



Review and Update of the World Bank's Environmental and Social Safeguard Policies

Phase 2

Feedback Summary

Date: February 5 and 6, 2015

Location: Manila, Philippines

Audience: Asian Indigenous Peoples Representatives (Bangladesh, Cambodia, India, Indonesia, Lao PDR, Myanmar, Nepal, Philippines, Thailand and Vietnam)

Overview and Key Issues Discussed:

In the morning of the first day, a brief overview of the global dialogue and engagement of the World Bank with indigenous peoples and current status of the the consultation process was presented by Luis Felipe Duchicela, Indigenous Peoples Advisor. This was followed by a discussion facilitated by Juan Martinez, Senior Social Scientist, on updates and other important issues for indigenous peoples.

As this was the first time that indigenous peoples from the region had the opportunity to meet face to face to discuss the draft Framework, they used the afternoon of the first day for internal discussions to develop a regional position on the draft. The morning of the second day was devoted to an in-depth discussion of indigenous peoples' proposals for an independent Indigenous Advisory Council and an Indigenous Fund. In the afternoon, Peter Leonard, Safeguard Advisor for Asia and the Pacific, presented the framework on behalf of the World Bank, with particular emphasis on ESS7.

The discussion focused on free, prior and informed consent (FPIC), the "alternative approach" in paragraph 9 of ESS7, country staff capacity, use of country systems, difference between ESS7 and other ESSs for indigenous peoples, language needs of indigenous peoples in Asia, rights of vulnerable groups within indigenous communities (women, children, PWDs, etc.), application of safeguards to other loan instruments, indicators

and monitoring mechanisms, sanctions for violations of policies and human rights, among others. A concise summary of the discussion highlights follows below.

Specific Feedback from Stakeholders
1. General Comments
<ul style="list-style-type: none"> • The new draft should take into consideration the excellent recommendations arising from internal reviews conducted by the bank on the implementation of its policies, as many of these recommendations address concerns of indigenous peoples. • The ESSs apply only to one of the Bank's three loan instruments, investment loans, and not to Development Policy Loans (DPL) and Program for Results (P4R), which make up a significant proportion of Bank financing. It is crucial for indigenous peoples that the same policies and protections apply regardless of loan instrument used. • The proposed system of ESP and ESSs separates out the responsibilities of the Bank and the Borrower, largely shifts the responsibility to implement the safeguards to the Borrower, and reduces the Bank's role to due diligence (almost exclusively reduced to review of documents provided by Borrowers) and monitoring. This is a riskier approach to lending and assumes an ability to monitor actual practice that Bank staff have not shown in the past. There needs to be increased investment by the Bank in staff training and budget allocation for safeguard staff so that staff can adequately undertake these additional tasks.
2. A Vision for Sustainable Development
N/A
3. World Bank Environmental and Social Policy
<ul style="list-style-type: none"> • In undertaking a screening to determine the applicability of ESS 7, the Bank should not rely solely on the information contained in documents (such as the environmental and social assessment) submitted by the Borrower. The Bank should engage with respected indigenous leaders and experts, and enable their full and effective participation, in determining whether Indigenous Peoples are present in, or have collective attachment to, the project area. • The provisions for an alternative approach in paragraph 33 and other related sections must be deleted, as it directly and seriously undermines the specific and fundamental rights of indigenous peoples, violates the principle of universality of human rights, significantly dilutes the Bank's existing safeguards, and constitutes a diminishment of rights, contrary to relevant articles of the UNDRIP and international law.

4. Environmental and Social Standard 1 (ESS1): Assessment and Management of Environmental and Social Risks and Impacts

- The use of a country’s own laws and policies in place of Bank standards must be allowed only after a higher threshold is met. This includes assessment of not just the laws and policies in place but, more importantly, actual practice of that country in meeting the standards incorporated into its national laws and policies, and must include open consultation with the affected peoples or communities for whom the Bank standards would be set aside.
- The provision on sub-projects under a financial intermediary has the effect of removing sub-projects implemented with Bank financing from the requirements of the ESSs, including ESS7, for all but the highest risk rating. All projects funded by World Bank financing and impacting on indigenous peoples must be subject to the same standards. To do otherwise is to establish an incentive for more complex projects to be bundled under sub-project classification where a requirement for FPIC, among others, was not applied. While the very highest risk projects are not in danger of this, sub-projects with ‘substantial risk’ to the lives and livelihoods of indigenous peoples could be financed by the Bank without reference to the requirements of ESS7.

5. Environmental and Social Standard 2 (ESS2): Labor and Working Conditions

N/A

6. Environmental and Social Standard 3 (ESS3): Resource Efficiency and Pollution Prevention

N/A

7. Environmental and Social Standard 4 (ESS4): Community Health and Safety

N/A

8. Environmental and Social Standard 5 (ESS5): Land Acquisition, Restriction on Land Use and Involuntary Resettlement

- Indigenous peoples, in general, collectively own and manage their lands, to which they have a cultural and highly spiritual link. Land is regarded as the material basis of indigenous peoples' culture and the basis of their existence as peoples, making land issues very critical for them. Hence, they should be differentiated from other poor communities.
- Application of ESS 5 in place of ESS 7 (as when the alternative approach is used) results in a lowering of standards, as ESS 5 seeks only to “avoid involuntary resettlement” and “avoid forced eviction”, unlike ESS7 which reflects customary international law that disallows resettlement without FPIC.
- ESS 5 only refers to affected persons, not collectivities, and largely classifies indigenous peoples as persons “who have no

recognizable legal right or claim to the land or assets they occupy or use”, providing only for resettlement assistance, and not compensation for land, contrary to the UNDRIP.

9. Environmental and Social Standard 6 (ESS6): Biodiversity Conservation and Sustainable Management of Living Natural Resources

- Participants proposed retention of the reference to sacred sites of indigenous peoples in the definition of “critical natural habitats”, contained in the current safeguards (OP4.04 and OP4.36), which both recognize ‘critical natural habitats’ (a category requiring the highest protection) to include “areas initially recognized as protected by traditional local communities (e.g., sacred groves)”.

10. Environmental and Social Standard 7 (ESS7): Indigenous Peoples

- **NOTE: This section summarizes the written comments formally submitted to the World Bank by indigenous peoples who participated at the consultation. This section of the report should be read in conjunction with the written submission.**
- Consultation participants felt that while it is important to have good safeguard policies, it is equally crucial to ensure proper implementation of such policies. The safeguard policies must put in place mechanisms which ensure that bank staff at the country level understand and accept indigenous peoples' rights and have the capacity to implement free, prior and informed consent (FPIC) provisions of the policy, consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Participants welcomed the inclusion of FPIC in ESS 7 after years of advocacy with the Bank. However, the alternative approach proposed in ESS 7 is causing extreme concern amongst indigenous peoples as it threatens to undo all the gains they have achieved, especially on FPIC, and will result in clear diminution of indigenous peoples' rights enshrined in the UNDRIP and international law. It is like the bank giving with one hand (FPIC) and then taking it back with the other hand (alternative approach).
- ESS 7 should be the main reference of the Bank and Borrower for projects affecting indigenous peoples, and non-discrimination, full and effective participation, and self-determination the main principles that guide all project activities.
- Independent participatory monitoring mechanisms, provided with adequate budget, using clear monitoring guidelines and indicators, and that ensure the equitable participation of independent indigenous peoples' experts should be put in place. Should there be findings of violations of indigenous peoples' rights, clear and proportionate sanctions shall be imposed.
- The Bank's grievance and redress procedures are difficult for indigenous peoples' on the ground to follow. It was suggested that the Bank fund and conduct wide-ranging information dissemination on the Bank's grievance and redress mechanisms among indigenous peoples' communities.

- Participants welcomed the inclusion of Free, Prior and Informed Consent (FPIC) in the draft but called for the deletion of provisions on the alternative approach, as it is contrary to international human rights law, dilutes existing standards, and would likely lead to Borrower countries avoiding application of ESS 7 and FPIC.
- Use of “project area” in identifying impacts of Bank projects excludes indigenous peoples in other affected areas from decision-making and benefit-sharing. The term “project affected area” was proposed as a more inclusive term.
- For projects designed specifically to provide benefits directly to Indigenous Peoples, the Borrower will proactively engage with Indigenous Peoples, subject to their FPIC, to ensure their ownership and participation in project design, implementation, monitoring and evaluation.
- Participants proposed the deletion of paragraph 13, and preferred that the procedure for consultation and FPIC as well as project design, planning, and implementation be the same as when indigenous peoples are not the sole or overwhelming majority of project beneficiaries.
- In cases where indigenous peoples are not the sole beneficiaries, the Borrower along with the affected indigenous peoples and indigenous experts will design and implement the project in a manner that provides affected Indigenous Peoples with equitable access to project benefits. The concerns or preferences of Indigenous Peoples will be addressed through the conduct of FPIC. Agreements and plans arising from this process should have a clear monitoring tool with budget.
- The formulation of the Indigenous Peoples Plan or the broader integrated community development shall involve the meaningful participation of the affected Indigenous Peoples and indigenous experts, with minimum characteristics to be specified in the Annex.
- Adverse impacts on Indigenous Peoples will be avoided where possible. Where alternatives have been explored and adverse impacts are unavoidable, the Borrower, affected indigenous peoples and indigenous experts will determine the impacts through the conduct of environmental and social impact assessment. The determination of impacts, short term and long term, shall include specific impacts to children, women and persons with disabilities and other vulnerable groups within the community. The assessment shall also include possibilities of potential conflicts (within/intra- and inter-community) resulting from the project. The compensation will be determined by the affected indigenous peoples.
- Participants welcomed the inclusion of paragraph 17, which covers indigenous peoples in voluntary isolation. However, it must be clear that what the standards are respecting and protecting are not simply their lands, territories, environment, and culture, but

their rights to them.

- While participants welcomed an exposition on what “meaningful consultation” is in the context of indigenous peoples, they felt that contents of such a paragraph, which deals with part of the consent process, falls more appropriately under the section on FPIC. Thus, paragraph 18 should be deleted and elements contained therein transferred to paragraph 20.
- Participants felt that footnote 9 of paragraph 18, dealing with the nature of indigenous peoples' decision-making, should be deleted as it has the effect of providing impetus for Bank staff and the Borrower to disregard collective decisions on the basis of the presence of internal dissent and challenges by some in the community.
- Paragraphs 19 to 22 on FPIC were welcomed by indigenous peoples, with a few proposals for improvement. In general, they felt that though details of the process may be confined to a certain set of paragraphs, the principles behind FPIC (such as respect for the right to self-determination, non-discrimination and indigenous peoples full and effective participation in all stages of project planning) should permeate the entire document, even beyond ESS 7.
- The section on FPIC should be within the framework and context of respecting and recognizing the rights of indigenous peoples over their lands, territories and resources, and not merely on their “vulnerability”. For instance, the first sentence of paragraph 19, in order to be within the framework of rights and not just vulnerability, should read “The conduct of the FPIC process is in line with the recognition and respect of the collective rights of indigenous peoples to self-determination and to their lands, territories and resources.”
- In accordance with the objective of ESS7 to “ensure that the development process fosters full respect for the human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of Indigenous Peoples”, it is critical that the WB Policy is fully aligned with the UNDRIP in order to ensure that indigenous peoples rights are not violated, and that they become genuine partners for sustainable development.
- On the enumeration of circumstances where FPIC would apply, participants proposed to add a clarifying clause at the end of letter (c) in paragraph 19: “such as projects for basic services and education” after “cultural heritage,”. Such projects, which have potentially profound impacts on indigenous peoples' culture are frequently wrongly exempted from the requirement for FPIC.
- While it is true that there is no universally accepted definition of FPIC, there are clear elements and criteria that have been widely accepted internationally and in national contexts. Such elements could be useful to include in paragraph 20, which could state the following in the chapeau: “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.”

- On the establishment of FPIC, participants proposed the deletion of (b) and (d) in paragraph 20. Instead, the enumeration could include the following broadly accepted elements: inclusion of stakeholder analysis, engagement planning, and disclosure of information; culturally appropriate; inclusion of, among others, women, elders, youth, socio-economically disadvantaged sections and persons with disability in the process; leadership of Indigenous Peoples’ community-recognized traditional or other institutions, councils, organizations and other representative bodies; FPIC at national, sub-national or local levels, as demanded by the context, and; documentation of the decision making process as defined and agreed by the affected communities, the outcome of the FPIC process, and evidence of agreement between the parties on the outcome of the negotiations.
- On ascertaining FPIC, this should not be the responsibility of the Bank, but of indigenous peoples’ representatives and experts, based on clear indicators.
- The FPIC process is a process of the indigenous peoples’ community and not anyone else’s. Thus, the decision-making process that the Borrower will document is that agreed on by the affected communities, and not a “mutually accepted process between the Borrower and indigenous peoples” as stated in the draft.
- Agreements reached between the Borrower and affected Indigenous Peoples will be described, and actions necessary to accomplish agreements will be included, in the ESCP. Agreements shall be written in a language and form understood and affirmed and be made public and affirmed by the affected indigenous peoples. Agreements shall have clear indicators and monitoring system.
- During implementation, the Borrower will ensure that necessary actions are taken through the effective and meaningful participation of the affected indigenous peoples, and agreed benefits or improvements to services are delivered on time, so as to maintain Indigenous Peoples’ support for the project. The benefits shall fully take into account the specific needs and priorities of women, children, persons with disabilities, elderly and the poorest of the poor and to avoid elite capture.
- An independent monitoring mechanism with the affected indigenous peoples should be established and provided with the necessary resources. The Bank shall ensure the monitoring of the implementation of agreements.
- In case of violation or non-compliance with agreements reached with communities or cases of violation of the policy requirements in ESS7 there must be a clear and accessible grievance mechanism that affected communities and peoples can access for redress, including but not limited to direct access to the Inspection Panel. Technical and financial support for use of grievance mechanisms

and/or Inspection Panel must be available upon request.

- In instances when impacts on land are foreseen the “plan for recognition of their perpetual or long –term renewable custodial or use rights”, as contained in paragraph 23 must be developed in partnership with the indigenous peoples themselves, time-bound, designed against clear indicators and with sufficient budget allowance.
- The first two sentences of paragraph 23 should be rephrased as follows in order to conform for the UNDRIP: “Indigenous Peoples are entitled to their rights to their land and related natural resources. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”
- Participants proposed the deletion of all references to land acquisition in paragraph 24.
- Participants proposed deletion of references to ESS 5 in paragraph 25 and its footnote 14. Traditional and customary collective tenure is often unrecognized, leading to individual titles being secured in the absence of any available collective tenure. However this does not mean collective tenure is absent, and certainly does not mean that a project affecting an entire community need only gain approval from individual land holders. FPIC must be obtained from the whole project affected community irrespective of tenure arrangements.
- Paragraph 26 under the heading “Cultural Heritage” should include a reference to sacred mountains and forests including livelihoods and recognize the concept of “no go zones”/”negative list” (i.e. sacred mountains, burial grounds and sites).
- In paragraph 27, the Borrower should not just ensure the fair and equitable benefit sharing⁸ but also the intellectual property rights of Indigenous Peoples (patenting should be determined by Indigenous Peoples).
- Paragraph 27 (a) should be modified to read “Their rights under national and international human rights and environmental laws”.
- Agreements on mitigation and development benefits shall be included in the overall content of the agreement with affected indigenous peoples as stipulated in paragraph 22.
- Activities contained in paragraphs 29 and 30 shall be subject to FPIC.
- The grievance mechanism to be established should be effective and accessible for affected indigenous peoples.
- Clear sanctions shall be identified for any violations committed. For instance, grave violations committed against indigenous peoples shall result in the discontinuity of the project. There should also be compensation/indemnification to the victims including

<p>rehabilitation of victims and areas affected as identified by the affected indigenous peoples themselves.</p> <ul style="list-style-type: none"> • When intra- or inter-conflict arises as a result of the project, all activities of the project should be suspended until such time that the conflict is resolved. • Negotiation and mediation can take place with mutually agreed terms with the participation of third parties.
11. <i>Environmental and Social Standard 8 (ESS8): Cultural Heritage</i>
N/A
12. <i>Environmental and Social Standard 9 (ESS9): Financial Intermediaries</i>
N/A
13. <i>Environmental and Social Standard 10 (ESS10): Information Disclosure and Stakeholder Engagement</i>
N/A