Consultation on the first draft of the Environmental and Social Framework and Technical dialogue on Human Rights, Land Administration, Tenure and Natural Resources
Technical dialogue on human rights

Opening remarks Marita Steinke, Human Rights Division BMZ
Berlin, 13.11.2014

➢ Warm welcome to the second day of consultations

➢ We are pleased to complement the regular World Bank consultations on the draft Environmental and Social Framework with a thematic dialogue on Human Rights.

We are looking forward to an interesting and fruitful/controversial discussion.

(1) Why do we do this

• The objective of this human rights dialogue session is to guarantee a human rights perspective on the first draft of the new safeguards framework. What does this mean for us? What is our orientation?

• First of all, we are guided by all international human rights treaties which Germany has ratified, among them the International Covenant on Economic, Social and Cultural Rights.

• The Committee on Economic, Social and Cultural Rights which supervises the implementation of the Covenant has declared that member states of international financial institutions have to use their decision-making power in accordance with their human rights obligations. – We are convinced to have a responsibility in this regard.
• Secondly, since 2011 we have a binding human rights strategy for development cooperation. This strategy includes that BMZ “endorses, promotes and advocates for international institutions to adopt a human rights-based approach”.

• We also have committed ourselves to ensure that the international financial institutions such as the World Bank and the regional development banks, gear their operational activities and guidelines more strongly towards human rights”.

• In our dialogue today, we want to explore how exactly such a human rights perspective, based on the binding international treaties and our human rights strategy, can be integrated into the ongoing safeguard reform process.

(2) World Bank and human rights

• Of course, we are aware that the question of human rights has been a contentious issue within the World Bank since the 1980s. Quite often, we heard the argument that due to its articles of agreement the World Bank has to abstain from working on human rights.

• However, in the past few years the World Bank has been working on a range of human rights issues, whose consideration it has itself declared indispensable for development such as governance, indigenous peoples, gender, etc.

• Furthermore, the World Bank makes its impacts on human rights of people all over the World - be it through the positive impacts of projects or be it through the negative consequences when possible negative human rights impacts had not been properly assessed from the outset.

• So, finally, it does not matter whether the World Bank has an explicit human rights policy or not - anyway it lives one. Philip Alston, the UN Special Rapporteur on
Extreme Poverty and Human Rights, pointed it out in a speech about a month ago at the World Bank: “Not having a policy, or having one that insists on neutrality in such matters, makes a very clear statement and is a position that will be highly influential at both the national and international levels.”

- Moreover, the international environment has changed dramatically: Compared to the 1980s when these fundamental discussions took place at the World Bank, nowadays human rights and their obligations beyond borders and for all actors other than nation states are increasingly well understood.
- Today, human rights are an integral part of the global legal order - and of the vision, of the strategy and of the internal legal order of most international organisations, among them the United Nations and its organisations like the World Bank.
- Last but not least, we all should recognize that human rights are not just a mere tool for conditionality or sanctions.
- Ongoing development discussions make it more than clear, that through a human rights-based approach human rights can be implemented in a myriad of ways.
- Human rights can serve as a framework for dialogue, for policy advice and for programming.
- The World Bank, while implementing e.g. technical programmes of water supply, is contributing to the fulfilment of human rights. But those programmes can be better, more efficient and more sustainable when applying a human rights-based approach. => Because vulnerable groups will not be neglected, ethnical minorities
will not be excluded and marginalized people are consequently participating in decisions.

(3) BMZ and the draft safeguards

• Let me add a few words on the draft safeguards. We have studied the draft published end of July 2014 and contributed to the positions developed by the World Bank desk of the Ministry.

• It is evident that reforming the safeguards from a human rights perspective is not just a legal question. It also has to involve the results of the impact of World Bank projects so far. In other words: Our position is based on experience and analysis how World Bank projects have been implemented and which problems they faced.

• Our concerns and questions touch on a variety of issues. I will not mention all of them.

  o We welcome the introduction of a standard on labour and working conditions. However, we are worried about the selective approach to agreed international core labour standards which leaves out the freedom of association and the right to collective bargaining. We also notice the limitation to contract workers and the exclusion of project workers and we are concerned about the dynamics this might generate.

  o We appreciate very much the introduction of the concept of free, prior and informed consent in the standard on indigenous peoples. At the same time, we are concerned about the proposed opt-out clause and how it would be applied.
One central question relates to the change from a standard-based approach to a risk-based approach and an increased reliance on “country systems”.

While we appreciate both a focus on risks and on ownership, we would like to discuss what this change means in practice.

The proposed assessment of national capacity and the strengthening of national capacities are crucial – but they have to be managed adequately.

What are the capacities for the Bank to monitor the level of capacity in partner countries? How will capacity building be supported?

We understand that a risk-based approach requires more flexibility in procedures, but we are concerned about imprecise legal concepts within World Bank. They give quite some leeway to the World Bank, but so far they fail to explain the procedures and criteria which finally will guide the Bank.

It is important to ensure transparency in all envisaged procedural steps.

(4) Outlook

- These are a few complex questions and we are glad to discuss them with you today.

- We are happy to have some well-known international experts with us. Although the consultation is taking place here in Germany and is mainly directed to German stakeholders, we are glad to have you here to enlighten us with your experience, your competence and your specific perspective.

- This includes both the perspective of representatives of the Global South as well as from international non-governmental organisations which represent stakeholders and communities from all over the World.

- Thank you for joining us today.
• I would like to invite all of you to participate actively and to make use of the extraordinary chance to contribute to shaping the new safeguards.

• Thank you!
Fixing the World Bank Safeguards: Strengths & Weaknesses of ESP, ESS1 and ESS10, Environmental and Social Framework

Vince McElhinny, Bank Information Center
November 13, 2014
Prepared for Berlin Consultation, Technical Session on Human Rights, Review and Update of World bank’s Environmental and Social Safeguard Policies
Context: Not just the Policy, but Enabling Environment

- World Bank reorganization
- Weakened safeguard supervision capacity
World Bank E & S Standards: What Changes?

What the World Bank now has:
• Safeguards designed as a minimum, predictable safety net

Proposed changes:
• ‘Opt out' clauses to delegate safeguard responsibility
• Defers appraisal & open-ended compliance
• Abandons minimum procedural requirements
• Unclear implementation M&E requirements and capacity
• Risk of inconsistent application
Opt out clauses to defer safeguard responsibilities w/o adequately clear thresholds

1. Use of Borrower Frameworks
2. Common Approach for multi-donor projects
3. Associated Facilities (other donor funded)
4. Projects in advanced state of construction
5. Financial Intermediaries

**Suggested Revisions:** Eligibility based on consistency w/ more operational, less aspirational ESS objectives; define criteria for acceptable Borrower capacity & track record; list activities that can not be delegated; Exclusion list
Risk Categorization

+? High/Substantial/Moderate/Low risk classification
- Unclear definition and requirements for substantial risk projects
- Unclear criteria for Borrower commitment & track record
- Unclear criteria for risk classification adjustment

Suggested Revision: Adopt indicative high risk list (EBRD); specify ESS1 requirements for substantial risk projects; Require long-term tracking of high risk project impacts;
Deferred Appraisal & Open-ended Compliance

ESS compliance can be deferred “in a manner and timeframe acceptable to the Bank, as set out in the Environment and Social Commitment Plan.”

- ESCP is part of the legal agreement
- No limitations for deferring high risk activities
- Unclear ESCP leverage
- Unclear Bank Safeguard responsibility during ESCP implementation

**Suggested Revisions:** Exclude high risk activities from any deferral; clarify criteria for deferral ineligibility; link ESCP to disbursements; define minimum ESCP disclosure criteria; 3rd party/community monitoring.
Environment & Social Assessment

+ Expanded social and conflict risk analysis
+? Non-discrimination and differentiated measures

- No upstream requirements (i.e. clear ties to SCD/CPF?)
- No explicit requirement for Climate Change Assessment
- No clear triggers for SESA, Sector/Regional – cumulative impact assessments
- No Universal Access & Inclusion Plan provisions
- Lack of clarity on gaps in treatment of substantial risk subprojects

Suggested Revisions: Explicit upstream links to SCD/CPF; explicit triggers for specialized methods; less narrow definition of Associated Facilities; directives on unique assessment of risks to vulnerable peoples;
Consultation, Participation and Disclosure (ESS 10)

+ Meaningful consultation, FPIC
+ Lifecycle Stakeholder Engagement Plan

- Unclear minimum procedural requirements – no anchors
- Treatment of substantial risk subprojects

**Suggested Revisions:** Restore minimum requirements; strengthen inclusion requirements; 3rd party/community monitoring requirements for certain projects
Implementation M&E Requirements and Capacity

+ Top IEG reform recommendation
+ Core premise of ESF
+ Annual safeguard monitoring
  - Unclear additional reporting requirements (i.e. of ESCP)
  - No community or 3rd party monitoring requirements
  - Persistent Bank monitoring capacity questions

**Suggested Revisions**: Clear Bank role in defining E & S performance indicators; 3rd party or community monitoring and E & S outcomes; impact assessment for certain projects.
Diminished Scope of Consistent Safeguard Application

Fig. 2 World Bank Group Safeguard Scope Dilution under Proposed ESF

- 54% Fully Safeguarded
- 22% Instrument Not covered
- 12% Fast Track
- 6% Deferred
- 2% Unclear requirements
- 2% Fully covered

Fully Safeguarded World Bank Group Lending is 8% ($7.5 Bn) of $61.5 Bn FY14
Final Thought

The **extreme inconsistency** in how the proposed Bank standards will likely apply in practice will result in a **safety net with so many loopholes, uncertainties and unaccountable judgments** that the original purpose of safeguards will be rendered ineffective.
Thank you!

The Bank Information Center (BIC) [www.bicusa.org](http://www.bicusa.org) partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions (IFIs) to promote social and economic justice and ecological sustainability. BIC is an independent, non-profit, non-governmental organization that advocates for the protection of rights, participation, transparency, and public accountability in the governance and operations of the World Bank Group and regional development banks.
Major weaknesses in World Bank’s draft labour standards safeguard

Since 2012, the World Bank has been engaged in a revision of its social and environmental safeguards policies and held consultations in which the International Trade Union Confederation (ITUC), some Global Union Federations and several national trade union organizations took part. At the end of July 2014, the World Bank’s executive board authorized the Bank to carry out public consultations on a draft policy that would, for the first time, include a standard on labour and working conditions.¹ The Bank’s board is scheduled to consider a draft in 2015 that is supposed be revised after the consultations.

Unfortunately the draft labour standard prepared by Bank management contains some substantial gaps relative to the labour standards requirement that has existed at the Bank’s private-sector lending arm, the International Finance Corporation (IFC), since 2006 and those that have been adopted in recent years by some regional development banks. This note points out the significant weaknesses in the World Bank’s draft “Environmental and Social Standard 2: Labor and Working Conditions” and calls for them to be corrected prior to adoption.

Background

The lack of a labour standards safeguard in the World Bank’s current social and environmental safeguards policies, parts of which date back more than two decades, has been criticized by many governments, civil society organizations including trade unions, and by the Bank’s own Independent Evaluation Group (IEG). In a report it published in 2010, the IEG stated: “There is no obvious reason to presume that community and labor impacts are not relevant to the Bank’s portfolio … The World Bank should: Ensure adequate coverage of the social effects – integrating community and gender impacts, labor and working conditions, and health, safety and security issues currently not covered by its safeguards policies …”.²

The absence of a labour standards safeguard at the World Bank has meant that borrowers from the World Bank’s public-sector divisions, IBRD and IDA, and managers of projects and other activities funded by those divisions have not been required to comply with the basic labour standards adopted at other multilateral development banks (MDBs). MDBs that have adopted labour standards requirements include the World Bank’s private-sector division, IFC, the

European Bank for Reconstruction and Development (EBRD) and the African Development Bank (AfDB). All of the preceding labour standards safeguards or requirements have included obligations to comply with the International Labour Organization’s (ILO) core labour standards,3 present written information to workers about their conditions of employment, provide a safe and healthy work environment and ensure that sub-contracted workers’ rights and working conditions are also protected.

The fact that the World Bank has not adopted such standards has created confusion and inconsistency as to the labour conditions that must be applied in development projects, depending on which MDB or which division of the World Bank provides the financing. For example, labour researchers in Iraq found important disparities in the labour standards complied with in World Bank Group-financed projects according to whether financing came from IFC or the Bank’s public-sector divisions, with evidence of child labour, unsafe working conditions, unpaid wages and denial of freedom of association in projects financed by the latter.4 The lack of a labour safeguard has also meant that the Bank has fallen behind other MDBs which require that the projects they fund meet accepted international labour standards. The World Bank has thus not shown the kind of leadership it demonstrated in past years when it adopted environmental standards that other MDBs subsequently replicated in their lending requirements.

Disappointingly, the draft “Environmental and Social Standard 2: Labor and Working Conditions” (ESS 2) prepared by World Bank management will not allow it to catch up to the standards that have been adopted by other MDBs. The most important weaknesses concern proposals that borrowers from the public-sector divisions of the Bank need not comply with all of the core labour standards and that contract workers should be denied any protection under the labour safeguard.

**Incomplete compliance with core labour standards**

The World Bank’s leadership has expressed its support for the core labour standards (CLS) since 2002, when the Bank’s president stated at a public meeting that “the Bank supports the promotion of all four core labor standards”.5 In 2006 the Bank took the step of incorporating them into IFC’s Social and Environmental Performance Standards, which meant that borrowers were expected to comply with them in order to benefit from IFC financial support. To avoid any ambiguity, IFC’s “Performance Standard 2: Labor and Working Conditions” (PS 2) includes an explicit reference to the ILO conventions on which the CLS are based, namely the eight fundamental rights conventions that cover the four themes of freedom of association and right

---

3 The core labour standards are internationally-agreed fundamental human rights for all workers irrespective of countries’ level of development that are defined by eight ILO conventions covering freedom of association and right to collective bargaining, elimination of discrimination in respect of employment and occupation, elimination of forced or compulsory labour, and effective abolition of child labour.


5 World Bank, “Transcript of Town Hall Meeting with NGOs”, January 2002
to collective bargaining, elimination of discrimination, elimination of forced labour and prohibition of child labour.

In 2010, clauses similar to the CLS language of IFC’s Performance Standards were included in the harmonized contract documents for procurement of works intended to be used for large public-sector infrastructure projects by the World Bank and regional development banks. Two regional banks incorporated similar language covering the four components of the CLS and are applicable to all of their lending: the EBRD when it adopted its Social and Environmental Performance Requirements in 2008 and the AfDB when it adopted its Operational Safeguards in 2013.

Importantly, all of the preceding MDB instruments stipulate the principle of compliance with CLS whether or not national laws completely protect these rights. They thus acknowledge that since 1998 it has been a *de facto* condition of membership to the ILO, whose list of members is almost identical to that of the World Bank, that member countries are expected to comply with the CLS whether or not they have been ratified in national law. On the issue of freedom of association and right to collective bargaining, all of the MDB instruments mentioned in the preceding two paragraphs stipulate that no matter what is the precise protection of these rights in national law, the borrower or contractor “shall not discriminate or retaliate against workers who participate or seek to participate in [workers’] organisations and engage in collective bargaining”.

If adopted in its current form, the World Bank’s proposed “ESS 2: Labor and Working Conditions” would entail the Bank stepping backwards more than a decade, that is prior to 2002 when it began supporting the CLS. The draft ESS 2 makes no mention of the ILO, its eight fundamental rights conventions or the core labour standards. And for the first time since before 2002, the World Bank suggests through ESS 2 that it rejects the notion of the CLS as an inseparable amalgam of four fundamental rights by stating that some CLS must be complied with in Bank-funded projects whether or not national law provides for them, but that others can be dispensed with. Thus, ESS 2 requires compliance with specific interdictions concerning forced labour, child labour and discriminatory practices. However as concerns freedom of association and right to collective bargaining, ESS 2 states that only “where national law recognizes” those rights will they not be interfered with in Bank-funded projects.

This indicates that Bank project managers would have the green light to discriminate or take repressive measures against workers who seek to exercise freedom of association, unless this right is explicitly protected under national law. Contrary to what has been done in all the other

---

6 This wording is from the AfDB’s “Operational Safeguard 5 – Labour conditions, health and safety”, adopted in December 2013. Similar language is found in IFC’s “Performance Standard 2” (revised 2012), EBRD’s “Performance Requirement 2” (revised 2014) and the World Bank’s “Standard Bidding Document for Procurement of Works” (revised 2010).

MDB labour standards instruments – IFC’s PS 2, EBRD’s PR 2, AfDB’s OS 5 and the World Bank’s procurement standards – such practices are not prohibited under the draft ESS 2.

ESS 2 also proposes to break with ILO precedent and practice by creating a distinct and limited category of rights for public servants. The World Bank’s proposed policy states that “ESS2 will not apply to such government civil servants [who work in the project], except for the provisions of paragraphs 15 to 19 (Protecting the Work Force) and paragraphs 20 and 21 (Occupational Health and Safety).” Specifically not included would be any right to information about conditions of employment, to a grievance mechanism, to freedom of association and against discriminatory practices.

One other derogation from the other MDB labour standards requirements under the CLS rubric is that ESS 2 has removed the stipulation that “the principles of non-discrimination [in wages, working conditions, etc.] apply to migrant workers”, which one finds in IFC’s PS 2 and the AfDB’s OS 5. The draft ESS 2 only prohibits employment of trafficked persons.

**Contract workers are excluded from protection**

An important feature of labour standards requirements adopted by IFC, EBRD and AfDB is that almost all of their provisions are applicable to contract, sub-contracted or third-party workers. For example, IFC’s PS 2 stipulates that all the requirements apply to contracted workers with the exception of retrenchment procedures and supply chain assessments. Protection of contract workers has been one of the most beneficial aspects of the MDB labour standards, since workers in that category are often subject to the greatest exploitation and abuse, meaning that they are more frequently the victims of unsafe workplaces, discriminatory practices and unjust dismissal. Iraqi trade unions, for example, felt that the greatest improvements obtained in enterprises that complied with IFC’s PS 2 were for contract workers since the requirement that the borrower was responsible for their treatment meant that they had to ensure sub-contracting firms adhered to legal requirements such as safe working conditions, maximum hours of work and social security coverage.

The World Bank’s draft ESS 2 deletes all of the obligations vis-à-vis contract workers that exist in the other MDB standards. The sections on third-party workers or contract workers and on supply chains to be found in the preceding MDB labour standards are completely absent from ESS 2. The proposed standard states that ESS 2 applies only to “people employed or engaged directly by the Borrower, the project proponent and/or project implementing agencies to work specifically in relation to the project” (emphasis added).

The non-application to contract or sub-contracted workers, and the very limited application to public servants as explained above, mean that ESS 2 would apply to almost no one. The

---

8 Ibid., p. 36
9 “Behind the World Bank’s projects in Iraq”, op. cit.
infrastructure projects for which this new safeguards framework is intended to apply – by repeatedly emphasizing its applicability to projects, the draft policy implies that the Bank’s large portfolio of development policy loans is excluded – are rarely carried out by government agencies directly. Typically, the work is contracted out to a general contractor, who in turn frequently subcontracts much of the work to specialized sub-contractors. The employees of all of these firms would be excluded from any protection through ESS 2. The only workers who would have any coverage would be the civil servants who may work in the project as direct employees of the borrower, that is the state entity, but only a very limited number of provisions notably concerning health and safety would apply to these public employees.

The non-application of the draft ESS 2 to contract workers is an explicit and discriminatory exclusion which contradicts the other parts of the proposed Environmental and Social Standards. The draft ESS 1 on “Assessment and Management of Environmental and Social Risks and Impacts” comprises an Annex stipulating that “the Borrower will ensure that all contractors engaged on the project operate in a manner consistent with the requirements of the ESSs”, which includes “in the case of subcontracting, requiring contractors to have similar arrangements with their subcontractors.”11

By making ESS 2 virtually inapplicable to most workers in Bank-funded infrastructure projects through the exclusion of contact workers, even though contractors and sub-contractors are expected to comply with all the other provisions of the new safeguards policy, one could have the impression that the Bank has gone out of its way to ensure that nothing is done to protect a category of workers who, as we have noted, tend to be particularly vulnerable to exploitation and abuse.

World Bank should catch up to, not undermine, labour standards of other MDBs

Other changes in the proposed ESS 2 relative to the template of the other MDBs’ labour standards requirements are similarly difficult to comprehend. All the other MDB standards include the very elementary requirement that the borrower must provide workers with “documented information” (quoted from IFC’s PS 2) on the terms of employment. The draft ESS 2 strikes the word “documented”, implying that in World Bank-funded projects a cursory verbal (and unverifiable) explanation of the conditions of employment will suffice.

Added together, the Bank’s proposed ESS 2 not only means that most workers in World Bank-funded projects will be devoid of even the most basic protections, but by breaking with the precedents of more robust labour standards in all of the other MDB lending requirements, the Bank risks creating a chaotic mishmash of varying labour standards requirements, with the World Bank’s far weaker than the others. Thus, a private contractor building a power plant for a public electricity utility in an African country would have to refrain from using child labour, respect workers freedom of association and provide safe working conditions if the project receives

financing from the AfDB, but not if financing is provided by the World Bank. If, on the other hand, the work is carried out for a private power producer who obtains financing from the World Bank’s IFC, it would have to comply with labour standards similar to those of the AfDB.

The World Bank should revise its draft ESS 2 and harmonize its provisions with the labour standards requirements established at other MDBs, including its own IFC, as regards compliance with the ILO’s core labour standards, application to contact workers, assessment of supply chains and obligation to provide written information to workers about their conditions of employment.

Peter Bakvis
Director, ITUC/Global Unions - Washington Office
3 September 2014
Some Comments on ESS 7 from the perspective of Indigenous Peoples of Asia

Review and Update of the World Bank's Environmental and Social Safeguard Policies (Phase 2)
Consultation Meeting
13 November 2014
Berlin, Germany

Jennifer Tauli Corpuz
Legal Officer
Tebtebba Foundation
Philippines
General Comments

- Free, prior and informed consent
- “Alternative approach” / “opt-out clause”
- “Indigenous Peoples” as a generic term, criteria, process of identification
- Loan instruments covered
- Responsibility for implementation of safeguards shifted to borrower
- Capacity of bank staff
- Qualifying language (“in a manner and time frame acceptable to the bank”, “where appropriate”, etc.)
Implications of the inclusion of an “Alternative approach” (1)

- The Bank has considerable influence over other banks and private financing (in Asia, example of Indonesia)
- Principle of universality of human rights
- Will undermine progressive development of legislative protections for indigenous peoples
- Will affect attitudes and decisions of bank staff
- ESS 7 is based on the collective rights of indigenous peoples; other standards are not; ESS provides protections for:
  - self-governance and autonomous decision making processes
  - protection from marginalization by dominant ethnic groups and peoples
  - specific and additional requirements for consultation and effective participation.
  - self-governance, autonomous decision making processes
  - continued cultural integrity and survival though a requirement to obtain FPIC; prohibition on resettlement without FPIC.
  - land and resource rights
Requirements of ESS 5

- seeks only to ‘avoid involuntary resettlement’ and ‘avoid forced eviction, no strict prohibition on forced resettlement of indigenous peoples
- Exclusions in 5(d) and (e), land titling and natural resource regulation
- Identification issues - “affected persons” and collective rights, resettlement assistance instead of compensation for land

Requirement of ESS 6

- Removes definition of “critical natural habitats” as including “areas initially recognized as protected by traditional local communities (e.g., sacred groves)”
Many of Asian states deny existence of indigenous peoples, would find the “alternative approach” appealing.

Attempts of Asian states to develop legislation or establish institution protecting indigenous peoples might be discouraged.

Other treaties and voluntary standards have FPIC.

Application of the “alternative approach”, in seeking to avoid civil strife, might end up causing it.
Action plans

- Content of paragraph 10 on participation needs to be reiterated in subsequent paragraphs
- Para 11 – Borrower should include indigenous peoples in preparing a consultation strategy
- Access to project benefits (paras. 12-15) – action plan must be developed with indigenous peoples, reflect their priorities, have a budget, clear time line, monitoring & assessment framework; attach draft plan to ESS 7
- Para 18(a) on meaningful consultation – include meaningful participation of women and children
Guidance on FPIC

- Paras 19-22 should contain more detailed guidance, that should be based on experience:
  - Process of decision making and agreements reached with communities must be described and verified by the Bank together with independent experts.
  - Clear time lines and budget allocation.
  - Content of agreement – benefit-sharing, monitoring, mitigation & resettlement plans, grievance and redress mechanisms, delineation of responsibilities, transparency in fund disbursement, etc.
  - Accessible grievance and redress mechanism, appropriate information disclosure, inclusion of vulnerable groups within indigenous community.
- Para 20(d) – instead of stating that “FPIC does not require unanimity…”, recognize customary decision-making processes of indigenous peoples.
When people other than indigenous peoples are affected by a project, the Bank can require a consultation or consent process for such project-affected people. For instance, in the Philippines, the local government code requires consultations and prior approval of the local legislative body before projects or programs can be implemented in their territory. The Philippine Mining Act refers to this requirement of the local government code.
Dakkel ay lyaman!
Thank you!
Merci Beaucoup!
Muchas Gracias!
I. FIVE KEY ACHIEVEMENTS ON IPs AT RISK IN AFRICA BECAUSE OF ‘OOT-OUT-OPTION’

II. POLICY IMPLICATIONS OF THE ‘OPT-OUT-OPTION’

III. FEW SPECIFIC RECOMMENDATIONS

(Albert.K. Barume)
I. Five key achievements on indigenous peoples in Africa at risk because of the ‘opt-out-option’

I.1. Conceptualization of indigenous peoples in Africa: A human rights-based understanding:

- Communities whose ways of life and livelihoods have been historically considered as wasteful, uncivilized and in conflict with ‘modern’ development paradigms;

- The concept does not include the claim of being the first inhabitants of any given region or country;

- No right to secession or statehood,

- The concerned communities are not found in all African countries;

- This human rights-based meaning of the term indigenous should be distinguished from the literal meaning of the term ‘indigenous’ that could mean all African
I.2. On-going constructive dialogue on indigenous peoples between African States and regional human rights institutions, notably the African Commission and the Human rights Court


- In September 2014, the President of Kenya established a Task Force for the implementation of the ruling of the African Commission in the Endorois Case; http://www.escr-net.org/node/365651

- The African Court for Human and Peoples’ Rights seating in Arusha has an indigenous case among its first and African Governments are constructively engaging it on the issue.
I.3. Constructive positions of African States through the Human Rights Council-led UPR process:

The Universal Periodic Review (UPR) by the Human Rights Council in Geneva has provided a platform for African States to share their commitment to indigenous peoples’ rights, as illustrated by the following few examples:

- **Cameroun 2013** State Report to UPR “… Government to implement the National Study on the Identification of Indigenous Peoples in Cameroon…”

- **Gabon 2010** State report to UPR “… Gabon, together with civil society and a number of development partners, is taking steps to protect the rights of indigenous peoples through public debates and the provision of medical, educational and economic assistance.”

- **Namibia 2011** “Regarding the rights of indigenous communities, the Government identified certain communities that were particularly deprived (the San, the Ovatue and the Ovaţjimba) and had implemented support programmes to raise their standard of living.” The recommendations accepted by the Government of Namibia include to “formulate a white paper in accordance with the United Nations Declaration on the Rights of Indigenous Peoples”

- **Rwanda 2010**: “The Special Rapporteur on indigenous people in Africa visited Rwanda in 2008 and appreciated the Rwandan Government’s efforts to promote the rights of the marginalized and vulnerable population.”

- **Uganda State report 2011** “Uganda has indigenous communities who include the Batwa in the West; Benet in the Mt. Elgon region; the Tepeth in Karamoja; and others in other remote locations. While it is acknowledged that their situation is still unsatisfactory, Government is actively seized of the matter and continues to pursue the delicate path of accommodative dialogue with them; with a view to minimizing any disruptive approaches to the lifestyle and traditions of the concerned communities.”

- **Tanzania Working group Report 2011** “Concerning the issue of indigenous people, there was no consensus definition of indigenous peoples in Tanzania. Generally, all ethnic Tanzanians were regarded as indigenous. The position of the Government was that there were special groups that needed special protection within the country. Those included the Maasai, Hadzabe and Barbaig. The Government had taken various measures to provide political, social and cultural amenities to such groups in the fields of health, politics, employment and education.”
I.4. African States’ developing domestic legal and policy frameworks on indigenous peoples;
Numerous African States have developed policies or laws specifically addressing the situation of communities that self-identify as indigenous peoples. These include:

- The 10 countries African tropical forests that have established COMIFAC, that have established a sub-regional festival for indigenous peoples called FIPAC; http://pfbc-cbfp.org/news_en/items/FIPAC3-enen-IUCN.html
- Congo Brazzaville adopted in a specific law on indigenous peoples in 2011 (Act No. 5-2011 of 25 February 2011);
- Cameroon’s was among the first African countries to adopt an indigenous peoples development plan and its Ministry of Foreign affairs has just completed a new study on indigenous peoples. It has also demarcated forest areas for indigenous peoples;
- Kenya’s 2010 new Constitution identifies hunter-gatherers and pastoralists as communities have suffered land-related historical injustices that should be redressed;
- CAR ratified ILO Convention 169 in 2010;
- Rwanda and Burundi have allocated or reserved seats in Parliaments for ‘historically marginalized communities, the Batwa;
- Namibia has set up a specific Directorate on San peoples within the Prime Minister Office and a San Development Programme;
- DR Congo has passed forest legislation that refer explicitly to indigenous peoples;
- Numerous climate change and REDD Plus-related documents by African States make references to indigenous peoples;
- African States endorsed the Outcome Document of the World Conference on indigenous peoples held in September 2014;
- Niger, Burkina Faso have taken specific measures for pastoralists communities.
- Tanzania: On October 18, 2011, the Hadza living in the Yaeda valley were issued land titles for land encompassing more than 20,000 ha.
Conclusion:
With regards to indigenous peoples’ rights, African States could be grouped into three following categories:

- States recognizing that there are, within their boundaries, communities suffering from stereotyping views of their ways of life, which are stigmatized as outdated and that led to non-recognition and protection of their customary use and occupation of lands. These communities are mostly hunter-gatherers and pastoralist. These countries include those that have adopted specific laws or policies on indigenous peoples;

- States that recognize and are willing to redress the historical injustices suffered by some of their communities but remain uncomfortable with the term “indigenous” and therefore prefer using alternative concepts to achieve the same results. These countries include for instance Rwanda, Kenya, Namibia and many others;

- States arguing that there are no indigenous peoples in Africa or that all African are indigenous. These are increasingly few in numbers and often they do not have communities that self-identify as indigenous and they are few in numbers.
5. A positive legacy of O.P. 4.10 on indigenous peoples in Africa

- The World Bank Operational Policy 4.10 has had a positive impact in Africa, as far as indigenous peoples’ rights are concerned. It has contributed to a better understanding of indigenous peoples’ rights by many African governments and could be seen as having contributed to key milestones achieved in Africa on the issue, including the adoption of a law on indigenous people in Congo. Several African countries have developed indigenous peoples plans or policies as a result of O.P.4.10 being triggered by a World Bank-funded projects. A number of these World Bank-funded projects have led to national policies on indigenous peoples.

- O.P.10 provided also a grievance mechanism for indigenous peoples in Africa. The World Bank Inspection Panel has registered more than 25 cases from Africa and almost 20% of them involved OP. 4.10
II. Policy implications of the ‘opt-out-option’

II.1. Isolate the efforts by African States and Governments that have already endorsed the concept indigenous peoples, pass laws or adopt policies on IPs;

II.2. Make pointless on-going efforts, by African States that are still uncomfortable with the term indigenous peoples, to find alternative terms that can deliver the same expected equality and redress of historical injustices leading to marginalization of indigenous peoples. These States and Governments would no longer bother finding alternative concepts if they can simply opt out of the whole issue on indigenous peoples?

II.3. Give primacy of political considerations over human rights concerns: In Africa this would seriously affect governance issues;

II.4. Give a wrong impression that a country can achieve or redress the situation of indigenous peoples otherwise than complying with international standards on the issue. The international human rights regime on indigenous peoples is unique in a sense that it was devised to address land-related racial discriminations, taking into account the collective aspects of the rights involved. It would be hard for any other SSS to deliver on what is expected from SSS7.

II.5. Raise legal questions: “The agreement between the Bank and the Borrower regarding this approach will be set out in the ESCP.” With such language, the World Bank could be seen as trading communities’ rights with Africa States or offering ways for African States to evade their international obligations. Wouldn’t make the World Bank look like taking active part in decisions to limit access to rights on the continent?
III. Specific substantive comments on SSS7

III.1. Emphasise equality and not distinct aspirations:
Emphasizing indigenous communities as distinct societies with distinct aspirations can give the impression that those groups seek to break away from their States or enjoy special rights. The following introductory paragraph of the current SSS7 draft could give such wrong impression. “This ESS recognizes that Indigenous Peoples have identities and aspirations that are distinct from mainstream groups in national societies....” The indigenous peoples international human rights regime was not devised to just provide protection of any community with cultural identity distinct from that of the mainstream society. (Importance of distinguishing indigenous peoples from minorities)

The language above seems not to emphasize equal societies as the main objective of IPs international human rights regime. O.P.10 had a much better language:“The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects,”

IPs regime aims at measures to bring certain categories to the same and equal level of enjoyment of all fundamental rights and freedoms. SSS7 language is not tight enough on this aspect.

African States are particularly sensitive to anything that could allude to promoting special categories of communities within their boundaries or creating States within States (see main insertion by African States in the UNDRIP in article 46). This is where the misunderstanding often comes from. Generally, when most peoples in Africa hear of the concept ‘indigenous peoples’ they think of groups that want special rights.
III.2 FPIC and Land rights

Indigenous peoples land rights

- It is commendable that in the current draft of SSS7 the section on lands is part of the FPIC overall heading. This is critically important and encouraging. There is indeed a strong direct link between IPs land rights and FPIC. (1) What would FPIC mean and have as scope for IPs in a country where they are not recognized? (2) What FPIC would mean and have as scope for IPs in a country that recognizes them but does not legally protect and recognize their lands? (3) What FPIC would mean and have as scope in a country that recognize them and legally protect their land rights? The types of negotiations, extent of compensations if necessary, and roles of IPs in the project (scope of FPIC) depend much on the level of recognition and protection of indigenous peoples’ rights. **SSS7 should seek to leave behind a legacy of redressed or recognized land rights for indigenous peoples.** Otherwise, SSS7 will only serve two objectives that are the borrowers’ investments or projects and the WB’ ‘s smooth operations, meaning that once a project is completed all things go back to square one.

- The language in para. 23 should recognise customary law as an equal source land rights as written law. I therefore recommend the following rewording of paragraph 23:
  - “Indigenous Peoples are often closely tied to their land and related natural resources. Frequently, land is traditionally owned or under customary use or occupation. While Indigenous Peoples may not possess legal title to land as defined by national law, their customary rights over lands, including seasonal or cyclical use, for their livelihoods, or for cultural, ceremonial, and spiritual purposes that define their identity and community, have equal legal standing as those under written law. Where projects are likely to have significant impacts on land that is traditionally owned or under customary use or occupation by Indigenous Peoples, the Borrower will prepare a plan for legal recognition of their rights, as customarily recognized.”
IV. Recommendations regarding “opt-out-option”

- **Abandoning** the opt-out-option and consider replacing it with the ‘an obligation for a borrower to suggest an agreed upon alternative concept that can deliver the same level of protection to the concerned communities’

- **Facilitate an in-house dialogue in Africa, including between** the African World Bank board members and the African Commission so that the Continent can speak with one voice indigenous peoples’ issues. The African Commission on Human and Peoples’ Rights (ACHPR) mandate include among others providing advice to African Union’ organs and member states on issues regarding human rights. The African Commission provided this kind of assistance to the AU and member states, through an advisory opinion, for the process that led to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. After all, none expect African finances ministers or representatives of Africa at the of the World Bank Board of directors to be fully aware of what the human rights mechanisms have been doing on one specific issue in Africa; yet everyone expect Africa to speak with one voice on an issue.

- **ESS7 could consider using one or several additional terms to “indigenous peoples”**. This approach has been used for other international instruments, including the ILO Convention 169 that uses both “indigenous” and “tribal”. The travaux preparatoires of this Convention reveal that the term “tribal” was suggested for almost the same reasons by Governments and States that were uncomfortable with the concept “indigenous”. The use additional term (s) to would however requires two conditions: (1) that whichever term a country adopts, the substantive and procedural rights guaranteed in international for IPs remain the same, (2) the additional
term(s) should not allow any marginalised group to fit in it. “Whatever the specific term to analyse and describe their situation will be, it is highly important to recognize the issue and to urgently do something to safeguard fundamental collective human rights. Debates on terminology should not prevent such action. “

- This multiple terms approach has proven its practical usefulness, as illustrated in the Saramaka case against Suriname that involved African descent community members recognised as ‘tribal’ under ILO Convention 169 even though they were not the first inhabitants of the contested lands.
- Agreeable additional term(s) could be identified through African States practices in consultation with African indigenous peoples civil society, as done during the Kenyan constitutional process.
- Judicial review mechanisms could also be considered by SSS7 with regard to a State decision not to recognize a community as indigenous