

# INDIAN LAW RESOURCE CENTER

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March 10, 2016

Mark King  
Chief Officer, Environmental and Social Standards  
The World Bank  
1818 H Street NW  
Washington, D.C. 20433

**RE: Follow-up to the Multi-Stakeholder Consultation Meeting held in Washington, D.C.**

Dear Mr. King,

The Indian Law Resource Center is appreciative of the opportunity it had to participate in the multi-stakeholder consultation meeting on the World Bank's Proposed Environmental and Social Framework (ESF) that was held in Washington, D.C. on February 22-24, 2016. As the safeguard policies review process appears to be drawing to a close, the Center would like to highlight some of the central points we raised at this meeting on issues relating to indigenous peoples, involuntary resettlement, and cultural heritage. These points received unanimous support from the attendees, including the Safeguards Team members, officials of the U.S. Government, and representatives of non-governmental organizations.

The criticisms and suggestions on outstanding issues discussed herein are not comprehensive or exhaustive, but rather modest. They are some of the salient or most important outstanding matters that could affect indigenous peoples' well-being. Our main points and suggestions are summarized below and are discussed further in the body of our previous written comments,<sup>1</sup> which are available at <http://indianlaw.org/mdb/world-bank>.

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<sup>1</sup> See, Leonardo A. Crippa & Chris Foley, *Comments on the World Bank's Environmental and Social Framework Second Draft*, (Jan. 2016) (addressing outstanding issues relating to the substance and implementation of the proposed policies); 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.

- *Standard 7: Individual ownership of lands.* We urged the World Bank to either eliminate Standard 7 language referring to conversion of indigenous peoples' property rights to land into individual ownership, or set up a prohibition of financial support to projects seeking such a conversion. Considering that indigenous peoples own their lands collectively and hold a special relationship to their lands as distinct peoples within existing nation-states, such a conversion must be explicitly prohibited. Current policy language fails to meet the standard set by the U.N. Declaration on the Rights of Indigenous Peoples (U.N. Declaration) on this matter.<sup>2</sup>
- *Standards 5 & 7: Land-based redress.* We advised the World Bank to explicitly state in these Standards that: (1) land-based redress for indigenous peoples will be a priority; and that (2) when indigenous peoples are subject to involuntary resettlement, they should be guaranteed 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. Current policy language falls below the standard set by the U.N. Declaration.<sup>3</sup>
- *Standard 7: Indigenous peoples living in voluntary isolation.* We asked the World Bank to include an explicit prohibition for financial support to projects that may affect indigenous peoples living in voluntary isolation. Because current policy language is vague and does not set out a clear protection measure, it fails to meet regional applicable standards set by the Proposed American Declaration on the Rights of Indigenous Peoples,<sup>4</sup> the Inter-American Development Bank's Operational Policy on Indigenous Peoples,<sup>5</sup> and the Inter-American Commission on Human Rights.<sup>6</sup>
- *Standards 5, 7 & 8: Relocation of indigenous peoples' sacred sites.* We exhorted the World Bank to prohibit the relocation of indigenous peoples' sacred sites. As sacred sites are by their very nature site-specific, any attempt to 'relocate' these sacred spaces will destroy their religious and cultural value in all but the rarest cases. Such relocation would prevent indigenous peoples from manifesting, practicing, and teaching their

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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").

<sup>2</sup> Article 26(2) states that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 26(2), U.N. Doc A/RES/61/295 (Sept. 13, 2007).

<sup>3</sup> Article 28(2) states that replacement lands should be "equal in quality, size and legal status" unless free, prior and informed consent has been obtained for alternative redress. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 28(2), U.N. Doc A/RES/61/295.

<sup>4</sup> Article 25(2) asks states to "adopt adequate policies and measures... to protect the lands, territories, environment, and cultures of these peoples as well as their life, and individual and collective integrity. (**Agreed upon by consensus** in October, 2005 – Sixth Meeting of Negotiations in the Quest for Points of Consensus)." O.A.S. Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 10 (Apr. 30, 2015).

<sup>5</sup> This policy asks borrowers to "avoid contact with them as a direct or indirect consequence of the project." Inter-Amer. Development Bank, Operational Policy on Indigenous Peoples (OP/765), Feb. 22, 2006, page 38.

<sup>6</sup> Inter-Amer. C.H.R., *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas*, OEA/SER.L/V/II, Doc.47/13, Dec. 30, 2013, para 62, (recognizing their right to live in isolation in their territory).

spiritual and religious traditions, customs, and ceremonies associated with their sacred and ceremonial sites. Without a bright line prohibition on relocation of indigenous peoples' sacred sites, the current language in the ESF falls short of its goal to protect indigenous peoples' sacred sites and falls below the standard set by the U.N. Declaration.<sup>7</sup>

Neither Standard 5 nor Standard 7 prevent such relocation. Paragraph 17 of Standard 5 merely cross-references Standard 7 without discussing indigenous peoples' sacred sites. Unfortunately, paragraph 24 of Standard 7 applies only to projects that may "significantly impact cultural heritage that is relevant to the identity and/or cultural, ceremonial or spiritual aspects of Indigenous Peoples' lives," requiring that "priority... be given to the avoidance of such impact. Where significant project impacts are unavoidable, the Borrower will obtain the FPIC of affected Indigenous Peoples." The determination of "significant impact" is too vague to serve as an effective standard and its interpretation appears to be left to the borrower's discretion.

Standard 8 allows relocation of "archeological sites and material" (para. 18), "built heritage" (para. 22), and "natural features with cultural significance" (para. 25). The language in paragraph 25 is alarming, as it makes the borrower responsible of determining "whether it is possible to transfer the cultural heritage and/or sacred characteristics of a place to another location."

- *Standard 7 & 8: Due process of law.* We requested that the World Bank explicitly require in these Standards that due process is applied in all consultation proceedings with indigenous peoples where their rights and/or interests are subject to determination, as well as when projects intend to use indigenous peoples' cultural heritage/resources for commercial purposes. Standard 8 requires only that borrowers inform "affected parties", including indigenous peoples, about their rights, the scope of the commercial development, and potential benefits (para. 28). It also asks borrowers to carry out a meaningful consultation, provide for benefit sharing, and identify mitigation measures (para. 29). Standard 8 should be strengthened and clarified to ensure coherence with the greater protections found in paragraph 22(f) of Standard 7, which requires borrowers to afford due process where a project promotes the commercial development of indigenous peoples' land or natural resources. In turn, Standard 7 should extend the application of due process to projects promoting the commercial development of indigenous peoples' cultural heritage/ resources.

We hope that these observations and recommendations will be helpful in preparing a revised edition of the ESF, especially of Standards 5, 7 and 8. We recognize the difficulty of the task of producing a set of policies that will be useful and contain adequate information, without becoming burdensome and impracticable. Keeping this in mind, we have tried to keep our suggestions modest and limited in number.

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<sup>7</sup> Article 11(1) protects indigenous peoples' "right to maintain, protect and develop ...manifestations of their cultures, such as archaeological and historical sites..." Article 12(1) upholds indigenous peoples' "right to maintain, protect, and have access in privacy to their religious and cultural sites." U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 11(1) & 12(1), U.N. Doc A/RES/61/295.

It is of great importance that the World Bank progresses and moves toward vigorous and forthright actions and policies to protect and promote human rights in all of its work and in all of the projects it finances to borrowing countries. For this purpose, we have suggested to hold an in-depth and ongoing discussion on this matter through a working group, which should be comprised of key members of the World Bank's Board of Directors and Staff and outside experts. There is still much to be done, but we acknowledge and welcome the progress made thus far.

We thank the World Bank for the opportunity to submit further comments as a follow-up to the multi-stakeholder consultation meeting held in Washington, D.C. We look forward to our continued involvement with the World Bank as it proceeds to the final stages of the safeguard policies review process.



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