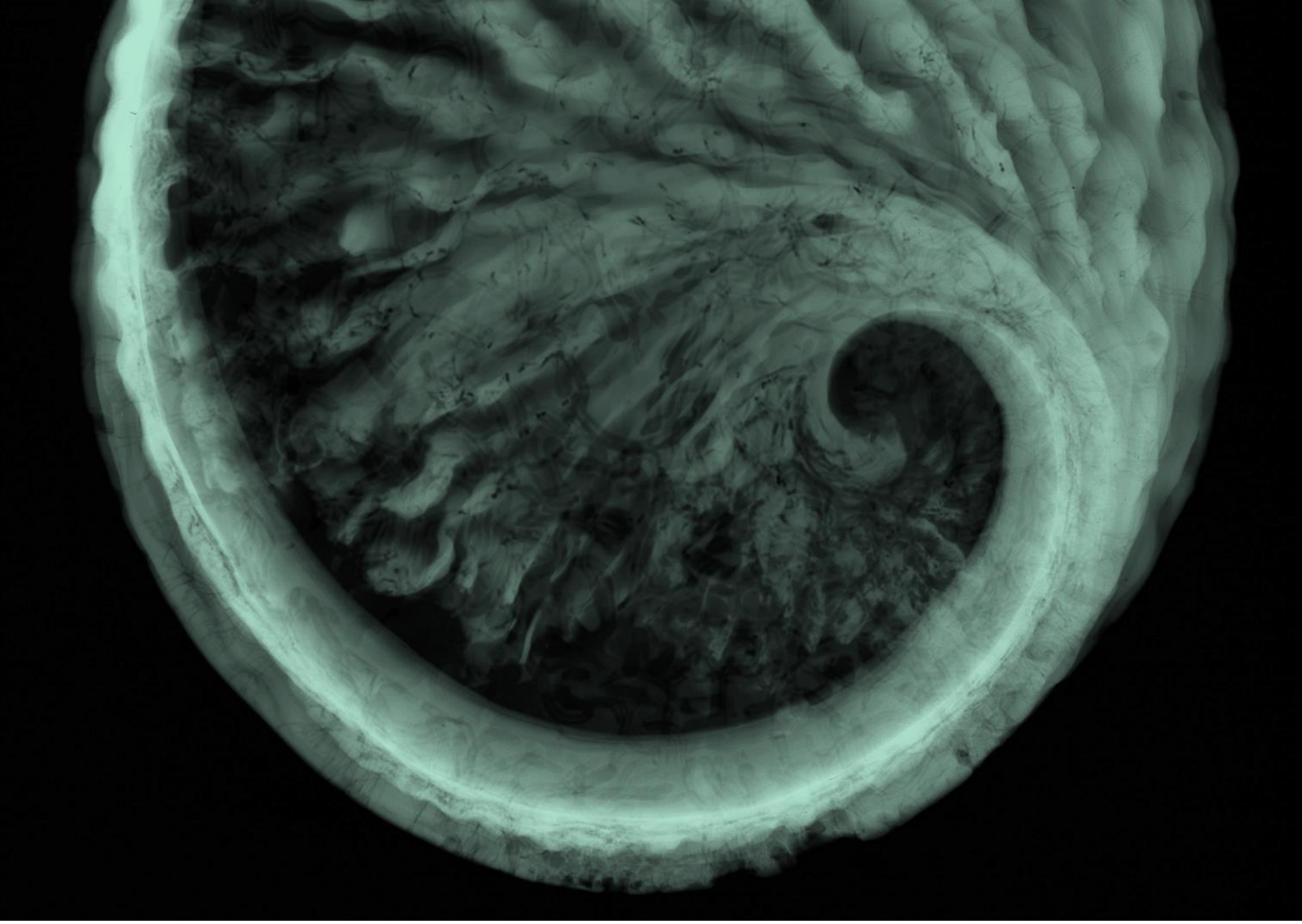

FPIC Guidance for Projects Supported by Geothermal Risk Mitigation Facility for Eastern Africa

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Acronyms and Abbreviations

ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
FPIC	Free, Prior and Informed Consent
GRMF	Geothermal Risk Mitigation Facility
IFC	International Finance Corporation
IP	Indigenous Peoples
IPP	Indigenous Peoples Plan
KfW	KfW Development Bank
NGO	Non-Governmental Organization
PS	Performance Standards
RAP	Resettlement Action Plan
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1. INTRODUCTION

In order to mitigate the high risk of exploration and reservoir confirmation drilling, the African Union Commission (AUC) with the German Federal Ministry for Economic Cooperation and the European Union (EU)-Africa Infrastructure Trust Fund through KfW Entwicklungsbank (KfW), have agreed to establish the Geothermal Risk Mitigation Facility (GRMF) for Eastern Africa. The GRMF published a Developer Manual (Eleventh Edition, 28 April 2020) outlining the requirements the applicants have to comply with including Environmental and Social requirements. The FPIC Guidance at hand is supporting this Developer Manual and should be used by applicants where applicable.

If an indigenous group may be affected by the development of a Project, including potential physical and/or economic displacement, Section 3 of this report provides structured guidance for a diligent Free, Prior, and Informed Consent FPIC process to support upcoming Project activities. This guidance outlines a process to support Free, Prior, and Informed Consent through a culturally appropriate and meaningful approach aligned with the guidance of International Finance Corporation (IFC) Performance Standard (PS) 7.

The process described in Section 3 is presented as a general approach, rather than specifically speaking to the people and parties engaged in the Project. However, it is intended to inform Project Developers and their consultants' approach to engagement of, and consultation with, indigenous peoples throughout - and beyond – the Surface Study and the Drilling Study stage.

2. APPLICABLE GUIDANCE

2.1 Indigenous Context

Indigenous Peoples IPs are not always explicitly identified or defined in the Constitution or in other regulations of a country. However, international institutions that recognize such populations as a distinct indigenous peoples include the African Commission on Human and Peoples' Rights[1] and Minority Rights Group International[2]. A Social Assessment needs to be made to classify a population as marginalized and vulnerable as a result of screening in accordance with IFC PSs. This is often reflected in national context where similarly a population is categorized as vulnerable and marginalized.

The IFC PS 7 guidance name IPs in a wider context as "Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities".

Further advice can be sought from International Work Group for Indigenous Affairs IWGIA[3]

Indigenous Classification

To be an indigenous group in accordance with the IFC's definition of indigenous peoples[4], Table 1-1 describes these criteria and should be applied to assess if a group meets the criteria to be classified as indigenous.

[1] African Commission on Human and Peoples' Rights (CHPR) and International Work Group for Indigenous Affairs (IWGIA). 2006. *Indigenous Peoples in Africa: the Forgotten Peoples?*

[2] Minority Rights Group International. 2018. *World Directory of Minorities and Indigenous Peoples - Kenya: Pastoralists*. January 2018. Available at: https://www.refworld.org/docid/49749cf765.html [accessed 22 March 2020]

[3] http://iwgia.org/images/yearbook/2020/IWGIA_The_Indigenous_World_2020.pdf

[4] IFC PS 7: Indigenous Peoples (2012)

Table 2-1. Indigenous Classification

Characteristics of Indigenous Peoples
1. Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others.
2. A collective attachment to geographically distinct habitats, ancestral territories, or areas of seasonal use or occupation, and to the natural resources of those areas, including a physical presence in and economic ties to these lands for generations.
3. Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society and culture.
4. A distinct language or dialect, often different from the official language(s) of the country or region.

2.2 IFC PS 7

The purpose of IFC PS7 is to ensure that potentially affected indigenous peoples are fully consulted about - and have opportunities to actively participate in - project design and the determination of project implementation arrangements. PS 7 recognizes the rights and vulnerabilities of indigenous peoples, and aims to:

- Ensure that the project development process fosters respect for human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of indigenous peoples;
- Avoid, minimize, or compensate for adverse impacts on indigenous peoples;
- Promote sustainable development benefits and opportunities for indigenous peoples in an accessible, inclusive, and culturally appropriate manner;
- Improve project design and promote locals support by establishing and maintaining an ongoing relationship based on meaningful consultation and engagement with affected indigenous peoples;
- Obtain the Free, Prior, and Informed Consent (FPIC) of indigenous peoples when required (see below); and
- Recognize, respect, and preserve indigenous peoples' culture, knowledge, and practices, and provide them with an opportunity to adapt to changing conditions in a manner and time-frame acceptable to them.

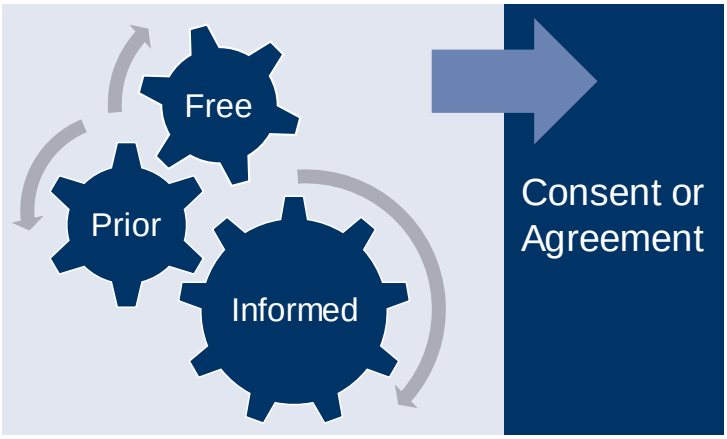
Additionally, PS 7 requires that meaningful consultation be planned and conducted - and documented - in line with PS 1:

- Engagement process will include stakeholder analysis and engagement planning, disclosure of information, and meaningful consultation in a culturally appropriate and inclusive manner.
  - Meaningful consultation begins early in the planning process so that it can inform project design, and continues on an ongoing basis; and
  - Stakeholder feedback is encouraged, and proponents consider and respond to feedback.
- For IPs, the process of meaningful consultation also:
  - Involves the IP's representative bodies or organizations;
  - Provides sufficient time for traditional decision-making processes; and
  - Allows for IP's effective participation in the design of project activities or mitigation measures that could potentially affect them positively or negatively.

2.3 Free, Prior, and Informed Consent

Founded in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), FPIC is required under PS 7 when a proposed project will have adverse impacts on lands and natural resources subject to traditional ownership or under customary use/occupation; or result in the relocation of indigenous peoples from their traditional or customary lands and resources; or have significant impacts on the cultural heritage of indigenous peoples[5].

Figure 2-1. Free, Prior, and Informed Consent



FPIC builds on the process of meaningful consultation and is established through good faith negotiation. While there is no universally accepted definition of FPIC, it is widely regarded as a process rather than a specific outcome, and both process and outcomes should be carefully documented. FPIC terms are defined by UNDRIP:

- **Free**: engagement processes are self-directed by the affected community, and are unencumbered by coercion, intimidation, pre-defined expectations, or externally imposed timelines.
- **Prior**: consultation occurs in advance of the planned development, before key project decisions are made, and before impacts occur, and there is sufficient time provided for meaningful consultation prior to a determination of consent.
- **Informed**: consultation is supported by the provision of timely, relevant, and accessible information about the proposed project, potential adverse effects, and potential benefits. Information should be provided in understandable (i.e., non-technical) format and in indigenous languages where applicable.
- **Consent**: decisions are made by indigenous peoples and communities through their customary decision-making processes, with sufficient time provided for consensus building. The affected group or community should determine what is required for consent, and how consent is defined.

Notably, FPIC does *not* require unanimous decision making within the indigenous population. There may be individuals or groups within (or among) affected indigenous peoples who explicitly disagree. Within the context of PS 7, consent is understood to refer to “the collective support” of indigenous peoples for the project activities that affect them, as reached through a culturally appropriate process.

[5] Further detail is provided in PS 7.

Good Faith Negotiation

Good faith negotiation is the only path to FPIC. In principle, good faith negotiation includes:

- A willingness of all parties to engage in the consultation and negotiation process;
- Agreement by all parties on a mutually acceptable process and procedures for negotiation;
- The timely provision of information needed to support informed discussion and decision-making;
- Dialogue to explore key concerns and issues of importance to all parties;
- A willingness to change initial positions and amend project design in response to feedback, and to seek compromise where needed; and
- Allowance of sufficient time in which conduct engagement and enable decision-making processes.

3. RECOMMENDED FPIC PROCESS

The FPIC process presented in this section is based on five stages of engagement, as summarized in Figure 3-1 and described further in the sub-sections below.

Figure 3-1. FPIC Process

3.1 Understanding the Context

Objectives:

- Establish the baseline
- Understand the scope of potential Project environmental and social impacts
- Identify indigenous peoples who may be affected, and associated organizations/representatives
- Identify other relevant parties, including government agencies (and applicable regulations/processes), NGOs and potential third-party facilitators
- Identify potentially vulnerable, disadvantaged and/or marginalized groups of IPs, or within an IP

Understand the Baseline and Expected Impacts

If baseline studies and impact assessments (or other studies, e.g. RAP) have been completed for the Project, refer to these to understand the existing conditions, anticipated impacts (including social, economic and cultural impacts, as well as environmental impacts that may affect indigenous peoples' use of lands and natural resources), and concerns/issues expressed by IPs to date. If these studies have not been completed (i.e., when IPs are engaged early in the planning process), some initial research should be done to understand local conditions, the presence of IPs and other stakeholders in the vicinity of the Project, and their basic characteristics (Box 3-1). Prior to a fulsome ESIA, anticipated impacts can be identified through an impact scoping exercise in order to inform the identification of potentially affected IPs.

Box 3-1. Baseline Information

Baseline information for affected IPs should provide an understanding of these and other factors:

- Demographic information including population, tribal/clan identification, changes in population over time, age and gender, household composition, etc.
- Cultural norms and practices
- Livelihoods including traditional activities and participation in the waged economy (if applicable), and use of lands and natural resources
- Land ownership and/or tenure, including unresolved land claims, communal lands, etc.
- Migration and settlement patterns
- Governance and representation, including decision-making authorities within and outside of the IP (e.g., elders, elected officials, involvement of external stakeholders including NGOs and community-based organizations) and relationship of the IP to mainstream government structures
- Cultural heritage sites and their significance
- Language and literacy
- Poverty and vulnerability profiles
- Housing, water, sanitation, energy, and infrastructure
- Access to markets and services

Identify Potentially Affected IPs

Considering the baseline and anticipated impacts, potentially affected indigenous groups and/or communities can be identified. In accordance with PS 7, FPIC is required if the project will have one or more of the following types of impacts:

1. Adverse impacts on lands and natural resources subject to traditional ownership or under customary use/occupation;
2. Resulting in the relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use/occupation; and/or
3. Significant impacts on the cultural heritage of indigenous peoples, including cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected IPs' lives.

These three factors should be considered when identifying potentially affected IPs. When possible impacts are identified but there is uncertainty about whether these impacts might occur, the precautionary principle should be applied; in these cases, consider the IP to be affected until evidence proves otherwise.

Identify Other Parties

Aside from the project proponent and affected indigenous group, it is also important to identify other parties that may need to be involved in, or that can influence the success of, the negotiation and consent process. This may include governmental agencies responsible for indigenous issues, land management, valuation, etc. It may also include NGOs and community-based organizations that may have influence in the communities, or that may have an agenda related to the proposed project.

In some cases, particularly where tensions and/or mistrust exists between IPs and the proponent, a third-party facilitator may add value to the process by supporting objectivity and transparency.

Consider Potential Risks

Based on the contextual information compiled above, a preliminary risk analysis can be conducted to identify potential social risks that may affect the success of the FPIC negotiations or the proponent's reputation and relationships with other stakeholders. Measures to mitigate risks should also be described. Questions to consider during the risk analysis are presented in Box 3-2.

Box 3-2. Social Risk Analysis

Questions to consider during the risk analysis may include:

- What experience does the IP have with the project proponent, or with other project developments/developers? What issues have arisen and how have they been addressed?
- How strong is the current understanding of local entry protocols and leadership/representation of the IP?
- Does the IP (or other parties) have an agenda that may be contradictory (or complementary) to this project?
- Have there been significant socio-cultural, economic, political, environmental, or other changes that have affected the well-being of the IP?
- What is the capacity of the IP for engagement and negotiation, including human capital, financial resources, etc.?

3.2 Planning & Initial Engagement

Objectives:

- Engage IPs to introduce the Project, and seek their views and preferences on how they wish to be engaged
- Start to build a relationship with IPs based on trust and transparency
- Establish a negotiation team, including representatives of the indigenous group or community, and ensure all parties have sufficient capacity to participate effectively in negotiations
- Establish (document and agree) an agreement under which engagement and negotiation will be conducted

Initial Engagement

Engagement and negotiation towards FPIC requires involvement from both sides of the negotiating table. Indigenous peoples' representatives need to work with the proponent, and the proponent needs to understand and be respective and supportive of the cultural norms, expectations, and decision-making processes of the IP. The proponent should also recognize that capacity challenges may affect IPs' ability to engage in the process.

Factors to consider before and during the initial engagement include:

- Seek trustworthy advice from advisors with good local knowledge;
- Introductions to the IP should be directed to the culturally appropriate leadership or other representative, and should be presented in a culturally appropriate manner (e.g., in person meeting, formal letter);
- Demonstrate a commitment to open and transparent communications, and to understanding and addressing issues collaboratively;
- Engage the IP directly to understand how they wish to be engaged, and what their limitations may be (e.g., demands of seasonal activities, dispersed pastoralist population); and
- Understand and respect social norms associated with arranging meetings, discussions, deliberations, decisions, and documentation.

If cooperation is not forthcoming and indigenous groups are unwilling to engage, document all attempts at engagement. Seek the advice of those knowledgeable of the community to consider different approaches, if appropriate, change the agenda of the introductory meeting, or to understand and address the factors obstructing engagement. If necessary, consider mediation by mutually acceptable third parties.

Negotiation Team

Facilitate trust and relationship building by sending the same company representatives to meet with the IP representatives and communities. Senior company representatives should attend meetings - especially initial meetings - to demonstrate the proponent's respect and commitment to the engagement process.

As part of the negotiation agreement (below), clearly establish the negotiation team including appropriate representatives of the project proponent, indigenous group, and any relevant third parties (e.g., mediators, NGOs). Capacity building may be required to support the participation of IPs, as representatives may not be familiar with FPIC processes and expectations, their rights, and/or technical aspects of the project. Capacity may also need to be developed within the company, including cultural awareness/sensitivity training and good faith negotiation techniques.

Good Faith Negotiation Framework

Before seeking consent, the process of good faith negotiation towards FPIC should be agreed with the affected indigenous group or community, and documented in a framework agreement[6] that outlines (and is agreed between the proponent and indigenous representatives) how negotiations occur, who will be involved, and how "consent" will be determined. Sample contents of an agreement are provided in Box 3-3.

Milestones and/or interim agreements may be useful to mark progress and reaffirm the commitment of all parties over the course of negotiations.

Development of the Good Faith Negotiation Framework should involve the IP's representative bodies and organizations (e.g., council of elders, village councils, chieftains) and where appropriate other community members. The agreement should ensure that there is sufficient time for the IP's internal decision-making processes. It should enable and empower IPs to effectively participate in the design of the proposed project; in the development of measures to mitigate adverse impacts and optimize benefits; and to participate in dialogue about the conditions under which FPIC may be achieved.

Box 3-3. Sample Contents of a Good Faith Negotiation Framework

Contents may include, but are not limited to:

- Clear scope, purpose, and objectives for the engagement/negotiation process
- Guiding principles (i.e., ground rules for engagement)
- Representatives of the affected IP and the proponent who will participate in the negotiation and decision-making process
- Agreement of consultation processes, protocols, and methods, including traditional methods of engagement as well as those that support the inclusion of people who may be otherwise excluded from decision-making processes (e.g., women, youth)
- Roles and responsibilities of all parties
- Agreed definition of how "consent" will be determined (e.g., signing of an agreement, majority referendum, unanimous decision)
- Agreed means of recourse in the event that agreement (on some or all items) cannot be reached
- Processes and timing for engagement of community members and external stakeholders
- Required resources including funding and expenditures
- Process for amending the framework agreement

Alignment

The agreed framework should be aligned with related project planning documents, including stakeholder engagement plans/strategies, indigenous peoples' plans, resettlement action plans, and/or livelihood restoration plans. Engagement processes should be designed to support meaningful consultation in accordance with the principles of PS 7 and PS 1.

[6] The title of the agreement may vary, e.g., memorandum of understanding, framework agreement, good faith negotiation process agreement, consent process framework, etc.

3.3 Negotiation & Decision Making

Objectives:

- Conduct engagement in accordance with the processes defined in the negotiation framework and applicable engagement plans
- Ensure engagement and negotiation activities are inclusive and accessible
- Engage regularly and track/report on progress
- Employ the agreed mechanisms for dispute resolution, as needed

The principles of free, prior, and informed consultation will be applied throughout all engagement. In the implementation stage, the processes defined within the negotiation framework (and other applicable plans) are applied. IPs should be involved through the participatory development of detailed project design, including meaningful engagement on the topics outlined in Box 3-4. For example, this may include consideration and negotiation of routing and/or siting of infrastructure to avoid areas important for culture and/or livelihoods, or development of new or modified mitigation measures or community benefit initiatives.

As engagement and negotiations proceed, the processes defined by the negotiation framework may be refined.

Box 3-4. Engagement to Support FPIC

Working towards FPIC, meaningful engagement with IPs may cover a wide variety of topics based on participants' interests, issues, and concerns. General topics should include, but are not limited to:

- Efforts to avoid and otherwise minimize land take
- Feasible alternatives including alternative project design
- Efforts to avoid and otherwise minimize adverse impacts on natural resources and/or areas subject to traditional/customary ownership or use
- Identifying property interests, formal and informal tenures, and traditional use activities in areas potential affected by the project
- Assessing indigenous resource use, including gender perspectives on the use and management of natural resources
- Potential impacts to livelihoods, household life, community wellbeing, health outcomes, or tangible and intangible cultural heritage
- Informing IPs of their land rights, the scope and nature of the proposed project, and the potential environmental and social impacts of the project
- Consideration of appropriate compensation together with culturally appropriate sustainable development opportunities, at least equivalent to that which would be entitled by any landowner with full legal title, including: compensation for leasing/acquisition; continued access to natural resources; support for alternative livelihoods (if required); benefits sharing; and other topics.

Land Rights and Tenure

Where IPs do not possess legal title to their traditional or customary lands under national law, and where a project involves establishing and/or acquiring these land rights, support for recognition or conversion of indigenous land rights should be pursued in accordance with PS 7. This will be required prior to any determination of FPIC.

Grievance Mechanism

In accordance with PS 1, an accessible and culturally appropriate grievance mechanism will be established for the project and applicable to the FPIC negotiations. IP representatives and communities will be informed of the grievance mechanism and its use.

Community Involvement

Although negotiations may be focused within a smaller group of people, the broader community should also be regularly engaged. This may include community meetings, focus groups, site visits, and other activities designed to ensure that community members are aware of the project and the ongoing engagement process, and to keep them updated on the progress of negotiations. This is also an opportunity to validate that the negotiation team continues to be representative of the indigenous community.

Other stakeholders (e.g., government authorities, NGOs, and community-based organisations) may also be invited to participate to help guide and/or witness the process.

3.4 Documentation of Process & Outcomes

Objectives:

- Document in a written agreement, where possible, clearly identifying the conditions for consent
- Share and communicate the agreement, and seek broad community support
- Document all steps of the engagement and negotiation process
- Third-party verification can improve perception of legitimacy

The mechanism(s) by which the IP can give its consent will be documented in the framework agreement, and should involve some form of ratification by a larger body of IP members or the community-at-large. If there is a vote or referendum, the percentage of support required to accept the agreement should be specified in the negotiation framework. Verification of these processes by an independent third party can confer further legitimacy to the process and outcomes. Furthermore, IPs may have culturally significant ceremonies or cultural practices to validate agreements, and these should be embraced as part of the process.

Clear and accurate documentation of both the negotiation process and its outcomes is of utmost importance. Documented outcomes of good faith negotiations should include a record of all agreements, conditions for consent, and summaries of dissenting views.

Consent at this stage represents alignment on a set of conditions under which the affected indigenous community agrees to move forward with the project. However, the relationship that has been built between the proponent and the IP is as, if not more, important. This relationship will need to be maintained - and consent will need to be reaffirmed - over the life of the project.

The FPIC process and outcomes should also be documented in the project's Indigenous Peoples Plan, if applicable, in line with the guidance provided by PS 7.

Environmental and Social Commitments

Commitments and actions agreed through the negotiation process will be included in the project-specific environmental and social commitments plan/register, in order to ensure that necessary actions are taken and that the agreed mitigation, management, and/or community development commitments are achieved.

3.5 Maintaining Consent

Objectives:

- Implement the measures contained within the agreement
- Monitor and report on progress
- Ongoing meaningful engagement and participation

As part of any agreement with IPs, a plan for monitoring and evaluation, and reporting, should be included to ascertain the expected versus actual success of agreed mitigation and management measures. Depending on the interests and capacity of the IP, community-based participatory

monitoring may be a beneficial approach to improve engagement, support communications, and increase overall acceptance of the proposed project.

As agreements are implemented, progress should also be clearly tracked and reported back to affected communities. This may include progress towards the fulfilment of commitments contained within the agreement, responses to grievances, and/or sharing milestones of the project overall.

Withdrawal of Consent

As noted in Section 2.4, “consent” represents alignment between the proponent and IPs at a certain point in time. Consent can similarly be withdrawn should circumstances change. Thus, the proponent should make regular and strategic efforts to maintain the satisfaction of the affected IPs, engaging frequently to stay apprised of and address evolving issues. Any issues that may result in the withdrawal of consent should be prioritized including engagement to understand, discuss, and collaboratively address these issues. Regular and effective engagement, and addressing concerns and complaints through the grievance mechanism, should help the project avoid situations where consent may be withdrawn.

Ongoing Engagement

The good faith negotiation process, and ongoing engagement, is the foundation for building and maintaining the relationship between the proponent and IPs, based on trust and mutual respect. To avoid loss of consent, proponents should take care not to become complacent with the status of the relationship. By maintaining open dialogue and strong relationships with the IP community, individual incidents that may arise will be more easily resolved.

Amending Agreements

The implementation process should adhere to the spirit of the written agreement with an opportunity to revisit the various measures on a regular basis. While the agreement should be valid for the entire project duration, for projects with a longer life span it is important to review the agreement and action plans if the project circumstances change.

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African Commission on Human and Peoples’ Rights (CHPR) and International Work Group for Indigenous Affairs (IWGIA). 2006. *Indigenous Peoples in Africa: the Forgotten Peoples?*

Minority Rights Group International. 2018. World Directory of Minorities and Indigenous Peoples - Kenya: Pastoralists. January 2018. Available at: https://www.refworld.org/docid/49749cf765.html [accessed 22 March 2020]

IFC PS 7. 2012. *Indigenous Peoples*

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