Secretary of Agriculture.⁴¹ The original policy was laid out in Executive Order 13007, but because the current administration is keenly aware of the need to protect sacred sites, it is currently conducting consultations with Indian tribes to make its policy more effective.⁴²

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, rocks, lakes and waterfalls. **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.
5. Where the client’s project site contains cultural heritage or prevents access to previously accessible cultural heritage **and sacred** sites being used by, or that has been used by, Affected Communities within living memory for long-standing cultural **and religious** purposes, the client will allow access to the cultural site or will provide an alternative access route, subject to overriding health, safety, and security considerations and to possible impacts on the cultural heritage from the project.

Critical Cultural Heritage

9. 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.**

38 Case of the Suramaka People v. Suriname, Inter-Amer. HR Court (Serie C No. 172), Nov. 28, 2007, para. 82

39 *Id.*

40 *Gold Ltd. v. United States of America*. The Arbitral Tribunal of the North American Free Trade Agreement. June 8, 2009. 337, 355.

41 US Department of Agriculture Forest Service. *Sacred Sites – Questions & Answers for the Review of USDA & Forest Service Policies and Procedures for the Accommodation of Indian Sacred Sites*, <http://www.fs.fed.us/spf/tribalrelations/sacredsites.shtml> (last visited Feb. 8, 2011).

42 *Id.*

V | CONCLUSION

29. 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,"⁴³ and its stated mission is to "promote private sector investment in developing countries, helping to reduce poverty and improve peoples' lives."⁴⁴ 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.

30. We thank the IFC for the opportunity to submit a second set of 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.

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

⁴³ "IFC at a Glance" Online: <http://www.ifc.org/ifcext/careers.nsf/Content/IFCataGlance>

⁴⁴ *Ibid.*