

World Bank undermines decades of progress on building protections for the rights of indigenous peoples

On Wednesday 20th of July 2016, a sub-section of the Executive Board of the World Bank met to approve a draft text called the 'Environmental and Social Framework'. The text will now proceed to a full Board meeting in August where it is likely to be approved with little or no change.

The Environmental and Social Framework (ESF) is intended to contribute to the so-called 'twin goals' of the Bank: eliminating extreme poverty and boosting shared prosperity. It defines the approach that the World Bank will take to assess and minimise negative impacts from World Bank investments, and promote social and environmental goods.

Specifically for indigenous peoples, it defines the mandatory minimum standards that the Bank views as necessary to "foster full respect for the human rights, dignity, aspirations, identity, culture, and ... livelihoods" of indigenous peoples.¹ It replaces the current troubled Bank safeguard for indigenous peoples, Operational Policy 4.10.²

With lofty ambitions to 'shared prosperity' and 'full respect' for human rights, it is a significant disappointment to see in the new draft that the Bank has failed to set high standards for protecting the rights and interests of indigenous peoples. The Bank has instead released a complicated, confusing and fundamentally weaker set of standards.

Even in defining its scope, the new proposal is confused, contradictory and difficult to understand. The title of the new standard is 'Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities' – an excessively long and complicated terminology repeated *ad infinitum* throughout the standard.

Nowhere is the term 'indigenous peoples' now found without the strange codicil attached to the end, coupling an internationally recognized legal category with attendant rights and status (peoples) with a long list of adjectives added to a category never defined (communities). Yet the title (and subsequent consent reiteration of the title's absurd categories) is only the most immediately apparent of the draft's many weaknesses.

The importance of this review is undeniable. It is the first significant re-shaping of the World Bank's approach to social and environmental protection since the introduction of 'operational policies' designed to safeguard communities and the environment in 1989 (building on earlier operational manual statements on indigenous peoples in force at the Bank from 1982). Since 1989, the World

¹ http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/third_draft_esf_for_disclosure_july_20_2016.pdf

² Review of IP 2009

Bank's approach to safeguards has proved influential, with other multilateral financing institutions following the Bank's lead and even private sector standards increasingly aligning with the minimum standards adopted by the Bank.

In short: what the Bank does to its safeguard framework matters because others will follow its lead.

And now that the latest draft of the proposed safeguard framework is released it is clear that 2016 represents a devastating low point in the Bank's approach to the protection of social and environmental goods, and of the rights and interests of indigenous peoples in particular.

Getting to the crux of what has gone wrong with the new standards requires a look into the detail of what the Bank has said in this text. Without looking into the detail, the extent of weakening and double-speak cannot be fully understood.

The first critical issue is the **weakening or removal of protections for the rights and interests of indigenous peoples** when compared with current Bank policy, or compared with various previous drafts used during the review.

There are many, many examples of this.

In OP4.10 specific, mutually agreed plans (called 'Indigenous Peoples Plans') were mandatory. Requirements for Indigenous Peoples Plans in the future are woolly and 'in certain circumstances' set aside (circumstances which include both when indigenous peoples are the sole beneficiaries of a project, and also when they are not the sole beneficiaries of a project).³

In OP4.10 indigenous peoples need to express their broad support for a project before it goes ahead. In the new draft, indigenous peoples only need express their support in sharply curtailed situations. Support is required when projects have impacts on their lands and resources, but those impacts must be 'adverse' (and the borrower must agree they are adverse hence introducing a dangerous and potentially perverse conflict of interest in the identification and assessment of possible negative impacts). Impacts on cultural heritage trigger the requirement for support, but only if those impacts are 'material to the identity' of the people concerned (and the borrower agrees they are material – once again triggering a conflict of interest problem).⁴

In OP4.10 one of the primary purposes of 'Indigenous Peoples Plans' was to "ensure that ... Indigenous Peoples affected by the project receive culturally appropriate social and economic benefits".⁵ The new proposal talks about compensation and shared benefits, noting 'various factors' that might impact on such compensation payments and stating only that the project "will aim to

³ World Bank, draft ESF, ESS7 paragraphs 15 – 17.

⁴ The Environmental and Social Impact Assessment, undertaken by the Borrower, is the vehicle through which impacts are identified and therefore responded to or mitigated.

⁵ OP 4.10. Paragraph 12.

address the goals and preferences of the affected Indigenous Peoples”. Even when discussing compensation to collective rights holders, the draft now asserts only “where control of resources, assets and decision making are predominantly collective in nature, *efforts will be made* to ensure that, *where possible*, benefits and compensation are collective ...”.⁶ ‘Efforts will be made’, ‘will aim to address’, ‘where possible’, all serve to demonstrably weaken any requirement for agreed equitable sharing of benefits.

The second major shortcoming in the Bank’s policy proposals is that the new draft **fails to reflect, incorporate or accommodate the significant input provided to the Bank by indigenous peoples** over the past years. This is a direct affront to the hundreds of indigenous representatives who travelled to their capital cities, to regional consultations and to Washington DC to share experiences and provide recommendations.

To take two examples: indigenous peoples have called continuously for participation in the conduct of impact assessments for projects that will impact on them. This argument has been made on the basis that the potentially affected peoples themselves have the right to be fully involved in such impact assessments and possess knowledge and understandings that are essential to evaluate the scope of potential impacts that may happen, particularly when it is impacts to the cultural heritage, livelihoods, way of life and identity of the people that is being assessed.

For this to be done in isolation, as proposed by the current draft, by external experts and then presented as a *fait accompli* to the peoples concerned is contrary to applicable international standards and human rights law.⁷ As the Inter-American Commission on Human Rights points out, the purpose of an environmental and social impact assessment (ESIA) is in part to preserve, protect and guarantee the special relationship of indigenous peoples with their territories, and to guarantee their subsistence as peoples⁸ and indigenous peoples have a right to participate in ESIA’s regardless of whether states have recognised their ownership.⁹

It is particularly worrying because the ESF uses the impact assessment as the framework for everything that follows. The application of the requirements for indigenous peoples (as outlined in Environmental and Social Standard 7 – ESS7) is “proportionate to the scope and scale of potential project risks and impacts”. As it currently stands, these risks and impacts will be assessed by the same project proponent who will be responsible for mitigating them.

⁶ ESF, ESS7 paragraph 20 fn. 12

⁷ For an extensive treatment of the appropriate form and purpose of impact assessments related to the lands and resources of indigenous peoples, please see I-AHRC Doc. 56/09, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, 30 December 2009 <http://cidh.org/countryrep/Indigenous-Lands09/TOC.htm>

⁸ Ibid. Paragraph 245

⁹ Ibid. Paragraph 246

A second example is the need for consent for project activities that have the potential to be life altering for the peoples concerned. International law provides guidance as to what types of activities represent such fundamental threats. One is any relocation (physical or economic) that affects or threatens the livelihoods of indigenous peoples, a second is any use of, or impact on, the cultural heritage of the peoples concerned, and a third is any impacts on the lands and resources on which the peoples depend, or which they use or own by custom or otherwise.¹⁰

The Bank has sharply curtailed these categories, and has withdrawn a previous proposal for consent. Instead the Bank has retreated to the idea of 'collective support', a hazy and ill-defined concept which echoes the 'broad support' found in current Bank safeguards for indigenous peoples, Operational Policy 4.10 (OP4.10) that has been resoundingly rejected by indigenous peoples, and by experts in the field of indigenous rights.

The third is that the standard released yesterday uses **obscure, confusing and conflicting language that will render it difficult, if not impossible, to implement** consistently across the globe.

We know already that the existing Bank safeguards for indigenous peoples (OP 4.10) has proved difficult to implement over the years because it is able to be interpreted in very different ways in different regions, countries and contexts. This has led to a 'location lottery' where the standards applied by Bank staff depend in part on where the peoples concerned live, undermining the uniformity that should characterise a global safeguard standard.¹¹

The language employed in the new ESF has only increased the uncertainty and confusion. Two examples are illustrative here.

The conversion of collective rights into individual tenure is a significant threat to the livelihoods and identities of indigenous peoples who govern themselves and their lands as collectives. While such conversion may happen as a peoples' resource management adapts, it must not be forced upon a community. However the language used in ESS7 is not clear on this point: "Conversion of customary usage rights to individual ownership rights will only be an objective following **consultation** with the Indigenous Peoples ... concerned and assessment of the impacts of such conversion on the communities and their livelihoods."¹²

A second example is in the policy's treatment of peoples living in voluntary isolation. Peoples who have chosen actively to reject contact with mainstream

¹⁰ For an exhaustive presentation of international jurisprudence on when consent, or Free Prior and Informed Consent (FPIC) must be sought and obtained, see UN-REDD Programme, Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC), January 2013 http://www.unredd.net/index.php?option=com_docman&view=list&slug=legal-companion-to-fpic-guidelines-2655&Itemid=134

¹¹ Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review, OCPS, August 2011

¹² World Bank, draft ESF, ESS7, footnote 17

parts of society have demonstrated by this choice their active rejection of development projects and this choice must be respected. Yet the language the Bank has chosen to employ talks about “measures to avoid all *undesired* contact with them as a consequence of the project.” This is yet another unnecessary obfuscation of the underlying principle that un-contacted peoples must remain so.

There is little time remaining before the World Bank Executive Board is faced with the decision of whether to approve the ESF in its current form or ask for revisions. Given the 4+ years already spent on developing this draft, further delays are unlikely.

We must turn now to the challenge of implementing this convoluted and confused system and of pushing the Bank to implement these standards well. We ask now that the Bank adopts guidance that aims higher than this Framework and exerts its considerable influence to bring governments closer to agreed international standards and towards a truly equitable and just model of development.