



Forest Peoples Programme

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Dr. Jim Yong Kim
President
The World Bank group
Washington DC

June 4, 2014

Re: World Bank Group safeguard review and update process

Dear Dr. Kim,

We are writing to you with regards to the review of existing safeguard policies of the World Bank. Bank staff indicated to civil society during the recently concluded Spring Meetings that it is expected that a first draft of a proposed new system for managing project-level social and environmental risk should be available for further consultations shortly. It is in this context that we reiterate and emphasize the importance of key issues that will require your attention, including the institution of a requirement to obtain the free, prior and informed consent of indigenous peoples to development activities impacting on them, and the need to apply any policy provisions for indigenous peoples on a strictly non-discriminatory basis.

It is an exciting moment, and along with the wider Change Strategy taking place at the Bank, these new social and environmental safeguards have the potential to mark a new chapter in Bank financing and in the impact that the Bank Group has on the development situation and potential of the world's poorest. The convening later this year of the World Conference on Indigenous Peoples as a special session of the UN General Assembly underscores again the consensus within the UN system of the importance of respecting and protecting the rights of indigenous peoples as partners in development and in governance. As part of the UN system, the Bank has a special role in supporting the countries it lends to in making this consensus a reality.

Our comments here are directed at proposed changes to protections for indigenous peoples:

1. First, we emphasize and reiterate calls for a requirement to obtain the free, prior and informed consent of indigenous peoples for projects impacting on
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them, or their livelihoods, lands, territories or resources. As discussed at length in the expert group convened on this topic, and in numerous statements, submissions and reports provided to the consultation, FPIC is a procedural requirement which is fundamental to effectively protecting the rights of indigenous peoples and supporting equitable and partnership based development initiatives for indigenous peoples, enabling self-determined development.

The current terminology used by the Bank is ‘broad community support’ (BCS), a standard that has been repeatedly rejected by indigenous peoples’ representatives and support organisations and is inconsistent with the settled jurisprudence of international human rights law to which most borrower states are legally committed.¹

BCS is determined by the borrower based on their social assessment and the process of consultation undertaken with the affected indigenous peoples.² The Bank then reviews the documentation to satisfy itself that BCS exists.³ A critical weakness of this is that there is no reference to or requirement for positive affirmation by the affected communities of a decision made on the basis of their support. Communities may not even know that they have been judged by the Bank and Borrower to have ‘supported’ a given project. Its failure as a protective standard is apparent in the internal desk review of the implementation of OP4.10, which noted that less than half of all projects applying OP4.10 in the review period had evidence of having secured BCS despite it being a requirement for all.⁴

FPIC is demanded by indigenous peoples in order to enable respectful, mutual development planning and implementation processes. BCS, by itself, cannot support a mutually respectful and positive working relationship because it does not require that affected communities or peoples participate in decision-making about their own development. OP4.10 does have separate participation requirements but these are weakened by being detached from a judgement of support. Furthermore, BCS is not informed, communities are not routinely told that their support is required nor the implications of support. Finally, as already noted above, BCS is not within the authority of

¹ See, for instance, *Concerns over ADB's new proposed safeguard policies*, 2 February, 2009.

Available at:

<http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/adbngoletsafeguardpolfebo9eng.pdf> and Tugendhat, Helen. *Forest Peoples Programme Submission to the Independent Evaluation Group Regarding the World Bank Group Safeguard and Sustainability Frameworks*,

June 2010. Available at:

<http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/wbsafegdfppsubmissioniegjun10eng.pdf>

² World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 11.

³ “The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples’ communities have provided their broad support to the project. The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior, and informed consultation with the affected Indigenous Peoples’ communities as a basis for ascertaining whether there is such support”. World Bank Operational Policy 4.10 on Indigenous Peoples, at para. 11.

⁴ “[B]road community support was evidenced in only 27 projects or less than half of all projects (46 percent).” World Bank, *Implementation of the World Bank’s Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*, August 2011. p. 23

traditional or customary decision-making processes, but assessed from a distance by external actors against undefined indicators.

BCS does not and cannot work as a replacement standard for free, prior and informed consent because it does not meet the basic test of respect for indigenous peoples' own decision making processes nor respect for the right to refuse an intervention that may negatively impact on lives, lands and livelihoods.

2. Secondly, also related to the policy on development interventions impacting on indigenous peoples, we wish to emphasize that the policy must be applied strictly in conformity with the foundational legal principle of non-discrimination. Comments during the Spring Meetings by Safeguard Review Team Leader Mark King caused concern that the application of the indigenous peoples' policy in Africa will be different from other regions. This is of serious concern to us, and threatens to undermine key achievements in supporting the rights of indigenous peoples globally.

International and regional debates about the applicability of law regarding the rights of indigenous peoples (or associated policies and regulations) in Africa were largely settled by the seminal work undertaken by the Working Group on Indigenous Populations under the African Commission on Human and Peoples' Rights (ACHPR). In this book, expert witnesses reiterate that the analytical concept of 'indigenous' includes experiences of marginalization and disempowerment.

This recognition has been applied again and again, by national courts in Africa⁵, by the African Commission on Human and Peoples' Rights⁶ and by international human rights treaty bodies. The World Bank's own analysis, in reviewing the case of *Endorois v. Kenya*, emphasises the importance of distinguishing effectively those peoples to whom the particular protections of law on the rights of indigenous peoples are due. In this case, as acknowledged by Bank Counsel, severing a people from their lands is recognized as a violation because it affected "their right to preserve their identity through linkage with their ancestral lands and therefore struck at the heart of indigenous peoples' rights".⁷

The African Caucus, at the recently concluded UN Permanent Forum on Indigenous Issues, stated its alarm at the possibility that the policy would be discriminatorily applied for indigenous peoples in Africa and highlighted the significant and recent legal steps taken to recognize indigenous peoples rights

⁵ See, for instance, *Sesana and others v. The Attorney-General (2006) (2) BLR 633 (HC)*, wherein the Judge recognized that "the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples' is of relevance" and accordingly applied protections under the International Convention on the Elimination of Racial Discrimination.

⁶ ACHPR 2009, Decision on Communication 276/2003, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) on behalf of Endorois Welfare Council v Kenya*.

⁷ Victor Mosoti, World Bank Counsel, Environment and International Law Unit, Legal Vice Presidency December 2010 <http://go.worldbank.org/5FS928HBQo>

on the continent.⁸ To apply any proposed indigenous peoples' policy separately to the continent of Africa would ignore the combined expert views of the African Commission on Human and Peoples' Rights, and international legal findings going back decades.

In conclusion, we strongly urge you to present to the Board a consultation draft of the new proposed safeguard for indigenous peoples which includes a requirement for obtaining the free, prior and informed consent of indigenous peoples, as determined and expressed by themselves, and a policy which is applied strictly on the basis of non-discrimination on the grounds of race, ethnicity or national origin.

Best regards,

A handwritten signature in black ink that reads "Joji Carino". The signature is written in a cursive, flowing style.

Joji Carino
Director
Forest Peoples Programme

⁸ Africa Caucus statement to the 13th Session of UNPFII, delivered by Mr Kanyinke Sena, May, 2014. Available at: <http://natural-justice.blogspot.co.uk/2014/05/13th-session-of-unpfi-african-caucus.html>

When is Free, Prior and Informed Consent required?

The United Nations Declaration on the Rights of Indigenous Peoples provides important guidance to the WBG. The Declaration not only highlights the responsibility of the Bank, as a specialised agency of the United Nations, to support the implementation of the Declaration⁹ it further specifies areas of action for which FPIC area required. Most directly relevant to the Bank as a development agency is Article 32(2) that specifically provides that:

*States shall consult and cooperate in good faith with the indigenous people concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*¹⁰

The Declaration goes on to affirm that ‘indigenous peoples shall not be forcibly removed from their lands or territories’ and that ‘no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned’.¹¹ Consent is also required under the Declaration where cultural property is concerned,¹² and more broadly when legislative or administrative measures are adopted that may affect indigenous peoples.¹³ The Declaration restates articles of international law, standards and jurisprudence regarding the applicability of FPIC to resource exploitation,¹⁴ resettlement or relocation from lands and resources,¹⁵ policy formulation¹⁶ and use of cultural knowledge.¹⁷

⁹ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), article 42 (2007) (hereinafter “the Declaration”), Article 42

¹⁰ Ibid. at article 32 paragraph 2

¹¹ Ibid. at article 10

¹² Ibid. at article 11 paragraph 2

¹³ Ibid. at article 19

¹⁴ Among others, *Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, 24 October 2003, paras. 111-19, 141. G. Handl, Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem, in *Environmental Damage in International and Comparative Law. Problems of Definition and Valuation* 85-110, at 95 (footnotes omitted) (M. Bowman and A. Boyle eds., OUP 2002)(arguing ‘there can be little room for doubt that there exists today a general consensus among states that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by states, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups’ survival as culturally distinct peoples and communities’).

¹⁵ Among others, ILO Convention 107, art. 12, ILO Convention No. 169, art. 16(2), draft UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII.

¹⁶ *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee’s 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4 requires that ‘ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.’

¹⁷ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, at 11.