

Compiled comments



Forest Peoples
Programme

Forest Peoples Programme

Second Draft of the proposed World Bank Environmental and Social Management Framework

Comments submitted in March 2016

Introduction

These comments are specifically designed to address key issues identified that will have the potential, if not addressed, to adversely affect **the rights and interests of indigenous peoples** and other communities and peoples holding **customary or collective land tenure systems**.

We will not repeat here all the critique that we, and allied organisations, have provided to the Bank in the past, but rather will focus on **the most critical issues that remain in this second draft** and that, in our view, must be addressed prior to any adoption of this new environmental and social management framework.¹

However we must start this submission by noting our significant concern regarding the Committee on Development Effectiveness (CODE)'s instructions for this third consultation period to consider "Circumstances (e.g. criteria and timing) in which a waiver may be considered and the information to be provided to the Board to inform its decision".² **Re-introducing any consideration of placing a formal waiver process into ESS7 would be a direct and serious violation of the rights of indigenous peoples**, and implies that internationally recognized protections for their rights are able to be set aside by the Bank.³

Vision for Sustainable Development

The World Bank has included reference to the Universal Declaration on Human Rights in the Vision for Sustainable Development, however the

¹ AIPP / FPP joint submission, 2015 <http://www.forestpeoples.org/topics/safeguard-accountability-issues/news/2015/02/joint-aipp-and-fpp-submission-world-bank>; Effective Implementation: the Key to Safeguard Reform, FPP, Urgewald, BIC and additional organisations, March 2015 <http://www.forestpeoples.org/topics/safeguard-accountability-issues/publication/2013/submission-world-bank-effective-implementation>; Civil Society Statement on ESS6: Biodiversity, World Bank Environmental and Social Framework CODE Draft, 29 July, 2014 <http://www.forestpeoples.org/topics/safeguard-accountability-issues/news/2014/07/civil-society-statement-ess6-biodiversity-world>

² Issues for Phase 3 Consultations, Committee on Development Effectiveness (CODE), World Bank, August 3rd, 2015: p. 3

³ See also African Commission on Human and Peoples Rights, Resolution 301, 2015; Forest Peoples Programme, Memorandum on the 'Alternative Approach, 2015

reference is to the 'aspirations' of the Declaration, and provides no recognition of the inherent relationship between the World Bank's own mandate and the promotion of human rights, including the right to development. **The World Bank must recognize and assert its role in promoting the realisation of human rights, including the right to development**, and provide reference to the appropriate international standards, including but not restricted to the UDHR. This has been pointed out to the Bank on numerous occasions by expert voices.⁴

Environmental and Social Policy

- The proposed ESP and ESSs separate out the responsibilities of the Bank (contained in the ESP) and the borrowers (contained in the ESSs). In doing so, **responsibility to actually implement and meet the standards is largely turned over to the borrowers**. The Bank's role is to conduct due diligence (almost exclusively reduced to review of information provided by the borrowers) and a monitoring and follow-up role for most types of projects.
- This is **a riskier approach to lending**, and it assumes an ability to monitor actual practice that Bank staff members have not shown in the past. It also assumes willingness to speak up quickly when things are going wrong. **Repeated evidence from past evaluations, and from the findings of the Inspection Panel, highlights the inability of Bank processes to meet such an increased monitoring role**.
- The proposed promotion of the **use of borrower systems** (paragraphs 23-27):
 - **Fails to meet the existing requirements of Operational Policy 4.00** (which it replaces) on the use of borrower systems, with the new ESP simply requiring the Bank to assess if the borrower system would "achieve objectives materially consistent with" the ESS requirements. Requirements provided in OP4.00 Table A1 have disappeared.
 - Relies entirely on information provided to the Bank by the borrower, and requires the Bank only to assess the laws and policies in place in a given country, with **no attention required on the actual practice of a given government** against the policies and laws in place, with the exception of one reference to 'implementation capacity' (paragraph 25). The scope of the review of 'implementation capacity' is not defined.
 - Contains **no requirement to consult** with peoples or communities affected by the project about their views on the use of the country laws in place of Banks standards.
- The proposed scope of the new ESMF **continues to fail to cover significant portions of the Bank lending portfolio**. We strongly object to the use of a patchwork system of requirements, with expectations on

⁴ As an example, 28 UN Special Mandate holders wrote to the Dr. Jim Kim in 2015 on this topic, pointing out that "Human Rights are not merely a matter of sound policy, but of legal obligation. As an international organization with international legal personality, and as a UN specialized agency, the Bank is bound by obligations stemming not only from its Articles of Agreement, but also from human rights obligations arising under 'general rules of international law'". Letter from 28 UN Special Mandate Holders, 12 December 2014.

borrowers defined by the lending instrument that they use. The requirements for Development Policy Loans (OP 8.60) and for the newer Program for Results (OP 9.00) are materially different from those being proposed for Investment Lending. We reiterate previous calls for consistency in the application of environmental and social safeguards across the Bank's portfolio.

- The ESP states that the Bank “may follow the Borrower's framework for identification of indigenous peoples during project screening, when that framework is consistent with this policy”.⁵ As stated in previous submissions⁶, use of a borrower system of identifying indigenous peoples will place at risk the rights and interests of the peoples concerned, and will politicize the triggering of protections for indigenous peoples. **The Bank must only use the borrower system for identifying indigenous peoples with the express consent of the peoples concerned**, or risk being complicit in the violation of their rights.
- The ESP continues to use **terms such as ‘requires’ in replacement of existing requirements to ‘ensure’** (an illustrative example of such language change is the new proposal that “the Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs in a manner and timeframe acceptable to the Bank”⁷ in place of existing language that requires the Bank to “ensure” the consistency of Borrower actions with applicable safeguard policies). This language change **appears to place a materially reduced responsibility on Bank in its obligations** to make sure that carefully designed safeguard requirements are met in practice, and throughout the life of a project.
- The language change above, along with the use of the phrase ‘in a manner and timeframe acceptable to the Bank’ raises serious concerns about the ability of the Inspection Panel to fulfil its mandate to assess the Bank's compliance with its own policies. If application of critical safeguards is ‘in a manner acceptable to the Bank’, **then non-compliance will be far more difficult for the Panel to prove**, thus significantly **reducing access to remedy** by affected peoples and communities.

Environmental and Social Standard 1

- The application of a ‘common approach’ between the WB and other funding agencies is allowed as long as the approach will “enable the project to **achieve objectives materially consistent with the ESSs**”.⁸ **This phrase must be clearly defined and elaborated**, and its implications for the actual requirements of the ESS (including the requirement to obtain free, prior and informed consent) clearly spelt out by the Bank.
- The conduct of social and environmental impact assessments (Section B, paragraphs 21- 35) for **projects potentially impacting on indigenous peoples must involve direct and effective consultation with the potentially affected indigenous peoples**. Only the peoples directly

⁵ ESP (2nd draft, 2015), paragraph 51

⁶ AIPP FPP joint submission,

⁷ ESP (2nd draft, 2015), paragraph 16

⁸ ESS1 (2nd draft, 2015), paragraphs 8, 12 and others

affected can identify and validate certain social, ecological and cultural impacts that may not be discernable to external observers.

Environmental and Social Standard 5

- There needs to be an explicit link between the requirements in ESS5 and the related requirements in ESS7. The Bank must recognize that **peoples and communities with collective customary tenure systems may be denied the protections of ESS7** for specific political and/or historic reasons, and the protections of ESS5 must be adequate to appropriately address the risks facing these groups.
- We continue to be concerned that displacement impacts from 'Land Use Regulation & Natural Resource Management Programs' are not covered in ESS5, thereby **removing protections from non-indigenous forest dependent peoples and communities.**⁹ Current policy under OP4.04 (Natural Habitats) requires attention to the rights of forest-dependent peoples, and such attention must be retained and strengthened in ESS5.
- The approach to land rights in ESS5 is that the Bank and the client need only ensure (when involuntarily moving people) the new land meet certain criteria. While important, this must be based on **a recognition and acceptance of the land rights that people have *in situ*** whether legally secured or not.
- The international standards expressed in the Voluntary Guidelines on the Governance of Tenure (VGGTs) regarding the protection of customary tenure and collective tenure systems in the absence of legal recognition are not met in ESS5, despite Bank assertions that the ESS5 standard is in compliance with the requirements of the VGGTs.

Environmental and Social Standard 6

- In recognition of the importance of forests to indigenous peoples and other peoples and communities directly dependent on forests and other natural resources, the **existing Natural Habitats policy (OP 4.04) expects the borrower to take into account the views of local communities and NGOs affected by Bank-financed projects involving natural habitats**, and to involve such people in the planning, design, implementation, monitoring and evaluation of these projects.¹⁰ In the context of forest certification systems, OP 4.36 further calls for the recognition of, and respect for, any legally documented or customary land tenure and use rights, as well as the rights of indigenous peoples and workers.¹¹
- **ESS6 removes these requirements** and only states the impact assessment: "will consider the use of and dependence on natural resources by Indigenous Peoples and affected communities who live in or around the project areas and whose use of biodiversity resources may be affected by the project, as well as their potential role in the conservation and sustainable use of such biodiversity resources."¹² Notably

⁹ ESS5 (2nd draft, 2015), paragraph 8

¹⁰ World Bank. 2001. OP 4.04- Natural Habitats, para 10.

¹¹ World Bank. 2002. OP 4.36- Forests, para 10b.

¹² World Bank. Environmental and Social Framework. July 2014. ESS6, para 13.

no mention of the rights of such peoples and groups, nor any mention of the need for compensation.

Environmental and Social Standard 7

- The Bank must ensure that policies designed to protect the rights and interests of indigenous peoples are established in **compliance with the rights recognized in the UN Declaration on the Rights of Indigenous Peoples**, and the proposed ESS7 fails to meet this standard.
- The World Bank requires borrowers to conduct impact assessments **without any requirement for consultation with the peoples whose customary lands, resources or livelihoods will be impacted**.¹³ This includes the assessment of cultural impacts, which cannot be adequately assessed without consultation with, and validation by, the affected peoples themselves.
- Both projects conceived as primarily intended to benefit indigenous peoples (paragraphs 11 & 12), and those in which indigenous peoples are not the sole beneficiaries (paragraphs 13 – 16), must be subject to the same FPIC requirements.
- Any action plan associated with projects impacting on indigenous peoples **must be developed in close partnership with the affected indigenous peoples**. The plan must reflect the self-determined development priorities of indigenous peoples, contain specific budget allocated against planned activities or objectives, have an associated clear time line agreed in advance, include associated monitoring indicators for assessment of results gained, and be subject to regular participatory assessment with the affected peoples. A draft framework plan should be developed and provided as an annex to ESS7 to provide consistency and clarity for borrowers and certainty for affected peoples.¹⁴
- The welcomed inclusion of a requirement to secure the free, prior and informed consent of indigenous peoples prior to certain project activities is welcomed. The following critical weaknesses need to be addressed:
 - The inclusion of a requirement for FPIC in ESS7 does not impact on other forms of Bank financing, and **the same requirement to secure FPIC must be introduced for all forms of Bank loans and grants that impact on indigenous peoples**.
 - The **definition of Free, Prior and Informed Consent is inadequate and narrow (18 a-d), failing to include active participation in, and validation of, impact assessments**, and a range of other critical aspects of FPIC that are essential to realize this important safeguard.¹⁵ We recommend that the Bank, in close consultation with indigenous peoples' organisations and leaders, establish a mandatory guide to the effective implementation of FPIC.
 - The Bank continues to emphasize "FPIC does not necessarily require unanimity" (18(d)). In submissions by indigenous peoples' organisations, recommended replacement text was proposed:

¹³ ESS7 (2nd draft, 2015), paragraph 10

¹⁴ This recommendation was originally submitted to the Bank in 2015, but remains unaddressed in the current second draft. AIPP / FPP joint submission 2015, page 4, Section D.

¹⁵ See AIPP/FPP joint submission, 2015, Section H (a-n) for further details

- “Customary decision making processes of indigenous peoples respects and recognizes collective decision of the community resulting to an independent decision free from coercion or manipulation.** Conflicting views shall be resolved by community members and the Bank and Borrower shall adhere to the final outcome of the decision making process taking into account the legitimate views and issues raised by community members as bases for their decision.” We endorse this text for inclusion.
- Relocation of indigenous peoples from their lands and resources triggers a requirement for free, prior and informed consent.¹⁶ However the **economic displacement of indigenous peoples, through restriction of access to their customary resources is not covered** and is essential to providing the scope of protections required.
 - Where a project proposes to commercially develop the cultural heritage of indigenous peoples, the Bank requires the Borrower merely to “enable indigenous peoples to share equitably in the benefits derived”.¹⁷ Any **commercial development of the cultural heritage and/or traditional knowledge of indigenous peoples must be subject to the free, prior and informed consent** of the peoples owning such knowledge and heritage, and must be **compliant with international law** on intellectual property rights.
 - The **World Bank continues to retain final power in ‘ascertaining’ the presence of FPIC**, removing the authority to validate ones own consent from the affected indigenous peoples.¹⁸ Validation of the requirement to secure the free, prior and informed consent should depend on the **expressed statements of the indigenous peoples concerned**, recognized by the World Bank.
 - Where projects involve activities that are dependent on having formal legal recognition of rights to lands and territories claimed by indigenous peoples, the Borrower is required to “prepare a plan for the legal recognition of such ownership, occupation, or usage...”. **The land rights of indigenous peoples have been recognized by international, regional and national law as fundamental to the very survival of the peoples themselves.** Any plan established to provide legal recognition of any type to indigenous peoples’ customary and traditional use, ownership and/or occupation rights **must be developed in partnership with the peoples themselves**, time-bound and designed against clear indicators or success and with sufficient budget allowance. Without such mutually agreed plans in place, activities involving legal recognition or any type must not proceed.

¹⁶ ESS7 (2nd draft, 2015), paragraph 23

¹⁷ ESS7, (2nd draft, 2015), paragraph 25

¹⁸ ESS7 (2nd draft, 2015), paragraph 19