

May 20, 2016

Mr. Jim Yong Kim, President

World Bank Group

1818 H Street NW

Washington, DC 20433

Dear President Kim,

We are writing to you on behalf of the three United Nations mechanisms on Indigenous peoples, namely the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the rights of indigenous peoples, to underscore an important inaccuracy in the summary document of the High Level Dialogue on the Proposed ESS 7 on Indigenous Peoples that was held in Addis Ababa on 11 and 12 February 2016.<sup>1</sup> We are also writing to express our serious concerns about the term "broad community support" (BCS), as operational understanding of FPIC.

**1. Inaccurate statement in the summary document**

It has come to our attention that the World Bank has recently released on its website a summary document of the High Level Dialogue on the Proposed ESS 7 on Indigenous Peoples that was held in Addis Ababa on 11 and 12 February 2016. That summary document states that the government representatives, the current and former UN Special Rapporteur on the rights of indigenous peoples, the representative of the UN Expert Mechanism on the Rights of Indigenous Peoples, and the representative of the African Commission on Human and Peoples Rights expressed their "broad acceptance" to the proposal that Free Prior and Informed Consent (FPIC) would be operationally defined as having an outcome of "broad community support" (BCS).

We reaffirm that it was *never* the objective of the High Level Dialogue meeting held in Addis Ababa on 11-12 February to generate interpretative comments on any international standards. Accordingly, the representatives of United Nations mechanisms on Indigenous peoples who attended the meeting did not express any broad support to any interpretation of the international norms on FPIC. While equating the right to FPIC to BCS was discussed at the meeting, the Indigenous experts attending did not express their agreement to such an operational definition. Hence, it cannot be concluded that there was "broad acceptance" among the participants of defining the outcome of FPIC as "broad community support".

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<sup>1</sup> [https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/final\\_summary\\_-\\_high-level\\_dialogue\\_on\\_ess\\_7.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/final_summary_-_high-level_dialogue_on_ess_7.pdf)

We therefore request that this summary document on the meeting is amended accordingly, including on the external website of the World Bank.

## **2. Concerns about the term “broad community support” with regards to FPIC**

We would also like to express our serious reservations to the notion that “operationally FPIC [will be] interpreted in the same manner as free prior and informed consultation leading to broad community support”. There are a number of technical reasons for our concerns:

- (1) The requirement for Indigenous peoples’ FPIC is provided for under international law with a progressively crystallising understanding through international standards and jurisprudence. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the ILO Convention 169 uphold the FPIC principle and a broad range of UN Human Rights Treaty Bodies have over the years increasingly elaborated on the applicability of the State duty to obtain Indigenous peoples’ FPIC and the associated right of Indigenous peoples to give or withhold their FPIC. Likewise the ILO Committee of Experts on the Application of Conventions and Recommendations, regional and national courts and human rights institutions have and continue to generate jurisprudential materials that are consolidating the understanding on the FPIC norm.
- (2) “Broad community support” (BCS) is an ambiguous concept with no legal basis under international law and without a clear understanding or meaning. The World Bank’s own internal review on the implementation of its existing policy on Indigenous peoples points to the fact that “broad community support” has not been ascertained in a consistent manner and has failed to ensure good faith consultation leading to outcomes and agreements with Indigenous peoples that guarantee respect for their rights. BCS has been applied in projects that manifestly lacked the substantive elements of FPIC and has consequently served to weaken the respect for the collective decisions of Indigenous peoples based on their own decision-making institutions and processes. We are therefore of the view that any use of the concept BCS in the implementation of FPIC would bring about confusion and seriously undermine the potential of the new WB safeguard standards to comply with the human rights-based approach to development that is environmentally and socially responsible and is in service to the peoples they are meant to support. Establishing BCS as the operational definition of FPIC would undermine the effective implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in general, as well as its specific provisions relating to the requirement for the FPIC of Indigenous peoples and respect for their decision-making processes and institutions. BCS would also be an obstacle to any rebuilding of trust and constructive partnership between States and Indigenous peoples. We would like to reiterate that the right to give or withhold FPIC is a collective self-determination based right of Indigenous peoples as peoples. Consent must therefore be obtained through Indigenous peoples’ own decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices.
- (3) Furthermore, we would like to highlight that FPIC is a norm introduced in international law for two mutually reinforcing objectives. On the one hand, FPIC seeks to contribute to

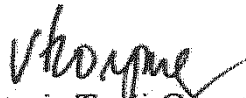
the realisation of Indigenous peoples' rights. The obligation of States to consult in order to obtain the free, prior and informed consent of Indigenous peoples is affirmed in the context of the right of Indigenous peoples to self-determination and the associated right to determine and develop priorities and strategies for the development or use of their lands, territories and resources. On the other hand, the FPIC norm also seeks to forge between States and its peoples a new partnership grounded in mutual trust, with a view to achieving shared growth, prosperity and participatory development. FPIC is equally a tool that would enable Indigenous peoples to contribute to national development and solutions to global issues such as tackling climate change, economic development and poverty eradication. A relationship between State and Indigenous peoples which is built on the recognition and respect for the rights of Indigenous peoples as peoples engenders peace, human well-being, political and economic confidence, and effective governance. . Respecting and implanting FPIC will pave the way for genuine cooperation and partnership with Indigenous peoples based on their perspectives, needs, aspirations and ensure that development is in line with culture, identity, and need, and is therefore, sustainable. FPIC should not be seen as a barrier to development, but as facilitating national development, shared prosperity, advancing the rule of law, and securing economic and foreign investments in all countries.

- (4) We assert that the World Bank has the responsibility to uphold the highest standards of international law, including the rights of Indigenous peoples. The operational understanding of FPIC as broad community support would, in our collective view, amount to watering down international standards on the rights of Indigenous peoples and thus seriously undermine the application of key international law principles. In short, failure to respect and implement international law in this respect would expose all stakeholders, including States, Indigenous peoples and World Bank to increased risk.

We sincerely hope that the World Bank will adhere to its international responsibilities and support FPIC over BCS in the final version of ESS7. We have provided some textual edits below which we believe provide a more appropriate level of protection for the rights of Indigenous peoples. We are willing to engage in a technical and operational discussion on the different constitutive elements of FPIC and would welcome the opportunity to discuss this with Bank leadership.

In addition, we would like to encourage to the Bank to extend its offer to hold dialogues between Indigenous peoples' leaders, representatives of the UN Indigenous rights mechanisms, and high level officials of the World Bank before the final decision is taken on the safeguards. We believe it would be mutually beneficial to initiate these dialogues, including those on how to move forward with the establishment of the proposed Indigenous Peoples Advisory Council, as soon as possible in the interests advancing meaningful, impactful and sustainable development and would go a long way in building stronger and more productive relationships with Indigenous peoples.

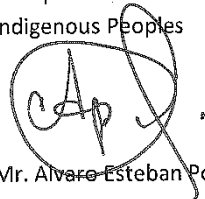
Yours sincerely,

  
Victoria Tauli-Corpuz  
UN Special Rapporteur on the rights of  
indigenous peoples



Mr. Alexey Tsykarev

Chairperson of the Expert Mechanism on the Rights of  
Indigenous Peoples



Mr. Alvaro Esteban Pop

Chairperson of the UN Permanent Forum on Indigenous Issues

Cc:

Members of the World Bank Committee on Development Effectiveness

Members of the World Bank Executive Board

Mr Luis Felipe Duchicela, Senior Advisor for Indigenous Peoples for the World Bank

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Modified version of "New draft, proposed paragraph 19", text to delete with strikethrough and new text to add in red:

~~Operationally FPIC is interpreted in the same manner as free prior and informed consultation leading to broad community support. For the purposes of this ESS, consent of affected Indigenous Peoples communities refers to a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized freely chosen representatives, of broad community support agreement for the project activities. Such broad community support agreement must be obtained through Indigenous Peoples' own decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices and may exist even if some individuals or groups object to project activities.~~