



Forest Peoples Programme

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BRIEFING ON INDIGENOUS PEOPLES AND PRIVATE SECTOR PROJECT FINANCING

THE INTERNATIONAL FINANCE CORPORATION, THE EQUATOR PRINCIPLES BANKS AND EXPORT CREDIT AGENCIES

I. INTRODUCTION

This briefing looks at international financing for private sector projects from three different sources: the International Finance Corporation (IFC), the Equator Principles Banks (EPBs) and Export Credit Agencies (ECAs). In 2006, these institutions adopted or are in the process of adopting new policy standards on indigenous peoples. The IFC is part of the World Bank Group (WBG) and until recently employed World Bank policies on indigenous peoples and other issues. On 1 May 2006, a new set of IFC private-sector specific policies came into force, including a new instrument concerning indigenous peoples.¹ The EPBs are 41 major commercial banks that have signed on to a set of environmental and social standards known as the Equator Principles.² These Principles are based on the policies employed by the IFC and are presently being updated to be consistent with the new IFC policies. ECAs are national level bodies owned and operated by most industrialized countries that provide loans and export credits to their own national companies for their operations abroad. Most ECAs are meeting at the end of May 2006, to discuss whether they will adopt the new IFC standards and apply them in their projects. Considering that the new IFC policies will also be used by the EPBs and potentially by ECAs, this briefing will primarily focus on and summarize these policies, particularly the one directly addressing indigenous peoples. A more complete analysis of the new IFC standards will be available later this year.

The activities funded by these institutions are increasingly affecting indigenous peoples and arguably may now have greater impact on the territories, livelihoods and cultures of indigenous peoples than the public sector funding provided by the multilateral development banks. Together, the IFC, EPBs and ECAs provide the vast majority of private sector project financing around the world. The EPBs alone financed US\$125 billion of direct foreign investment in 2005 and ECAs are estimated to support twice the amount of oil, gas and mining projects as all multilateral development banks combined. In addition to financing projects on their own, these bodies often co-finance projects, including those part-financed by public sector bodies such as the World Bank and bilateral development agencies. In fact, it is increasingly common for projects to be financed by a variety of sources and, therefore, it is important to know who these various actors are and what their policies, if they have one, on indigenous peoples require. Corporations also often obtain financing from the IFC, EPBs and ECAs and are in principle required to comply with their policies. The Chad-Cameroon oil pipeline, for instance, is a \$3.7 billion project supported by the World Bank, the IFC, a number of ECAs and commercial banks, and involves three main corporations.

¹ The new IFC policies are available at: <http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards>

² See: <http://www.equator-principles.com/>

II. THE IFC POLICY AND PERFORMANCE STANDARDS

The IFC is part of the private sector arm of the WBG and as such provides loans and other support to corporations, including some of the world's wealthiest, rather than to governments. It is also a member of the Permanent Forum on Indigenous Issues' Inter-Agency Support Group. According to the IFC, its mission is "to promote sustainable private sector development in developing countries helping reduce poverty and improve people's [sic] lives." IFC believes that sound economic growth, grounded in sustainable private investment, is crucial to poverty reduction. As the IFC often buys a stake in projects, it operates as both the guarantor of environmental and social standards and as an investor that stands to profit from the same projects.

On 21 February 2006, the Board of the World Bank Group approved the adoption of a new IFC Policy on Social and Environmental Sustainability (which only applies to the IFC as opposed to its clients) and 8 new Performance Standards (PS) to replace the general World Bank policies previously used by the IFC. The PS, which IFC clients are required to follow, cover Social and Environmental Assessment (PS1), Labour and Working Conditions (PS2), Pollution Prevention and Abatement (PS3), Community Health, Safety and Security (PS4), Land Acquisition and Involuntary Resettlement (PS5), Biodiversity Conservation (PS6), Indigenous Peoples (PS7) and Cultural Heritage (PS8). The package also includes a revised set of Environmental and Social Review Procedures to be followed by IFC staff, and a set of non-binding best practice Guidance Notes that advise both IFC staff and its corporate clients on how to implement the PS. These new standards and procedures were adopted without serious and meaningful input by indigenous peoples.

Some IFC-supported projects have negatively affected indigenous peoples. The Chad-Cameroon oil pipeline project, for example, passes through indigenous lands in Cameroon and has resulted in uncompensated and non-consensual loss of lands and resources, exacerbated conflicts with non-indigenous neighbours, and has caused an overall deterioration in indigenous peoples' economic and social well-being. Protected areas established under the project to 'off-set' biodiversity loss have also resulted in violations of indigenous peoples' rights. A number of IFC supported mining projects – the Glamic operated mine in Guatemala and the Newmont operated Yanacocha mine in Peru, for instance – have also engendered substantial opposition from affected indigenous peoples. Will the new IFC PS on indigenous peoples provide effective safeguards and ensure that this will not occur in the future?

A. Performance Standard 7 on Indigenous Peoples

PS7 is the primary reference point for IFC projects affecting indigenous peoples. PS7 is also cross referenced in other PSs, such as PS1 and PS5, and, in some cases, it must be read conjunctively with these other standards. There is no definition of indigenous peoples as such in PS7, although a number of criteria, including self-identification, are set out, which may be used to determine if an affected group qualifies as an indigenous people (para. 5).

1. Objectives

The objectives of PS7 are defined as avoidance or mitigation of adverse impacts; fostering "full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples;" establishing and maintaining an ongoing relationship with indigenous peoples affected by the project; and, to "foster good faith negotiation with and informed participation of Indigenous Peoples when projects are to be located on traditional or customary lands under use by the Indigenous Peoples." In connection with the reference to human rights in the objectives, the (non-binding) Guidance Notes provide that:

IFC recognizes that the rights of Indigenous Peoples are being addressed under both national and international law. Under international law, key UN human rights conventions ... form the core of international instruments that provide the rights framework for the world's indigenous peoples. In addition, some countries have passed legislation or ratified other international or regional conventions for the protection of Indigenous Peoples (for example, ILO Convention 169, ratified by 17 countries).... While such legal instruments establish responsibilities of states, it is increasingly expected that private sector companies conduct their affairs in a way that would uphold these rights and not interfere with states' obligations under these instruments. It is in recognition of this emerging business environment that IFC expects that private sector projects financed by IFC foster full respect for the dignity, human rights, aspirations, cultures and customary livelihoods of Indigenous Peoples (GN1).

What this language may mean in practice remains to be seen, particularly as the IFC has yet to develop tools that could be used to monitor how corporations will assess and uphold indigenous peoples' rights and not interfere with State's obligations. However, the IFC is working with the International Business Leaders Forum to develop a Human Rights Impact Assessment tool, which, while not specific to indigenous peoples' rights, could be used at least to identify human rights risks and impacts that could be accounted for in project design and implementation.³ Clearly, to be effective, such a tool must reflect the specific rights of indigenous peoples and be developed and implemented with indigenous peoples' informed and meaningful participation.

2. Environmental and Social Impact Assessment

In accordance with PS1 on Impact Assessment and PS7 on Indigenous Peoples, as part of avoiding or, when not possible, mitigating adverse impacts, the client has to conduct a social and environmental impact assessment that identifies all potentially affected indigenous peoples within the project's 'area of influence' (PS7, para. 7).⁴ According to the Guidance Notes, the impact assessment "should use participatory approaches and reflect the views of the affected communities of Indigenous Peoples on expected project risks, impacts and benefits" (GN11) and; "the client should seek active participation of the affected communities of Indigenous Peoples throughout the key stages of the process of Assessment on matters that pertain to them" (GN18). PS7, paragraph 13, further provides that "Indigenous Peoples' land use will be documented by experts in collaboration with the affected communities of Indigenous Peoples without prejudicing any Indigenous Peoples' land claim."

Where avoidance of adverse impacts is not 'feasible', the client has to develop a 'time bound plan' with the informed participation of indigenous peoples (para. 8). This plan must set out mitigation measures and provide for development benefits identified with indigenous peoples' participation (para. 10). The client is also required to create a culturally appropriate grievance mechanism (PS1) that "should enable the affected communities of Indigenous Peoples to raise and receive responses to grievances and complaints, and provide for fair, transparent, and timely redress of grievances at no cost...." (GN20).

3. 'Broad Community Support'

In international human rights law, indigenous peoples have the right to give or withhold their free, prior and informed consent in relation to activities that may affect their lands, territories and resources traditionally owned or otherwise occupied and used. This standard is also increasingly reflected in development policy instruments and was endorsed by the World Commission on Dams and the Extractive Industries Review in relation to World Bank Group

³ <http://www.iblf.org/>. See also, <http://www.iblf.org/activities/humanrights.jsp>.

⁴ The area of influence includes primary project sites, associated facilities, areas that could be affected by cumulative impacts from subsequent project components, and from unplanned but predictable developments related to the project (PS1).

projects. PS7 does not comply with this standard, but, instead, requires that the client will conduct ‘free, prior and informed consultation’ with indigenous peoples and seek their informed participation (among others, para. 9 and PS1) and, for ‘high risk’ projects or activities, enter into and successfully conclude good faith negotiations (see below). The non-binding Guidance Notes further provide that, before presenting a project to its Board for approval, the IFC will determine that: the client’s community engagement has involved free, prior and informed consultation; this process has enabled indigenous peoples’ informed participation; and, this process has lead to broad community support for the project (GN 19).

Broad community support is defined as “a collection of expression[s] by the affected communities, through individuals and/or their recognized representatives, in support of the project. There may be broad community support even if some individuals or groups object to the project” (GN19). It is important to note that the broad community support requirement, apart from being difficult to understand, is not required in PS7 or any other PS and, therefore, is not a requirement that the client itself must meet. Instead, it is required in the IFC Policy on Social and Environmental Sustainability, which sets out the obligations of the IFC rather than the client. Accordingly, the IFC itself is required to **verify** its existence or lack thereof as a requirement of project processing in projects with adverse impacts on indigenous peoples. No independent verification is required of the existence of broad community support: such a determination is made solely by the IFC.

4. 'High Risk' Projects and Good Faith Negotiation

As noted above, for certain ‘high risk’ projects or activities, PS7 requires the client to “enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and the successful outcome of the negotiation” (paras. 13, 14 and 15). These high risk projects are:

- projects that may be on, or commercially develop natural resources within, indigenous peoples’ “traditional or customary lands under use, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples...” (para. 13);
- physical relocation (para. 14; PS5, para. 19);
- ‘economic displacement’ due to land acquisition/compulsory takings for project purposes (PS5, para. 21);⁵ and,
- commercial use of cultural resources, and traditional knowledge, innovations and practices (para. 15).

With regard to the terms used in the first point above, the Guidance Notes (GN 23) state that:

Customary use of land and resources refers to patterns of long-standing community land and resource use in accordance with Indigenous Peoples’ customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the state. Cultural, ceremonial and spiritual uses are an integral part of Indigenous Peoples’ relationships to their lands and resources, are embedded within their unique knowledge and belief systems, and are key to their cultural integrity. Such uses may be intermittent, may take place in areas distant from population centers, and may not be site specific. Any potential adverse impacts on such use must be documented and addressed within the context of these belief systems.

⁵ According to PS5, para. 1, ‘economic displacement’ includes “loss of assets or access to assets that leads to loss of income sources or means of livelihood ... as a result of project-related land acquisition.”

These clarifications are important and seemingly situate land and resource use and cultural, ceremonial and spiritual uses within indigenous peoples' own frames of reference (i.e., in accordance with customary laws, values and traditions, and knowledge and belief systems). Similarly, such usage need not be permanent (seasonal or cyclical, intermittent) and is not dependent on recognition by the State. While these clarifications are found in the non-binding Guidance Notes, they should nonetheless be considered as authoritative interpretations of the terms used in the PS itself and therefore more than simply statements of aspiration. Additionally, the Guidance Notes propose that impact assessments should go beyond documenting usage and also "describe the Indigenous Peoples' customary land and resource tenure system within the project's area of influence" (GN23).

The good faith negotiation required in paras. 13, 14 and 15 must: involve indigenous peoples' representative bodies, be gender and generationally inclusive in a culturally appropriate manner, and provide sufficient time for indigenous peoples' collective decision making processes (para. 9). While there is no definition of the term 'good faith negotiation', the Guidance Notes explain that it, at a minimum: "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" (GN25). Note in particular that there should be mutually acceptable procedures for the negotiation.

There is similarly no definition of a 'successful outcome' of the good faith negotiations in PS7. However, it would be perverse to interpret the successful outcome of a negotiation to be anything other than some form of agreement. This is reflected in the Guidance Notes, which provide that documentation indicating a successful outcome include: "a memorandum of understanding, a letter of intent, a joint statement of principles, and written agreements" (GN25). The 'agreement(s)' that may be arrived at during the negotiation may also have an operational role in the project itself; in this respect, the Guidance Notes add that it "may be appropriate to recite or reflect the contents of a Community Development Plan or an Indigenous Peoples Development Plan in such documents or agreements to confirm and clarify the responsibilities of involved parties with respect to the relevant plan" (GN25).

The requirement that good faith negotiation takes place and is demonstrably successful is an improvement over previous IFC policy and present World Bank policy (OP 4.10).⁶ Leaving aside the many issues involved with negotiation processes – such as inequality of bargaining power – there should be no reason to rule out the possibility that indigenous peoples can either refuse to negotiate – thus there would be no successful outcome and in principle no IFC financing – or require that negotiations culminate in a legally binding instrument. However, it remains to be seen how IFC would deal with such a situation. It is also unclear how PS7, paragraph 13 relates to the broad community support standard, and most importantly: what, in practice, will be the dividing line between projects that trigger the good faith negotiation requirement as opposed to broad community support? What can be said now is that the IFC requires both for projects that fall within the high risk category and seems to treat successfully concluded negotiations as evidence of broad community support and therefore, presumably the converse is also the case (GN26).

⁶ It should be noted that the new Inter-American Development Bank Operational Policy on Indigenous Peoples also uses the term 'good faith negotiation' and requires this in certain circumstances. See separate briefing on the IADB.

B. Relevant Requirements in PS6 and PS8

Paragraph 10 of PS6 on Biodiversity Conservation requires that clients not conduct project activities in ‘critical habitats’ unless “there are no measurable adverse impacts on … the functions of the critical habitat” in relation to its social, economic or cultural importance to local communities. ‘Critical habitats’ are defined as, among others, areas “having biodiversity of significant social, economic or cultural importance to local communities,” presumably also including indigenous peoples (para. 9). In principle, this creates a higher standard in relation to areas used by indigenous peoples for, among others, “cultural, ceremonial, or spiritual” purposes, although it is likely that the term ‘functions’ will be interpreted narrowly and will serve as a major limitation.

Similarly, PS8 on Cultural Heritage is also relevant.⁷ PS8, paragraph 9, requires successfully concluded and good faith negotiation where a project “may significantly damage critical cultural heritage, and its damage or loss may endanger the cultural or economic survival of communities within the host country who use the cultural heritage for long-standing cultural purposes....” ‘Critical cultural heritage’ is defined as “(i) the internationally recognized heritage of communities who use, or have used within living memory the cultural heritage for long-standing cultural purposes; and (ii) legally protected cultural heritage areas, including those proposed by host governments for such designation” (PS8, para. 8). This language is quite narrow and does not require negotiation for damage to critical cultural heritage, only significant damage, and then only if such damage endangers cultural or economic survival. Where a project may affect non-critical cultural heritage, the client simply has to consult the affected people or community and incorporate their views into its decision making process (PS8, para. 6).

C. Concluding Remarks

While the negotiation standard is an improvement over ‘broad community support’, paragraph 13 nonetheless contains number of potentially inappropriate limitations. While these limitations may be a matter of interpretation of the terminology used – the Guidance Notes quoted above, do provide some helpful clarification in this respect – they are nonetheless problematic, and it is doubtful that this provision would apply to all projects on indigenous peoples’ traditionally owned lands. How, for example, will the terms ‘customary or traditional lands’ and the language “that define the identity and community of Indigenous Peoples” be interpreted in practice, and what does it mean to say that lands must be ‘under use’? The latter especially is discriminatory as the property rights of non-indigenous persons are often protected even where such property is not under use. Also, what is meant by ‘commercially develop natural resources’; does this, for instance, apply to a mining company using water from indigenous lands for processing, but the actual mine and plant are located somewhere else?

Finally, with the exception of paragraph 13 requiring collaborative documentation of traditional tenure systems, there is no explicit requirement in PS7 that indigenous peoples participate in impact assessments and the statements to this effect in the Guidance Notes are non-binding. This is highly problematic considering that the results of the assessment – conducted solely by the client – trigger the various provisions of the remainder of PS7. It is doubly problematic in light of past and contemporary failures to adequately assess impacts on indigenous peoples. Also, IFC verification of broad community support for projects – rather than simply requiring a written statement of agreement from indigenous peoples or

⁷ According to PS8, “cultural heritage refers to tangible forms of cultural heritage, such as tangible property and sites having archaeological (prehistoric), paleontological, historical, cultural, artistic, and religious values, as well as unique natural environmental features that embody cultural values, such as sacred groves” (para. 3).

verification by an independent third party – is tantamount to IFC saying ‘trust us to do the right thing’, when past experience shows that, from indigenous peoples’ perspectives, the IFC often does the wrong thing. Extractive projects are especially worrisome in this context as, according to the IFC, these projects are the best performers in its portfolio, meaning that the IFC makes the most profit from these projects. There is an inherent conflict of interest manifest in the IFC assuming the role of both investor and sole guarantor of social and environmental standards that is compounded by inadequate accountability measures and the ambiguity of much of PS7’s language. This conflict of interest is also manifest in the policies and operations of the EPBs and ECAs discussed below.

III. THE EQUATOR PRINCIPLES BANKS

The Equator Principles were adopted in 2003 by 10 large commercial banks under the title, “An industry approach for financial institutions in determining, assessing and managing environmental & social risk in project financing.”⁸ According to the Principles’ preamble, ‘In adopting these principles, we seek to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices.’ As of January 2006, the Principles have been adopted by 41 commercial banks, which cumulatively are responsible for over 80% of global private sector project finance (see Box 1 for a list of the EPBs).⁹

The current Principles apply to any project over US\$50 million and provide that the EPBs will not finance projects that fail to assess and manage environmental and social risks, involve consultation with indigenous peoples and local communities, and that do not include contractual provisions guaranteeing compliance with management regimes governing environmental and social risks. The Principles incorporate the pre-2006 IFC policies and compliance with these policies comprises the bulk of client requirements in EPBs-financed project processing.

Given that the Equator Principles are strongly connected to the IFC’s policies, when the IFC began the process of developing its new policy framework (discussed above), the EPBs also began to review the Principles. In February 2006, they met to discuss revision of the Principles, which, according to their website, is “being undertaken to 1) reflect implementation learning from the past 2 ½ years, 2) incorporate comments from various stakeholders received during this period, and 3) to ensure incorporation of, and consistency with, the IFC Performance Standards.” The EPBs certainly intend to adopt and use the new IFC policies, and the main issue they now have to deal with is what changes should be reflected in the body of the Principles themselves. One important change already agreed on by the EPBs is to lower the threshold at which the Principles

Box 1: The Equator Principles Banks
ABN AMRO
Banco Bradesco
Banco do Brasil
Banco Itaú
Banco Itaú BBA
Bank of America
BMO Financial
BTMU
Barclays
BBVA
BES Group
Calyon
CIBC
Citigroup
Credit Suisse
Caja Navarra
Dexia Group

⁸ See, <http://www.equator-principles.com/principles.shtml>

⁹ An NGO coalition that monitors the EPBs is called the Bank Track Network. See, [http://www.banktrack.org/](http://www.banktrack.org/http://www.equator-principles.com/documents/EquatorPrinciplesRedraftMarch2006.pdf)

¹⁰ <http://www.equator-principles.com/documents/EquatorPrinciplesRedraftMarch2006.pdf>

¹¹ Among others, see, *Shaping the Future of Sustainable Finance*. A report by BankTrack and WWF-UK. Available at: <http://www.banktrack.org/?id=47>

¹² *Risky Business -the new Shell. Shell's failure to apply its Environmental Impact Assessment Guidelines to Sakhalin II*, WWF-UK, November 2005. Available at: http://www.banktrack.org/doc/File/Projects/sakhalin%20II%20russia/risky_business_final2.pdf

apply to projects from US\$50 million to US\$10 million. The existing Principles will cease to apply on 30 June 2006 and the revised Principles, again incorporating the new IFC PSs, will come into force a day later on July 1, 2006.

To date, there have been no formal meetings between the EPBs and indigenous peoples to discuss the revision process. A preliminary draft of the revised Principles, dated March 2006, only makes brief mention of indigenous peoples in two annexes and a footnote.¹⁰ A May 2006 draft however is expected to include a specific paragraph on indigenous peoples in Principle 5, which deals with community engagement. This paragraph will recognize that a higher standard of engagement is required when projects may affect indigenous peoples and will be based on paragraphs 13, 14 and 15 of PS7, which include the good faith and successfully concluded negotiation requirement.

Irrespective of the final text of the revised Principles themselves, as noted above, the bulk of the requirements applied in EPB-financed projects are derived from IFC policies and therefore, clients are required to meet PS7 and the other PSs. This includes the good faith negotiation requirement and the other points discussed above. However, the new Principles only incorporate the PSs and therefore will not include the broad community support standard, which is located solely in the IFC's Policy on Social and Environmental Sustainability. In cases where the good faith negotiation requirement does not apply, the EPBs will merely require free, prior and informed consultation and informed participation.

Finally, NGOs and others, including financial auditing services, have identified serious problems with the implementation of the Equator Principles by the EPBs. Among other things, they have noted that some of the EPBs continue to invest in projects that conflict with the Principles and continue to cause environmental and social problems on the ground, including in the case of indigenous peoples.¹¹ The Sakhalin II oil project in Russia is a prime example. According to reports, the project, part funded by two EPBs, is operating on indigenous peoples' lands without their meaningful participation in decision making; indigenous peoples were not adequately addressed in the Environmental and Social Impact Assessment; oil spills have seriously degraded salmon spawning areas and fishing grounds, which are a fundamental part of indigenous peoples' means of subsistence; an oil storage facility has been constructed on a sacred burial site; and an Indigenous Peoples Development Plan – a requirement in IFC projects that must be completed prior to project approval – was not started until well after the project had commenced.¹²

IV. EXPORT CREDIT AGENCIES

Export credit and investment insurance agencies (ECAs) are usually public agencies that provide government-backed loans, guarantees, credits, insurance and other financial services to corporations from the ECA's home country to do business abroad. In 2001, ECAs financed US\$5 billion in project-related activities, and were involved in 10% of all world trade. In 2002, they reportedly held 28% of developing countries' total debt and 65% of their official debt. ECAs greatly facilitate projects in areas where corporations may not otherwise get involved by

Dresdner Bank
EKF
FMO
Fortis
HSBC Group
HVB Group
ING Group
JPMorgan Chase
KBC
Manulife
MCC
Mizuho Bank
Millennium bcp
Nedbank Group
Rabobank Group
RB Canada
Scotiabank
Standard Chartered Bank
SMBC
RB Scotland
Unibanco
Wells Fargo
WestLB
Westpac

providing risk insurance that essentially converts a private risk to a public risk backed up with government loans. Most industrialized countries now have at least one ECA, with 36 globally and 28 in Organization for Economic Co-operation and Development (OECD) countries (see Box 2).¹³

Box 2: OECD Member Country ECAs

Australia	Export Finance and Insurance Corporation (EFIC)
Austria	Oesterreichische Kontrollbank AG (OeKB)
Belgium	Office National du Ducroire/Nationale Delcrederedienst (ONDD)
Canada	Export Development Canada (EDC)
Czech Rep.	Export Guarantee & Insurance Corporation (EGAP) & Czech Export Bank
Denmark	Eksport Kredit Fonden (EKF)
Finland	Finnvera Oyj & FIDE Ltd.
France	Compagnie française d'Assurance pour le commerce extérieur (COFACE) & Direction des Relations Economiques Extérieures (Ministère de l'Economie) (DREE)
Germany	Euler Hermes
Greece	Export Credit Insurance Organization (ECIO)
Hungary	Hungarian Export Credit Insurance Ltd (MEHIB) & Hungarian Export-Import Bank
Italy	Sezione Speciale per l'Assicurazione del Credito all'Esportazione (SACE)
Japan	Nippon Export and Investment Insurance (NEXI) & Japan Bank for International Cooperation (JBIC)
Korea	Korea Export Insurance Corporation (KEIC) & Export-Import Bank of Korea (KEXIM)
Luxembourg	Office du Ducroire (ODD)
Mexico	Banco National de Comercio Exterior
Netherlands	Atradius
New Zealand	Export Credit Office (ECO)
Norway	Norwegian Guarantee Institute for Export Credits (GIEK)
Poland	Korporacja Ubezpieczén Kredytów (KUKE)
Portugal	Companhia de Seguro de Créditos
Slovakia	Export-Import Bank of the Slovak Republic (Eximbank SR)
Spain	Compañía Española de Seguros de Crédito a la Exportación & Secretaría de Estado de Comercio (Ministerio de Economía)
Sweden	Exportkreditnämnden (EKN)
Switzerland	Export Risk Guarantee (ERG)
Turkey	Export Credit Bank of Turkey (Türk Eximbank)
U.K	Export Credits Guarantee Department (ECGD)
U.S.A	Export-Import Bank of the United States (Ex-Im Bank)

ECAs have gained a reputation for funding environmentally and socially destructive projects that the World Bank and others decline to finance, such as extractive industries, large dams, nuclear facilities, pulp and paper factories, and arms sales. A prime example is the Three Gorges Dam in China, which was declined by a number of multi- and bilateral lenders and, despite the fact that this project is forcibly displacing over 1.8 million people, it received export credits and guarantees from Germany, Switzerland, France, Canada, Japan and Sweden. According to an NGO coalition that monitors ECAs, they are “the newer, bigger, badder banks ... which have as big, if not bigger, impacts on the growth of irresponsible corporate globalization and national debt in the global south as better-known institutions like the World Bank and WTO.”¹⁴ A separate case study on one ECA, the Japan Bank for International

¹³ See, http://www.oecd.org/department/0.2688.en_2649_34181_1_1_1_1_1.00.html

¹⁴ See, <http://www.eca-watch.org/>

Cooperation, which highlights its activities and policies as they affect indigenous peoples, is included in the overall package of briefings on international financial institutions.¹⁵

OECD country ECAs will be meeting in Paris at the end of May 2006 to discuss whether they will adopt and implement the new IFC PSs in the projects they support. As with the EPBs, only the PSs, rather than the IFC's other active policies, will be adopted if the ECAs do adopt the IFC standards. This includes PS7, which could become part of the project processing requirements applicable in all OECD country ECA projects at some point in the near future. The same issues discussed in relation to the IFC and EPBs will therefore also be relevant to ECAs and their activities as they affect indigenous peoples.

V. CONCLUDING REMARKS

Just as public sector international financial institutions have recently developed, revised (i.e., the World Bank and the Inter-American Development Bank) or are presently revising (Asian Development Bank) their project-related policies on indigenous peoples, this same shift in policies is also taking place among the private sector bodies. This recent and rapid change constitutes a global shift at the policy level that requires attention at the international, national and local levels if indigenous peoples are to fully understand the implications. Seemingly new terminology has been introduced: broad community support, the cynical 'free, prior and informed consultation', which in reality is simply consultation by another name, and good faith negotiation. How will these terms be understood and implemented in practice? How do these terms and the policies in which they are found measure up to human rights standards applicable to indigenous peoples, particularly as the latter require indigenous peoples' free, prior and informed CONSENT?

Increased attention is especially required with regard to the private sector project financing, which is rapidly increasing in relation to public sector funding. The new private sector standards require that a substantial proportion of projects – perhaps even the vast majority of projects – that may have adverse impacts on indigenous peoples' lands, their relationships therewith or their livelihoods, involve successfully concluded negotiations between indigenous peoples and the project proponent. The IFC's Guidance Notes to PS7 explicitly confirm this by stating that: "Whether the project should proceed with the potential adverse impacts on these lands should be subject to good faith negotiation with the affected communities of Indigenous Peoples" (GN25). The same is also the case for projects that involve physical or economic displacement and commercial use of cultural resources. What have been indigenous peoples' experiences with negotiated agreements in the past and what lessons may be learned from these experiences? How can these lessons be shared among indigenous peoples and what capacity building measures may be required in relation to negotiations?

Private sector project financing also has effects on industry and how industry behaves. Even the largest companies in the world often do not self-finance their projects and therefore will approach private sector lenders for funding. One area where this is particularly true is the extractives sector, a sector that has caused serious problems for many indigenous peoples. In this respect, the International Council on Mining and Metals, an industry group incorporating many of the world's largest mining companies, is in the process of adopting a 'Position Statement' on indigenous peoples. Not coincidentally, this draft Position Statement contains the following draft 'Commitments':

¹⁵ Joan Carling & Friends of the Earth-Japan, Japan Bank for International Cooperation (JBIC) Guidelines for Confirmation of Environmental and Social Considerations: Its Implications on Indigenous Peoples. In: *'Indigenous Peoples and the Human Rights-Based Approach to Development: Engaging in Dialogue'* - proceedings from a workshop held in November 2005 in Baguio City, Philippines. UNDP/RIPP & DINTEG, forthcoming.

ICMM members seek to gain and maintain broad community support for their activities throughout the project cycle by: [...]

Participating in dialogues with Indigenous Peoples and others to develop ways in which broad community support can be objectively assessed; [...] and;

Developing relationships with Indigenous Peoples based on their identified interests and the project impacts, which may include:

- Seeking consent for activities. For example, where Indigenous Peoples have formal title to the affected land, or are owners of recognised legal interests in land or resources they must, at least, be afforded the same right as any other land owner;
- Negotiating agreements, such as for access and benefit sharing, participation, land use etc., to specify the processes, roles and outcomes which form the basis of a relationship.¹⁶

Finally, most international financial institutions previously have had policies on indigenous peoples, in some cases for decades, yet indigenous peoples still often complain about the negative impacts of their projects. While the substance of the policies may in part be to blame for this and can certainly be improved, among others, by reflecting human rights standards, a major deficit is in policy implementation and enforcement. This is case for both the public and private sector. How can indigenous peoples influence implementation issues in the future? Are there any effective enforcement mechanisms that may be used to address implementation failures or rights violations that are not covered by the policies themselves?

All of the preceding questions and many other not posed here require thought and responses. It is hoped that this briefing and the others prepared for the 2006 session of the PFII will assist in thinking about these issues. The other briefings that are available are:

- The World Bank's Operational Policy 4.10 on Indigenous Peoples
- The Asian Development Bank's Indigenous Peoples' Policy and its Impact on Indigenous Peoples of Asia
- Analysis of the Inter-American Development Bank's Recently Approved "Operational Policy on Indigenous Peoples"
- Japan Bank for International Cooperation (JBIC) Guidelines for Confirmation of Environmental and Social Considerations: Its Implications on Indigenous Peoples

¹⁶ International Council on Metals and Mining, *Draft Position Statement on Mining and Indigenous Peoples' Issues*, March 2006, p. 2. See, <http://www.icmm.com/newsdetail.php?rcd=84>