



**Comments on the World Bank proposed safeguards for indigenous peoples
(ESS7: Indigenous Peoples)**

**Environmental and Social Policy and associated Environmental and Social
Standards (1-10)**

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GENERAL COMMENTS

The purpose of this submission is to highlight key issues for indigenous peoples in the new Environmental and Social safeguard system proposed by the World Bank. The policies referred to herein are the Environmental and Social Policy (ESP) and the Environmental and Social Standards (ESS), 1 through 10, with particular focus on ESS7 on indigenous peoples.

Before looking in detail at the requirements of the system, it is worth noting that the ESSs apply only to one of the Bank's three loan instruments, investment loans. This is indicated in Paragraph 1 and paragraph 6 (footnote 3) of ESS1. The ESSs are not applied to Development Policy Loans or Program for Results (P4R), which make up a significant proportion of Bank financing. This restriction is problematic, as it ensures that any advances secured in the protections provided to indigenous peoples in ESS7 are NOT applied to projects impacting on indigenous peoples if a different loan instrument is used. This is an opaque and confusing method of standard development, and makes it difficult for affected peoples to be sure of what standards are applied to them. As has been stated repeatedly during the review of these safeguard policies, it is crucial for indigenous peoples that the same policies and protections apply **regardless of loan instrument used**.

The new system of ESP and ESSs separate out the responsibilities of the Bank (contained in the ESP) and the borrowers (contained in the ESSs). In doing so, responsibility to actually implement and meet the standards is largely turned over to the borrowers (to the governments). The Bank's role is to conduct due diligence (almost exclusively reduced to review of information provided by the borrowers) and a monitoring and follow-up role for most types of projects.

This is a riskier approach to lending, and it assumes an ability to monitor actual practice that Bank staff have not shown in the past. It also assumes a willingness to speak up quickly when things are going wrong. The current structure of investment in staff training, and allocated budget for safeguard staff, is not high enough for the staff to take on significantly more responsibility to review and monitor projects at a more detailed level, but there has been no information provided about how staff will be funded and supported to undertake these additional tasks.

ESS 7. INDIGENOUS PEOPLES

RECOMMENDATION: ESS7 should be the main reference of the Bank and the Borrower for projects affecting indigenous peoples. All other ESS should give reference to ESS7 when it is identified that indigenous peoples will be affected. Further, there is a need to ensure that the provisions in ESS7 is aligned with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) particularly on the recognition of the rights of

indigenous peoples to their land, territories and resources, development, Free Prior and Informed Consent (FPIC) and cultural heritage among others.

- A. Paragraph 9. Where the Borrower is 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, or where the identification of culturally-distinct groups as envisioned in this ESS is inconsistent with the provisions of the national constitution, the Borrower may request the Bank to agree on an alternative approach, in which risks and impacts of the project on Indigenous Peoples will be addressed through the application of the ESSs other than ESS7

This section directly and seriously undermines the specific and fundamental rights that indigenous peoples have over their lives, their lands and resources and the course of their own development, as already enshrined in international human rights law. To enable governments to opt-out of applying protections for indigenous peoples implies an endorsement of the idea that the protections due to indigenous peoples, as a matter of law or of policy, are dependent on the governments under which they live. This fundamentally violates international law on the rights of indigenous peoples as progressively developed over the past thirty years.

Encroachment on the lands, resources and territories of indigenous peoples is often undertaken with the implicit or explicit consent of governments whose decisions often adversely impact indigenous peoples. If the decision on whether international human rights are to be respected or not rests solely with national governments, then the Bank is acting to further undermine agreed international human rights standards, protected by UN and regional human rights instruments.

The Bank is also undermining significant progress achieved in the development of national level laws and policies recognizing and protecting the unique rights of indigenous peoples. This danger was highlighted by the African Commission on Human and Peoples Rights (ACHPR) in its communication with the World Bank, through the Working Group on Indigenous Populations. In its communications with the Bank the WGIP stated:

...any 'alternative approach' to indigenous peoples in Africa would undermine the work of the Commission, which has started to bear fruit by gradually inspiring and guiding national laws and policies. Such an 'alternative approach' would also undermine the Commission's on-going work to sensitize stakeholders about what the concept means in Africa.

The 'alternative approach' being proposed by the World Bank could also lead to a parallel and conflicting framework that would discourage more African States from developing policies and legal frameworks for indigenous peoples. The 'alternative approach' would as well be in stark

*contradiction with the various policies, decisions and rulings of the Commission and that of the African Union.*¹

RECOMMENDATION: Remove Section 9 where governments can simply “opt out” of applying the policy requirements intended to protect indigenous peoples.

- B. Paragraph 8. Following a determination by the World Bank that indigenous peoples are present in, or have collective attachment to the project area, the Borrower may be required to seek inputs from appropriate specialists to meet the consultation, planning, or other requirements of this ESS.

RECOMMENDATION: The determination of whether indigenous peoples are present in, or have collective attachment to the project area should not rely solely with Bank. It should involve indigenous experts and indigenous representatives from the proposed project area.

- C. Paragraph 11. The Borrower will assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on Indigenous Peoples who are present in, or have collective attachment to, the project area...

RECOMMENDATION: The participation of the affected Indigenous Peoples including indigenous experts should start in the determination of impacts (environmental and social impact assessments) and not just during the project design and implementation.

- D. Paragraph 13. When Indigenous Peoples are the sole, or the overwhelming majority of, direct project beneficiaries, the elements of an action plan may be included in the overall project design and preparation of a stand-alone plan is not necessary.

RECOMMENDATION: For the action plan referred to here, and any other form of Indigenous Peoples’ Plan or related planning document, the plan must be developed in close partnership with the affected indigenous peoples. The plan must reflect the self-determined development priorities of indigenous peoples, contain specific budget allocated against planned activities or objectives, have an associated clear time line agreed in advance, include associated monitoring indicators for assessment of results gained, and be subject to regular participatory assessment with the affected peoples. A draft framework plan should be developed and provided as an annex to ESS7 to provide consistency and clarity for borrowers and certainty for affected peoples.

- E. Providing Equitable Access to Project Benefits

¹ Communication to Dr. Jim Kim from Commissioner Soyata Maiga, Chairperson of the African Commission’s Working Group on Indigenous Populations/Communities in Africa, 4 July 2014

RECOMMENDATION: 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 and the plan shall have specific indicators and measures for Indigenous Peoples to be able have equitable access to project benefits.

This must include, at a minimum, the following characteristics: written agreement on project benefits; the establishment of a project-level grievance mechanism for non-compliance; and clear sanctions and enforcement mechanisms to resolve conflicts at the project level and ensure compliance with agreed plans. The terms of the project benefits included in the plan must be established as part of the process of obtaining and maintaining Free, Prior and Informed Consent.

F. Meaningful Consultation Tailored to Indigenous Peoples

RECOMMENDATION: The consultation process shall involve not just indigenous peoples' representative bodies and organizations but also other community members. The process shall likewise ensure transparency and the meaningful participation of women and youth and where needed to conduct separate consultations with them to ensure that their views are taken into account.

G. Meaningful Consultation Tailored to Indigenous Peoples, Footnote 9: Internal decision making processes are generally but not always collective in nature. There may be internal dissent, and decisions and may be challenged by some in the community.

RECOMMENDATION: 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.

H. Circumstances Requiring Free Prior and Informed Consent

RECOMMENDATION: The inclusion of a requirement for obtaining the free, prior and informed consent is of fundamental importance in that the requirement achieves the objective of ensuring indigenous peoples can exercise their right to self-determination and are full partners in the development process. The current formulation proposed in paragraphs 19-22 fails to achieve this, and the following important amendments, are at a minimum, required:

1. The process of decision making and agreements reached with communities must be described and verified by the Bank together with independent experts, including time-bound actions necessary to ensure that agreements are met and clear budget allocations made to agreed actions. The agreement in particular shall contain the following:

- a. Detailed benefit-sharing provisions, the benefits to be derived by the affected community indicating the type of benefits, specific target beneficiaries as to sector and number, the period covered, and other pertinent information;
 - b. Development projects based on the development priorities of the community;
 - c. Monitoring of the implementation agreement. This undertaking shall be paid for by the Bank/Borrower;
 - d. Mitigation and resettlement plans for potential risks;
 - e. Redress mechanisms;
 - f. Clause on the non-transferability of the agreement;
 - g. Clause for renegotiation of the economic provisions;
 - h. List of responsibilities of the company and the affected community
 - i. Inclusive dates/duration of agreement;
 - j. Transparency mechanism on transfer and disbursement of funds;
 - k. Detailed measures to protect IP rights and value systems;
 - l. Detailed measures to conserve/protect any affected portion of the indigenous territories critical for watersheds, mangroves, wildlife sanctuaries, forest cover, and the like;
 - m. Remedies and/ or penalties for non-compliance or violation of the terms and conditions which includes applicability of customary laws and imposition of sanction/ s;
 - n. Provision to render assistance in the event of calamities/disasters in the community;
(Lifted from the 2012 FPIC Guideline of the National Commission on Indigenous Peoples in the Philippines)
2. In any case of violation or non-compliance with agreements reached with communities or in any 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 to redress, including but not limited to direct access to the Inspection Panel. Technical support for use of grievance mechanisms and/or Inspection Panel must be available upon request.
 3. Disclosure of information must be required to be in a language and in appropriate forms to be fully understood by the affected communities.
 4. The involvement of indigenous peoples representative bodies and organizations must specifically include women, youth and other community members in addition to councils of elders, village councils or chieftains.
 5. Respect for decision-making processes of indigenous peoples should be mandatory (not where applicable) and must ensure respect for the independent and collective decision-making processes free from intimidation, manipulation and any form of undue pressure.
- I. *Paragraph 20 (d): FPIC does not require unanimity and may be achieved even when individuals or groups within or among affected Indigenous Peoples explicitly disagree.*

RECOMMENDATION: Paragraph 20 be rephrased as follows: 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.

Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use or Occupation

J. Paragraph 23: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 perpetual or long –term renewable custodial or use rights

RECOMMENDATION: The land rights of indigenous peoples have been recognized again and again under international and regional human rights law as fundamental to the very survival of the peoples themselves. Given the importance of this set of rights, it is critical that requirements intended to ensure that such rights are protected are clearly formulated. As such, the required “plan for recognition of their perpetual or long –term renewable custodial or use rights” must be developed in partnership with the indigenous peoples themselves, time-bound, designed against clear indicators and with sufficient budget allowance.

K. Paragraph 24: If the borrower proposes to locate a project, or commercially develop natural resources, on land traditionally owned by or under customary use or occupation of, Indigenous Peoples, and adverse impacts can be expected, the Borrower will take the following steps and obtain their FPIC:

- (a) Document efforts to avoid and otherwise minimize the area of land proposed for the project;
- (b) Document efforts to avoid and otherwise minimize impacts on natural resources subject to traditional ownership or customary use or occupation;
- (c) Identify and review all property interests, tenurial arrangements and traditional resource usage prior to purchasing, leasing or, as a last resort, undertaking land acquisition;
- (d) Assess and document Indigenous Peoples’ resource use without prejudicing any Indigenous Peoples’ land claim. The assessment of land and natural resource use will be gender inclusive and specifically consider women’s role in the management and use of these resources;
- (e) Ensure that affected Indigenous Peoples are informed of: (i) their land rights under the national law, including any national law recognizing customary use rights; (ii) the scope and nature of the project; and (iii) the potential impacts of the project; and
- (f) Where a project promotes commercial development of their land or resources, afford due process, and offer compensation together with culturally appropriate sustainable development opportunities to Indigenous Peoples, at

least equivalent to that which any landowner with full legal title to the land would be entitled, including.....

RECOMMENDATION: In this process, the Borrower shall not only acquire the FPIC of the affected community but the process should be conducted in partnership with the indigenous peoples themselves through a clear mechanism.

- L. Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership of Under Customary Use or Occupation, Footnote 14: Where Indigenous peoples individually hold legal title, or where the relevant national law recognizes customary rights for individuals, the requirements of ESS5 will apply, rather than the requirements under paragraph 25 of this ESS.

RECOMMENDATION: FPIC should be applied in all processes/aspects of any project affecting Indigenous Peoples or affecting any member of indigenous peoples' communities. Where individual titles exist within indigenous territories, such legal ownership must of course be recognized, but the requirements of paragraph 25 of ESS7 must be retained. 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.

- M. Cultural Heritage, Paragraph 27:The Borrower will also ensure fair and equitable sharing of benefits from commercialization of such knowledge....

RECOMMENDATION: In this, the Borrower should not just ensure the fair and equitable benefit sharing but also the intellectual property rights of Indigenous Peoples (ie patenting should be determined by Indigenous Peoples).

- N. Grievance Mechanism

RECOMMENDATION: Include – Clear sanctions shall be identified for any violations committed. Ie. Grave violations committed against indigenous peoples shall result to the discontinuity of the project.

ESS 1. ASSESSMENT AND MANAGEMENT OF ENVIRONMENTAL AND SOCIAL RISKS AND IMPACTS

- O. Use of Borrower's ES Framework, paragraph 18. When a project is proposed for Bank support, the Borrower will provide information to the Bank in connection with the Bank's review of the Borrower's existing environmental and social framework relevant for the proposed project (the ES Framework). (see also paragraphs 19 and 20)

These paragraphs outline the process through which a borrower would apply to

use national laws and policies in place of the ESS of the World Bank. It includes the process through which a government could apply to use its national laws in place of ESS7 on indigenous peoples. The critical judgment from the Bank is “to what extent the ES Framework can be used to achieve objectives materially consistent with the ESSs” (footnote 14). The proposal to use country systems, or national laws and policies, as written relies entirely on information provided to the Bank by the borrower, and requires the Bank only to assess the laws and policies in place in a given country, with no attention required on the *actual practice* of a given government against the policies and laws in place. There is also no requirement to consult with peoples or communities affected by the project about their views on the use of the country laws in place of Banks standards.

RECOMMENDATION: 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 the 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.

- P. *Sub-projects under a financial intermediary. Paragraph 29 ... If the project involves the preparation of subprojects, the Borrower will carry out appropriate environmental and social assessment of each subproject in accordance with national law. Where subprojects are classified as High Risk, the environmental and social assessment will be consistent with ESSs 1 to 8 and ESS10. Borrowers will ensure that subprojects are structured to meet national regulatory requirements relating to environmental and social risks and impacts, and where subprojects are classified as High Risk, they are also structured to meet ESSs 1 to 8 and ESS10.*

The effect of the paragraph above is to remove from Bank standards sub-projects implemented with Bank financing from the requirements of the ESSs, including ESS7, for all but the highest risk rating. These risk classifications are not defined clearly, but it is clear that in addition to ‘high risk’ classifications there are “substantial risk”, “moderate risk” and “low risk”. All three of these risk categories would be exempt from applying the standards of the ESSs if they were implemented as sub-projects.

RECOMMENDATION: 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 Free, Prior and Informed Consent (for example) 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.

Q. Conduct of environment and social risk assessments

RECOMMENDATION: Ensure the participation of indigenous experts and indigenous peoples in environment and social risk assessments and any impact to indigenous peoples should trigger the implementation of ESS7.

THE INSPECTION PANEL

Q. The new proposed safeguard system does not change the mandate of the Inspection Panel, which is set out under the relevant Resolutions. However it materially and directly impacts on the Panel's ability to meet its mandated responsibilities and on the level of utility that the Panel will have for affected peoples and communities in the future.

The inclusion of phrases in the ESP and ESS such as projects being expected to meet the standards 'in a manner and timeframe acceptable to the Bank'², or 'where appropriate', 'in a reasonable timeframe', among many others is very problematic. Who is assessing what is reasonable, acceptable and feasible? The Inspection Panel will no longer be asked the simpler question of whether a requirement was met or not (a clear yes or no), but rather whether it was met, and if it was not met, whether that was necessary or feasible. For indigenous peoples, all the specific protections provided under ESS7 are therefore able to be delayed or adjusted according to staff judgment, and the Panel can only assess whether a staff member judged compliance to be required only under a longer timeframe, or in a manner different from that expected by the affected peoples. This has the direct effect of making the Inspection Panel a less effective tool for indigenous peoples and thereby reducing avenues for redress in cases of violations of Bank requirements.

RECOMMENDATION: Ensure that requirements are clear and mandatory, that all projects shall meet the requirements of the ESS. Instead of standard being presented as flexible expectations to be met over time, they are required to be fully met throughout the life of the project.

Prepared by: Asia Indigenous Peoples Pact (AIPP) and Forest Peoples Programme (FPP)

² ESP paragraph 13

LIST OF ENDORSING ORGANIZATIONS

SUMMARY: 44 – Indigenous Peoples Organizations/Institutions and 42 – Support Groups

INDIGENOUS PEOPLES ORGANIZATIONS/INSTITUTIONS

Africa Indigenous Peoples Network; Fondation Batwa - Rwanda, Africa; Kapaeeng Foundation – Bangladesh; International Council for the Indigenous Peoples of the CHT (ICIP-CHT)- Bangladesh; Association pour l'Intégration et le Développement durable au Burundi (AIDB) – Burundi; Indigenous Rights Active Member (IRAM) – Cambodia; Organization for the Promotion of Kui Culture (OPKC) – Cambodia; Cambodia Indigenous Peoples Alliance; Highlanders Association – Cambodia; Cambodia Indigenous Youth Association (CIYA); Peoples Organisation for Development Action (DULAL) – India; Borok Peoples Human Rights Organization (BPHRO)/Borok Indigenous Tribal Peoples Development Center (BITPDC) – India; Zo Indigenous Forum – India; Grassroot Development Network , Mizoram – India; Naga Women's Union Manipur – India; Civil Society Women Organization (CSWO) – India; Sengwer Indigenous People Programme – Kenya; Ogiek Welfare Council – Kenya; Ogiek Peoples Council – Kenya; International Alliance of Indigenous and Tribal Peoples of the Tropical Forests (IAITPTF); Indigenous Information Network – Kenya; PACOS Trust – Malaysia; Sarawak Dayak Iban Association (Sadia) - Malaysia; Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE); Promotion of Indigenous and Nature Together (POINT) – Myanmar; Nepal Federation of Indigenous Nationalities (NEFIN); National Indigenous Women's Federation – Nepal; Youth Federation of Indigenous Nationalities (YFIN) –Nepal; Ancestral Land/Domain Watch (ALDAW) – Philippines; United Tribes of Palawan (NATRIPAL) - Philippines; Tribal Government of the Philippines; Tebtebba; Asia Indigenous Women's Network (AIWN); Cordillera Peoples Alliance (CPA) – Philippines; Kalipunan ng Mga Katutubong Mamamayan ng Pilipinas (KAMP) – Philippines; Aoke, Langalanga Constituency APEX Association (ALCAA) – Solomon Islands; TARA-Ping Pu - Taiwan/China; Pastoralists Indigenous NGOs Forum (PINGOs Forum) –Tanzania; Association for Law and Advocacy for Pastoralists – Tanzania; Inter Mountain Peoples Education and Culture in Thailand (IMPECT); Indigenous Peoples' Foundation for Education and Environment (I.P.F) – Thailand; Shan Women's Action Network (SWAN) – Thailand; NaKoa Ikaika Kalahui Hawaii – USA; Tribal Environmental Policy Center – USA; Center for Sustainable Development in Mountainous Areas (CSDM) – Vietnam

SUPPORT GROUPS

The Climate Justice Programme (CJP) – Australia; Coastal Livelihood and Environmental Action Network (CLEAN) - Bangladesh; Alliance for Cooperation and Legal Aid Bangladesh (ACLAB) – Bangladesh; 11.11.11 - Coalition of the Flemish North-South Movement – Belgium; The Indigenous Community Support Organization (ICSO) – Cambodia; The NGO FORUM on Cambodia; Heinrich Boell Foundation – Cambodia; Global Association for People and the Environment (GAPE) – Canada;

International Work Group for Indigenous Affairs (IWGIA) – Denmark; Defensa y Cobservacion de Intag – Ecuador; Centro de Planificación y Estudio Social (CEPLAES) – Ecuador; Association Gabonaise d'Assistance aux Femmes Indigènes et Indigentes (ONG AGAFI) – Gabon; Centre for Organisation Research & Education – India; Society for Re-building Land Races (PARAMPARIKA KRUSHAK SANGATHANA) – India; Bible Hill Youth Club (National Social Development & Research Center) – India; Centre for Organisation Research and Education - India; Centre for Research and Advocacy, Manipur – India; PADI Indonesia; SONIA for a Just New World – Italy; Friends of the Earth Japan; Green Community Alliance (GCA) – Laos; Center for Orang Asli Concerns – Malaysia; Coalition to Abolish Modern-day Slavery in Asia (CAMSA) – Malaysia; OT Watch – Mongolia; Gobi Soil – Mongolia; Rivers without Boundaries –Mongolia; Sustainable Development Knowledge Network (Spectrum) Myanmar; The Netherlands Centre for Indigenous Peoples (NCIV), Amsterdam – Netherlands; Regnskogfondet - Rainforest Foundation Norway; Coalition Against Land Grabbing (CALG) – Philippines; Ateneo School of Government – Philippines; Alyansa Tigil Mina (Alliance Against Mining) – Philippines; Human Rights Ambassador for Salem-News.com – UK; Minority Rights Group International – UK; Philippine Indigenous Peoples Link; Accountability Counsel - United States; Centre of Research & Development in Upland Area (CERDA) – Vietnam; Council of Indigenous Peoples in Today's Vietnam (CIP-TVN) – USA; Boat People SOS (BPSOS) – USA; Law and Policy of Sustainable Development Research Center (LPSD) – Vietnam; Action to the Community Development Center (ACDC) – Vietnam; Justice and Peace Network – Myanmar; Conservation International