



INDIAN LAW

RESOURCE CENTER

Comments on the World Bank's Draft Guidance Note for the Environmental and Social Standard 7 Indigenous Peoples

Ensuring that the interpretations of the recently approved policies are correct and do not lower the level of protection achieved for indigenous peoples

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December, 2017

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With the generous support of the C.S. Mott Foundation

I | INTRODUCTION

1. The Indian Law Resource Center (Center) welcomes the opportunity to provide comment on the World Bank’s Draft Guidance Note for the Environmental and Social Standards (Standards). The Center is a non-profit law and advocacy organization established and directed by American Indians that provides free legal assistance to indigenous peoples in the Americas. Since mid-2011, the Center has engaged in the Review and Update of the World Bank Safeguard Policies in order to ensure that the Safeguard Policies would retain the indigenous peoples policy as a stand-alone policy and not dilute it into an umbrella policy covering all vulnerable groups.¹ We have also worked hard to ensure that the resulting Standard 7 on Indigenous Peoples reflects relevant international law standards on the rights of indigenous peoples.²

2. This submission only addresses the Draft Guidance Note (Note) for Standard 7 on Indigenous Peoples. While this particular Note falls short in providing helpful advice to borrowers on many respects, we decided to focus our comments on three concrete issues where the Note either (1) contradicts a clear safeguard measure recognized by Standard 7 (the provisions regarding indigenous peoples in voluntary isolation), (2) fails to enhance the value of very useful safeguard measures in Standard 7 (provisions requiring meaningful consultation tailored to indigenous peoples), or (3) provides no guidance at all on a matter central to the survival of indigenous peoples (impacts on lands and natural resources subject to traditional ownership or under customary use or occupation). Concise comments on these concerns follow below.

II | INDIGENOUS PEOPLES IN VOLUNTARY ISOLATION

3. The Center welcomed the inclusion of a specific safeguard measure into Standard 7 to protect indigenous peoples living in voluntary isolation from bank-funded projects.³ This provision is critical for the survival and well-being of many indigenous peoples living in the Amazon and Chaco regions in South America.⁴ The Standard states that “projects that would

¹ See, Letter from the Indian Law Resource Center to World Bank President Robert Zoellick on Updating and Reviewing the World Bank Indigenous Peoples Policy, July 11, 2011, <http://indianlaw.org/sites/default/files/07%2011%202011%20Indian%20Law%20Resource%20Center%20Ltr%20to%20Pres%20%20Zoellick.pdf> (asking the Bank to keep the policy on indigenous peoples as a stand-alone policy, to adopt a stand-alone human rights policy, to carry out extensive consultations with indigenous peoples, and to adopt a rights-based approach for the Bank’s climate programs, including REDD+ programs). See also, Submission of the Indian Law Resource Center on the Review and Update of the Environmental and Social Safeguard Policies, May 2013, <http://indianlaw.org/sites/default/files/ILRC%20WB%20Submission%20Final.pdf> (providing inputs on the “emerging areas” and commenting on the existing environmental and social safeguard policies).

² To access all relevant submissions, letters and articles made by the Indian Law Resource Center throughout the Review and Update of the World Bank Safeguard Policies process, visit our dedicated website: <http://indianlaw.org/mdb/world-bank>.

³ See, Indian Law Resource Center, *The World Bank Approves Indigenous Peoples Policy* (Sept. 8, 2016), <http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy>.

⁴ See, Leonardo A. Crippa & Rosali Francis, Indian Law Resource Center, *Comments on the World Bank’s Proposed “Environmental and Social Network”—Ensuring Consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015), <http://indianlaw.org/sites/default/files/2015-02%20ILRC%20Comments%20ENG.pdf> (assessing whether or not the proposed Environmental and Social Framework’s constituent policy instruments took

result in [an] undesired contact will not be processed further”.⁵ This is a clear proscription of financial support to projects resulting in such contact.

4. But, to our surprise and great concern, the current draft of the Note directly contradicts this safeguard measure. Indeed, instead of a restatement of the clear prohibition established in Standard 7, the Note calls for “measures to mitigate potential adverse impacts resulting from any unintended contact.”⁶ This indicates to borrowers and Bank staff that financial support for projects that would result in undesired contact could still be given and paves the way to force such contact. We suggest the Bank redraft this section of the Note to ensure conformity with the plain language of the Standard. The Note should clearly affirm and elaborate on the prohibition of funding for projects that would result in undesired contact found in the Standard. The Note must meet the standard of protection set by the Standard, not lower or undermine it.

III | MEANINGFUL CONSULTATION TAILORED TO INDIGENOUS PEOPLES

5. The Center also welcomed the clarification made in Standard 7 regarding which indigenous institutions borrowers should consult with.⁷ The Standard states that consultations should be carried out with indigenous peoples’ “representative bodies and organizations... and, where appropriate, other community members.”⁸ In so doing, the Standard makes clear that consultations are to be conducted with the grass-roots indigenous organizations whose lands and resources might be adversely affected by a bank-funded project. Unfortunately, the Note fails to provide further guidance to borrowers about this element of Standard 7.⁹ We suggest the Bank revise the Note to clarify that the safeguards requiring such a consultation are actually carried out with the right indigenous institution, not with intermediaries.

6. We also suggest the Bank define or explain the meaning of the terms “affected indigenous peoples.” Generally speaking, the Standard calls for consultation with “affected indigenous peoples.”¹⁰ However, no guidance is provided to borrowers about what exactly these terms mean, which are critical to determining the right indigenous institution to consult with. “Affected indigenous peoples” could mean different institutions depending on the project area, among other factors. For instance, it could mean specific communities when the project area coincides with the lands possessed by such communities, or “organizations... at the national or regional level” when the project has a national or regional scope.¹¹ Explaining these terms and

into account the applicable legal standard established by the UN Declaration on the Rights of Indigenous Peoples and laying out the regional particularities of indigenous peoples of the Americas that should be taken into account by the Framework’s constituent policies, including indigenous peoples living in voluntary isolation).

⁵ Standard 7 Indigenous Peoples, para. 19.

⁶ Standard 7 Indigenous Peoples Guidance Note, para. GN19.1.

⁷ See, Indian Law Resource Center, *The World Bank Approves Indigenous Peoples Policy* (Sept. 8, 2016), <http://indianlaw.org/mbd/world-bank-approves-indigenous-peoples-policy>.

⁸ Standard 7 Indigenous Peoples, para. 23.a.

⁹ See, Standard 7 Indigenous Peoples Guidance Note, para. GN23.1.

¹⁰ Standard 7 Indigenous Peoples, para. 23 (stating that “to promote effective project design, to build local project support or ownership, and to reduce the risk of project-related delays or controversies, the Borrower will undertake an engagement process with affected indigenous peoples...”) (the emphasis is ours).

¹¹ Standard 7 Indigenous Peoples, footnote 13.

providing examples about the various institutions at play would considerably help borrowers understand who to consult with regarding their proposed projects.

IV | IMPACTS ON LANDS AND NATURAL RESOURCES SUBJECT TO TRADITIONAL OWNERSHIP OR UNDER CUSTOMARY USE OR OCCUPATION

7. The Center has consistently raised concerns about the Bank's support of projects that seek to divide collectively-held indigenous lands into allotments for indigenous individuals.¹² Sadly, and despite Bank policy's consistent recognition of the importance of protecting indigenous peoples' collective attachment to their lands, the Standard embraces this approach by allowing borrowers to plan for the "conversion of customary usage rights to communal and/or individual ownership rights."¹³ Any bank-funded project that would result in the conversion of indigenous peoples' collective land rights into individual land rights would violate applicable legal rules and make the Bank complicit in such violations. No international instrument supports individual over collective ownership of land.¹⁴

8. The Note is conspicuously silent about this issue and provides no guidance to borrowers about the two paragraphs in the Standard which address it along with other project impacts on indigenous lands.¹⁵ We believe the Bank should plainly address this concern in order to avoid supporting projects that would result in the allotment of collectively-held indigenous lands for development purposes. The bank's own accountability mechanism, the Inspection Panel, has concluded that bank-financed projects supporting activities contingent on establishing individual ownership do harm indigenous peoples.¹⁶

¹² See, Indian Law Resource Center, *The World Bank Approves Indigenous Peoples Policy* (Sept. 8, 2016), <http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy>; Letter from the Indian Law Resource Center to World Bank President Jim Yong Kim on Breaking the Ambivalence: Ending Allotment on Indigenous Lands, Raising Concerns over the Use of Consultations to Overcome the Rights of Indigenous Peoples, and Ensuring No-Contact with Indigenous Peoples in Voluntary Isolation, June 29, 2016, <http://indianlaw.org/sites/default/files/06-29-2016%20Letter%20to%20World%20Bank%20President%20Kim%20FINAL%20ENG.pdf>, *Comments on the World Bank's Environmental and Social Framework Second Draft Addressing outstanding issues relating to the substance and implementation of the proposed policies* (Jan. 2016), <http://indianlaw.org/sites/default/files/2016-02-01%20ILRC%20Comments%20FINAL%20ENG.pdf>, *Comments on the World Bank's Proposed "Environmental and Social Framework" Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015), <http://indianlaw.org/sites/default/files/2015-02%20ILRC%20Comments%20ENG.pdf>, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013), <http://indianlaw.org/sites/default/files/ILRC%20WB%20Submission%20Final.pdf>

¹³ Standard 7 Indigenous Peoples, para. 29 (the emphasis is ours).

¹⁴ See, Organization of American States, *American Declaration on the Rights of Indigenous Peoples Art. VI & XXV*, OEA/Ser.P, AG/doc.5537/16 (June 8, 2016) (recognizing and calling for respect of indigenous peoples' "collective rights that are indispensable for their existence, wellbeing, and integral development as peoples, such as their collective ownership of lands, territories, and resources). See also, U.N. Declaration on the Rights of Indigenous Peoples Art. 26, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007); International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries Art. 14, 15*, ILOLEX C169 (June 27, 1989).

¹⁵ See, Standard 7 Indigenous Peoples Guidance Note, page 15-16.

¹⁶ See, The Inspection Panel, *Investigation Report, Honduras: Land Administration Project, (IDA Credit 3858-HO)*,

I | CONCLUSION

9. The Guidance Notes will play an important role in educating and building the capacity of borrowers to implement the recently approved Standards. This is particularly true because the Standards are part of a new policy framework, because they address issues that were not previously considered by the safeguard policies, and because they reflect improvements on various policies. However, we are very concerned about the three shortcomings of the Note for Standard 7 mentioned above. These three elements of the Note represent a major step backward and reflect an apparent attempt to lower the standard of protection achieved for indigenous peoples through the review and update of the safeguard policy on indigenous peoples.

10. We strongly encourage the Environmental and Social Framework Team to immediately address these concerns and develop helpful guidance for borrowers. While there is value in the plan to review the Guidance Notes on a rolling basis, many lessons on consultation with indigenous peoples and allotment of indigenous lands can already be drawn from the Inspection Panel's completed investigations¹⁷ and dedicated reports.¹⁸ Allotments of collectively-held indigenous lands and undesired contact with indigenous peoples living in voluntary isolation are irreparable harms, not minor ones. There is no excuse to wait for major project impacts on indigenous peoples before making the changes we have suggested.

June 12, 2007, para. 378. [http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20(English).pdf) (concluding that individual titling supported by the Honduras' Land Administration Project was harmful to indigenous peoples because it decreased the Garifuna people's collective lands, which placed their cultural integrity and economic base at risk). *See also*, The Inspection Panel, Investigation Report, Panama: Land Administration Project, (Loan No. 7045-PAN), Sept. 16, 2010. [http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20(English).pdf) (reaching the same conclusion with regard to the Panama's Land Administration Project impacts on the Naso and Ngabe indigenous peoples).

¹⁷ *See*, The Inspection Panel, Investigation Report, Honduras: Land Administration Project, (IDA Credit 3858-HO), June 12, 2007, [http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/38-Investigation%20Report%20(English).pdf); Investigation Report, Panama: Land Administration Project, (Loan No. 7045-PAN), Sept. 16, 2010. [http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20(English).pdf).

¹⁸ *See*, The Inspection Panel, LESSONS LEARNED SERIES NO. 4: CONSULTATION, PARTICIPATION AND DISCLOSURE OF INFORMATION (Oct. 2017), <http://ewebapps.worldbank.org/apps/IP/IPPublications/Consultation%20Participation%20and%20Disclosure%20of%20Information.pdf>; LESSONS LEARNED SERIES NO. 3: INDIGENOUS PEOPLES (Oct. 2016), <http://ewebapps.worldbank.org/apps/IP/IPPublications/Emerging%20Lessons%20Learned%20No.%202%20-%20Indigenous%20Peoples.pdf>.