



INDIAN LAW

RESOURCE CENTER

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

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I | INTRODUCTION

1. The Indian Law Resource Center (Center) welcomes the opportunity to provide comments on the World Bank's (Bank) second draft of its proposed "Environmental and Social Framework" (Framework), which includes an Environmental and Social Policy (Policy) and ten Environmental and Social Standards (Standards). While the Policy defines the Bank's responsibility and enforcement measures when providing public financing for investment projects, the Standards establish the borrowers' responsibility and compliance measures in fulfilling the requirements for receiving Bank financial support. On July 1, 2015, the Bank launched the latest phase of the safeguard review process by releasing the Framework for public comments.

2. The Center is a non-profit law and advocacy organization founded and directed by Native American lawyers and indigenous experts. The Center provides legal assistance without charge to indigenous peoples in North, Central and South America who are working to protect their lands, resources, human rights, environment and cultural heritage. For more than thirty-five years, the Center has been at the forefront of legal and policy standard setting procedures on indigenous issues within international organizations, including the United Nations (U.N.), the Organization of American States (O.A.S.), the World Bank, and other multilateral development banks.

3. This submission only provides comments and recommendations on outstanding issues. Matters that we have previously raised and which the Bank has already addressed are generally not considered, even in cases where we believe the proposed Framework is not wholly adequate.¹ For the purpose of this paper, the Center considers "outstanding" issues to include the following: (1) issues not addressed by the Framework, such as human rights; (2) new issues of concern brought up by the Framework's second draft itself, including matters that may be very harmful for indigenous peoples and nations, such as the allotment of indigenous peoples' collectively owned lands to indigenous individuals; (3) issues that, while not yet addressed thoroughly by the Framework, can be easily resolved with little controversy or additional study, such as requiring land-based redress for indigenous peoples and due process elements in all consultation proceedings with indigenous peoples; (4) issues that the Bank can resolve by offering clarified and strengthened safeguard measures, such as prohibiting or proscribing financial support to projects that would adversely impact indigenous peoples living in voluntary isolation; and (5) issues that require further clarification to ensure that the Bank can properly enforce the Framework or that borrowers can fully comply with the Framework's obligations. Examples of these sort of issues include the questions of when the Bank should require independent verification in project monitoring and reporting or when borrowers should be required to retain third party specialists to help them assess risks caused by their proposed projects.

¹ See generally, Leonardo A. Crippa & Rosalie Francis, Indian Law Resource Center, *Comments on the World Bank's "Environmental and Social Framework", Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015) (assessing consistency between the first draft of the Framework and the U.N. Declaration). See also, Leonardo A. Crippa, Chris Foley, et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013) (commenting on the existing safeguard policies and identified "emerging areas").

4. In addition to these issues regarding the Framework itself, we would also like to draw attention to another matter of great concern. Among the instructions for this third consultation period released by the Committee on Development Effectiveness is the direction that, in consultations regarding the proposed Indigenous Peoples policy, consideration be given to “Circumstances (e.g. criteria and timing) in which a waiver may be considered and the information to be provided to the Board to inform its decision.”² The creation of a process by which the Bank could unilaterally set aside the internationally recognized rights of indigenous peoples would itself contribute to the violation of indigenous peoples’ rights, would threaten the integrity of the Framework, and is a proposal which the Center strenuously opposes.

II | OUTSTANDING CROSS-CUTTING ISSUES

II.1 | Human Rights

The Bank should create a working group to discuss how to pragmatically incorporate human rights in the Policy and relevant Standards.

5. Human rights are a cross-cutting issue that is relevant for both the Policy and the Standards, particularly to those sections addressing “social” matters. However, despite a dedicated discussion with an external focus group during the first phase of the review process, the Framework does not systematically address human rights in either the Policy or in the Standards, referring to them only once, in Standard 7 relating to indigenous peoples.

6. As stated in our May 2013 submission, an in-depth and ongoing exchange between Bank Staff and external experts is needed to jointly discuss a way to articulate a pragmatic human rights approach within the Framework.³ In our opinion, the Bank should follow the path taken by the International Finance Corporation (I.F.C.) in developing, reviewing and testing the Guide to Human Rights Impact Assessment and Management (Guide).⁴ In that process the I.F.C. created an External Advisory Panel to review a draft of the Guide, and constructively discuss outstanding issues. For further information on our recommendations on human rights, see our May 2013 submission.⁵

III | OUTSTANDING INDIGENOUS ISSUES

III.1 | Standard 7: Individual ownership of lands

² Issues for Phase 3 Consultations, Committee on Development Effectiveness (CODE), World Bank, August 3rd, 2015: p. 3, https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/list_of_issues_for_consultations.pdf.

³ Leonardo A. Crippa, Chris Foley, et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013), para. 26-36.

⁴ The International Business Leaders Forum and the International Finance Corporation, in association with the U.N. Global Compact, *Guide to Human Rights Impact Assessment and Management*, 2010, <http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES>

⁵ Leonardo A. Crippa, Chris Foley, et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013).

The Bank should not provide financial support to projects seeking the conversion of indigenous peoples' property rights to land to individual ownership.

7. Supporting the conversion of indigenous peoples' collective property rights to individual ownership of lands is a major step backwards. The Framework's previous draft did not support such conversion,⁶ yet paragraph 21 of the second draft states that the objective of this Standard's action plan shall be to legally recognize indigenous peoples' property rights to land including by securing "... (b) [the] conversion of customary usage rights to communal and/or individual ownership rights...."

8. The Bank's intention to safeguard indigenous peoples' property rights to lands is very positive and welcome. However, the endorsement of the conversion of these collective rights to individual ownership rights is a dangerous idea. It will not meet the Bank's own stated objectives for Standard 7. Further, the proposed approach does not conform with any of the numerous existing domestic and international law standards that recognize and support indigenous peoples' collective ownership of lands under their possession.⁷ The approach would, however, divide up indigenous communities located within the project area, infringe their full enjoyment of collective property rights, including ownership and usufruct or use, adversely affect their special attachment to their lands, and threaten their continued existence as a distinct people within existing nation-states. To avoid these grave risks and harms, the Bank should forbid financial support to projects seeking to convert indigenous peoples' collective property rights into individually-held ownership rights.

III.2 | Standard 7: Diminished forms of property to lands

The Bank should explicitly clarify that the objective of the Standard's action plans will be to secure (a) full legal recognition of existing property rights and customary land tenure systems of Indigenous Peoples; or (b) conversion of customary usufruct and/or use rights to collective ownership.

9. The Framework continues to embrace the same mistaken approach that conservationists have often used, promoting the recognition of indigenous peoples' use rights to their lands as a positive step forward. This approach is no longer viable because it is contrary to current international law standards that call for recognition of indigenous peoples' ownership of their lands, not recognition of some form of diminished property rights, such as usufruct and use.⁸ Indeed, major international organizations and networks have abandoned this approach and begun to recognize that respect for indigenous peoples' collective ownership of lands is the best

⁶ See, World Bank, Environmental and Social Framework, Setting Standards for Sustainable Development, First Draft for Consultation, July 30, 2014, para. 23.

⁷ See, Leonardo A. Crippa & Rosalie Francis, Indian Law Resource Center, *Comments on the World Bank's "Environmental and Social Framework", Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015), para. 15-19.

⁸ Indian Law Resource Center & I.U.C.N. Commission on Environmental, Economic and Social Policies, *Conservation and Indigenous Peoples in Mesoamerica: A Guide* (Jan. 2015), p. 17-20.

strategy to protect lands and forests.⁹

10. The language of paragraph 21 pointed out above is carried over directly from the existing OP 4.10 paragraph 17, and repeats the mistakes of that earlier policy.¹⁰ Collective property rights to land must neither be transmuted into individual ownership nor reduced to mere “long-term renewable custodial or use rights”. There is no reason to focus on diminished forms of property rights when indigenous lands and resources are at stake. As stated in our February 2015 submission, “custodial” rights have no meaning in the law of property.¹¹ Such a focus leads to violations of collective ownership to lands and resources—rights essential to the very existence of indigenous peoples and nations.

III.3 | Standard 5: Land-based redress

The Bank should clarify that indigenous peoples be ensured equal or greater ownership rights over any replacement lands, and that replacement lands should be equal in quality, size and legal status unless their free, prior and informed consent has been obtained for alternative redress.

11. Paragraph 14 states that “Where livelihoods of displaced persons are land-based, or where land is collectively owned, the Borrower will offer the displaced persons an option for replacement in kind, unless it can be demonstrated to the Bank’s satisfaction that equivalent replacement land is unavailable.” The policy does not clearly require that indigenous peoples be ensured equal or greater ownership rights over their replacement land, consistent with international law. According to Article 28(2) of the U.N. Declaration on the Rights of Indigenous Peoples, replacement lands should be “equal in quality, size and legal status” unless free, prior and informed consent has been obtained for alternative redress.

III.4 | Standard 7: Indigenous peoples living in voluntary isolation

The Bank should ensure that measures are taken to screen for the possible presence of indigenous peoples living in voluntary isolation, and proscribe Bank support for projects that may impact them.

12. The Center welcomes the inclusion of specific language in paragraph 16 regarding indigenous peoples living in voluntary isolation. Yet this provision must be strengthened. As drafted, paragraph 16 states that “Projects that may have potential impacts on these peoples require appropriate measures to recognize, respect and protect their land and territories, environment, health and culture, as well as measures to avoid all undesired contact with them as

⁹ See generally, Rights and Resources Initiative, *Who Owns the Land in Latin America? The status of indigenous and community land rights in Latin America* (Dec. 2015). See also, Rights and Resources Initiative, *Recognizing Indigenous and Community Rights, Priority Steps to Advance Development and Mitigate Climate Change* (Sept. 2014).

¹⁰ World Bank, O.P 4.10 – Indigenous Peoples, July, 2005, para. 17.

¹¹ Leonardo A. Crippa & Rosalie Francis, Indian Law Resource Center, *Comments on the World Bank’s “Environmental and Social Framework”, Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015), para. 16.

a consequence of the project.” Of course, by choosing to live in voluntary isolation these indigenous peoples are demonstrating in the clearest possible manner that all contact is undesired. Further, as it is impossible to gain free, prior and informed consent from indigenous peoples living in voluntary isolation, projects impacting their lands and territories and natural and cultural resources are automatically prohibited by the Standard.

13. The Bank should clarify this position, provide clear guidance to borrowers, and prevent misinterpretation of current policy language. In so doing, the Bank should consider regional legal standards provided that this is a clear regional issue. As stated in our February 2015 submission, the domestic law of relevant countries in the Americas, special studies by the Inter-American Commission on Human Rights, and the O.A.S. Proposed American Declaration on the Rights of Indigenous Peoples¹² call on states to proscribe actions that would adversely affect the lands and members of indigenous peoples living in voluntary isolation.

III.5 | Standard 7: Due process of law

The Bank should require due process of law protections within all consultation proceedings where indigenous peoples’ rights are subject to determination for project purposes, especially in those situations where free, prior and informed consent is being sought.

14. As stated in our May 2013 submission, all State proceedings, including consultation proceedings, must provide for the most fundamental elements of due process of law where decisions may affect human rights.¹³ The principle of due process is not only deeply rooted in all countries’ legal system, but is also a treaty law obligation agreed upon in all major human rights treaties, such as the American Convention on Human Rights.¹⁴ However, paragraph 22(f) states that only “Where a project promotes commercial development of their land or natural resources, [the borrower will] afford due process....”

15. There is no reason to limit due process to projects seeking commercial development of indigenous lands and resources. According to the Inter-American Court of Human Rights, the most important elements of due process should govern all consultation proceedings with indigenous peoples where their lands and resources are at stake.¹⁵ The Bank does require due process in other Standards, including Standard 5 (stating that “the exercise of eminent domain...

¹² Leonardo A. Crippa & Rosalie Francis, Indian Law Resource Center, *Comments on the World Bank’s “Environmental and Social Framework”, Ensuring consistency with the UN Declaration on the Rights of Indigenous Peoples* (Feb. 2015), para. 20-23.

¹³ Leonardo A. Crippa, Chris Foley, et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013), para. 62-66.

¹⁴ Judicial Guarantees in States of Emergency, Inter-Am. H.R. Ct. (Ser. A No. 9), Oct. 6, 1987, para. 27, 28 (stating that Article 8 of the American Convention on Human Rights does recognize the concept of “due process of law”, which refers to those “procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention”).

¹⁵ Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. H.R. Ct (Ser. C No. 125), para. 62, 104 (highlighting that due process must be respected in administrative proceedings and in any other proceedings where the decision may affect human rights, such as those land titling procedures that process indigenous peoples’ land claims).

by a Borrower will not be considered to be forced eviction providing it... is conducted in a manner consistent with basic principles of due process...”¹⁶ and Standard 6 (emphasizing that “in areas of critical habitat, the Borrower will not implement any project activities unless... All due process required under international obligations or national law... has been complied with”).¹⁷

16. In particular, due process must be required in all consultation proceedings where the borrower is seeking free, prior and informed consent. The experts that participated in the Bank’s focus group meeting concerning the question of free, prior and informed consent, recommended the Bank to require due process in those consultation proceedings seeking to obtain free, prior and informed consent.¹⁸ The borrower must be as diligent as possible within consent-seeking consultations because of the likelihood of considerable adverse impacts on indigenous peoples, lands and resources. However, even though due process is the highest procedural guarantee and exists in all countries’ domestic laws, the Framework falls short in integrating due process requirements into such important consultation proceedings.

IV | OUTSTANDING COMPLIANCE ISSUES

IV.1 | Standard 1: Compensation and offset of residual risks

The Bank should clarify that where residual risks or impacts remain after the other elements of the mitigation hierarchy have been applied, those residual risks must be compensated or offset. If this is not feasible, the project should be deemed nonviable.

17. All borrowers must comply with Standard 1 for projects supported by the Bank through Investment Project Financing. The second objective of Standard 1 is the adoption of a mitigation hierarchy approach to avoid, minimize, mitigate, and compensate or offset risks and impacts. Yet the discussion of compensation and offset for residual risks states that this is necessary only “where technically and financially feasible.”¹⁹ This raises the possibility that a project could generate risks that cannot be avoided, reduced, or mitigated, and which cannot be compensated for or offset because doing so would not be technically or financially feasible. As structured, the mitigation hierarchy seems to create a perverse incentive to claim that compensation would be so expensive as to render a project nonviable, and that as a result, no compensation is therefore required. And yet this result, where the costs would directly outweigh the benefits, would apparently meet the objectives of Standard 1.

¹⁶ World Bank, Environmental and Social Framework, Second Draft for Consultation, ESS 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement, July 1, 2015 para. 31.

¹⁷ World Bank, Environmental and Social Framework, Second Draft for Consultation, ESS6: Biodiversity Conservation and Sustainable Management of Natural Resources, July 1, 2015, para. 24(b).

¹⁸ See, Leonardo A. Crippa, Senior Attorney, Indian Law Resource Center, Address at the World Bank and International Monetary Fund’s Annual Meetings: Key Recommendations to the Bank on FPIC (April 2013).

¹⁹ World Bank, Environmental and Social Framework, Second Draft for Consultation, ESS1: Assessment and Management of Environmental and Social Risks and Impacts, July 1, 2015, para. 5.

IV.2 | Standard 1: Project monitoring and reporting

The Bank should offer bright-line rules about what category of projects will trigger the requirement to engage stakeholders or third parties to complement or verify borrower's monitoring activities and should retain discretionary authority to mandate third-party monitoring in other situations as appropriate.

18. Project Monitoring and Reporting is addressed in paragraphs 45 through 50. This important responsibility is left to the borrower, although “where appropriate, the borrower will engage stakeholders and third parties, such as independent experts, local communities or NGOs, to complement or verify its own monitoring activities.”²⁰ Although borrowers have a clear obligation to monitor their own projects, there are evident conflicts of interest in this arrangement. The Bank should establish bright-line rules for when monitoring must be done by an independent party, such as for projects categorized as High Risk, and retain discretion to require third party monitoring in other circumstances.

IV.3 | Standard 7: Qualified experts' inputs

The Bank should require that when the Bank's screening determines that indigenous peoples are present in, or have collective attachment to the project area, the borrower seek inputs from appropriate specialists to meet the consultation, planning, or other requirements of this Standard.

19. Paragraph 8 states that “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.” The existing safeguard, OP 4.10 paragraph 8, states that if the Bank determines that Indigenous Peoples are present in or have collective attachment to the project area, the borrower is required to “[engage] social scientists whose qualifications, experience, and terms of reference are acceptable to the Bank” to conduct the necessary social assessment. This draft Standard thus represents a step back from current standards, by reducing the engagement of qualified experts from a mandatory obligation, to a discretionary measure that the Bank may impose. Given the difficult and technical problems posed by the interplay of indigenous peoples international human rights, domestic law, and the Bank safeguards, it is essential that qualified experts be engaged by the borrower in projects affecting indigenous peoples, their lands, territories, and natural and cultural resources.

IV.4 | Standard 7: Third-party verification

The Bank should ensure that benefit sharing with indigenous peoples is consistent with ownership rights and their right to development and should require third-party verification of compliance with benefit-sharing agreements.

²⁰ World Bank, Environmental and Social Framework, Second Draft for Consultation, ESS1: Assessment and Management of Environmental and Social Risks and Impacts, July 1, 2015, para. 45.

20. Paragraphs 26 through 28 address benefit sharing. However, there is no requirement that benefit-sharing agreements undergo third-party verification to ensure compliance. Instead, paragraph 26 states only that “The Borrower will ensure the timely delivery of agreed measures to affected Indigenous Peoples.” Benefit-sharing agreements are essential if indigenous peoples are to benefit from development activities. Whenever indigenous peoples’ lands, territories, natural or cultural resources are affected, benefits must be shared equitably with them consistent with their ownership rights and right to development.²¹ The establishment of third-party verification of the agreements reached with affected indigenous peoples will strengthen these agreements, and can help ensure successful development outcomes that will more successfully alleviate poverty among indigenous peoples.

V | OUTSTANDING ENFORCEMENT ISSUES

V.1 | Policy: Ensuring compliance

The Bank should ensure that it only supports projects that are expected to meet the requirements of the Standards and should require the borrower to prepare and implement projects so that they meet the requirements of the Standards.

21. The Policy sets out the Bank’s requirements in relation to the projects it supports through Investment Project Financing. Paragraph 7 of the Policy states that the Bank will only support projects that “are expected to meet the requirements of the ESSs in a manner and timeframe acceptable to the Bank.” Paragraph 16 states that the Bank will require the borrower to “prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank.” While these paragraphs rightly place primary responsibility on the Bank to ensure compliance with the Standards, the phrasing “in a manner and timeframe acceptable to the Bank” may leave too much discretion to the Bank to reinterpret the Standard on an *ad-hoc* or project-by-project basis. For the Standards to be meaningful standards that can guide Bank decision-making and risk assessment, they must be more than merely subjective guidelines.

V.2 | Policy: Evaluating project documents

The Bank should conduct its due diligence process by evaluating information supplied by the borrower regarding environmental and social risks and impacts against information available from reliable independent sources.

The Bank should establish clear standards for when borrowers will be required to retain independent third party specialists to assist in the assessment of environmental and social impacts.

22. Paragraph 30 of the Policy explains the Bank’s due diligence process. This process includes “(a) reviewing the information provided by the Borrower relating to the environmental

²¹ Leonardo A. Crippa, Chris Foley, et. al, Indian Law Resource Center, *Submission to the World Bank on the Review and Update of its Social and Environmental Safeguard Policies* (May 2013), para. 74.

and social risks and impacts of the projects, and requesting additional and relevant information where there are gaps that prevent the Bank from completing its due diligence; and (b) providing guidance to assist the Borrower in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESSs.” As described, this process is entirely limited to information provided by the borrower and provides no obligation for the Bank to assess its reliability or accuracy by reference to independent sources. Although paragraph 33 gives the Bank discretion to require the borrower to “retain independent third party specialists to assist in the assessment of environmental and social impacts” there are no clear standards for when this may be required. An evaluation by independent third party specialists may not be required in all cases, but a meaningful due diligence process for the Bank must include some evaluation of the reliability of the information presented by the borrower based on reliable independent sources.

VI | CONCLUSION

23. The Framework does reflect an evolution in the Bank’s understanding of indigenous peoples’ concerns and issues. However, as indicated in this paper, there are still outstanding issues that the Bank needs to address in order to better safeguard indigenous peoples, lands and resources. Most of these issues have been thoroughly discussed throughout this review process, can be easily fixed, and do not require further detailed debate. The U.N. Declaration on the Rights of Indigenous Peoples provides adequate guidance to fix these remaining concerns.

24. However, there are some issues that do require further discussions—for instance, the application of due process in consultation proceedings, and a proscription on support for projects promoting the conversion of collective property rights to land to individual ownership. Unfortunately, the failure to properly address these issues shows that the Bank either ignored the recommendations made by experts, such as a due process-related recommendation that emerged from a dedicated focus group meeting, or refuses to learn from its own positive experience in supporting projects relating to indigenous collective property rights to land, such as the Nicaragua Land Administration Project.²²

25. Finally, human rights is a cross-cutting issue that clearly requires a dedicated in-depth discussion. Despite the obvious relevance of human rights to both the Policy and the Standards, the Framework provides no evidence of any meaningful consideration of this issue. The Bank’s only attempt to address human rights is found in Standard 7 on indigenous peoples. The absence of any further effort to integrate human rights into the Framework is glaring. The Framework’s ad hoc and limited approach to this issue does not contribute to a better understanding of indigenous peoples’ human rights or bridge the gap between the Bank’s existing, out-dated policies and the current best practices in development.

²² During the 2013 World Bank Fall Annual Meetings, the Indian Law Resource Center held a high-level panel discussion on indigenous peoples’ lands and development with a focus on land administration projects in Nicaragua and Guatemala. All presentations made by the experts, including Alf Jerve, Isabel Lavandez-Paccieri, and Liza Grandia, are available in the Indian Law Resource Center’s website: <http://indianlaw.org/mdb/Oct-2013-panel>