

# REVIEW AND UPDATE OF THE WORLD BANK ENVIRONMENTAL AND SOCIAL SAFEGUARD POLICIES

## Submission to the World Bank Safeguards Review April 2013

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## 1. Introduction

Through the 1990s, the World Bank's<sup>1</sup> environmental and social safeguard policies (hereinafter "safeguards") established it as an international leader in reducing the negative effects of investment operations in developing countries.<sup>2</sup> However, the Bank has failed to incorporate the latest best practice standards into its safeguards.<sup>3</sup> This failure is important for a number of reasons, including the fact that the safeguards set standards for sound business management practices that influence the policies of other International Financial Institutions (IFIs) and private banks.<sup>4</sup>

As reported by the World Bank Independent Evaluation Group (IEG), the number of high-impact projects that the Bank is funding is increasing. Between 1999 and 2008, Category A<sup>5</sup> projects increased from 5 to 11 percent of the portfolio and Category B<sup>6</sup> projects increased from 37 to 51 percent, while Category C projects dropped from 40 to 18 percent.<sup>7</sup> As the number of projects with potential adverse environmental, social and cultural impacts increases, the importance of safeguards needed to mitigate those impacts increases as well.

The safeguards are only as effective as their implementation. One of the major issues identified by the IEG is the lack of monitoring of safeguards once a project has begun. Unfortunately, the IEG found that more than one-third of Bank projects between 1999 and 2008 were inadequately monitored and evaluated.<sup>8</sup> In fact, around one-fifth of Category A projects and one-half of Category B projects do not track or report on safeguard performance.<sup>9</sup> Without proper monitoring of safeguard

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<sup>1</sup> The World Bank Group consists of five member institutions of which two, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), make up what is commonly referred to as the World Bank. For ease of reference, they will be referred to in this submission as the "Bank."

<sup>2</sup> See Lawrence, Shannon, *Retreat from the Safeguard Policies: Recent Trends Undermining Social and Environmental Accountability at the World Bank* (Retreat from the Safeguard Policies, 2005) at 5.

<sup>3</sup> Lawrence, *Retreat from the Safeguard Policies*, at 1.

<sup>4</sup> "Similar policies are now widely used internationally as a fundamental aspect of sound business management practice and development effectiveness." World Bank Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience* (IEG Report, 2010), at 3.

<sup>5</sup> A proposed project is classified as Category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented. These impacts may affect an area broader than the sites or facilities subject to physical works. A potential impact is considered "sensitive" if it may be irreversible (e.g., lead to loss of a major natural habitat) or raise issues covered by Operational Policy ("OP") 4.04, Natural Habitats; OP/BP 4.10, Indigenous Peoples; OP/BP 4.11, Physical Cultural Resources or OP 4.12, Involuntary Resettlement. OP 4.01.

<sup>6</sup> A proposed project is classified as Category B if its potential adverse environmental impacts on human populations or environmentally important areas—including wetlands, forests, grasslands, and other natural habitats—are less adverse than those of Category A projects. These impacts are site-specific; few if any of them are irreversible; and in most cases mitigatory measures can be designed more readily than for Category A projects. OP 4.01.

<sup>7</sup> IEG Report at 11, 74.

<sup>8</sup> IEG Report at 31.

<sup>9</sup> IEG Report at 44.

performance, it is impossible to tell whether the safeguards are being properly implemented.

For these reasons, among others, the authors and endorsers of this submission welcome the Bank's recognition that an update to its safeguards is necessary. In conducting its review, the Bank should ensure that its updated safeguards incorporate and comply with applicable standards under international law, particularly those set forth in: the International Bill of Human Rights<sup>10</sup>; the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); the International Labor Organization Indigenous and Tribal Peoples Convention No. 169; the Convention on Biological Diversity and subsequent decisions of the Conference of the Parties; the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization (Nagoya Protocol); conventions of the United Nations Educational, Scientific and Cultural Organization (UNESCO)<sup>11</sup>; and the Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice In Environmental Matters (Aarhus Convention).

Additionally, and of notable importance are the guidelines set forth in the subsidiary instruments to the Convention on Biological Diversity, including the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets (Aichi Targets); the Akwe: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (Akwe: Kon Guidelines); the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (AAPG); and the Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (Code of Ethical Conduct).

Specifically, in updating its safeguards the Bank should consider local customs and traditions, as set forth in the Addis Ababa Principles and Guidelines,<sup>12</sup> and require such consideration in the application of individual safeguards. Where projects will affect biological resources, means should be adopted that aim toward delegating rights, responsibility, and accountability to those who use and/or manage biological resources, including Indigenous peoples and local communities.<sup>13</sup>

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<sup>10</sup> Generally considered to consist of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and their subsidiary Protocols.

<sup>11</sup> These include the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention for the Safeguarding of the Intangible Cultural Heritage, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

<sup>12</sup> AAPG at 8.

<sup>13</sup> AAPG at 9.

At the very least, the update process should not be taken as an opportunity to weaken existing safeguards in any way. Instead, the process should serve to harmonize the Bank's safeguards with existing international standards and to restore the Bank's place as a standards-setter for other IFIs and business institutions.

## 2. Operational Policies

### 2.1 *OP 4.00 Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects*

This policy,<sup>14</sup> which the Bank refers to as "Use of Country Systems," is critical to the Bank's safeguard approach. If the Bank chooses to allow Country Systems to be used in place of its own safeguards, it must ensure that countries have the capacity to implement such systems and that true equivalency exists between the Country Systems and the Bank's safeguards. In making this determination, the Bank should look to a country's record of respecting relevant environmental and human rights.

OP 4.00 acknowledges that gaps will exist in Country Systems that must be addressed before equivalence can be determined.<sup>15</sup> Currently the policy appears to allow the Bank to determine equivalence *before gaps have been filled* by taking account of measures to improve the borrower's system or to strengthen borrower implementation practices and capacity. The only requirement is that such measures must be implemented before project activities begin.<sup>16</sup>

Determining equivalence before equivalence is actually achieved, on the basis of planned measures, risks approval of Country Systems that do not fulfill the standards set forth in the Bank's safeguards or broad standards of existing international norms. The IEG repeatedly pointed out that the Bank faces serious issues regarding monitoring and evaluation of safeguards.<sup>17</sup> OP 4.00 should be updated to make clear that equivalence will only be determined after all gaps have been filled. Furthermore, given the Bank's issues with monitoring and evaluation, third party monitoring and evaluation and/or audits should be mandatory, rather than optional as is currently the case.<sup>18</sup>

### 2.2 *OP 4.01 Environmental Assessment*

OP 4.01 is by far the Bank's most applied safeguard, having been triggered in about two-thirds of Bank investment projects approved since 1999.<sup>19</sup> OP 4.01 requires

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<sup>14</sup> The Bank does not classify OP 4.00 as a safeguard.

<sup>15</sup> OP 4.00 ¶3.

<sup>16</sup> See OP 4.00 ¶3.

<sup>17</sup> See IEG Report at xii ("Categorization of risks has not been consistent across the WBG, however, and supervision or monitoring of results has not been thorough.")

<sup>18</sup> OP 4.00 ¶5.

<sup>19</sup> IEG Report at xx.

environmental assessment (EA) of projects to help ensure they are environmentally sound and sustainable. An EA takes into account the natural environment, human health and safety, *social aspects*, and transboundary and global environmental aspects. With regard to “social aspects,” the policy articulates only three— involuntary resettlement, indigenous peoples, and physical cultural resources— which are standalone policies that already exist under the safeguards framework.

In 2011, “strategic environmental and social assessment” (SESA) was added to the list of available instruments that can be used to satisfy the Bank’s EA requirements. The Bank defines an SESA as “[a]n instrument that describes analytical and participatory approaches that aim to integrate environmental and social considerations into policies, plans and programs and evaluate their inter linkages with economic considerations.”<sup>20</sup> Despite the inclusion of SESAs as an available instrument to satisfy EA requirements, the approach in OP 4.01 toward impact assessments is far too narrow. For example, the social and cultural aspects of a project may involve effects on local communities who are not considered to be indigenous. Nevertheless, the social and cultural impacts on local communities should be considered as part of a project assessment.

OP 4.01 should be generally brought into line with existing guidelines such as the 2004 Akwé: Kon Guidelines, which have been recognized as an important tool in development assessment.<sup>21</sup> The Akwe: Kon Guidelines provide a comprehensive approach toward impact assessment, but several of its best practices are worth noting specifically.

First, as the title implies, best practices regarding impact assessments involve more than assessing impacts on the environment. OP 4.01 acknowledges this to an extent with its clarification that EAs take social aspects into account. However, Bank funded projects impact more than just the environment and the narrow social aspects identified in OP 4.01. Instead, assessments of environmental, social and cultural impacts as appropriate should be called for in the safeguard. Additionally, the Akwe: Kon Guidelines note that it is desirable to integrate cultural, environmental, and social impacts within a single assessment process.<sup>22</sup>

Second, Indigenous peoples and local communities should be involved and consulted at every phase of the impact assessment, in line with current international law standards. Specifically, best practice participatory methods of consultation should be employed.<sup>23</sup> Currently, borrowers only need to hold two consultations

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<sup>20</sup> OP 4.01 Annex A ¶10.

<sup>21</sup> United Nations, *State of the World’s Indigenous Peoples* (2009), at 105, available at [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf).

<sup>22</sup> Akwe: Kon Guidelines ¶7.

<sup>23</sup> See, e.g., guidelines developed by the Southern African Institute for Environmental Assessment with support from World Bank TF-ESSD, available at [http://www.saiea.com/calabash/final\\_report/html/products.html](http://www.saiea.com/calabash/final_report/html/products.html).

when the project is Category A,<sup>24</sup> and there are no specific requirements for non-category A projects set forth in OP 4.01. In contrast, the Akwe: Kon Guidelines call for a formal process to identify the indigenous and local community members and other relevant stakeholders who should be engaged.<sup>25</sup> The World Bank Group itself has determined that stakeholder participation in the assessment process is critical, and helps to empower weaker stakeholders, particularly the poor.<sup>26</sup>

Third, the screening process set forth in OP 4.01 should be updated to make it consistent with the guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or process and in strategic environmental assessments endorsed by the Conference of the Parties in paragraph 1 of decision VI/7 A, and contained in the annex to that decision.<sup>27</sup> These screening methods include positive lists identifying projects requiring environmental impact assessment, expert judgment, and/or a combination of the two.

Generally, impact assessment requirements for significant projects include independent review of the assessment.<sup>28</sup> Currently, OP 4.01 only requires the borrower to retain independent EA experts for Category A projects.<sup>29</sup> However, Category B projects, as well as Category FI projects might also be significant and warrant independent preparation and/or review of an impact assessment.

Additionally, OP 4.01 adds a subcategory of Category A projects: “projects that are highly risky or contentious or that involve serious and multidimensional environmental concerns.”<sup>30</sup> For such projects, “the borrower should normally also engage an advisory panel ... to advise on all aspects of the project relevant to the EA.” There should be clear standards in place to determine when Category A projects will fall into this subcategory. Furthermore, there should be clear indicators for when a borrower must engage an advisory panel.

Finally, it is crucial that OP 4.01 retain the standard that the Bank does not finance project activities that would contravene the obligation of a country under relevant international treaties and agreements.<sup>31</sup>

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<sup>24</sup> OP 4.01 ¶14.

<sup>25</sup> Akwe: Kon Guidelines ¶13.

<sup>26</sup> *Strategic Environmental Assessment in the World Bank: Learning from Recent Experiences and Challenges* (2012), at 15, available at [http://commdev.org/userfiles/Strategic\\_Environmental\\_Assessment\\_in\\_the\\_World\\_Bank.pdf](http://commdev.org/userfiles/Strategic_Environmental_Assessment_in_the_World_Bank.pdf).

<sup>27</sup> Available at <http://www.cbd.int/decision/cop/default.shtml?id=7181>.

<sup>28</sup> Wasserman, Cheryl, *Enforcement of Environmental Impact Assessment Requirements* (2011) at 503, available at [http://inece.org/conference/9/proceedings/57\\_Wasserman.pdf](http://inece.org/conference/9/proceedings/57_Wasserman.pdf).

<sup>29</sup> OP 4.01 ¶4.

<sup>30</sup> OP 4.01 ¶4.

<sup>31</sup> OP 4.01 ¶3.

### 2.3 OP 4.04 Natural Habitats

Importantly, the Bank recognizes that the conservation of natural habitats is essential for long-term sustainable development and it supports the protection, maintenance, and rehabilitation of natural habitats and their functions.<sup>32</sup> One way for the Bank to enhance its support for natural habitats is to join the international community in explicitly recognizing the multiple ecological and livelihood values of Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs) as a legitimate and effective area-based conservation measure for natural habitats.

ICCAs are natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural values, voluntarily conserved by Indigenous peoples and local communities, both sedentary and mobile, through customary laws or other effective means. ICCAs can include ecosystems with minimum to substantial human influence as well as cases of continuation, revival or modification of traditional practices or new initiatives taken up by communities in the face of new threats or opportunities. Several of them are inviolate zones ranging from very small to large stretches of land and waterscapes.<sup>33</sup>

The CBD Conference of the Parties has addressed ICCAs in several of its decisions. The CBD Programme of Work on Protected Areas (PoWPA) Element 2.1.2 encourages Parties to the CBD to “recognize and promote a broad set of protected area governance types ..., which may include areas conserved by indigenous and local communities and private nature reserves.”<sup>34</sup> At the eighth COP, held in 2006, the COP invited parties to consider “[f]unding mechanisms to support indigenous and local communities conserved areas” in designing plans to finance protected areas.<sup>35</sup> The COP also invited the Global Environment Facility to “support community conserved areas, ensuring the immediate, full and effective participation of indigenous peoples and local communities in the development of relevant activities.”<sup>36</sup> And at the 2012 CBD Conference of the Parties, the CBD Executive Secretary recognized that ICCAs are essential for reaching the Aichi biodiversity targets.

According to the International Union for Conservation of Nature (IUCN), “there is also a growing recognition of ICCAs and acknowledgement of their role in the conservation of biodiversity. Some governments have integrated them into their official Protected Area Systems, and the Vth World Parks Congress and the Programme of Work on Protected Areas of the CBD accepted ICCAs as legitimate conservation sites that deserve support and, as appropriate, inclusion in national

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<sup>32</sup> OP 4.04 ¶1.

<sup>33</sup> [www.iccaconsortium.org](http://www.iccaconsortium.org).

<sup>34</sup> CBD PoWPA Element 2, available at <http://www.cbd.int/protected/pow/learnmore/intro#element2>.

<sup>35</sup> UNEP/CBD/COP/DEC/VIII/24 at 3-4.

<sup>36</sup> UNEP/CBD/COP/DEC/VIII/24 at 5. *See also* UNEP/CBD/COP/DEC/IX/18, at 3; UNEP/CBD/COP/DEC/X/32, at 3.



and international systems.”<sup>37</sup> Consistent with the CBD, the IUCN, and national governments, OP 4.04 should recognize ICCAs as an effective area-based method of conserving natural habitats and respect and actively protect them in the implementation of Bank projects.

Additionally, OP 4.04 should be updated to make it consistent with the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (AAPG) and the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets (Aichi Biodiversity Targets).

- OP 4.04 paragraph 1 provides that the Bank supports application of the precautionary approach to natural resource management. The Bank should continue to support and apply the precautionary approach consistent with that set forth in the AAPG.<sup>38</sup>
- OP 4.04 paragraph 2 provides that the Bank’s Country Assistance Strategies (CAS) incorporate findings from work involving identification of natural habitat issues and measures for protecting such areas.<sup>39</sup> As part of developing CASSs, the Bank should require borrowers to submit national biodiversity strategies and action plans (NBSAPs) as set forth in CBD Decision IX/8.<sup>40</sup> Information regarding measures for protecting natural habitats should include how borrowers will seek to implement the Aichi Biodiversity Targets as well as how specific projects would affect these targets.
- OP 4.04 paragraph 5 provides that if a project would significantly convert or degrade natural habitats, mitigation measures acceptable to the Bank must be included. These mitigation measures should also be acceptable—through a process of obtaining free, prior and informed consent—to Indigenous peoples and local communities who will rely on the natural habitat and will be affected by the project.<sup>41</sup>
- OP 4.04 paragraph 10 provides that borrowers shall take into account the views, roles, and rights of affected groups, including local communities, and that such people shall be involved in planning, monitoring, and evaluating projects involving natural habitats, including protected areas. The Bank should be guided by the principles of free, prior and informed consent with regard to Indigenous peoples and local communities, consistent with

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<sup>37</sup> Available at <http://iucn.org/about/union/commissions/ceesp/topics/governance/icca/>. For an in-depth analysis of relevant CBD COP decisions and IUCN Resolutions and Recommendations that support ICCAs, see *An Analysis of International Law, National Legislation, Judgments, and Institutions as They Interrelate With Territories and Areas Conserved by Indigenous Peoples and Local Communities*, Natural Justice (2012) at 48 -61, available at this [link](#).

<sup>38</sup> AAPG ¶8(f).

<sup>39</sup> OP 4.04 ¶2.

<sup>40</sup> COP Guidance on Developing NBSAPs, available at <https://www.cbd.int/nbsap/guidance.shtml>.

<sup>41</sup> See AAPG at 10 (protecting customary use of biological resources); Code of Ethical Conduct ¶¶18 (access to traditional resources), 27 (subsidiarity and decision making), 30 (full and effective participation).

international standards as discussed below in Section 2.4. OP 4.04 should encourage countries to establish rights and policy frameworks that enable communities to remain custodians of local ecosystems to which their lifestyles are closely linked.

- In regard to protected areas, affected Indigenous peoples and local communities should be involved in the governance and management of protected areas such as through respect for and protection of ICCAs or shared governance mechanisms.

Finally, pursuant to OP 4.04, the Bank does not support projects that, in the *Bank's opinion*, involve the significant conversion or degradation of critical natural habitats.<sup>42</sup> How the Bank formulates its opinion regarding “significant conversion or degradation” is not articulated in OP 4.04, although it does define these terms. OP 4.04 should be tied to OP 4.01, and should make clear that whether a project involves significant conversion or degradation should be based on impact assessments developed by independent third parties.

#### 2.4 OP 4.10 Indigenous Peoples

There are more than 370 million self-identified Indigenous peoples in some 70 countries around the world.<sup>43</sup> Although they account for less than 5 per cent of the global population, they comprise about 15 per cent of all impoverished people in the world.<sup>44</sup> With its stated mission of poverty reduction, the Bank’s actions and policies are particularly relevant to Indigenous peoples. OP 4.10 recognizes that the inextricable link between Indigenous peoples’ cultures and their lands and natural resources exposes them to profound risks from development projects. Thus, a balanced and progressive safeguard regarding Indigenous peoples that is based upon applicable international legal standards is of critical importance. Further, given the effect that Bank actions have on Indigenous peoples, the Bank should consider making Indigenous peoples a cross-cutting issue on all its safeguards.

As an initial matter, OP 4.10 must reflect, and Bank projects must be implemented with, respect for Indigenous peoples’ customs and traditions. The current approach to customary rights under OP 4.10 is ancillary at best, requiring only that borrowers pay attention to customary rights pertaining to land (*see* paragraphs 16(a) and 22(a)). OP 4.10 should be updated to reflect current international standards set forth in numerous instruments including ILO 169 Articles 8 and 9, UNDRIP Articles 26 and 33, the Nagoya Protocol Article 12, Addis Ababa Principles and Guidelines Practical Principles 1 and 2, Akwe: Kon Guidelines No. 60, and the Code of Ethical Conduct paragraph 18. Pursuant to these standards, Indigenous peoples’ customs

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<sup>42</sup> OP 4.04 ¶4.

<sup>43</sup> International Fund for Agricultural Development, available at <http://www.ifad.org/english/indigenous/index.htm>.

<sup>44</sup> Rural Poverty Portal, available at [http://www.ruralpovertyportal.org/topic/home/tags/indigenous\\_peoples](http://www.ruralpovertyportal.org/topic/home/tags/indigenous_peoples).

and traditions should be recognized, respected and protected, and this approach should underpin OP 4.10.

A crucial aspect of OP 4.10 is its guidelines regarding consultation<sup>45</sup> and participation. One way to ensure that the Bank is appropriately engaging with Indigenous peoples is by taking their community protocols<sup>46</sup> into consideration. Community protocols articulate community-determined values, procedures and priorities. They set forth rights and responsibilities under customary, state and international law as the basis for engaging with external actors such as governments, companies and the Bank. If the Bank is engaging with a community that has developed a community protocol, it should consider, respect and apply the protocol to its consultation process. Community protocols are gaining increasing international recognition, including in the Nagoya Protocol, which instructs parties to consider community protocols when implementing their obligations under that treaty,<sup>47</sup> and the Akwe: Kon Guidelines.<sup>48</sup> The Bank should also include development of community protocols among the initiatives for development planning listed in OP 4.10 paragraph 22.

The Bank has also identified the free, prior and informed consent<sup>49</sup> of Indigenous people as an “emerging area” that “it could potentially address.” Currently, OP 4.10 applies a free, prior and informed *consultation* standard regarding Indigenous peoples. However, the UNPFII affirms that Indigenous peoples’ right to free, prior and informed consent “can never be replaced by or undermined through the notion of ‘consultation.’”<sup>50</sup>

Free, prior and informed consent is now a recognized right under international law as evidenced by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Nagoya Protocol, as well as other international instruments. Article 19 of the UNDRIP provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Articles 6, 7 and 15 of the Nagoya Protocol require parties to obtain “prior

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<sup>45</sup> As discussed below, the Bank’s policy should seek free, prior and informed *consent* in accordance with existing international legal standards.

<sup>46</sup> The term “community protocols” is broadly defined, but generally denotes a written document prepared by a community that provides guidance to external parties on a range of community issues. As the name implies, community protocols are not limited to Indigenous peoples, but can be prepared by local communities as well. For more information see [www.community-protocols.org](http://www.community-protocols.org); *Participatory Learning and Action* 65, Biodiversity and Culture: Exploring Community Protocols, Rights and Consent (IIED, 2012).

<sup>47</sup> Nagoya Protocol Article 12.

<sup>48</sup> Akwe: Kon Guidelines No. 30.

<sup>49</sup> For a comprehensive definition of the term “free, prior and informed consent” see the United Nations Permanent Forum on Indigenous Issues (UNPFII) Report on the Tenth Session (2011), ¶34, available at [http://www.un.org/esa/socdev/unpfii/documents/session\\_10\\_report\\_EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/session_10_report_EN.pdf).

<sup>50</sup> Report on the Tenth Session ¶36.

informed consent” from Indigenous peoples, as well as local communities, before accessing traditional knowledge associated with genetic resources.

This right is also recognized in several other instruments, including the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization,<sup>51</sup> the Code of Ethical Conduct,<sup>52</sup> the Akwe: Kon Guidelines<sup>53</sup> and the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security,<sup>54</sup> as well as the International Finance Corporation’s Performance Standards on Environmental and Social Sustainability.<sup>55</sup> Consistent with these instruments, the UNPFII has called on “all United Nations agencies and intergovernmental agencies to implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent[.]”<sup>56</sup> To ensure that the Bank is meeting its obligations under international law, free, prior and informed consent is a standard that should be adopted by the Bank in all of its policies, including with regard to OP 4.10.<sup>57</sup>

Additionally, the Bank must address the following issues with OP 4.10:

- Pursuant to paragraph 18, borrowers are required to equitably share benefits with Indigenous peoples derived from commercial development. Paragraph 18 should be updated to reflect the fact that such sharing of benefits should take place after free, prior and informed consent and on mutually agreed terms.<sup>58</sup>
- In addition to being informed about their rights to cultural resources under statutory and customary law as set forth in paragraph 19(a), Indigenous peoples should also be informed of their rights under international law to which the borrower is a party.
- OP 4.10 Annex B paragraph 2 sets forth the elements of an Indigenous Peoples Plan (IPP). Among the elements listed, an IPP should also include: written confirmation from community leadership (in addition to that already called for on the part of the borrower) confirming that the “broad community support” required for the Bank to support a project actually exists.
- The framework called for in OP 4.10 Annex B paragraph 2(d) should be broad, taking into consideration the particularities and contexts of different communities.

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<sup>51</sup> Provisions 16, 25, 26, 31, 33.

<sup>52</sup> Section 2.

<sup>53</sup> No. 38.

<sup>54</sup> No. 9(9).

<sup>55</sup> Performance Standard No. 7.

<sup>56</sup> Tenth Session Report ¶39.

<sup>57</sup> For further guidance on free, prior and informed consent see Buxton, Abbi & Wilson, Emma, *FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects* (2013), available at <http://pubs.iied.org/pdfs/16530IIED.pdf>.

<sup>58</sup> See Nagoya Protocol Article 5.

## 2.5 *OP 4.11 Physical Cultural Resources*

The following should be included in the Bank's update of OP 4.11:

- Paragraph 3, which proscribes impacts on physical cultural resources that contravene a borrower's legal obligations, should be revised to explicitly state that these obligations include those found in human rights and cultural treaties and agreements, including the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.
- Paragraph 11 (Consultation) should be updated to reflect international standards regarding free, prior and informed consent as discussed above in Section 2.4.
- Paragraph 13 (Emergency Operations under OP/BP 8.00) which allows for exemptions from the requirements of OP 4.11 under certain circumstances should make clear that any process for exemptions must be transparent and that communities must be involved in decision-making pursuant to their rights to free, prior and informed consent.

## 2.6 *OP 4.12 Involuntary Resettlement*

Pursuant to international human rights standards, involuntary resettlement should only occur as a last resort, in "exceptional" circumstances.<sup>59</sup> Consistent with the discussion in Section 2.4, the standard of free, prior and informed consent should be integrated into OP 4.12, and resettlement cannot occur without first obtaining free, prior and informed consent.<sup>60</sup> The UNDRIP specifically addresses this issue in the context of resettlement, providing in Article 10 that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned[.]" As the Bank acknowledges, involuntary resettlement can have profound and devastating impacts on resettled communities.<sup>61</sup> To help avoid and mitigate these impacts, free, prior and informed consent and compensation based on fair and equitable terms<sup>62</sup> should be adopted as a standard in OP 4.12.

Specifically, OP 4.12 should be updated in the following manner:

- Paragraph 2 sets forth a number of important policy objectives that OP 4.12 is designed to meet. Paragraph 2 should reference the particular sensitivity regarding involuntary resettlement of Indigenous peoples.

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<sup>59</sup> ILO 169 Article 16(2).

<sup>60</sup> ILO 169 Article 16(2).

<sup>61</sup> OP 4.12 ¶1.

<sup>62</sup> UNDRIP Article 10.

- Paragraph 11 provides options to address situations where land is not available at a reasonable price. Under this paragraph, the “lack of adequate land must be demonstrated and documented to the satisfaction of the Bank.” This paragraph should make clear that the people who are subject to resettlement are included in the decision of whether adequate land exists consistent with the right to free, prior and informed consent.
- Paragraph 15 sets forth criteria for eligibility as a displaced person which references land rights recognized under the laws of the country. This paragraph should be updated to reference land rights pursuant to ILO 169 and the UNDRIP.
- Paragraph 18 sets forth borrower responsibilities for a resettlement plan. The bank should ensure that where borrowers lack the capacity to fulfill these responsibilities, the Bank is prepared to build borrower capacity so that it can satisfactorily implement a resettlement plan.
- Under Paragraph 24, borrowers are required to undertake assessments to determine whether the objectives of the resettlement instrument have been achieved. If the assessment reveals that these objectives may not be realized, the borrower should propose follow-up measures that may serve as the basis for continued Bank supervision, as the Bank deems appropriate. Paragraph 24 should provide that in the event follow-up measures are required, either a) the bank should provide capacity for such measures in the event that the borrower lacks the requisite capacity, or b) independent monitoring and evaluation should take place.

## 2.7 OP 4.36 Forests

The IEG recently stated that the World Bank has had a major role in shaping global forest-related priorities.<sup>63</sup> Unfortunately, despite the Bank’s operational safeguards, IEG concluded that “there have been negligible outcomes in managing natural forests in a socially and environmentally sustainable way.”<sup>64</sup> This failure must be addressed in the update to OP 4.36.

The following updates should be made to OP 4.36:

- The policy objectives of OP 4.36 should include recognition, respect and active protection for Indigenous Peoples’ and Community Conserved Territories and Areas (ICCAs), discussed above in Section 2.3, to recognize and respect Indigenous peoples and local communities self-governance of forests, including in accordance with their knowledge, customary law and

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<sup>63</sup> *Managing Forest Resources for Sustainable Development: An Evaluation of World Bank Group Experience* (IEG Forest Report, 2012), in Memorandum to the Executive Directors and the President, available at <http://www.redd-monitor.org/wordpress/wp-content/uploads/2013/01/ForestCODE-Jan-2013.pdf>.

<sup>64</sup> IEG Forest Report at 99.

practices as supported in CBD Articles 8(j) and 10(c) and to meet the Aichi Biodiversity Targets, including Target 11.

- Currently the Bank does not finance projects that contravene applicable international environmental agreements.<sup>65</sup> In addition, the Bank should not finance projects that contravene a country's human rights obligations, be they international, regional or national, nor should it finance projects that contravene other international or regional agreements, such as the Aichi Biodiversity Targets, or other environmental commitments.
- OP 4.36, like the other safeguards, should incorporate the right to free, prior and informed consent. Paragraph 12, for example, refers to "meaningful participation" of communities. Meaningful participation should include free, prior and informed consent as a component.
- The definition of "forest" in OP 4.36 should be revised as follows: "Forests are complex tree dominated ecosystems with particular structural biotic and abiotic components, assembled within temporal and spatial limits and with a self sustained successional dynamic determined by its own biodiversity, including the determining anthropogenic interfaces, particularly with Indigenous Peoples and peoples who adopted their knowledge." If the Bank chooses not to adopt this proposed definition, the definition of "forest" should at a minimum be made consistent with the portion of the Food and Agriculture Organization's (FAO) definition of the same term clarifying that "[t]he term [forest] specifically excludes stands of trees established primarily for agricultural production, for example fruit tree plantations. It also excludes trees planted in agroforestry systems"<sup>66</sup> and forest plantations as defined by the FAO in its Global Forest Resources Assessment 2000.<sup>67</sup>
- The definition of "local community" should make clear that if the local community is also indigenous, special protections are afforded under international law that should be applied.

## 2.8 OP 4.37 Safety of Dams

In its groundbreaking report *Dams and Development*, the World Commission on Dams stated that "the social and cultural implications of putting a dam into [a river] landscape are spatially significant, locally disruptive, lasting and often irreversible."<sup>68</sup> As of 2000, the construction of large dams had led to the displacement of some 40 to 80 million people, many of whom have not been

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<sup>65</sup> OP 4.36 ¶6.

<sup>66</sup> *FAO Global Forest Resources Assessment 2000* (FRA 2000, 2001), Appendix 2, available at <http://www.fao.org/docrep/004/y1997e/y1997e1m.htm#bm58>.

<sup>67</sup> FRA 2000, Appendix 2 (defining "forest plantation" as "A forest established by planting or/and seeding in the process of afforestation or reforestation. It consists of introduced species or, in some cases, indigenous species.").

<sup>68</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-making* (Dams and Development, 2000) at 102, available at [http://www.internationalrivers.org/files/attached-files/world\\_commission\\_on\\_dams\\_final\\_report.pdf](http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf)

resettled or received adequate compensation, if any.<sup>69</sup> The adverse social impacts are “often not acknowledged or considered in the planning process and may remain unrecognised during project operations” and even “[w]here measures are put in place to mitigate impacts on affected people they typically fail to address adequately the problems caused by the decision to build a large dam.”<sup>70</sup>

Given the impacts of dams and the difficulty of mitigating those impacts, it is essential for the Bank to have detailed policies in place for dam projects. However, despite the profound environmental, social and cultural impact of dams, Indigenous peoples and local communities receive no mention in OP 4.37. At the least, OP 4.37 should be updated to provide that when the Bank finances a project that includes construction of a new dam, such construction will be undertaken with the free, prior and informed consent of affected communities.

### **3. Emerging Areas**

#### *3.1 Human Rights*

In general, the Bank should ensure that both substantive and procedural human rights are respected in the implementation of projects it funds. These substantive and procedural rights are set forth in a range of international and regional instruments, including those that make up the International Bill of Human Rights,<sup>71</sup> as well as standalone instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, ILO 169 and the UNDRIP. Additionally, where applicable, reference should be made and borrowers should be aware of how these rights have been interpreted in relevant jurisprudence. Such jurisprudence includes decisions by the universal periodic review of the Human Rights Council, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,<sup>72</sup> and the African Commission on Human and Peoples’ Rights<sup>73</sup> addressing, among other things, the duty to consult with Indigenous peoples and to obtain their consent.

At a minimum, the Bank should incorporate human rights due diligence into its safeguards, as called for in the Initial Comments by Civil Society Organizations on the World Bank’s Safeguard Policies Review and Update (CSO Initial Comments).<sup>74</sup>

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<sup>69</sup> Dams and Development at 17.

<sup>70</sup> Dams and Development at 98.

<sup>71</sup> Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and their subsidiary Protocols.

<sup>72</sup> See, e.g., *Saramaka People v. Suriname* (28 November 2007) available at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakajudgmentnov07eng.pdf>.

<sup>73</sup> *Endorois Welfare Council v. Kenya* (2010) available at <http://allafrica.com/download/resource/main/main/idatcs/00020047:cab98db3ac25b55074e4b94db4939697.pdf>.

<sup>74</sup> CSO Initial Comments, at 7, available at this [link](#).



Under this approach, the Bank and borrowers identify all potential impacts on human rights for Bank financed projects, and take all necessary measures to address adverse impacts. For further guidance on the intersection of business and human rights the Bank can look to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, which sets forth three core principles: the State's duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.<sup>75</sup>

### 3.2 *Free, Prior and Informed Consent of Indigenous Peoples*

Free, prior and informed consent regarding Indigenous peoples is discussed extensively in Section 2.4, and that discussion should be incorporated here by reference.

In addition, free, prior and informed consent should be a cross cutting issue that is incorporated throughout all the Bank's safeguards. This means that free, prior and informed consent should be sought not only from Indigenous peoples, but local communities as well. This view is supported by conclusions drawn by the Extractive Industries Review initiated by the World Bank Group in 2003.<sup>76</sup> The Final Report concluded that the World Bank Group should "require companies to engage in consent processes with communities and groups directly affected by projects in order to obtain their free prior and informed consent[.]"<sup>77</sup> Court cases have also extended the right to tribes that are technically non-indigenous.<sup>78</sup> Similarly, ILO 169, which applies to both "tribal peoples" and Indigenous peoples, requires "free and informed" consent in situations involving relocation.<sup>79</sup> And Article 7(1) of the Nagoya Protocol extends the right of "prior and informed consent" to local communities in regard to traditional knowledge associated with genetic resources.

When seeking the free, prior and informed consent of communities (whether Indigenous or otherwise) affected by Bank projects, the Bank should apply internationally recognized standards for doing so. Furthermore, the Bank should assist communities in articulating their own requirements for providing free, prior and informed consent, such as through the use of community protocols.

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<sup>75</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) at 1, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>76</sup> Extractive Industries Review, *Striking a Better Balance: Final Report* (Striking a Better Balance, 2003), available at this [link](#).

<sup>77</sup> *Striking a Better Balance*, at Volume I, ix.

<sup>78</sup> McGee, Brant, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 Berkeley J. Int'l Law. 570 (2009), available at: <http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6>

<sup>79</sup> ILO 169 Article 16(2).

### 3.3 Land Tenure and Natural Resources

World Bank Group President Dr. Jim Yong Kim recently stated that “Securing access to land is critical for millions of poor people. Modern, efficient, and transparent policies on land rights are vital to reducing poverty and promoting growth, agriculture production, better nutrition, and sustainable development.”<sup>80</sup> With this in mind, land tenure and natural resources should be a central theme of the Bank’s safeguards. The Bank should look to international law including the UNDRIP, ILO 169 and decisions of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples’ Rights, as well as approaches set forth in instruments such as the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines)<sup>81</sup> for guidance on addressing land tenure and natural resources.

Several international instruments, as well as decisions by the courts and commissions noted above, support the land tenure rights of Indigenous peoples and local communities. In general, they call for the rights of Indigenous peoples and local communities to ownership and possession of traditionally occupied lands to be respected, for collective property and customary tenure systems to be recognized, or for land tenure issues to be considered by countries during the development of national strategies.<sup>82</sup>

The FAO Tenure Guidelines extensively address the issue of land tenure from the position that States should recognize and respect all legitimate tenure right holders and their rights.<sup>83</sup> The FAO Tenure Guidelines echo the words of Dr. Kim, providing that “States should strive to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth.” The Bank’s safeguards should support borrowers in recognizing and protecting the legitimate tenure rights of Indigenous peoples and other communities with customary tenure systems.<sup>84</sup>

The FAO Tenure Guidelines call on States to adapt their policy, legal and organizational frameworks to recognize tenure systems of Indigenous peoples and other communities with customary tenure systems.<sup>85</sup> Further, in drafting tenure policies and laws, it is suggested that States “take into account the social, cultural,

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<sup>80</sup> World Bank Group Press Release: *Access to Land is Critical for the Poor*, available at <http://www.worldbank.org/en/news/press-release/2013/04/08/world-bank-group-access-to-land-is-critical-for-the-poor>

<sup>81</sup> The FAO Tenure Guidelines are available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

<sup>82</sup> See, e.g., ILO 169 Article 14; UNDRIP Articles 26, 27, 32; UN Framework Convention on Climate Change Cancun Agreements Paragraph 72.

<sup>83</sup> FAO Tenure Guidelines No. 3(1).

<sup>84</sup> See FAO Tenure Guidelines No. 9(4).

<sup>85</sup> FAO Tenure Guidelines No. 9(6).

spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems.”<sup>86</sup> The FAO Tenure Guidelines support the full and effective participation of community members in developing policies related to tenure systems, as well as respect for customary approaches of communities regarding customary tenure systems.<sup>87</sup>

Similarly, in updating its safeguards, the Bank should recognize and take into account the value of areas held under tenure systems of Indigenous peoples and local communities. The safeguards should be updated with the full and effective participation of Indigenous peoples and local communities, and the Bank should respect their customary approaches to dealing with land tenure.

Additionally, as discussed above in Section 2.3, Indigenous Peoples’ and Community Conserved Territories and Areas (ICCAs) should be recognized, respected and actively protected by the Bank in its safeguards as an effective method of conserving and sustainably using natural resources, as the CBD and IUCN already do. One of the defining characteristics of an ICCA is that community governance and management decisions and efforts lead to the conservation of the territory, area or species and associated cultural values.<sup>88</sup> Recognition of ICCAs can help promote land tenure rights of Indigenous peoples and local communities over natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural and spiritual values.

#### **4. Conclusion**

The Bank’s review and update of its safeguards offers an important opportunity to bring the safeguards into line with existing international law standards and to once again establish the Bank as a standard-setter in terms of policies that promote human and environmental rights. Monitoring and evaluation efforts need to be increased in order to ensure that safeguards are being properly applied. Free, prior and informed consent should be obtained from Indigenous peoples and local communities prior to the implementation of Bank projects, including relocation from protected areas and the establishment of protected area policies and plans that affect tenure, land/marine management, and natural resource use. The Bank should respect and promote the use of community protocols as a way to obtain such consent, as well as to, among other things, understand community needs and interact appropriately with communities affected by Bank projects. Additionally, the Bank should recognize, respect and actively protect ICCAs as fully legitimate and effective area-based conservation measures.

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<sup>86</sup> FAO Tenure Guidelines No. 9(7).

<sup>87</sup> FAO Tenure Guidelines No. 9(7), 9(11).

<sup>88</sup> See <http://www.iccaconsortium.org/> and <http://naturaljustice.org/library/our-publications/legal-research-resources/icca-legal-reviews> for more information on ICCAs.

At a minimum, the safeguards should not be weakened during this review and update. Respect for human rights, with a focus on the rights of those most affected by Bank projects, namely Indigenous peoples and local communities, should underpin any changes made to existing safeguards.