

World Bank Environmental and Social Framework First Draft for Consultation July 30, 2014

Submitted by Natural Justice: Lawyers for Communities and the Environment

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Introduction

Natural Justice welcomes the opportunity to comment on the first draft for consultation of the World Bank Environmental and Social Framework (“Draft ESF”). As we pointed out in our April 2013 Submission to the World Bank Safeguards Review,¹ the Bank’s current environmental and social safeguard policies (“safeguard policies”) at one time established it as an international leader in reducing the negative effects of investment operations in developing countries. That is no longer the case, however, and the Bank’s review and update of its safeguard policies provides an opportunity for the Bank to bring its policies into line with environmental and human rights standards that are now broadly accepted.

Unfortunately, the Bank failed to grasp that opportunity in the Draft ESF. The Draft ESF suffers from many problems, both procedural and substantive. With regard to the process of developing the Draft ESF, we understand that challenges exist in appropriately gathering and incorporating the views of numerous stakeholders. However, insufficient notice and other issues have marred many consultations on the Draft ESF.

Substantively, the lack of “recognition of the central importance of respecting and promoting human rights”² in the Draft ESF, the restriction of its coverage to investment loans, the shifting of responsibility for implementing the Environmental and Social Standards (ESSs) to borrowers, and the standards for applying national law in place of the ESSs, are just some of the major problems. However, these and other problems have been ably covered by several other submissions thus far. In this submission we will therefore focus mainly on ESS7, and specifically the issues caused by paragraph 9 of that ESS. Other submissions have also cogently addressed that paragraph, but due to the

¹ Available at <http://consultations.worldbank.org/Data/hub/files/naturaljusticesubmissiontoworldbanksafeguardsupdateapril2013.pdf>

² Letter of Special Procedures mandate holders (UN Special Procedures) of the U.N. Human Rights Council to Mr. Jim Yong Kim (17 December 2014).

potential consequences of its inclusion we feel it necessary to add our voice to the strong statements – including those made by the African Commission's Working Group on Indigenous Populations/Communities in Africa³ – calling for its deletion.

ESS7 paragraph 9, which allows borrowers to request that ESS7 be waived entirely, has come to be known as the “opt-out clause.” Nothing like this paragraph exists in the current safeguard policy on indigenous peoples, Operational Policy 4.10 (OP4.10). It is apparently being added at the request of some government representatives to the Bank.⁴

Whatever the motivation for inserting the opt-out clause, there are several reasons why it should be struck entirely from the final version of the revised safeguard policies. First, if applied it allows governments to ignore the standards set forth in ESS7, standards which are essential to the protection of indigenous peoples’ rights in the face of development. Second, it promotes an incorrect view of the consequences of recognizing the existence of indigenous peoples within a country’s borders. And third, it sets a dangerous precedent that other institutions and governments may follow, which will exacerbate the challenges that indigenous peoples already face and potentially undo decades of progress regarding recognition of indigenous peoples’ rights.

If Applied the Opt-Out Clause Nullifies ESS7

ESS7 contains many provisions protecting indigenous peoples’ rights that are not found in other ESSs. Of particular importance is the recognition of the principle of free, prior and informed consent (FPIC) and the requirement that borrowers obtain the FPIC of affected indigenous peoples under certain circumstances.⁵ FPIC, in the context of exercising certain substantive rights, such as the right to self-determination or land, is an internationally accepted normative obligation.⁶ To give just a few examples, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic Social and Cultural Rights (CESCR) and the UN Human Rights Committee have all affirmed States’ duties to obtain indigenous peoples’ FPIC where their rights and

³ Letter of Chairperson of the African Commission's Working Group on Indigenous Populations/Communities in Africa to Dr. Jim Yong Kim (1 September 2014).

⁴ See the statement entitled “Khartoum Declaration II” released following a September 2014 meeting in Khartoum of African ministers of finance and governors of the central banks Caucus in the World Bank (WB) and International Monetary Fund (IMF).

⁵ ESS7 paragraph 19. Legitimate concerns exist regarding the current wording on FPIC in ESS7 but we will not explore those in this submission.

⁶ For an extensive examination of instruments supporting this conclusion, as well as authoritative decisions of the bodies established by States to interpret and review States’ compliance with such instruments, see Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC) International Law and Jurisprudence Affirming the Requirement of FPIC (UN-REDD Programme 2013).

interests are affected.⁷ Additionally, several Articles of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) require FPIC, including in the context of relocation and projects affecting their lands and resources. States have recently reaffirmed their commitment to obtain FPIC prior to approval of projects affecting indigenous peoples' land and other resources.⁸ The Bank's inclusion of an FPIC requirement in ESS7 is a recognition of this development, and many other finance institutions and development agencies are already following this trend.

Despite the existence of standards unique to indigenous peoples in ESS7, including the requirement to obtain FPIC, the opt-out clause allows borrowers to address the risk and impacts of projects "through the application of the ESSs **other than ESS7.**" (Emphasis added.) If the Bank allows borrowers to address a project's risks and impacts through other ESSs, indigenous peoples will be denied the very protections that the new standard purports to offer. There are also specific requirements in ESS7 related to relocation and land that are not adequately covered in other ESSs.

The attempt to mitigate the effects of opting out of ESS7 by requiring "relevant project-affected communities (of Indigenous Peoples) [to] be treated at least as well as other project-affected people" is wholly inadequate. This is simply not possible because the other ESSs do not include international legal protections that are specifically accorded to indigenous peoples. Thus, the provision that indigenous peoples "will be treated at least as well" is an empty commitment.

The Opt-Out Clause Promotes a Regressive View of Indigenous Peoples

The opt-out clause allows borrowers to request an alternative approach where they are "concerned that the process of identifying groups for purposes of applying this ESS would create a serious risk of exacerbating ethnic tension or civil strife" First, neither "ethnic tension" nor "civil strife" is defined in the Draft ESF, and these phrases leave wide latitude for borrowers to justify opting out of ESS7. Second, regardless of whether the opt-out clause is ever triggered, it implies that recognizing peoples as "indigenous" somehow exacerbates tension and strife. The African Commission on Human and Peoples' Rights (ACHPR) has refuted this implication.

⁷ CERD, General Recommendation No. 23: Indigenous Peoples, A/52/18, annex V, para. 4(d) (18 August 1997); CESCR, General Comment 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the ICESCR) E/C.12/GC/21, paras 36-37 (21 December 2009); *Ángela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, Human Rights Committee Views on Communication No. 1457/2006, adopted on 27 March 2009, paras. 7.2-7.6.

⁸ Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, A/RES/69/2 (25 September 2014), para. 20 (hereinafter "WCIP Outcome Document").

To assert that recognizing indigenous peoples exacerbates tensions and strife (an assertion endorsed by the Bank in the opt-out clause) is to misunderstand the meaning of the term “indigenous.” In its modern form, “the very spirit of the term [indigenous peoples] is to be an instrument of true democratisation whereby the most marginalised groups/peoples within a state can get recognition and a voice.”⁹ As explained by the ACHPR, recognizing indigenous peoples prevents rather than leads to conflict:

Giving recognition to all groups, respecting their differences and allowing them all to flourish in a truly democratic spirit does not lead to conflict, it prevents conflict. What does create conflict is when certain dominant groups force through a sort of “unity” that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives. Or, put another way: conflicts do not arise because people demand their rights but because their rights are violated. Finding ways to protect the human rights of particularly discriminated groups should not be seen as tribalism and disruption of the unity of African states.¹⁰

The opt-out clause also allows borrowers to request an alternative approach “where the identification of culturally-distinct groups as envisioned in this ESS is inconsistent with the provisions of the national constitution” This makes ESS7 the only standard that allows national law to prevail if there are inconsistencies between the two.¹¹ Such an allowance sends the message that ESS7 is less consequential than the other ESSs.

But more important, this provision (which puts the Bank, and ultimately the Board, in the position of interpreting national constitutions) provides the very governments that have violated the rights of indigenous peoples in the past an avenue to do so in the future. The opt-out clause undermines decades of progress at the regional and international level, where recognition of the rights of indigenous peoples was critical in the face of actions by national governments. As noted by the UN Special Procedures, “the ability of borrower countries to effectively choose whether or not to recognize indigenous peoples appears incompatible with the fundamental purpose of the

⁹ Report of the African Commissions’ Working Group of Experts on Indigenous Populations/Communities, at 114, adopted by ACHPR /Res.65(XXXIV)03 (2003).

¹⁰ ACHPR and International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006), 12.

¹¹ The Bank’s guidance on inconsistencies between national law and the ESSs provides that “Where national law is inconsistent with the requirements of the Environmental and Social Standards, the provisions of the Environmental and Social Standards will prevail as regards the project being supported by the Bank”

http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/qa_safeguards_review.pdf (at page 4).

Declaration, which seeks to redress the wrongful denial of the existence of indigenous peoples and their right to self-determination.”¹²

The Opt-Out Clause Sets a Dangerous Precedent

The policies of the World Bank “have considerable practical impact, especially throughout the developing world.”¹³ Indeed, the Bank’s safeguard policies “have broadly influenced similar developments at most other international financial institutions.”¹⁴ As discussed above, however, the opt-out clause both allows borrowers the opportunity to escape their international obligations and promotes a negative and flawed view of indigenous peoples. The Bank should not be in the position of promoting such an approach, especially given the impact of the Bank’s policies on other lending institutions.

The effect of Bank policies is critical in light of the progress that has been made around the world, but particularly in Africa, regarding recognition of the rights of indigenous peoples. The Chairperson of the ACHPR’s Working Group on Indigenous Populations/Communities in Africa, in an 8 July 2014 letter to Dr. Jim Kim, set forth the myriad measures favorable to indigenous peoples that many African countries have taken, including in the Democratic Republic of Congo, the Central African Republic, Benin, Niger, Kenya and Uganda.¹⁵ The Chairperson pointed out that the opt-out clause “would be a major setback to the positive and encouraging developments recorded across the continent with regards to the increasing recognition and protection of indigenous peoples.”

The effects of the opt-out clause are even more discouraging given that the Bank is a specialized agency of the United Nations. UN Declaration Article 43 requires the UN and its specialized agencies, “including at the country level,” to “promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.” As pointed out by the UN Special Procedures, ESS7 as currently drafted has the opposite effect.

It is important to note that despite some arguments to the contrary, the UN Declaration should serve as the Bank’s lodestar in developing its indigenous peoples policy. It is true that the UN Declaration is not legally binding in the formal treaty sense, since it was

¹² Letter of Special Procedures mandate holders (UN Special Procedures) of the U.N. Human Rights Council (17 December 2014).

¹³ Charles Di Leva, *International Environmental Law and Development*, 10 *Geo. Int'l Env'tl. L. Rev.* 501, 501 (1998).

¹⁴ David Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 *Chi. J. Int'l L.* 437, 442 (2008).

¹⁵ Available at

https://consultations.worldbank.org/Data/hub/files/submissions_of_the_achpr_working_group_on_indigenous_populations_and_communities.pdf

proclaimed by a resolution of the UN General Assembly rather than adopted and ratified pursuant to the Vienna Convention. Nevertheless, it carries legal authority for several reasons. First, such authority is to a large extent inherent in a declaration of the UN General Assembly, “the most representative political organ of the world body”¹⁶ Second, the UN Declaration encapsulates well-established principles of human rights that are already integrated into human rights treaties, such as those making up the International Bill of Human Rights. Third, the basic normative principles set forth in the UN Declaration can also be found in many other instruments, as well as decisions by several international bodies.¹⁷ There are additional reasons, but the effect is the same: to argue that states are not bound by the UN Declaration because it is not a treaty is to take positivism to an extreme that ignores the history of its creation and the context in which it exists.

Looking beyond the UN Declaration itself, the rights of Indigenous peoples are increasingly recognized and enshrined at the international level. These include the 1989 International Labour Organization Indigenous and Tribal Peoples Convention (No. 169) as well as the 2014 WCIP Outcome Document, in which states reaffirmed their commitment to uphold the UN Declaration.¹⁸ It is also occurring in the context of processes that recognize indigenous peoples for the role they play as stewards of ecosystems and facilitators of sustainable development. For example, decisions of parties to the Convention on Biological Diversity such as the Akwe:Kon Guidelines and IUCN Resolutions and Recommendations arising out of its periodic Congresses¹⁹ are just some of the processes where this recognition is taking place. The Bank is a specialized agency of the UN and an entity that places sustainable development at the heart of its mission. It should seek to ensure that the rights of indigenous peoples are upheld and that their role as ecosystem stewards is protected and promoted.

Unfortunately, the opt-out clause allows borrowers to seek permission to avoid ESS7 altogether, and indeed it practically invites them to do so. Any argument that it is currently possible to opt out of the current indigenous peoples safeguard policy (OP4.10) misses the point. While that may be technically possible under the Bank’s Operational Policy Waivers policy OPCS5.06-POL.01 (OPW Policy), there is nothing in OP4.10 itself that specifically allows borrowers to request that it be waived entirely. Instead, the OPW Policy applies to all policies, and therefore it does not have the effect

¹⁶ James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *University of Hawaii Law Review* 983, 998 (2013).

¹⁷ See Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (Stephen Allen & Alexandra Xanthaki, eds), Hart Publishing: Oxford (2011), 38.

¹⁸ WCIP Outcome Document para. 4.

¹⁹ See e.g. IUCN Resolution 4.052, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, Adopted at Fourth Session of World Conservation Congress (2008).

of singling out one policy among all the others as one for which a waiver can be requested.

Conclusion

Much has changed since the Bank's first formal policy on indigenous peoples was adopted in 1982. While the Bank has revised this and other policies over the years, the process it is currently undertaking to review and update its safeguard policies presents a vital opportunity to bring them into line with accepted international standards. The Draft ESF does not take advantage of that opportunity. The opt-out clause in particular departs from decades of progress on indigenous peoples' rights. We urge the Bank to delete the opt-out clause and to address the other issues with the Draft ESF that have been highlighted since its release. Doing so will help to ensure that the Bank fulfills its role as a leader in global policy and sustainable development.