



FPIC at the IFC

How Performance Standard 7
Could Better Protect
Indigenous Peoples and Uphold
Human Rights

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Since 2012, the IFC's Performance Standard 7 on Indigenous Peoples purports to safeguard their right to Free, Prior and Informed Consent whenever livelihoods are impacted, resettlement is required, or cultural heritage is significantly affected. In eight years, IFC has applied its indigenous peoples performance standard in 29 projects out of a portfolio of 2116. No more than four have resulted in a documented FPIC process accepted by communities. Meanwhile, projects that bypassed FPIC have triggered ombudsman complaints, public protests and legal proceedings. IFC needs a stronger, clearer approach to PS7. This report details the gaps in current implementation and proposes a way forward.



Introduction

“Decisions about the land go to the very heart of who we are as Indigenous Peoples.”

Perry Bellegarde, Chief of the Federation of Saskatchewan Indian Nations, 2013

In 2012, launching new Performance Standards to guide the environmental and social sustainability of its investments, the World Bank’s private lending arm, the International Finance Corporation (IFC), established special safeguards for indigenous peoples.

Under the *Indigenous Peoples Performance Standard 7 (PS7)*, operators would be required to identify indigenous peoples affected by IFC investments and investigate whether conditions were present that would require the client to obtain the *Free, Prior and Informed Consent (FPIC)* of those indigenous peoples.

The rationale was simple: as a result of historic marginalization, indigenous peoples are uniquely vulnerable to development impacts. If empowered, they are also uniquely positioned to safeguard their traditional lands and promote sustainable practices.

Other development banks, as well as the 105 member-banks of the Equator Principles, established indigenous rights safeguards including the right to FPIC. Today, the vast majority of international project finance debt within developing and emerging markets now require FPIC.¹

IFC’s indigenous protections have been in place for nearly eight years. IFC has made over 2,000 investments since their launch. This report looks objectively at how PS7 has affected indigenous peoples during that time. Specifically, it asks:

- How does IFC determine whether FPIC is needed?
- How often do Indigenous People give their free, prior and informed consent to IFC funded projects?
- How does IFC assure FPIC has been obtained before financing is completed?
- What are the reasons given when FPIC is not obtained?



IFC’s FPIC commitment in PS7

This report examines the state of FPIC at the IFC using IFC’s own publicly available data on the client projects that have applied PS7 and been flagged for FPIC since 2012. It is a useful database for study, because IFC provided the model, often verbatim, for many development finance institutions, both private and public.

IFC articulates its understanding of FPIC in PS7, which commits IFC clients to “obtain” FPIC from indigenous peoples only in specific circumstances. First the client must

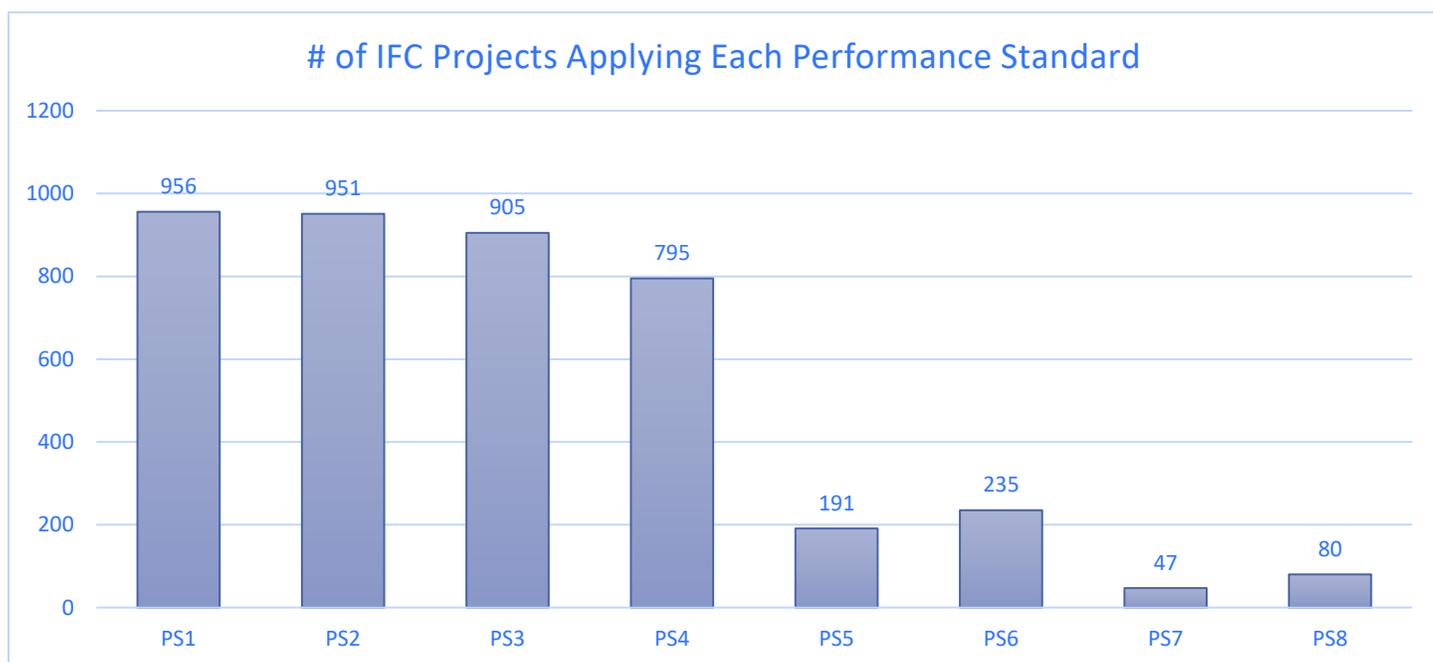
proactively identify indigenous populations. Once indigenous peoples are identified, the client must evaluate whether these populations will experience impacts that necessitate FPIC, specifically:

- Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use (PS7, paragraphs 13 and 14)
- Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or

Under Customary Use (PS7, paragraph 15)

- [Severe Impacts on] Critical Cultural Heritage (PS7, paragraphs 16 and 17)

The conditions enumerated in paragraphs 13 to 17 are each independent catalysts for FPIC. In other words, impacts on traditional lands would invoke FPIC, even if resettlement were not required; and impacts on critical cultural heritage would invoke FPIC even if it occurred on formally titled property rather than communal land.ⁱⁱ



IFC’s FPIC Commitment in Practice: The Data

Analyzing data available on the IFC’s project portal [disclosures.ifc.org], a key question is the extent to which the projects flagged by IFC to apply PS7 actually used PS7 criteria to require FPIC. This requires reviewing, first, how frequently the application of PS7 resulted in FPIC, and,

second, whether the FPIC processes pursued were benchmarked for being free, prior, informed and constitutive of indigenous processes of consent as defined by IFC and as defined by the communities themselves. For the latter, absence of any (disclosed) documentation indicating that

the community has consented to land expropriation or impacts, verbally, ceremonially or in writing, is considered absence of consent. IFC says it holds this documentation but will not make it public. In any case, is only pertinent in four projects, as FPIC was not required in the rest.



Application of PS7: Presence of indigenous peoples

The IFC has eight Performance Standards covering (1) risk management, (2) labor, (3) resource efficiency, (4) community welfare, (5) resettlement, (6) biodiversity, (7) indigenous peoples and (8) cultural heritage. These standards are implemented on all high- and mid-risk (Category A and Category B) investments.

Not all standards are applied on every project. For example, while 956 projects applied the risk management standard (PS1), only 47 applied PS7. Even the resettlement standard (PS5) was applied 4 times more frequently than PS7, although IFC strongly discourages projects from resettling populations.

Our dataset comprises the 47 projects that applied PS7. Of these, IFC clients confirmed the presence of Indigenous peoples in 28, confirmed their absence in 15, and left two undetermined. One is still pending approval and is thus excluded from this report. The other, located in Guangxi, China, is included in this research because the entity certifying the forest to global standards identified indigenous peoples presentⁱⁱⁱ As such, this research considers 29 projects where indigenous peoples are known to be present and FPIC conditions would need to be investigated.

Within these 29, IFC disputed the applicability of FPIC evaluation for indigenous communities that were not occupying their ancestral lands. This language, drawn from Paragraph 6 of the standard, is modified by the ensuing sentence. PS7 “may also apply to communities or groups that have [in their lifetimes] lost collective attachment to distinct habitats or ancestral territories ... because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area.” Absent an explanation why this language would be

bypassed, NomoGaia assumed that all indigenous peoples identified by IFC qualified for further FPIC review.

Livelihoods, lands, culture

Of the 29 projects reviewed, a subset involved direct impacts on indigenous lands, livelihoods and culture. These were coded using the language of IFC PS7 paragraphs 13-17, identifying specific references to “*impacts on lands or natural resources*”, “*relocation*”, and “*significant impacts on cultural heritage*.” As indicated in the table below, few impacts were overtly identified as absent, and the conditions requiring FPIC were often not clearly articulated.

Livelihoods

Twelve projects identified an adverse impact on land-based livelihoods, and 17 did not articulate whether impacts on livelihoods had been identified. None stated unequivocally that livelihoods would *not* be impacted. Among the projects that identified adverse livelihood impacts, four specified that the impact on lands did not require FPIC. Rationales included that families who had obtained individual titles for their land thereby forfeited communal rights, that the acquisition predated IFC involvement, and that a country context that does not recognize indigenous land rights does not need to apply indigenous protections laid out in PS7. Two clients (in PNG and India) gave no reason for bypassing FPIC. Six stated a need for FPIC but only three of them could document agreements for all the affected communities (two in Colombia, where it is legally mandated; one in Nepal).

Resettlement

Likewise, identified impacts on indigenous lands that would require resettling people did not automatically trigger FPIC processes. Of the 14 projects that identified

the need to resettle or relocate Indigenous peoples, only three pursued processes for community consultation and agreement. One claimed it had conducted a process that later proved non-inclusive (Kenya). Four were exempted from FPIC processes either because the state preferred to compensate households individually as members of a non-indigenous or mixed community or the land had already been acquired and thus opportunities to pursue communal agreements and consent had passed (China, Nepal, India and Vietnam). The remaining six bypassed FPIC because a project footprint had not yet been established and/or indigenous peoples had not yet been mapped at all.

Cultural heritage

Potentially severe impacts on cultural heritage were reported in six of the 29 projects but were never identified as a sole driver for FPIC processes. In 23 projects, cultural heritage impacts were not determined at all. No projects provided evidence that cultural heritage impacts were absent. This appears to be a result of the limited due diligence processes for identifying cultural heritage impacts. Because no fieldwork was required to evaluate impacts on cultural heritage, clients and consultants could not definitively refute or validate potential cultural impacts.

Benchmarks for FPIC: Negotiation & Agreement

Where customary lands, livelihoods and culture are impacted by a project, IFC requires clients to “document: (i) the mutually accepted [negotiation] *process* between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of *agreement* between the parties as the outcome of the negotiations”^{iv} (emphasis added). These processes were not often publicly documented by the IFC.



Q&A: How IFC defines these conditions and protections

1. Does the FPIC requirement change if the indigenous community is either wealthy or impoverished? NO.

PS7 explicitly states that indigenous communities “are not necessarily homogeneous” and may require varying levels of attention and resources to more versus less vulnerable groups. Indeed, clients are expected to “minimize, restore and/or compensate for” all adverse impacts on indigenous communities. When displacement occurs, thus necessitating FPIC, IFC describes the responsibility of clients to seek culturally appropriate compensation, “commensurate with the nature and scale of such impacts and the vulnerability of” the affected population. Thus, while vulnerable members of indigenous communities will require heightened resourcing of mitigation measures, no category of indigenous peoples is too wealthy or poor for FPIC protections.

2. If the state has no legal indigenous protections, may clients bypass FPIC? NO.

PS1 articulates that government-led efforts that do not meet IFC standards for engaging with affected populations must be supplemented with “a complementary process and, where appropriate... supplemental actions.”^v PS7 reinforces that, “Where government capacity is limited, the client will play an active role during planning, implementation, and monitoring of activities to the extent permitted by the agency.”^{vi}

3. If the state has legal indigenous protections, may they substitute for IFC PS7? NO.

Clients must meet both IFC requirements *and* legal requirements: “In addition to meeting the requirements under the Performance Standards, clients must comply with applicable national law, including those laws implementing host country obligations under international law.”^{vii} Where national laws purport to manage indigenous peoples, IFC clients must collaborate with those agencies, “to the extent feasible and permitted by the agency,”^{viii} to meet PS7 but must also, as noted above, supplement state approaches with “complementary” processes.

4. Can a client delay FPIC until the project proves lucrative? NO.

No language in PS7 articulates *when* the consultations and agreements must be carried out to meet IFCs interpretation of FPIC. However, FPIC is by definition obtained *prior* to impacts.^{ix}

5. If the client/anyone has already impacted indigenous communities in ways that require FPIC, can IFC invest? UNCLEAR.

Clients are required to “Assess and document the Affected Communities of Indigenous Peoples’ resource use without prejudicing any Indigenous Peoples’ land claim” (Para. 14). But, where governments have established nature reserves, extractive con-

cessions, individual land titles and other “alternative uses” on indigenous lands, clients are to “involve the relevant government agency in any consultation and negotiation with the affected communities of indigenous peoples.”^x To include the government agencies that violated indigenous land rights in negotiations risks negating any possibility of FPIC. When the client is among those pursuing an “alternative use” on indigenous land, it is unclear how IFC could invest in a project that has failed to obtain FPIC and that is legally restricted from pursuing it.

6. Can FPIC be bypassed if only a small number of indigenous peoples are affected? NO.

There is no language stating how many indigenous people are sufficient to require a client to obtain FPIC.

7. Can FPIC be bypassed if a mix of indigenous and non-indigenous communities are affected? NO.

While PS7 Footnote 3 notes that, “A community development plan may be appropriate in circumstances where Indigenous Peoples are a part of larger Affected Communities,” it nowhere says the analysis or negotiation process can be the same for both indigenous and non-indigenous communities.

8. Can legal titles negate FPIC requirements? UNCLEAR.

Common-law jurisdictions are in near-consensus that aboriginal title is inalienable, and that it may be held either individually or collectively.^{xi} In line with this, IFC states: “No documentation of land claims (or absence of land claim) should prejudice existing or future legal proceedings of Indigenous Peoples to establish legal title.”^{xii} Assuming ‘legal title’ refers to legal protections for indigenous peoples, individual titles should not bar indigenous peoples from negotiating as a community with IFC clients.

Footnote 12 states that where indigenous peoples “individually hold legal title, or where the relevant national law recognizes customary rights for individuals,” PS7 does not apply. But GN48 recognizes scenarios where individuals may hold legal titles but relocation may still be subject to community-based decision-making processes on ancestral lands. Regardless, land titling nuances have no bearing on conditions where cultural heritage and livelihoods are affected, which still require clients to obtain FPIC.

9. Can the client skip FPIC if the indigenous peoples now occupy lands different from their ancestral ones? NO

“This Performance Standard ... may also apply to communities or groups that have lost collective attachment to distinct habitats or ancestral territories in the project area, occurring within the concerned group members’ lifetime, because of forced severance, conflict, government resettlement programs, dispossession of their lands, natural disasters, or incorporation of such territories into an urban area.”^{xiii}



IFC's PS7 Projects 2012-Present (Excluding those that found Indigenous Peoples absent)

Country	Year	Company	Project Type	IFC Designated Project #	IPs Identified	PS7 FPIC Triggers	Livelihood	Resettlement	Cultural Heritage	PS7 FPIC Benchmarks	Negotiation	Agreement	Evaluation	
													?	Confirmed presence of issue/action
													<input checked="" type="checkbox"/>	Confirmed presence of issue/action
													?	No available documented evaluation of issue/action
														Confirmed absence of issue/action
														FPIC should have occurred but did not
														Some partial process was undertaken
														FPIC conditions never evaluated or met
														FPIC, as defined by IFC, met
Brazil	2012	Equatorial Energy	Energy Distrib.	32170	Y		?	?	?					Brazilian legal definitions replaced FPIC – quilombolas excluded
Brazil	2012	Klabin Growth	Pulp Mills	31903	Y		?	?	?					Indigenous peoples independently confirmed present through national registries. IP documentation requested of IFC (May 2020) not provided
Colombia	2012	PetroNova	Oil/Gas Exploration	32075	Y		?	?	?					No FPIC required by IFC, but Consulta Previa prior to and after IFC involvement included right of refusal; agreements are public under law
India	2012	OCL India	Cement	32057	Y		?	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					Households are titled, communal forests & cultural sites are degraded, therefore no FPIC
India	2013	UltraTech	Cement	32265	Y		?	<input checked="" type="checkbox"/>	?					Households are titled, therefore no FPIC
Paraguay	2013	President Energy	Oil/Gas Exploration	33842	Y		?	?	?					Impacts “temporary” thus no FPIC required by IFC (client pursued agreements and IFC said these were monitored but not publicly documented)
China	2013	Zhaoheng Hydropower	Large Hydro	30266	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					Municipal government manages livelihoods and resettlement, cultural impacts are not territory-based, therefore no FPIC
China	2013	Stora Enso	Pulp Mills	27286	?		?	?	?					Indigenous presence/impacts in Nanning, Qinlian and Chongzuo operational areas were never reported to IFC but were confirmed through FSC
Colombia	2013	Pacific Infrastructure	Ports/Harbors	31612	Y		<input checked="" type="checkbox"/>	?	?					Colombian legal process replaced FPIC; Ministry of Interior indicates all communities had Consulta Previa processes but not right of refusal ^{xiv}
Nepal	2013	Kabeli	Large Hydro	30977	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					“Negotiated settlement” for individual household compensation packages
Brazil	2014	Biosev	Sugar Mills	34607	Y		?	?	?					Potential impacts on displaced indigenous peoples not evaluated; Afro-Brazilians not evaluated
Colombia	2014	Pacific Midstream	Oilfield Services	34553	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	?					PM is a holding company. Among 4 subsidiaries, 3 had IPs; Consulta Previa was conducted on 1 but ordered on all 3
Malaysia	2014	Bilt Paper	Pulp/Paper	34602	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					Government ceded indigenous land to Bilt prior to IFC financing
PNG	2014	Transform	Oil/Gas Exploration	35312	Y		<input checked="" type="checkbox"/>	?	?					IFC reports that an FPIC process was required by IFC and commenced, but then the IFC exited the relationship with Transform
China	2015	Tian Lun Gas	Energy Distrib.	35400	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	?					Chinese legal processes replaced FPIC
Kenya	2015	African oil	Oil & Gas	36699	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					Two chiefs received documentation but one lost it; weeks after the agreement, communities blockaded roads
Vietnam	2016	GEC	Small Hydro	37567	Y		?	<input checked="" type="checkbox"/>	?					Government manages resettlement
Brazil	2017	CELSE	Powerplant	39652	Y		?	?	?					Quilombolas and traditional communities excluded in IFC public documents; under law CELSE seeks Quilombola permissions, which are pending
India	2017	FRV Solar India	Solar Park	39151	Y		?	<input checked="" type="checkbox"/>	?					Number of indigenous households deemed too small (2)
India	2017	JK Paper III	Pulp & Paper	39821	Y		<input checked="" type="checkbox"/>	?	?					Of investments in 2006, 2010, 2017, 2020, PS7 applied only 2017; none applied FPIC
Nepal	2017	FCS RR Himalayan	Resort Construction	38208	Y		?	?	?					No project documentation described social impacts or PS7 application
China	2018	Chenguang Bio	Food Production	40616	Y		?	?	?					Uighurs identified as indigenous; impacts on Uighur lands not reviewed; time lapse satellite imagery shows destruction of farmlands and homes
Colombia	2018	DCM Green Bond	Solar Park	39800	Y		<input checked="" type="checkbox"/>	?	?					Colombian legal process replaced FPIC but appears to meet IFC terms insofar as good faith negotiation occurred and agreement was achieved
India	2018	Rewa Mahindra	Solar	40646	Y		?	<input checked="" type="checkbox"/>	?					Individual titles disqualified IPs from protections
Nepal	2018	Upper Trishuli	Large Hydro	35701	Y		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					Detailed documentation produced
Brazil	2019	Klabin SA	Pulp Mills	42138	Y		?	?	?					Quilombolas and traditional communities excluded
Colombia	2019	Elecnorte	Energy Distrib.	39254	Y		<input checked="" type="checkbox"/>	?	?					Colombian legal process alleged to be fraudulent; legal complaint ongoing
Vietnam	2019	Nafoods	Agriculture	41576	Y		?	<input checked="" type="checkbox"/>	?					Government manages resettlement
India	2020	Oriental Infrastructure	Highway Constr.	39354	Y		?	<input checked="" type="checkbox"/>	?					Impacts predated IFC involvement



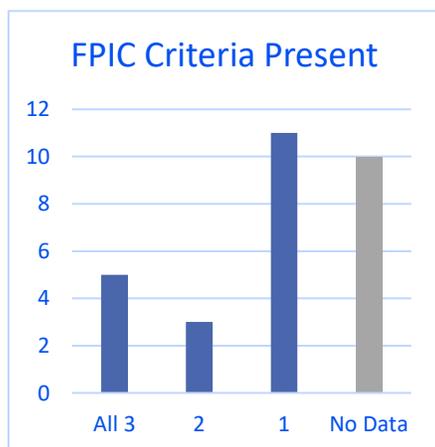
Reasons IFC clients gave for foregoing FPIC

Too poor:	The populations were indigent and landless and thus did not merit compensation (India)
Too rich:	The populations were insufficiently disadvantaged and held individual titles that disqualified them from communal consent processes (India)
Not state-certified:	The affected populations are not categorized as indigenous by the host state (either because the registration process was delayed, because the government used a different characterization for the population, or the state marginalizes the population actively) (Brazil ; Peru Tinka Resources)
State-certified:	Indigenous issues are managed by the state rather than IFC protections, although state regulations may not actually meet IFC standards (China , Colombia and Vietnam)
Too early:	The impacts are temporary (several years) as only petroleum exploration, not production is being financed (Colombia , PNG , Paraguay)
Too late:	Indigenous lands are already degraded or expropriated (India , Malaysia)
Too few IPs:	There are too few people to merit communal settlements (India , Nepal)
Too many IPs:	There are too many diverse groups to merit specific protections (Vietnam)
Too diffuse:	The cultural impacts do not coincide territorially with the resettlement impacts (China , Nepal)
Too discrete:	It is more efficient to compensate households individually as their land claims are distinct and not overtly communal (India , Vietnam)

Analysis

This section evaluates the relationships between the FPIC triggers in PS7 and the FPIC processes undertaken. Where the triggers are present but FPIC processes are not demonstrated, we examine the rationales for not obtaining FPIC.

The Triggers: Conditions which Require FPIC



Of the 29 projects where indigenous people were identified, 19 triggered one or more FPIC conditions: five projects flagged all three; two flagged two; and 11 flagged one. The remaining 10 projects did not overtly trigger FPIC, but project documentation did not articulate that any process had been undertaken to determine whether any of the FPIC conditions were present.

Although FPIC triggers were present in 19 projects, only four documented a negotiation process with all relevant indigenous groups.^{xv} These negotiations and their outcome agreements are not publicly available through IFC or through clients.

In Kenya, Oxfam sought to validate the agreement IFC client Africa Oil claimed to have conducted with the Turkana people. Oxfam found that local communities had received only two copies of the agreement. One copy holder was not in the community during Oxfam's visits, and the

other could not locate his draft. In community interviews, Oxfam found that residents were unaware of the contents of the agreement. Turkana people blockaded the road and halted operations less than four months after the agreement was signed. Both the limited local access to the signed agreement, and the protests shortly after its signing undermined the client's assertion that FPIC was obtained. It is coded in yellow as indicative that FPIC was not demonstrated with all affected indigenous groups.^{xvi}

A problem of timing: consent, but when?

While the IFC expects clients to obtain 'consent' for uses or impacts on indigenous lands, it does not validate or benchmark whether the process is free, prior or informed. Specifically, IFC posited that "there is no universally accepted definition of FPIC," and so proposed that rather



than define the components of the acronym, to instead distill its “meaning.” Paragraph 12 of PS7 is IFC’s articulation of FPIC. It reads: “FPIC builds on and expands the process of ICP [informed consultation and participation] described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples.” In this interpretation, FPIC is an expansion of a consultation process between an IFC client and a population group. Furthermore, FPIC is documented through evidence of a consultation, and evidence of a written agreement. In IFC’s words: “The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations.” Under the 2012 PS7, FPIC is only benchmarked by the outcomes of negotiations, not by the individual components of the acronym.^{xvii}

IFC provides additional guidance to clients on how to obtain FPIC in the non-normative Guidance Note to PS7. At minimum, it “generally 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) mutual[ly] 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.”^{xviii}

If this guidance were normative and benchmarked, it would better safeguard FPIC rights but would still leave a critical gap for non-consent. As Forest People’s Program noted when the standard launched, this guidance called for mutually acceptable procedures for the negotiation, yet it did not clearly leave room for indigenous peoples to reject negotiation procedures.^{xix}

Political and contextual drivers for (or against) FPIC

As illustrated above, FPIC conditions are not consistently applied across the IFC PS7 portfolio. Some variation correlates to national contexts. For example, IFC PS7 language explicitly notes that peoples “*may not possess legal title to these lands*” (emphasis added), but that “*use of these lands... can often be substantiated and documented.*” The implication is that clients should substantiate and document indigenous land uses in evaluating their impacts on indigenous peoples. In practice, however, clients define ‘traditional

“The [tribal] communities were under the false impression that a children’s park would be developed. The knowledge of the OCL [Cement] Plant was perceived as a pollutant, many perceived that it would generate dust and cause respiratory problems.”

lands’ and ‘customary use’ based on legal standards of host countries, using these designations to exclude peoples from FPIC protections.^{xx}

Host-country legal adversity is the very problem that indigenous rights protections were created to fix. Using host-country legal status to define indigenous rights places the fox to guard the henhouse.

Communal title is too pervasive for FPIC rights

In some contexts, the IFC found that indigenous communal lands were not protected by FPIC provisions because non-indigenous people, too, had communal lands. For example, in China and Vietnam,

the national laws that have eliminated individual titles are seen to negate the relevance of indigenous claims to their lands. In the Environmental and Social Review Summary (ESRS) for Zhaoheng Hydro-power in China, for example, (one of the 5 projects that met all three criteria for FPIC), the IFC notes, “The tenure arrangement in rural areas of China is such that all rural land is held under village collective or state ownership with use rights for some land parcels assigned to individual villagers (refer to PS5). This is also the case for land acquired for the Sponsor’s projects, including Banian/Menglang/Gaoqiao, and therefore it is not considered traditional or customary land.” The same rationale was provided in Tian Lun Gas project in China and the Nafoods agriculture project in Vietnam. At Nafoods, all 21 displaced IP households were compensated and resettled individually, not collectively. IFC offered two rationales: the ethnic Thai households (3) lost household lands rather than communal lands; the ethnic Hmong households (18) resettled in the area too recently to claim traditional usage, having been displaced from their own ancestral lands.^{xxi} The language of PS7 expressly extends indigenous protections to displaced indigenous peoples and considers the necessity of communal consent for land sales even on titled properties (IFC never actually states whether the Thai households held land titles, which would be surprising in Vietnam). IFC reports that the decision to bypass FPIC was made “with significant support from an international consulting group,” but none of this research is publicly available or was provided to NomoGaia upon request.

Individual title is too pervasive for FPIC rights

Conversely, in India, the fact that some indigenous peoples have acquired individual land titles was a disqualifier for FPIC protections in IFC documentation. Legally recognized Scheduled Tribes and Scheduled



Castes, whose members successfully obtained individual title to a share of their traditional lands, were excluded from FPIC protections, specifically because they could be compensated as individual titleholders rather than communally. For example, IFC's documentation for the FRV Solar project covered the expropriation of tribal lands under PS5, although the project's environmental and social impact assessment (ESIA) expressly stated that in the company's acquisition of 11,528 acres of land, "PS7 seems to be applicable." The ESIA also noted that the client claimed compensation was established through mutual consent, but that "no supporting documents, except the list of land owners/ assignees/ users with regard to land procurement/ acquisition has been provided."^{xxii}

Documentation for the OCL India cement facility indicated that FPIC was not needed both because households were individually titled and because communal lands that the group still used were degraded. The OCL case is particularly noteworthy because the documentation indicates that an indigenous population was under cultural and physical stress, seeking to safeguard degraded communal forests and using individual titling processes to retain their traditional homes. Here, the evidence of pressure on indigenous land was itself presented as a justification for bypassing rules protecting indigenous lands.

Had this indigenous population with stressed communal lands been afforded FPIC rights, consultations would have almost certainly been more detailed. Consultants producing the environmental and social impact assessment (ESIA) to meet IFC standards identified significant gaps in project preparation. The consultants reported that, "The communities were under the false impression that a children's park would be developed." Upon learning it would be a cement plant, "many perceived that it would generate dust and cause respiratory problems." It is difficult to reconcile this language with the intent

of PS7 "To establish and maintain an ongoing relationship based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project's life-cycle."^{xxiii}

Peoples are too impoverished for FPIC rights

While the existence of individual titles was a barrier for FPIC in some Indian projects, so was the absence of titles in others. At least one Indian client (Oriental Infrastructure Highway) fully bypassed the indigenous households of Scheduled Tribes and Scheduled Castes, denying them compensation by describing them as squatters who lacked legal title to the lands they occupied. The Resettlement Action Plan covered only 67 of the 117 kilometers of the highway corridor, excluding over 200 scheduled caste and scheduled tribe members from resettlement plan,^{xxiv} as documented by the client's own environmental and social consultant. This approach is inconsistent with PS7 but also, as the project's ESIA noted, was at variance with PS5 provisions. IFC committed to hold the project to PS7 standards "going forward," although evictions had been completed and displaced people had been lost to follow-up.

Projects are financed too late for FPIC

In addition to the Oriental Infrastructure Highway described above, IFC financed several other projects that nominally applied PS7, but involved FPIC triggers that predated IFC involvement and thus could not implement FPIC processes. These included projects in India, Malaysia, Brazil, China and Vietnam. The clients, some of whom had been impacting indigenous groups for decades, all committed to enhancing engagement. However, the aim of consultation under IFC's definition of FPIC is to establish mutually agreed terms for an operation, its compensation protocols

and its mitigation strategies. The consultations described in IFC documentation pertaining to these existing impacts did not demonstrate that clients met that expectation.

The question of whether IFC can adhere to PS7 when investing in projects linked to (either recent or long-term) indigenous impacts is part of a broader criticism long leveled at the World Bank Group for financing projects that exacerbate existing inequalities, further marginalizing vulnerable groups.^{xxv} However, with regard to IFC's current commitment to FPIC, it begs an answer. If IFC is committed to FPIC, can it contribute to operations implemented against the will of the indigenous peoples affected?

IFC's PS7 portfolio includes at least one project where it directly contributed to the original harms prior to implementation of the 2012 Performance Standards, but used the 'preexisting' nature of displacement to absolve the client from requiring FPIC. Specifically, India's JK Paper, a pulp and paper company that sources bamboo and eucalyptus from indigenous cooperatives, expanded onto tribal territories with IFC funding in 2006 without inquiring of the traditional land stewards whether they wished to produce materials for the mill.^{xxvi} IFC documentation from 2017 states the operation would "include procedures to obtain assurance that the decision to sell bamboo to them by the IP villages/communities has been approved" by the community leadership, "in a manner consistent with Free, Prior, and Informed Consent (FPIC) principles." "FPIC principles," implemented retroactively, are not defined; consent for the timber arrangement would be impossible to obtain 'prior' to impact. Independently, researchers found that "Adivasi women opposed [JK's expansion] with strong determination."^{xxvii} IFC does not articulate how 'FPIC principles' can be applied at all in a context where indigenous people actively opposed the project prior to its implementation.



In Brazil, the Louis Dreyfuss sugar-based ethanol subsidiary Biosev received IFC funding in 2014 while already operating in two officially recognized indigenous reserves and adjacent to an undocumented reserve of Terena Indians directly northwest of the mills. Four years after its IFC disbursement, Biosev published an IFC-required policy committing not to source sugarcane from indigenous lands. However, Biosev never evaluated its impacts on indigenous peoples beyond the pre-existing displacement described in project documents (i.e. livelihood or cultural impacts). IFC required Biosev to conduct a “Participatory Social Diagnosis”, which the company completed without engaging or interviewing any affected indigenous (or non-indigenous) peoples. The output was a booklet encouraging stakeholders to contact the firm for information. For six years IFC has owned equity in the firm, as it expands its footprint and transportation network through contested lands, without Biosev fulfilling IFC’s expectation that it “systematically survey nearby indigenous communities to understand possible impacts of its growing and transport operations,” let alone act on those findings.^{xxviii}

IFC also began financing a food production company operating in Xinjiang, China, Chenguang Bio, in 2019. Xinjiang is home to Uighur, Kazakh, Tajik, Hui, Kyrgyz, Mongol and Russian populations. At least eight processing facilities are on ancestral Uighur territories. IFC determined that, because the factories are in government-owned industrial zones, the indigenous peoples are not impacted. Beyond questions of whether the factories were implemented with indigenous Uighur consent, almost all raw materials (cotton, peppers, marigolds, walnuts, cummin, grapes, etc) are sourced from Uighur lands. Forced labor, forced eviction and ethnic violence have been widely reported against Uighurs in Xinjiang, leading to allegations of ethnic cleansing in 2019 when IFC invested, and calls of genocide by 2020. Yet IFC did not require the client to evaluate whether Uighur farmers were willing participants in the supply chain. Although the

US Department of State has halted all imports of cotton products from Xinjiang for their links to the Chinese state’s complex prison labor system implemented against Uighurs in Xinjiang, IFC has produced no public due diligence demonstrating that its cotton suppliers may be working under conditions of prison labor. Furthermore, increased production has involved expanding acreage for crop growing, but IFC required no investigation into how this expansion would impact Uighur farmers and communities.

This approach resembles IFC’s investment in another investment in China, the Stora Enso paper mill, which never established which indigenous groups were within the operation’s area of impact in the majority-minority region of Guangxi (in 2014 the environmental and social action plan required the client to “update its Stakeholder Engagement Plan specifically to engage local ethnic groups in a culturally appropriate manner. Where adverse impacts are identified, ... ensure free, prior, and informed consultation with identified ethnic communities,” but determined FPIC was unnecessary.

In each of these projects, as well as in Vietnam’s GEC and Malaysia’s Bilt, IFC clearly identified impacts on indigenous lands and populations that were already underway and in some cases directly linked to previous IFC funding but nevertheless moved forward with investments. IFC has not yet articulated how it can finance projects where prior consent was demonstrably not sought, and how it might contribute to remediation of prior impacts and prevention of future ones. These concepts are not benchmarked in IFC’s framework or its project documentation.

Projects are financed too early for FPIC

For three separate oil and gas exploration projects – Paraguay’s President Energy, Colombia’s Pacific Midstream,^{xxix} and Colombia’s PetroNova – IFC determined that

its investment was too early to necessitate FPIC processes.

While the aim of this research was not to delve too deeply into the specific nature of investments, the conditions associated with oil and gas exploration caused IFC to flag PS7 in its portfolio without applying FPIC. This decision merits scrutiny if it is to guide future evaluations at IFC, because PS7 actually articulates clearly that there is no moment too early for FPIC. Specifically: “FPIC applies to project design, implementation, *and expected outcomes* related to impacts affecting the communities of Indigenous Peoples” (emphasis added).^{xxx} If the expected outcome of an oil development project is, at minimum, a thoroughly mapped potential oilfield, FPIC should precede exploration activities.

It is useful to understand the engineering of hydrocarbon exploration activities to identify their impacts on indigenous peoples well before oilfields become productive. Only one in three exploration wells is successful, and sometimes a whole bloc will be left unexploited.^{xxxi} Also the companies that carry out exploration activities are not often the same as those that process and refine products. Exploration firms are usually smaller, with narrower profit margins and smaller community relations budgets. Given these conditionalities, oil producers are often reluctant to engage with local populations, fearing that engagement processes will raise expectations. The question with indigenous communities is not of raising expectations, however, but of impacting indigenous lands and cultures, initially through seismic survey activities and only much later through the potential economic implications of oil finds on their lands.

Almost all oil reserves are now explored using three-dimensional (3D) seismic surveys, wherein engineers create seismic waves on a predetermined grid, using either explosive charges drilled into the ground at regular intervals, or vibroseis plates that cause ground vibrations at a designated power and frequency. The seismic waves bounce off of subsurface



formations and are recorded onto 3D maps of anomalies that indicate where oil or gas may be trapped in sufficient quantities for exploration drilling activities. The gridlines must be cut through the landscape, usually in 5- to 15-foot wide trails, spaced evenly in 200-500-foot intervals. The area covered by the 3D grid must extend up to a mile beyond the boundaries subsurface area to be imaged in all directions, in order to produce sufficient data for the area of interest. These gridlines often crisscross 50 square miles of territory.

While the seismic charges themselves are rarely felt outside of a 100m radius, and fauna quickly return to their behavioral patterns, the setup process itself can substantially impact ecosystems and communities.^{xxxii} The grids cut through forests can take years or decades to recover, leaving pathways for opportunistic plants, animals and people to enter territories in the meantime.^{xxxiii}

The impacts of seismic surveys on indigenous communities and lands have been documented in Russia, Belize, Bolivia, Ecuador and Canada. In all cases, ecosystem services used for traditional livelihoods were removed to establish seismic grids, affecting the availability of essential resources.^{xxxiv} Likewise, the gridlines provided access to opportunistic outsiders, who carried out illegal activities including hunting and resource extraction, further restricting indigenous livelihood activities. In Belize, mishandled explosives set protected forest alight, burning additional natural resources.^{xxxv} In Ecuador, the hasty withdrawal of seismic teams left unexploded ordnance throughout indigenous lands.^{xxxvi}

The Supreme Court of Canada concluded in 2017 that seismic surveys necessitate prior consultation and consent by indigenous peoples, based specifically on such documented impacts.^{xxxvii} Lawsuits and other forms of indigenous resistance against exploration activities indicate that indigenous groups themselves believe they are entitled to FPIC *prior* to seismic surveys.^{xxxviii}

In addition to the physical impacts of exploration, there is also a matter of potential impacts of successful wells. If exploration is too early to seek consent, at what moment in oilfield development is it too late? There are legal regimes that require operations to convert exploration licenses into exploitation licenses within a certain timeframe, and to exploit all resources identified within a bloc.^{xxxix} If operators are required to exploit reserves that they have explored, then is there any moment later than pre-exploration that could allocate space for a community to consent.

IFC's investments in hydrocarbon exploration on indigenous lands impact indigenous communities, and aim to create conditions for future, long-term impacts on those lands. A serious commitment to FPIC would prioritize informed consent of indigenous peoples both to permit exploration activities and to play a role in whatever potential hydrocarbon development programs might follow.

Legal compliance serves as a surrogate for FPIC

IFC deferred to legal processes in some countries as "aligned" with FPIC, even when those laws explicitly exclude certain populations, do not necessitate 'consent,' or have a track record of implementation failures. For example, within IFC's portfolio, Brazilian clients excluded a large portion of indigenous populations from their PS7 analysis, and Chinese regulatory requirements "reflect a process of good faith negotiation and could constitute the required [FPIC] as stipulated in Performance Standard 7."^{xl}

IFC's decision to defer to legal requirements is at odds with PS7 language, which requires that clients comply with law, "In addition to meeting the requirements under the Performance Standards."^{xli} It is also at odds with IFC's definition of indigenous peoples, which expressly notes that communities, not governments, should be tasked with identifying themselves as indigenous.

National Threats to Cultural Heritage interfere with FPIC: China & Nepal

In assessing cultural impacts of the China Zhaoheng Hydropower Holdings power project, the client simultaneously noted that local populations organized "ethnic festivals" but also found "no signs of the presence of critical cultural heritage linked to the identity of ethnic groups." These two findings were never reconciled, but client and IFC concluded the FPIC requirement was applicable.

In Nepal, documentation for the Kabeli Dam identified four cultural resources that would be affected by the dam but never identified the cultural significance allocated to water bodies. Rather than consider the identified cultural resources relevant for FPIC determination, project documentation bypassed FPIC based solely on the resettlement criterion, arguing that too few IPs would be relocated to merit FPIC. To quote: "There are 13 households that will lose land as a result of the project. Of these households, only one is Limbu and it is expected to loss (*sic*) only 1.8% of its total land holdings." That cultural resources not belonging to a specific household would be impacted did not factor into this determination.

Brazil: The indigenous peoples missed by state certifying bodies

Brazil established legal protections for (1) indigenous peoples, (2) quilombolas (residents of afro-Brazilian settlements, first established by escaped slaves), and (3) 'traditional peoples' who live land-based livelihoods with cultural ties to ecosystems services but who have not sought or secured legal certification as indigenous. Distinct government agencies oversee the three different designations.^{xlii} In addition, municipalities are expected to keep tabs



on the presence of these protected populations. When Indigenous Peoples are identified within a 10km buffer zone of an operation, the ESIA must be supplemented with an Indigenous Component Study that involves anthropological evaluation of their forest and ecosystem services, which is the basis for plans to mitigate or reverse impacts in the event that an indigenous community permits the project to move forward. Such anthropological evaluations are also required for Quilombolas, but without the right to withhold consent or the provision of a buffer zone.^{xliii}

1140 communities have waited over a decade to secure their indigenous titles

However, self-identification of indigenous and quilombola communities is complicated, both by stigma that disincentivizes self-identification, and by bureaucracy that makes the process difficult, particularly for rural populations.^{xliiv} As governments and communities overcome the cultural history of white supremacy in Brazil, a growing number of communities seeks to reestablish or formalize the cultural traditions of their peoples but face bureaucratic hurdles and delays.^{xliv}

By the end of 2019, 2770 quilombola communities had received recognition by the designating agency, yet only 93 had received title documents for their traditional lands. On average, communities wait eight years from the self-identification process (which itself requires government certification) to titling (carried out by a separate agency) – 1140 communities have waited over a decade for indigenous title.^{xlvi} State and regional authorities have titled lands for more than 70 additional communities,^{xlvii} but these do not appear in the federally maintained quilombo database and thus can be overlooked by IFC during desktop reviews of project locations.

Some of the state-level land agencies are reluctant to issue titles to certified indigenous and quilombola communities, because their budgets are often dictated in large part to tax revenue from large corporate entities operating on indigenous lands. In Paraná, one of the first recognized quilombos (in 2005) finally received title in 2019, but the titling agency only handed over 225 of the 1200 hectares of ancestral lands, because the agency could not afford to re-expropriate the lands from the current title holder.^{xlviii}

IFC has invested in a pine operation in Paraná, Klabin, which has been linked to forced eviction and labor bondage of indigenous and quilombola communities for over a century.^{xlix} The Klabin mill is located on former indigenous lands and extends onto uncertified quilombola territories. Quilombola efforts to title their lands have faced delays for almost a generation. In essence, IFC is financing an operation whose continued existence is a barrier to indigenous reclamation of ancestral land.¹

2770 quilombola communities have received recognition by the designating agency; only 93 received title documents

IFC faces challenges differentiating the ongoing impacts on traditional communities from the legacy impacts of its clients in the Biosev sugar operations in Mato Grosso del Sul. These operations overlap with lands traditionally held by Guarani and Kaiowá peoples. Biosev’s sugarcane suppliers have been implicated in violent attacks on indigenous peoples reclaiming their ancestral lands in recent years.^{li} Biosev has committed not to source sugarcane from indigenous territories, but some indigenous lands remain under evaluation and without title, creating gray area in policy implementation. The quilombola communities ancestrally tied to Biosev’s sugarcane sourcing areas are

never considered in IFC’s project documentation.

The IFC’s exclusion of quilombola and traditional peoples from the scope of PS7 is a repeated feature of IFC PS7 reviews in Brazil. In IFC’s transmission line project with client Equatorial Energy, IFC notes that Brazilian law does not permit transmission lines on indigenous lands unless indigenous peoples receive electricity, suggesting that risks are generally mitigated legally. However, the powerline also runs inland through Pará state, where the ESIA identifies quilombolas and traditional communities. IFC would need to require heightened due diligence to meet its own standards, both for the identified Quilombola population in Oieras do Pará and for traditional communities. Such efforts are not made because IFC relies solely on legal frameworks in the country.

Colombia: Consulta Previa, the weakness of the Interior Ministry to understand indigenous issues, and the divide between ‘consultation’ and ‘consent’

Colombia’s Consulta Previa (literally “prior consultation”) law requires companies merely to consult with communities, not to obtain their consent. Public Law 134-18 lays out explicitly that, “The right of Prior Consultation being a fundamental right does not have the character of being absolute. Therefore, it does not carry a veto power” (translated by the author).^{lii} In 2011, when IFC announced that it would replace its “prior consultation” language with a “prior consent” requirement, the intention was expressly to empower communities with decision making authority. To quote: “The legitimacy of FPIC as a process requires agreement [if not full consensus].”^{liii}

Consulta Previa in concept meets the IFC interpretation of heightened consultation but not of consent. However, it relies on the judgement of the Ministry of Interior to assure that consultation is sufficiently informational to allow for informed decision-making.^{liiv}



Sometimes it appears to work to the benefit of all parties. Two of IFC's five investments in Colombia that applied PS7 produced documentation of consultation processes that resulted in agreements. The 2013 Puerto Bahia project by Pacific Infrastructure carried out follow-up on the agreement in 2017 and found that promises had been kept and communities were satisfied.

However, when the project overseer at the permitting agency is overwhelmed, incompetent, hostile to indigenous peoples or ill-equipped to evaluate the quality of dialog, mistakes can be made. Colombia's Ministry of the Interior does not have the staffing and capacity to consistently differentiate legitimate and illegitimate processes. For example, IFC's investment in the Elecnorte transmission line, which would affect 170 indigenous communities as well as 10 Afro-Colombian and tradi-

tional groups, was licensed to proceed under a fraudulent FPIC process.^{lv} The company claimed that through its consultation process communities had freely consented to the project. However, after the date of IFC disclosure, the communities jointly filed suit to reverse the Interior Ministry's acceptance of the consultation process decision, claiming fraud. The court ruled in the favor of the communities and ordered a new consultation process.^{lvi}

Where has IFC's PS7 Succeeded in FPIC as understood by rightsholders?

Within the database of IFC's PS7-flagged projects, five cases explicitly acknowledged that all three FPIC triggers were present. Four of these are described above and did not demonstrate that FPIC had been obtained. Specifically:

- At Africa Oil in Kenya, IFC documented consultation and agreements that Oxfam could not validate and the project met with road blockades and violent protests within months of their signing.
- In Malaysia the commitment by Bilt was retroactive and thus impossible to validate as "prior" or "consent".
- In Nepal's Kabeli, the IFC accepted a government preference for individual compensation.
- Likewise, in China's Chenguang Bio the client argued that land users should be considered as members of a village rather than members of an indigenous community.

The fifth case merits close attention: The Upper Trishuli project in Nepal, a largescale, run-of-river hydroelectric dam. Like many other projects, Trishuli had legal protections for indigenous groups,^{lvii} involved the physical displacement of a relatively small number (12) of indigenous

families, and occurred explicitly on government-owned forest lands. Although no clear markers differentiated this project from others where FPIC was bypassed, nevertheless, the identified impacts on "communally used forestland" were found to require FPIC at Upper Trishuli.^{lviii}

FPIC consultations ensued with the populations of 10 communities, through a structured process that incorporated gender balance, social and class divisions as well as community fissures, into meeting and engagement schedules. The consultant documented a clearly articulated strategy for understanding and meeting the needs of the affected populations, as well as a demonstrated commitment to recognizing the legacies generating ongoing vulnerability.^{lix} The full process of information sharing, agreement-setting and consent is laid out in the Indigenous Peoples Plan incorporated into an ESIA Addendum.^{lx} The consultant was foreign, but he partnered with a reputable indigenous peoples organization based in Nepal (NEFIN, the Nepal Federation of Indigenous Nationalities, an umbrella organization (NGO) with a recognized national mandate for representing IP interests). IFC documentation describes the "main parties involved in the FPIC process" as the indigenous peoples, the client, and local

government. The agreement represented a blend of project mitigation measures and benefits. The process prioritized voices and lived experiences of indigenous peoples in ways that would enable their meaningful engagement and empower them to know what they were being asked to consent to.

The process itself met IFC's interpretation of FPIC, but IFC did not, itself, benchmark it as such. Prior to the development of the indigenous peoples plan, the IFC claimed: "Consent will be based on compensation of affected families (6 in total) and communal benefits offered at the CFUG level to offset any project-related impacts on CFUG resource usage." In fact, 12 families were directly affected and required compensation, but the much more profound error lies in the stand-in of "compensation" for indigenous consent. On the contrary, much of the international effort around FPIC has focused on the fact that compensation to individual households undermines indigenous culture by fragmenting lands and fracturing social ties. If IFC benchmarks consent based on indigenous peoples' acceptance of compensation, Upper Trishuli need not have followed any of the meaningful and powerful processes undertaken.



Recommendations for FPIC and development finance going forward

Eight years of data shows that IFC needs to change how PS7 is applied and implemented. IFC has produced internal guidance to increase the rigor of evaluation. However, its effectiveness is not evident in the current portfolio; the data suggests that PS7 is not being applied more consistently or fulsomely over time. An increasing number of projects has flagged PS7 only to then determine it was flagged in error. Based on IFC’s internal articulation of existing processes, we propose actions that could address the persistent gaps. IFC responded to our recommendations (see full correspondence at nomogaia.org for detail), as included in parentheses.

What IFC says and does now	What is needed
Investment projects are screened at the early (Concept) stage, to identify which Performance Standards (PSs) are applicable.	This process should involve an indigenous rights expert in order to eliminate PS7 applicability in any country with known Indigenous peoples. [IFC AGREES]
In countries where determining whether a community should be treated as indigenous is complicated, e.g. Vietnam, IFC may retain an external IP expert(s) to help IFC make this determination.	IFC should standardize this approach across all countries where Indigenous peoples are present. Experts should be engaged throughout the appraisal <i>and</i> implementation process, to assure ongoing engagement. [IFC AGREES]
Once project due diligence commences (i.e. fieldwork), assigned specialist(s) verify which PSs are applicable based on a combination of documentation review and in-person visits/discussions.	These specialists do not currently have indigenous or human rights expertise, limiting their effectiveness in navigating indigenous rights issues. IFC needs human rights & indigenous peoples expertise in house. [IFC DOESN'T SAY WHETHER IT AGREES]
Only projects with direct project impacts on Indigenous peoples apply PS7. Publicly disclosed environmental and social review documents only include a justification of the applicability of the PS.	It is never articulated how clients concluded Indigenous peoples were not present. These justifications should clearly articulate what methods were used to identify indigenous peoples, who are often reluctant to engage with outsiders. [IFC AGREES]
Although IFC operates in 67 countries with indigenous peoples, it estimates that the number of projects that directly impact indigenous communities is relatively low, as it has asserted in many presentations to Equator Banks, CSOs, IP organizations and others.	IFC has not demonstrated the reported low correlation between IP lands and IFC investments. It should produce a map geolocating its project footprints (not HQ) over known indigenous territories. [IFC DISAGREES – SEE PART II OF NOMOGAIA’S PS7 REPORT]
Projects that might require FPIC are escalated for senior management review at the Concept stage due to potential timing and reputational concerns. If the issues are considered to be too difficult to manage, IFC will not engage further.	This is a double-edged sword as it risks disincentivizing loan officers from applying PS7, even when it is necessary. PS7 projects should not be escalated; IFC should hire competent staff to manage them directly at the specialist level. [IFC AGREES]
A majority of projects that IFC finances that impacted indigenous communities don’t trigger FPIC requirements because the specific triggers for an FPIC determination (paragraphs 13-17) are absent. Therefore only a portion of projects that trigger PS7 also have an FPIC requirement.	As the table on page 5 shows, the presence of FPIC criteria does not currently result in FPIC. IFC should increase transparency in how FPIC decisions are made and more actively oversee client implementation of PS7. [IFC AGREES THAT TRANSPARENCY SHOULD INCREASE BUT NOT THAT FPIC WAS ‘MISSED’]
Most of IFC’s projects requiring FPIC have to date been located in Latin America, where government consent requirements for projects impacting indigenous peoples are often well-established. In such cases, IFC typically reviews the Government-mandated consent process for consistency with PS7 objectives, rather than supporting a project-specific process.	In fact, 11 of 29 projects are in Latin America, but indeed the majority of FPIC projects are in countries with Prior Consultation laws (20). IFC should closely scrutinize gaps between those laws (including whether ‘consent’ is required and what groups are recognized as indigenous) and PS7 to avoid noncompliances and complaints. [IFC AGREES]
A much smaller number of projects outside of Latin America have triggered FPIC requirements. In these cases, IFC may need to work with a client, local government and IP organizations to develop a project-specific FPIC approach, i.e. in the absence of any formal Government-managed approach/regulations.	IFC has recently upgraded this process, bringing on more permanent support for managing indigenous issues in Asia. Similar expertise is needed in Africa and Latin America. [IFC PARTIALLY AGREES BUT CONTINUES TO BELIEVE ‘EXTERNAL’ SUPPORT IS ADEQUATE]



Conclusion

This report began with the question of how Free, Prior and Informed Consent is being implemented by IFC clients under the current Performance Standards. Assembling all the IFC loans between 2012 and the present that had applied PS7, we examined the nature of the FPIC processes pursued. A bleak picture emerged. Clients are at liberty to determine whether the project timing is either too early for FPIC, or too late. Communal title might be deemed too prevalent in a country to merit special consideration for indigenous peoples, or an indigenous group's members' acquisition of individual titles might eliminate their right to FPIC. Indigenous lands can be considered too degraded to merit FPIC or, in other cases, their lands are considered to be sufficiently protected by that government's legal definitions to merit special indigenous protections. In some cases, indigenous peoples were described by clients as too wealthy to merit indigenous protections.

None of these caveats are written into PS7. But even where IFC requires FPIC to be obtained, there are not consistent benchmarks to evaluate how the consultation processes and agreements are implemented by clients, to say nothing of how they are received by indigenous peoples.

The benchmarking issue is apparent at several levels. IFC's publicly articulated due diligence does not clearly articulate oversight for how clients identify indigenous peoples. Once indigenous peoples are confirmed present, IFC does not disclose how it retains confidence that clients assess the impacts on those peoples to understand how cultures and lands may be impacted – internally, staff report they are unaware of any processes for benchmarking impacts on culture. IFC's oversight structure aims to assure that this process is duly diligent, but it has a shortage of social specialists and a near-absence of indigenous specialists on staff. This work is highly specialized and, at IFC, understaffed. Additionally, FPIC itself is marked by the existence of a written agreement, which is not publicly available and which is the source of controversy at several existing projects.

What is at stake is not only the integrity of the IFC and the Performance Standards that have served as a basis for global finance since 2006, but IFC sustainability goals themselves. Where Indigenous peoples are displaced, the forests, waterways, biodiversity, cultural heritage, development and the very notion of community are at stake.^{lxi}

IFC agrees with the majority of NomoGaia's recommendations but has not proposed that it will implement them; bank staff feel that the support of external expertise is sufficient to manage indigenous issues. This perception may be rooted in IFC's belief that the 29 projects where PS7 was applied represent the full suite of projects where indigenous peoples were impacted. Part II of NomoGaia's report on PS7 calls that assumption into question.



Endnotes

Cover photo: Quilombola man waiting out a rainstorm at his small roadside shop. Pará, Brazil

ⁱ The Equator Principles. June 2013. <https://equator-principles.com/about/>

ⁱⁱ See, e.g. IFC's ESRS on the Brazil Biosev Operation: <https://disclosures.ifc.org/#/projectDetail/ESRS/34607>; the CAO investigation report from the Santa Rita hydroelectric project. CAO. Investigation Report: Real LRIF. 2017 p. 30-31 http://www.cao-ombudsman.org/cases/document-links/documents/CAOInvestigationReportREALLRIF_Final.pdf; Forest Peoples Programme. Free, Prior & Informed Consent Training Tool. 2017. www.forestpeoples.org/en/environmental-governance-legal-human-rights-responsible-finance/training-tool/2017/resources-free

ⁱⁱⁱ The other, located in Guangxi, China, is a paper mill and plantation owned by Stora Enso China. In Guangxi, the IFC required the client to study the presence of indigenous peoples, and, "based on the study results... engage local ethnic groups in a culturally appropriate manner." To address adverse impacts, the client was told to pursue an "ongoing communication process which will ensure free, prior, and informed consultation with identified ethnic communities, so as to facilitate their informed participation in Project related issues affecting them directly." This was required in 2013, referred to as "expected" in 2015 IFC oversight documents and listed as "pending/in progress" at the time of publication. Neither the client nor IFC has documented any engagement with the communities providing materials to the facility or identified any impacts to lands, culture or resettlement. Guangxi is the most ethnically diverse region in China, home to several ethnic minority groups and characterized by low socioeconomic development. Because IFC has not yet made a determination on the indigeneity of affected populations, and because Guangxi is home to an array of indigenous populations, we included it in the report, as the 29th project under review (see table).

^{iv} IFC PS7 Para. 12

^v IFC PS1, Para. 32 and 33.

^{vi} IFC PS7 Para. 21

^{vii} IFC PS7 Para. 5

^{viii} IFC PS7 Para. 2 and 21

^{ix} IFC PS7 Guidance Note Para. 15

^x IFC PS7 Guidance Note Para. 43

^{xi} Higgins, P. *Earth Is Our Business: Changing the Rules of the Game*. Shephard-Walwyn, London. 2012. See also: George M. Cole, Donald A. Wilson. *Land Tenure, Boundary Surveys, and Cadastral Systems*. CRC Press. Taylor and Francis. 2016. Sections 2.3 and 3.1.7.

^{xii} IFC PS7 Guidance Note Para. 42

^{xiii} IFC PS7 Para. 6

^{xiv} Each community received roughly \$50k US. Consulta Previa agreements were signed the 1, 2, 3, 4, 5,6 of Dec 2013 http://portal.anla.gov.co/sites/default/files/11784_res_1336_271213.pdf. Feb 2017 followup indicated that it was successful http://portal.anla.gov.co/sites/default/files/auto_0544_24022017_ct_3689_m.pdf

^{xv} Several IFC clients noted that they established negotiations with a specific sub-set of indigenous populations or leadership, which is not sufficient to meet IFC's FPIC expectations, nor the expectations of indigenous peoples. See, e.g. Biosev ESRS <https://disclosures.ifc.org/#/projectDetail/ESRS/34607>

^{xvi} Oxfam America. *Testing community consent: Tullow Oil project in Kenya*. January 2018. <https://www.oxfamamerica.org/explore/research-publications/testing-community-consent/>

^{xvii} Petkar 2017

^{xviii} IFC. *Guidance Note PS7*. P. 25

^{xix} *Forest People's Programme*, 2006

^{xx} IFC Performance Standards. PS7. Paragraph 13

^{xxi} Rikke Folving Ginzburg, Andreas Waaben Thulstrup & Thomas Theis Nielsen (2018) Impacts of – and farmers' adaptation to – land allocation policies in the north central uplands of Vietnam, *Geografisk Tidsskrift-Danish Journal of Geography*, 118:1, 36-55, DOI: 10.1080/00167223.2017.1393344; Several

specific instances of land acquisitions, inadequate compensation and indigenous vulnerability are chronicled by Jeff Hayes at Facts and Details.

http://factsanddetails.com/southeast-asia/Vietnam/sub5_9g/entry-3481.html; Nguyen Phuong Linh. Land Grabs Rile Vietnam's Farmers. *Financial Times*. Haiphong. April 10, 2013. <https://www.ft.com/content/15526952-a1c0-11e2-8971-00144feabdc0>

^{xxii} IFC. FRV Solar India. ESRS. Disclosed April 2017 <https://disclosures.ifc.org/#/projectDetail/ESRS/39151>

^{xxiii} DMC. *Social Impact and Resettlement Plan: OCL Cement*. Kolkata, August 2012. Section 6.7 page 79

^{xxiv} ESDD Report Nagpur Bypass Section NH-7 (Aug 2019) "RAP prepared for the project is not adequate in terms of coverage of project area (67 km out of 117 km), out of 3249 affected population (733 project affected families) due to the project, ST population is 23 and SC population is 194. As per the RAP, these SC and ST population are in vulnerable category and non-titleholder engaged in small business within the RoW."

^{xxv} For recent examples see Malouf Bous, K. and Farr, J. *False Promises: How delivering education through public-private partnerships risks fueling inequality instead of achieving quality education for all*. Oxfam. 2019. <http://hdl.handle.net/10546/620720>; Hunter, B. M. and Marriott, A. *Development Finance Institutions: The (in)coherence of their investments in private healthcare companies*. Reality of Aid Report, 2018. <https://realityofaid.org/wp-content/uploads/2018/12/RoA-Full-Report2018FINAL3-min.pdf#page=39>; For longer term analysis see Sarfaty, G. *Values in Translation: Human Rights and the Culture of the World Bank*. Stanford, 2012. P. 12, 80, elsewhere.

^{xxvi} JK Paper Ltd. IFC Project Information. IFC. Project #24171

^{xxvii} Debasree De. *A History of Adivasi Women in Post-Independence Eastern India: The margins of the marginals*. Sage, London. 2018

^{xxviii} Biosev. IFC Project Information. IFC Project #34607

^{xxix} Timing is particularly complicated with Pacific Midstream because it was a holding company that owned 3 existing assets (which required maintenance) and one under construction. Three of 4 assets (including the one under construction) had confirmed IPs present. IFC considered none eligible for FPIC, although the Colombian government mandated Consulta Previa for all three. When IFC invested, the company was involved in a multi-year conflict with the Afro-Brazilian U'wa population who would not allow pipeline operators on their land to carry out maintenance. [Petroelectrico de los Llanos](http://www.petroelectrico.com.co) was found not to have IPs by the Interior minister; Oleoducto Bicentenario de Colombia crosses [U'wa lands](http://www.petroelectrico.com.co) (and is 58.47% owned by Ecopetrol), and the U'wa weren't allowing access when IFC invested and continue not to allow access; At [Oleoduto de los Llanos Orientales](http://www.petroelectrico.com.co), Achagua and Piapoco communities in Puerto Lopez (Meta), were found on the Turpial-La Victoria reserve in 2011 & CP was [court-ordered](http://www.petroelectrico.com.co). IFC doesn't say whether it was completed. Finally, the Ministry of Interior certified the presence of indigenous community Maisheshe La Chivera on the [Cresciente-Tolu pipeline](http://www.petroelectrico.com.co). IFC notes that CP was conducted here, though the project did not go forward and IFC never mandated FPIC.

^{xxx} IFC PS7 Para. 11

^{xxxi} Commercial success rates have improved markedly in recent years, approaching 60% when effective stratigraphic analysis is applied. See, e.g. Westwood Energy. *State of Exploration 2020*. <https://www.westwoodenergy.com/reports/state-of-exploration-2020>

^{xxxii} Jorgenson, J.C., Ver Hoef, J.M, and Jorgenson, M.T. 2010 Long-term Recovery Patterns of Arctic Tundra After Winter Seismic Exploration: ANWR. In *Ecological Applications* 20(1): p. 205-221; Arun, P.R. and Rajan, P. Impact Assessment of Prospecting Exploration Activities Through 3D Seismic Data Acquisition by Oil Inda Ltd. on Mangrove Fauna at Kakinada, Andhra Pradesh. Salim Ali Centre for Ornithology and Natural History, Coimbatore, India. April 2014



- ^{xxxiii} Doudy, B. and Cockshell, D. A visual assessment of the recovery of 3D seismic lines in the Cooper Basin, South Australia. The APPEA Journal 56(1) 295-330 <https://doi.org/10.1071/AJ15023> Published: 2016 <https://www.publish.csiro.au/AJ/AJ15023>
- ^{xxxiv} Russia: LUKOil starting seismic exploration in indigenous territory without any consultation. 18 December 2014. <https://www.iwgia.org/en/russia/2195-russia-lukoil-starting-seismic-exploration-in-indi.html?highlight=WyzZWzbWjll0=>; Johnstone, R. L. and Hansen, A. M. Extractive Industries: Community Engagement in the Arctic. Routledge 2020; Praeli, Yvette Sierra. Environment and rights founder in the wake of Chinese Funding in Bolivia. Mongabay. 17 December 2018 <https://news.mongabay.com/2018/12/environment-and-rights-founder-in-the-wake-of-chinese-funding-in-bolivia/>
- ^{xxxv} The Maya population in Belize lost trees and vines used for food sources, traditional construction materials and rafter-ties in seismic line cutting. Additionally, traditional protected lands were set alight by mishandled blasting material. Illegal hunting, resource extraction and harvesting of forest products increased because the gridlines provided access to opportunists. In: Sarstoon Temash Institute for Indigenous Management (SATIIM) and Minority Rights Group International. Submission to the 17th Session of the Working Group on the UPR Joint Stakeholder Report Relating to the Examination of Belize March 2013; IWGIA.
- ^{xxxvi} Paige, J. M. Indigenous Revolution in Ecuador and Bolivia, 1990-2005. University of Arizona Press. 2020. P. 48
- ^{xxxvii} Tasker, J. P. Supreme Court quashes seismic testing in Nunavut, but gives green light to Enbridge pipeline. CBC News 26 July 2017. <https://www.cbc.ca/news/politics/supreme-court-ruling-indigenous-rights-1.4221698>
- ^{xxxviii} One indigenous community in Ecuador held state and company representatives hostage for 12 days to negotiate the “Sarayaku Accord” with the population, which banned seismic activity and legalized indigenous landholding throughout the Department. The following year, president Rodrigo Borja renounced the accord, arguing, without irony, that it had been signed under duress. J. Paige p. 47-49
- ^{xxxix} The US, Canada, Russia and most countries have these requirements
- ^{xl} Tian Lun Gas, Environmental and Social Review Summary
- ^{xli} IFC PS7 Para. 5
- ^{xlii} Fundação Nacional do Índio (FUNAI) oversees indigenous rights. Fundação Cultural Palmares (FCP) oversees Quilombola rights. Traditional land claims are overseen both by the agrarian reform agency (Instituto Nacional de Colonização e Reforma Agrária (INCRA)) and Instituto de Terras, Cartografia e Geociências (Institute of Lands, Mapping and Geosciences – ITGC).
- ^{xliii} This limitation has real-world implications for Quilombolas whose mapped territories could be impacted by activities adjacent to their traditional lands and whose traditional lands have been historically affected prior to their certification. Quilombola communities whose land was parceled off to agribusiness interests prior to certification, for example, have no recourse to seek restoration of environmental hygiene.
- ^{xliv} Henriques, J. Friere, L. Ethnic minorities in Brazil and Spain: Erasure and stigmatization, gender, and self-representation of indigenous and Roma communities. PhD Dissertation. University of Arizona Department of Spanish and Portuguese. 2012
- ^{xlv} In a 2016 submission to the UN Office of the High Commissioner for Human Rights during Brazil’s Universal Periodic Review, the National Quilombo Association (ANQ) identified the slow land titling process by the state as a major barrier to Quilombola cultural integrity. National Association of Quilombos. Quilombo Remnants: recognition of rights to territorial disputes - Overview of Brazil Quilombo Status Report in Brazil - Civil Society - UPR Brazil 3rd Cycle. Pinheiro, October 2016 [Link](#)
- ^{xlvi} All data from Palmares public documentation. “Download do XLS das Comunidades certificadas (Certidões expedidas)” http://www.palmares.gov.br/?page_id=37551; <http://www.palmares.gov.br/wp-content/uploads/2015/07/TABELA-DE-CRQ-COMPLETA-ANALISE.pdf>; <http://www.palmares.gov.br/wp-content/uploads/2015/07/TABELA-DE-CRQ-COMPLETA-VISITA-T%C3%89CNICA.pdf>
- ^{xlvii} Ibid.
- ^{xlviii} <https://terraredireitos.org.br/noticias/noticias/invernada-paiol-de-telha-e-o-primeiro-quilombo-titulado-no-parana/23069>
- ^{xlix} Klabin SA owns 93% of the lands of Telemaco Borba, having claimed it after the massacre of indigenous Caingangue/Kaingang peoples at the site of its Harmonia operations. Ema Klabin renamed the river and the plant Harmonia, decades after it had been named Rio das Mortandades, River of the Murdered. The municipality of Telemaco Borba itself was nearly named Klabinland in the 1960s, but was ultimately found too indicative of employment patronage. “Terra dos Caingangues” and “Pedro Lagoa” were rejected as too representative of the history of the defeated. Telémaco Borba, a Parana explorer “had much to say but nothing to do” with the development of the area. His was a neutral enough name. <https://acervodigital.ufpr.br/bitstream/handle/1884/24603/D%20-%20CUNHA,%20ANACILIA%20CARNEIRO%20DA.pdf> ANACÍLIA CARNEIRO DA CUNHA. O Homem Papel: Análise Histórica do Trabalhador das Indústrias Klabin do Paraná de Celulose S/A 1942-1980. Curitiba 1982. p. 49
- ^l Klabin’s effluent emissions are also linked to adverse impacts on downstream indigenous populations, and no evaluations have been made of the impacts of its sourcing plantations scattered across 37 municipalities. <https://environmentalpaper.org/wp-content/uploads/2020/04/Development-funds-disolving-in-pulp-April2020-1.pdf>
- ⁱⁱ <https://terrasindigenas.org.br/en/noticia/204155>; <https://grist.org/article/ranchers-with-ties-to-the-biofuel-industry-attack-brazilian-tribe-members/>
- ⁱⁱⁱ Public Law 134-18, Colombia. Section 2.9. Original language “2.9. No Veto. El derecho de Consulta Previa siendo un derecho fundamental no tiene el carácter de absoluto. Por tanto, no conlleva un poder de veto sobre las medidas legislativas, con fuerza de ley o administrativas, o los proyectos, obras o actividades (POA) consultados. La no consecución de un acuerdo o conciliación no impide que se tome la Decisión por parte del Estado de continuar con el trámite de las medidas legislativas, con fuerza de ley o administrativas, o los POA.”
- ⁱⁱⁱⁱ IFC Board. Update of IFC’s Policy and Performance Standards on Environmental and Social Sustainability, and Access to Information Policy. 14 April 2011. Para. 38 https://www.ifc.org/wps/wcm/connect/eea7879d-6833-4fc8-8cfc-57bea2492910/Board-Paper-IFC_SustainabilityFramework-2012.pdf?MOD=AJPERES&CVID=jiVQFYF
- ^{lv} Nicolas Pirsoul. The deliberative deficit of prior consultation mechanisms. Australian Journal of Political Science. 54(2) 2019. <https://www.tandfonline.com/doi/abs/10.1080/10361146.2019.1601681?sr=c=recsys&journalCode=cajp20>
- ^{lvi} IFC. Elecnorte Guajira ESRS. Jun 2019. <https://disclosures.ifc.org/#/projectDetail/ESRS/39254>
- ^{lvii} The government has certified fraudulent and illegal negotiations in which false or overly technical information is shared, restricting communities understanding of actual impacts. In other cases, leaders or communities have been offered money in exchange for project advancement, without quantifying the impacts the community will actually face or valuing the effects of the operation on culture and territory. Several processes have suffered from ‘elite capture,’ as the elites within an indigenous community secure direct benefits at the expense of communal welfare. See, e.g. Guerrero, S. Para obras de refuerzo eléctrico indígenas piden consulta previa. El Heraldo 1 August 2019. <https://www.elheraldo.co/la-guajira/para-obras-de-refuerzo-electrico-indigenas-piden-consulta-previa-654254> Semana Reporters. Proyecto de refuerzo eléctrico para La Guajira garantizará el servicio en el departamento. Semana. 22 October 2019. <https://www.semana.com/contenidos-editoriales/el-pais-si-fluye/articulo/como-va-el-proyecto-de-refuerzo-electrico-para-la-guajira/637002>; Juan C. Herrera. Binding consent of Indigenous Peoples in Colombia: an example of transformative constitutionalism. In (Eds) Claire Wright, Alexandra Tomaselli. The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap. Routledge, 2019. Houghton, J. 2008. Estrategia petrolera en los territorios indígenas. In J. Houghton (Ed.) La Tierra contra la muerte. Conflictos territorios de los pueblos indígenas en Colombia (P. 279-311). Bogotá CECOIN; Laura Calle Alzate. El espejismo de la autonomía indígena: mirada a la situación de una comunidad en la Orinoquía Colombiana



^{lvii} "FPIC is a Lender requirement and not required under Nepalese regulations." ESRS, Environmental and Social Mitigation Measures, PS7

^{lviii} Guldin, Greg. FPIC as a Project Bonus: The UT-1 Experience. World Bank Energy Week. March 7, 2019. Washington DC.

^{lix} Dalit householders were mixed in with Tamang households at the project. Rather than see this intermixing as signs undermining indigeneity, the Trishuli process considered all householders to merit indigenous protections.

^{lx} "Formal Consent was granted by the community for both the Project and the IPP by means of a puja carried out by lamas and bonpo (shamans) wherein the Company received the signed Consent Statement" (addenda including IPP <https://disclosures.ifc.org/#/projectDetail/ESRS/35701>). P. 37

^{lxi} Christoph Nolte, Arun Agrawal, Kirsten M. Silvius, Britaldo S. Soares-Filho. Protected area governance and deforestation. Proceedings of the National Academy of Sciences Mar 2013, 110 (13) 4956-4961; DOI: 10.1073/pnas.1214786110