

**LEGAL RESOURCES CENTRE**

**SUBMISSION TO THE EXECUTIVE COMMITTEE ON DEVELOPMENT  
EFFECTIVENESS OF THE WORLD BANK**

**ON THE ENVIRONMENTAL AND SOCIAL FRAMEWORK**

**1 MARCH 2015**

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**Abbreviations**

ACHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
CODE	Committee on Development Effectiveness
ESCP	Environmental and Social Commitment Plans
ESP	Environmental and Social Policy
ESS	Environmental and Social Standards
FPIC	Free, prior and informed consent
GRS	Grievance Redress Service
LRC	Legal Resources Centre
PAPs	Project-affected persons
VSD	Vision for Sustainable Development

## Introduction

1. This is a submission prepared by the Legal Resources Centre (“**LRC**”) for consideration by the Committee on Development Effectiveness (“**CODE**”) on the World Bank’s Environmental and Social Framework (“**the Framework**”). The LRC is one of the oldest public interest law firms in South Africa, focussing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. In this regard, the LRC’s clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental economic, social and environmental rights.
2. In making this submission, the LRC does not purport to hold a mandate on behalf of all communities, or to be an expert in international finance. However, as will be seen from what is contained below, the focus of the LRC’s submission is in relation to the importance of appropriate community consultation and remedy, these being areas in which the LRC has had vast experience. The LRC has represented a number of communities who have been affected in various ways by large infrastructure development, particularly in the extractive industries, and would like to share its insights with the CODE.
3. The LRC is also committed to supporting the mandate of the African Commission on Human and Peoples’ Rights (“**ACHPR**”) Working Group on Extractive Industries, Human Rights and the Environment (“**the Working Group**”). The Working Group, established by resolution in 2009, has a

mandate to examine the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples' Rights ("**the African Charter**"), and to formulate recommendations and proposals on appropriate measures to prevent and provide reparation for violations of human and peoples' rights.

4. In line with this mandate, the Working Group motivated for the adoption of two further resolutions. The first one, adopted by the ACHPR in 2012,<sup>1</sup> emphasised amongst other things the disproportionate impact of human rights abuses upon rural communities in Africa "that continue to struggle to assert their customary rights of access and control of resources including land, minerals, forestry and fishing" and called for "*independent social and human rights impact assessments that guarantee free prior and informed consent*". The second, adopted by the ACHPR in 2013,<sup>2</sup> noting that illicit capital flight from Africa "*leads to the loss of billions of US dollars every year*" and recognising "*the need for State Parties to develop and implement robust and efficient tax collection systems*", requested the Working Group, together with the Working Group on Socio-Economic and Cultural Rights, to undertake a study on the impact of illicit capital flight on human rights in Africa.
5. As will be set out more fully in this submission, the LRC submits that the CODE must, as part of the Framework, ensure that communities are aware of the Framework and design a process of consultation with affected communities on any deliberative process, with any decisions arising from such process of consultation being based on the principle of free, prior and informed consent

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<sup>1</sup> ACHPR/Res.224 (LI) 2012: Resolution on a human rights-based approach to natural resources governance. Available at: [www.achpr.org](http://www.achpr.org) (last accessed 26 August 2014).

<sup>2</sup> ACHPR/Res.236: Resolution on illicit capital flight from Africa. Available at: <http://www.achpr.org/sessions/53rd/resolutions/236/> (last accessed 26 August 2014).

(“**FPIC**”). Communities must also be guaranteed a minimum standard of protection of rights, and be given an opportunity for recourse for violations of those rights. In our view, as will be set out more fully below, this is the only way to ensure that the communities are active participants in processes that affect them and their development.

6. These submissions are made in the context of an increasing uprising from affected communities across the developing world against development projects that leave them worse off. From Marikana to Solwezi and from Assam to Patagonia, communities are asserting their rights to be taken seriously as agents in their own development – in the process successfully delaying or even halting major projects. The World Bank and its partners can no longer afford to treat these communities as spectators, but must recognise them as central to the projects planned. Our comments on the current review of the safeguards take this principle as a starting point.
7. In its common cause that the safeguards in their current form have not protected affected communities or promoted their right to development. A mere tinkering with these failed provisions, the LRC submits, will not be sufficient to turn the tide.
8. This submission is set out as follows:
  - 8.1. Firstly, we set out the scope of the LRC’s submission;
  - 8.2. Secondly, we deal with the application of the Framework;
  - 8.3. Thirdly, we outline our concerns regarding the World Bank’s duties of oversight, particularly in low-governance countries;

- 8.4. Fourthly, we deal with community consultation and FPIC, and set out our proposals for how this can be better operationalised; and
- 8.5. Lastly, we consider the grievance mechanism as contemplated in the Framework.
9. We deal with each of these in turn below.

### **The scope of the LRC's submission**

10. This submission is made as part of review process undertaken by the Code on the Framework that was published for consultation on 30 July 2014. According to the Framework, it comprises the following documents:<sup>3</sup>
- 10.1. The "Vision for Sustainable Development ("**VSD**")", setting out the World Bank's aspirations regarding environmental and social sustainability;
- 10.2. The Environmental and Social Policy ("**ESP**")", setting out the mandatory requirements that apply to the World Bank;
- 10.3. The Environmental and Social Standards ("**ESS**")", setting out the mandatory requirements that apply to a borrower and projects;
- 10.4. The "Environmental and Social Procedures, still in preparation, setting out the mandatory requirements for the World Bank and the borrower on how to implement the ESP and the ESS; and
- 10.5. Non-mandatory guidance and information tools to support the World Bank and the borrower to implement the ESP and the ESS.

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<sup>3</sup> The Framework at p 1.

11. This submission does not purport to address all aspects of the Framework. Rather, as mentioned above, the focus of this submission is targeted on communities and project affected persons (“**PAPS**”) in three particular aspects: (i) consultation; (ii) protection mechanisms; and (iii) redress.
12. We have had regard to the twin goals contained in the World Bank’s “Strategy 2013” of ending extreme poverty and promoting shared prosperity in all its partner countries.<sup>4</sup> We have also noted that, as contained in the VSD – albeit subject to the qualification of “*within the parameters of the project*” - the World Bank seeks to avoid or mitigate adverse impacts to people and the environment; conserve or rehabilitate biodiversity and natural habitats; promote worker and community health and safety; give due consideration to indigenous peoples, minority groups and those disadvantaged because of age, disability, gender or sexual orientation; ensure that there is no prejudice towards PAPS or communities in providing access to development resources and project benefits; and address project-level impacts on climate change.<sup>5</sup>
13. The LRC is unable to agree with the very starting point of this approach, which is based on a top-down approach to development (despite its failed track record) and affords communities nothing more than a tenuous opportunity to avoid the worse impacts of the project on their existence and livelihoods. For one, the approach fails to comply with the standard set by the ACHPR in its interpretation of the African Charter on Human and Peoples’ Rights’ protection

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<sup>4</sup> VSD at para 1.

<sup>5</sup> Vision at para 5.

of the right to development. The Commission, in its Endorois decision,<sup>6</sup> held that (emphasis added):

*“[T]he right to development is a two-pronged test, [...] it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development [...] recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. [...] Freedom of choice must be present as a part of the right to development. [...] The conditions of the consultation failed to fulfil the African Commission’s standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role. Furthermore, the community representatives were in an unequal bargaining position, [...] being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.”*

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<sup>6</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya Communication 276/03 at paras 277-282.

14. There is no justification for the World Bank to elect for a lower standard of consultation in its Safeguards as applicable on the African continent.
15. However, should the Bank persist with its approach, the LRC would emphasise in the strongest terms that its objectives can only be achieved if the voices of communities and PAPs are adequately and appropriately heard, and where legitimate matters of concern are raised, that these are taken on board and result in the altering of the course of the project in question. It is for this reason that the LRC has identified the abovementioned three areas of concern for consideration in this submission.

### **Application of the Framework**

16. The LRC notes at the outset that we are deeply concerned that projects that have received approval by the World Bank prior to the entry into force of the Framework will be subject to the policies currently in place, rather than to the social and environmental standards contained in the Framework. We submit that by mere virtue of this review being undertaken, the World Bank has acknowledged that policies in place are inadequate, and that better safeguards are needed to protect PAPs and communities. The World Bank currently has a reported 12 201 projects in 173 countries,<sup>7</sup> which in the current provisions of the Framework will not be required to comply with the environmental and social standards that the later projects will be subject to. This, in our view, is simply unacceptable.

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<sup>7</sup> See <http://www.worldbank.org/projects> (as at 1 March 2015).

17. While we accept that there will be agreements already in place with borrowers for these projects, this in itself ought not to disqualify the application of the Framework. Firstly, the operating procedures provide that they may be amended or updated as appropriate from time to time. Secondly, we view it as likely that the agreements concluded by the World Bank with borrowers contain a clause providing for the amendment or variation of that agreement. It is thus clear that there are bases on which the Framework can be appropriately provided for even in existing agreements.
18. As such, we propose that the current paragraph 53 of the ESP be amended as follows:
- “This Policy is effective as of [ ]. In relation to Projects receiving initial approval by Bank management prior to the entry into force of this Policy will be expected to enter into discussions with the Bank for the incorporation of this Policy into the existing procedures.”*
19. For those projects accepted after the Framework comes into operation, we would further suggest that the Framework makes it clear that compliance with it must continue to be pursued on an on-going basis throughout the lifespan of the project, and that initial compliance will not be sufficient for the World Bank to support a project to completion. Although this is apparent from annex 1 to ESS 1, for example, in relation to the environmental and social audit, the ESP does not contain a commensurate mandatory obligation on the World Bank to monitor compliance, and we submit that such a provision should be included in the ESP.
20. We turn next to consider the duties and responsibilities of the World Bank as contained in the Framework.

## The duties and responsibilities of the World Bank

21. There is no acceptable reason whatsoever for the World Bank to abdicate responsibility for the assurance that its projects adhere to an appropriate standard of human rights and environmental preservation. On the current reading of the Framework, however, it appears that the World Bank largely passes off any responsibility or duties that it may carry to the borrower, relying wholly on information provided to it by the borrower. While the World Bank may on occasion intervene at its own choosing, we submit that this is not sufficient.
22. The main responsibilities of the World Bank are set out in paragraph 3 of the ESP. It is clear from this that other than an oversight role, the World Bank has opted for a hands-off approach, relying heavily on the good faith of the borrower to comply with the Framework and provide reliable information.<sup>8</sup> A prime example of this is in relation to community consultation, stated in paragraph 3(b) of the ESP, which limits the World Bank's role in this regard to providing assistance to the borrower "[a]s and when required". This caveat provides the World Bank with the option to opt out whenever it so chooses and leave it to the sole discretion and instance of the borrower.
23. There are four somewhat inter-related aspects in particular relating to the World Bank's responsibility for the implementation of the Framework that are of particular concern to us:

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<sup>8</sup> The inadequacy of this approach is well-documented. See for example *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations* Human Rights Watch Report July 2013; *Cameroon: Pipeline to Prosperity? What happened to the project promoters called a "cargo of hope" for Africans* Pulitzer Center on Crisis Reporting and the Center for Investigative Reporting June 2010; *Tanzania: World Bank Funded Water Project a Failure – Activists* Tanzania Daily News 7 March 2013.

- 23.1. Due diligence and independent verification of information;
  - 23.2. The consequences of non-compliance and the standard of acceptability to the World Bank;
  - 23.3. The legal framework in the country in which the project will take place;
  - 23.4. Community consultation and engagement.
24. We deal with these below.

*Due diligence and independent verification of information*

25. Paragraph 3(a) of the ESP provides that the World Bank will undertake its own due diligence of proposed projects “*commensurate with the nature and potential significance of the environmental and social risks and impacts*” related to the project. Paragraph 29 of the ESP identifies the World Bank’s due diligence responsibilities, and states that:

*“The Bank’s due diligence responsibilities will include, as appropriate: (a) reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the project,<sup>9</sup> 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. The Borrower is responsible for ensuring that all relevant information is provided to the*

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<sup>9</sup> For example, pre-feasibility studies, scoping studies, national environmental and social assessments, licenses and permits.

*Bank so that the Bank can fulfill its responsibility to undertake environmental and social due diligence in accordance with this Policy.”*

26. In short, crudely put, the extent of the World Bank’s role is effectively to review information and provide guidance to the borrower. The World Bank does not actively participate in the information-gathering process and, of even more concern, does not endeavour to verify the information that it receives. Even the scope of the due diligence undertaken depends entirely on the information provided to it by the borrower.<sup>10</sup> Although the World Bank undertakes to assess the gaps in the information,<sup>11</sup> it is more than likely not to be aware of what gaps might exist without having any on-the-ground knowledge of the circumstances.
27. The World Bank is therefore rendered largely reliant on the information provided to it by the borrower. A key example of this would be in terms of the risk classification of the project, which carries with it significant consequences.<sup>12</sup> It would appear from paragraph 20 of the ESP that the information on which the World Bank bases its classification is that which it has received from the borrower, with no independent effort to verify it. While this is not to say that a borrower will necessarily lie, it would be naïve to think that a borrower would not omit information (either intentionally or inadvertently) that may be unfavourable to the project, or present information in a nuanced manner favourable to the project being granted with the least onerous obligations. Furthermore, information gathering that neglects local or indigenous knowledge and experience is known to produce skewed results that lack legitimacy. The World

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<sup>10</sup> ESP at para 3(a).

<sup>11</sup> ESP at para 29.

<sup>12</sup> ESP at para 20.

Bank is consequently at risk of basing its decision on incomplete or inaccurate information, which may be to the detriment of the community and the PAPs.

28. Clause 48 does provide that the Bank will require “[w]here appropriate” that the borrower must engage with stake holders and third parties (such as independent experts, local communities, non-governmental organisations or agencies), to “*complement and monitor project monitoring information*”. In our view, this is an important provision, but needs to be strengthened in order for it to have a meaningful impact. In this regard, we would suggest (i) that the words “*[w]here appropriate*” be deleted, so that such independent verification and community engagement take place in respect of all projects; and (ii) that this should be a supplementary safeguard measure taken in addition to the World Bank independently verifying information for itself – in particular through direct engagement with those affected by the project in question.
29. We are also concerned that the due diligence may be construed as a once-off obligation. Even in the event that the role of the World Bank is confined to mere oversight – which, for the reasons set out above, we submit would be insufficient – this oversight function should be maintained on an on-going basis, and this should be made pertinently clear in the Framework.

#### Community consultation and engagement

30. As noted above, paragraph 3(b) of the ESP provides that the World Bank may assist the borrower with consultation and engagement in cases where it chooses to do so. In terms of paragraph 44 of the ESP, the World Bank requires the borrower to “*engage with communities, groups or individuals affected by proposed projects, and with civil society, through information disclosure, consultation, and informed participation in a manner commensurate*

*with the risks to and impacts on affected communities*". This, however, appears to stand as a separate requirement from paragraph 45, which requires that where indigenous peoples are present in the proposed project area, the borrower is required to undertake a process of "*meaningful consultation*". The standard of FPIC is apparently only required when engaging with 'Indigenous Peoples'. This limitation on the right to FPIC is contrary to the African Charter's application of the right to development that all rural communities with customary forms of ownership and resource rights may claim. Indeed, and as we elaborate below, the ACHPR has emphasised that "*the term 'indigenous' is [...] not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities*".<sup>13</sup> The collective rights that protect indigenous peoples as marginalised people in Africa apply equally to all marginalised communities on the continent.<sup>14</sup>

31. The matter of community consultation and engagement is dealt with in more detail below. For the purposes of this section, our submission – similar to the submission above – is simply that this should not be a matter left to the sole discretion of the borrower. Although the World Bank is given the right to participate in this consultation, it has no duty to do so, and we are concerned that the only function that the World Bank would have in such circumstances would be of an oversight nature based on the information that it receives from the borrower.

*The legal framework in the country in which the project will take place*

32. Paragraph 24 of the ESP provides that the Framework will include "*those aspects of the country's policy, legal and institutional framework, including its*

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<sup>13</sup> Endorois (n6 above) at para 149.

<sup>14</sup> This was confirmed by the ACHPR's resolution 224 of 2012 (n 1 above).

*national, subnational, or sectoral implementing institutions and applicable laws, regulations, rules and procedures, and implementation capacity, which are relevant to the environmental and social risks and impacts of the project*". The concern, however, is in countries with low governance and poor human rights records whose laws do not guarantee the protection of rights, or promulgate laws that are not in compliance with human rights standards. Although the World Bank and the borrower are required to work together to "address gaps" in the Framework, it is unclear what this will mean in practice if such a gap were to be identified.

33. We would suggest that the World Bank adopt the following approach:
  - 33.1. Require compliance with the highest applicable standard whether found in the domestic legal framework, applicable international law or the Safeguards;
  - 33.2. With input from borrowers, governments, communities and civil society organisations, put together a list of countries with low governance or poor human rights track records. This list should be revisited on a regular basis to take into account the most recent developments, and a rubric should be created to establish the types of considerations that would cause a country to be placed in this list.
  - 33.3. Further, we would suggest that the World Bank impose a level of conditionality. This would include, for instance, requiring the borrower to put in place a clear framework to establish how it would promote and protect rights in lieu of the country doing so as a pre-condition to the project being granted.

34. This list should not, however, be exhaustive, and the World Bank should retain the power to impose conditionality in order to enforce compliance with human rights standards in any appropriate case. Such measures would serve to ensure that an appropriate level of rights would be protected for communities and PAPs.

*The consequences of non-compliance and the standard of acceptability to the World Bank*

35. It is unclear to us what the tipping point would be for the World Bank to decline to take on a project based on the information provided to it by the borrower in accordance with the Framework. We note in this regard that paragraph 4 of the ESP sets out the environmental and social risks that the World Bank will take into account in its due diligence, and that paragraph 5 of the ESP states that the World Bank projects are required to meet the ESS. Our particular concern, however, arises from paragraphs 7 and 13 of the ESP. In terms of these paragraphs, projects must comply with the ESS and be structured in a manner so that they *“meet the requirements of the ESSs in a manner and within a timeframe acceptable to the Bank”*.
36. Footnote 14 to paragraph 13 gives some guidance in this regard. It states that *“[i]n establishing the manner and an acceptable timeframe, the Bank will take into account the nature and significance of the potential environmental and social risks and impacts, the timing for development and implementation of the project, the capacity of the Borrower and other entities involved in developing and implementing the project, and the specific measures and actions to be put in place or taken by the Borrower to address such risks and impacts.”* This footnote is not, however, included in paragraph 7 as well, despite paragraph 7

having an almost-identical qualifier to it, and at a minimum we submit that this footnote should be incorporated into the contents of both paragraphs 7 and 13.

37. However, our submission goes further than this. Even with the explanatory note contained in footnote 14, the requirement of compliance with the ESS in a “*manner and timeframe acceptable to the Bank*” is untenably vague, and could seriously diminish the impact of the ESS. It is also difficult for borrowers to know what the acceptable level of compliance is and, more importantly for the LRC and similar organisations, for communities to know what level of compliance is unacceptable in order for PAPs to be entitled to seek redress.
38. Without wanting to be too formulaic in the approach, we would suggest the preparation of a rubric setting out the factors to be taken into account when making such a determination, and the weighting given to these factors. Whilst this may well vary on a case-by-case basis, this would at least lend a measure of certainty and transparency to the process.

### Recommendations

39. In view of the submissions set out above, our recommendations would be as follows:
- 39.1. That the World Bank adopt an active role in ensuring that there is compliance with the Framework, as opposed to relying simply on information received from the borrower. In this regard, we would propose that each project should be assigned a World Bank representative to oversee the project on the ground, and also provide reports on the project to the decision-makers within the World Bank. This person may be employed on a full-time or part-time basis, and the cost of this could be built into the project costs. Although this would not

resolve all matters, it would at least provide a mechanism for the World Bank to attempt to verify the information received, and serve as an additional incentive to the borrower to act in a transparent and accountable manner;

- 39.2. That the words “[a]s and where required” be deleted from paragraph 3(b) of the ESP;
- 39.3. That the words “[w]here appropriate” be deleted from paragraph 49 of the ESP;
- 39.4. That the World Bank impose a system of conditionality on countries with low governance and poor human rights track records;
- 39.5. That the World Bank develop a rubric to identify the considerations taken into account when determining the acceptability of the manner and timeframe of meeting the requirements of the ESS and structuring the project.

## **Community consultation and FPIC**

### *The appropriate level of engagement*

40. Community consultation and engagement is, of course, not new to frameworks for lending standards. The importance of this, with FPIC being the basis of any decision arising from that consultation, cannot be gainsaid.
41. Earlier in this document, we have alluded to one of our central submissions, namely that the standard of FPIC cannot, in the African context, be limited to ‘indigenous peoples’. The difficulty of translating the concept of ‘indigenous

peoples' from its origins in Latin America to the African context is well-documented.<sup>15</sup> As a result, the ACHPR, the definitive interpretive body of the African Charter on Human and Peoples' Rights, has emphasised not the definition of indigeneity itself, but rather the function of the term, or the outcome to be achieved. The function of protecting indigenous peoples, they say, is to address historical and present-day injustices. Such injustices, they acknowledge elsewhere,<sup>16</sup> continue for all African communities who even today are denied protection of their customary entitlement to land and resources based on continued discrimination against indigenous forms of law.

42. This approach is in line with developments elsewhere.
43. The World Bank's own Extractive Industries Review of 2003/2004 concluded that all potentially affected communities, classified as indigenous or not, should have the right to FPIC. The following recommendations were made:<sup>17</sup>
- 43.1. The World Bank should only support projects that benefit all affected local groups, including vulnerable ethnic minorities, women, and the poorest. The World Bank should decline to finance projects where this is not the case or should redesign them to guarantee that the standards of living for local groups clearly improve. The communities closest to extractive projects should become involved in participatory assessments of projects, giving free and prior informed consent to plans and projects and developing poverty reduction plans before projects begin.

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<sup>15</sup> See, for example, the work of the African Commission's Working Group on Indigenous People discussed below.

<sup>16</sup> Resolution 224 of 2012 states that the ACHPR is "*mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing*".

<sup>17</sup> The Final Report of the Extractive Industries Review Vol 1 Dec 2003 available at [http://bankwatch.ecn.cz/eir/reports/vol\\_1\\_eng.pdf](http://bankwatch.ecn.cz/eir/reports/vol_1_eng.pdf). P 49-50.

- 43.2. The World Bank should ensure that borrowers and clients engage in consent processes with indigenous peoples and local communities directly affected by oil, gas, and mining projects, to obtain their free prior and informed consent.
- 43.3. Participation should start at the project identification and comprehensive options assessment stage, before social and environmental assessment begins. It should lead to an agreed-upon environmental and social management system for construction, operation, and decommissioning. Social and environmental assessments need to be fully participatory and systematically updated as soon as there are plans to change any conditions.
- 43.4. FPIC should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a social license to operate.
- 43.5. Clearly, such consent processes ought to take different forms in different cultural settings. However, they should always be undertaken in a way that incorporates and requires the FPIC of affected indigenous peoples and local communities. The most affected groups are often the poorest

and the most vulnerable. Women, ethnic minorities, and indigenous peoples might otherwise not be included in local decision making processes, even though they often bear the brunt of the burden of negative impacts.

44. The Food and Agriculture Organisation's 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests – with objectives similar to that of the guidelines discussed here – provide that (emphasis added):<sup>18</sup>

*“States and other parties should hold good faith consultation with customary communities before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation [...] through their own representative institutions in order to obtain their free, prior and informed consent . . .”*

45. Thus, the standard of FPIC should be seen as an absolute minimum requirement before any conduct is asserted towards all local communities in Africa. In order for communities to choose and give their consent openly, freely and in an informed manner, there has to be one or more alternatives for how people can choose to use their resources. Moreover, to enable a community to be able to make such a choice, the community must be able to consult, engage and negotiate.
46. Unfortunately, consultation in reality most often occurs in the context of inevitability about the decision of a project to go ahead. Consultation has come

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<sup>18</sup> Available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

to be synonymous by way of assessment with the ‘tick box’ approach to corporate responsibilities and human rights. We submit, however, that FPIC, rather than being a once-off, yes/no vote, is a process by which PAPs, indigenous peoples, minorities, local communities, vulnerable members of society, government, companies and financiers may come to a mutual agreement in a forum that gives those affected enough leverage to negotiate conditions under which the project may proceed and an outcome leaving the community better off.

47. Community consultation is also important given that communities are not necessarily homogenous, and it is critical to understand the diversity of views of the community rather than simply the loudest voices. The failure to properly consult with the community can result in manifestly unfair results arising from a procedure that is geared towards assisting communities. While there are certainly practical issues that arise as a result of this – issues that are undoubtedly difficult and complex – it is crucial that these are heard and mediated in order to reach an outcome that is acceptable to those most affected by the project.
48. The Asian Development Bank has identified the provision of sufficient and timely information to communities and the holding of meaningful community consultations as two of the three key factors to prevent grievances. It is stated in this regard that:<sup>19</sup>

*“Grievances cannot be avoided entirely, but much can be done to reduce them to manageable numbers and reduce their impacts. Implementers should be aware and accept that grievances do occur,*

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<sup>19</sup> Asian Development Bank, *Designing and implementing grievance redress mechanisms: A guide for implementers of transport projects in Sri Lanka*, 2010.

*that dealing with them is part of the work, and that they should be considered in a work plan. Implementers should do the following:*

- *Provide sufficient and timely information to communities. Many grievances arise because of misunderstandings; lack of information; or delayed, inconsistent, or insufficient information. Accurate and adequate information about a project and its activities, plus an approximate implementation schedule, should be communicated to the communities, especially [PAPs], regularly. Appropriate communication channels and means of communication should be used. 'In line with [the Asian Development Bank's] Public Communications Policy, [the Asian Development Bank] is committed to working with the borrower .... to ensure that relevant information (whether positive or negative) about social and environmental safeguard issues is made available in a timely manner, in an accessible place, and in a form and language(s) understandable to affected people ....'*
- *Conduct meaningful community consultations. Project implementers should continue the process of consultation and dialogue throughout the implementation of a project. Sharing information, reporting on project progress, providing community members with an opportunity to express their concerns, clarifying and responding to their issues, eliciting communities' views, and receiving feedback on interventions will benefit the communities and the project management."*

49. The grievances of local communities are not a mere 'risk factor' to be anticipated and mitigated by borrowers. It is an expression of their fundamental rights in a context where these rights are habitually ignored or negated. That is the starting point, we submit, to any engagement with affected communities.
50. Having considered the broad framework of consultation and FPIC, we turn next to consider the specific terms of the Framework.

*The discretionary nature of the requirement for consultation on the part of the World Bank*

51. The ESP is the starting point for understanding what the Framework requires from the World Bank and the borrower:
- 51.1. In terms of paragraph 3(a) of the ESP, “[a]s and where required”, the World Bank is to assist the borrower to carry out “*early and continuing engagement and meaningful consultation with stakeholders*”.
- 51.2. However, the obligation for consultation rests squarely on the borrower. Paragraph 44 requires the borrower to engage with *inter alia* communities and PAPs, while giving the World Bank a right to participate. Similarly, paragraph 45 requires borrowers to undertake a process of meaningful consultation with indigenous peoples where they are present in, or have a collective attachment to, the proposed project area.
- 51.3. Indeed, paragraph 45 of the ESP makes specific mention of FPIC in the context of a discussion as to the vulnerability of indigenous peoples, in which it states that:

*“[T]he Bank recognizes that Indigenous Peoples may be particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. In recognition of this vulnerability, the Bank will require the Borrower to obtain the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples when such circumstances described in ESS7 are present. There is no universally accepted definition of FPIC. It does not require unanimity and may be achieved even when individuals or groups within or among affected Indigenous Peoples explicitly disagree. When the Bank is unable to ascertain that such consent is obtained from the affected Indigenous Peoples, the Bank will not proceed further with the aspects of the project that are relevant to those Indigenous Peoples. In such cases, the Bank will require the Borrower to ensure that the project will not cause adverse impacts on such Indigenous Peoples.”*

52. In our view, we submit that the current Framework should provide the same guarantee of meaningful consultation and FPIC to all PAPs as opposed to indigenous peoples alone. We consider this further below.
  
53. Furthermore, we note that, as mentioned above, we consider clause 48 to be an important clause, and are of the firm view that stakeholders and third parties must play an active role in complementing and verifying project monitoring information. In this regard, we re-iterate the submission made above that this important safeguard should be strengthened, for instance by deleting the words “[w]here appropriate” and causing it to be a mandatory requirement for all projects.

54. We submit that the factors mentioned above should be appropriately captured in the ESP and the ESS where applicable. Moreover, we submit that clear and specific obligations, with properly identified key performance indicators, in relation to engagement with communities and PAPs should be a mandatory clause in all Environmental and Social Commitment Plans (“**ESCP**”) as contemplated in annex 2 to ESS 1.

Reconciling the ESP and the ESS

55. There are various provisions in the ESS that provide generally for community consultation and require broadly (and rather blandly) that the borrower must undertake community engagement, including for instance paragraphs 16 and 22 of ESS 1. As has already been set out above, it appears from the ESP that the obligation to consult with communities is placed squarely on the borrowers, with the World Bank being entitled to intervene in cases of its choosing.
56. Inexplicably, however, other standards in the ESS do not specify the need for community engagement. A significant example of this is ESS 4 regarding community health and safety, in which there are no provisions made regarding consultation in order to assess the risks and the consequences thereof on communities and PAPs. Although the ESP would nevertheless be applicable, it is unclear what the implication of the distinction is between ESS 1 for example that instils a duty to consult, and ESS 4 on the hand that contains no such provision. We submit that a consistent approach should be adopted in this regard.
57. A further consideration is paragraph 4 of annex 1 to ESS 1, which provides that *“[t]he Borrower will consult with the Bank to determine the process to be used, taking into account a number of activities, including ... stakeholder*

*engagement*<sup>9</sup>. It therefore appears that the preliminary decisions taken in relation to community consultations are taken in conjunction with the World Bank, and that the World Bank has a more definitive role than the ESP contemplates. What remains unclear, however, is how these decisions are taken, what factors are taken into account, and what strategy is used to determine the process for community consultation.

58. While the LRC acknowledges the effort made in ESS 10 to provide a structured mechanism for consultation, we submit that we do however have several concerns regarding its provisions. These include:
  - 58.1. That paragraphs 11 and 20 of ESS 4 should not just cater for communications to be published in different languages, but should also take into account that people in communities may be illiterate;
  - 58.2. That paragraphs 12 and 13 do not provide any indication of how the borrower will identify the PAPs affected or likely to be affected by the project, or with an interest in the project. These clauses should provide better guidance – and make it mandatory – of what is expected of borrowers when undertaking the exercise of identifying the relevant people;
  - 58.3. That the Stakeholder Engagement Plan, as contained in paragraph 14 of ESS 10, should be specifically audited by the World Bank for compliance with what is considered to be acceptable standards of consultation.
59. In sum, the key shortcomings of ESS 10 are essentially three-fold: (i) that it doesn't set out a procedure or the requisite extent required to identify the relevant members of the communities or the minimum steps required for meaningful engagement; (ii) that it doesn't provide a clear oversight function for

the World Bank or prescribe criteria against which the borrower's compliance may be measured; and (iii) that it doesn't provide guidance on what to do when there are dissenting voices in the community.

60. In our view, the process for consultation should be clearly set out in all cases, but this is all the more important for those cases which carry with it serious consequences, such as resettlement as contemplated in ESS 5. While putting together such a process is no easy task, and will of course need to be adaptable depending on the circumstances of each case, it is by no means impossible; this is evident from the fact that such a step-by-step list was compiled in relation to indigenous peoples as contained in paragraph 24 of ESS 7. In our view, we submit that this minimum procedure should be a mandatory requirement for consultation with all communities and PAPs.

*Provisions regarding indigenous peoples*

61. We note the concerns raised in clause 5 of ESS 7 that “[t]here is no universally accepted definition” of indigenous peoples. The difficulty with referring to indigenous people arises firstly from the need to identify who classifies as indigenous, and secondly from the exclusion of those who do not. In limiting the scope to refer only indigenous people, other groups of people who may well be marginalised and vulnerable are nevertheless excluded. Even taking into account the characteristics identified in paragraph 6 of ESS 7, this is still a murky distinction to draw.

62. We have alluded to the approach of the ACHPR in this regard. They rely in part on the work of the African Commission's Working Group on Indigenous Peoples. The Working Group has noted:<sup>20</sup>
- 62.1. The term indigenous population does not mean first inhabitants in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other continents;
- 62.2. The term indigenous population or community is not aimed at protecting the rights of a certain category of citizens over and above others. This notion also does not create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups which have been historically marginalised;
- 62.3. In the African context, the notion of self-determination refers to cultural and socio-economic rights and their equal enjoyment. As a political right, it only guarantees internal group rights.
63. Accordingly, in light of the applicable legal standards in the African context, we would propose that reference should be made to "*affected people*" or "*affected communities*" rather than to "*indigenous*". The protection and rights afforded to indigenous peoples in terms of paragraph 45 of the ESP and ESS 7 should be afforded to all vulnerable PAPs, and the World Bank and the borrower should enforce these provisions fairly and equally to the benefit and favour of all persons concerned.

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<sup>20</sup> Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Populations.

Recommendations

64. In view of the submissions made above, and the crucial importance of community consultation and FPIC, we would suggest the following:
- 64.1. That the guarantees in relation to meaningful engagement and FPIC apply to PAPs, and the distinction between indigenous people and others should fall away;
- 64.2. That meaningful engagement with stakeholders and the community be included in all Environmental and Social Commitment Plans with clear key performance indicators;<sup>21</sup>
- 64.3. That a process be established and incorporated as part of the Framework setting out in detail the process to be followed to achieve the minimum accepted standard of community engagement, in a similar vein to that set out in ESS 7 in relation to indigenous peoples;
- 64.4. Prescribing the consequences for non-compliance (or insufficient compliance) with meaningful engagement as required by the Framework.

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<sup>21</sup> Annex 2 to ESS 1.

## Grievance mechanisms

### The mechanisms provided for in the Framework

65. We submit that a properly-functioning grievance mechanism is indispensable to a legitimate and credible framework. According to the ESP, there are several possible avenues to be pursued:
- 65.1. Firstly, in terms of paragraph 50 of the ESP, the World Bank requires the borrower to provide a grievance mechanism, process or procedure to receive and facilitate the resolution of stakeholders' concerns and grievances arising in connection with the project, in particular about the Borrower's environmental and social performance. This is to be scaled to the risks and impacts of the project; and
- 65.2. Secondly, in terms of paragraph 51 of the ESP, PAPs may submit complaints regarding a project to the project grievance redress mechanism, appropriate local grievance mechanism, or the World Bank's Grievance Redress Service ("**GRS**");
- 65.3. Thereafter, paragraph 51 of the ESP further provides that PAPs may also submit their complaint to the World Bank's independent inspection panel to request an independent compliance audit to determine whether harm has occurred as a result of World Bank non-compliance with its policies and procedures.
66. The Framework states that the obligations of the borrower are set out in more detail in ESS10, and more particularly in annex 1 to ESS10, although annex 1 is very scant in detail. Certain standards with the ESS – such as ESS 2 in relation to labour and working conditions, ESS 4 in relation to community health and

safety and ESS 7 in relation to indigenous peoples – stipulate that a grievance mechanism must be established in accordance with ESS 10.

*Possible shortcomings of the grievance mechanism*

67. We have several concerns with the grievance mechanism as currently postulated by the Framework:

67.1. Given the scant nature of annex 1 to ESS 10, the redress mechanism established by the borrower is largely at the borrower's discretion. We would strongly encourage the World Bank to expand upon the requirements of ESS10, in particular in relation to who the decision-makers of the redress mechanism would be.

67.2. Secondly, it appears to us that the GRS is focused on procedural compliance with the World Bank's Operating Provisions, and these should be amended to align with the Framework as well.

67.3. Thirdly, although the provisions above – most notably the inspection panel – provide for a grievance to be lodged and investigated, they do not prescribe the consequences of adverse findings against the borrower, particularly for non-compliance with the social and environmental safeguards contained in the Framework. This has frequently been recognised as one of the most crucial aspects of any grievance mechanism, and is essential to give credibility and ensure compliance. Failure to meaningfully engage with communities in relation to relocation, for instance, should carry with it a significant penalty that would deter borrowers from obviating this requirement. Although we recognise that redress is typically set out in the agreement entered into between the World Bank and the borrower, this lack of openness hinders

accountability, and should be made freely known to communities and PAPs in order for them to compel compliance with the Framework.

67.4. Fourthly, these grievance mechanisms do not appear to contemplate offering relief to PAPs where there is imminent harm that may occur. As stated in paragraph 51, for example, a complaint to the independent inspection panel is to determine whether harm has occurred, but does not provide for any anticipatory relief to be sought. It is easily conceivable, for instance, that non-compliance with ESS 3 that results in hazardous materials potentially polluting the community's water or land may be foreseen, and an anticipatory order may be justifiable. The result of this is that a PAP who foresees harm or damage being caused would have to resort to court litigation, but could not make use of the internal mechanisms provided through the Framework, the very purpose of which is to provide quick and accessible relief at the lowest level.

68. As we have already mentioned above, it is necessary for communities and PAPs to properly understand what the tipping point would be for the World Bank in order for non-compliance or a breach to result in either a project not being granted or being halted. In the face of meaningful consequences, borrowers would be more inclined to comply with the Framework and treat it with the appropriate weight.

### Recommendations

69. As identified by the Asian Development Bank, the following are characteristics of a good grievance redress mechanism:<sup>22</sup>

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<sup>22</sup> Asian Development Bank, *Designing and implementing grievance redress mechanisms: A guide for implementers of transport projects in Sri Lanka*, 2010.

- 69.1. Is known to the public and PAPs;
- 69.2. Has a systematic way of recording and monitoring the progress or resolution of issues;
- 69.3. Is accessible to all PAPs irrespective of their economic status, literacy level, ethnicity, caste, religion, gender, disabilities, geographical location, and so on;
- 69.4. Includes participation, representation, and consultation of PAPs in its design, planning, and operational processes;
- 69.5. Provides security (both physical and psychological) for PAPs to participate without fear of intimidation or retribution;
- 69.6. Has respect for the dignity and self-esteem of PAPs and an empathetic relationship towards PAPs;
- 69.7. Provides equitable access for PAPs to information, advice, and expertise;
- 69.8. Has different levels to allow for appeals;
- 69.9. Has a reasonable time frame that prevents grievances from dragging on unresolved;
- 69.10. Evidences social and cultural appropriateness of the systems, approaches, and methods adopted;
- 69.11. Possesses values, attitudes, and commitment to fairness and justice;
- 69.12. Shows transparency, accountability, and objectivity in conducting grievance redress processes and realising their outcomes;

- 69.13. Is independent and has a clear governance structure with no external interference with the conduct of grievance redress processes and reaching agreements;
  - 69.14. Shows clarity in procedures, processes, and time frames adopted;
  - 69.15. Has flexibility in decision-making processes, taking into account the unique and diverse character of grievances;
  - 69.16. Is in compliance with existing systems without undermining them Is run by professionally and technically competent grievance redress mechanism implementers who have been able to win trust and recognition from the communities;
  - 69.17. Shows respect for the freedom of PAPs to opt for alternative grievance redress mechanisms if they so decide.
70. In light of the above, we would recommend the following:
- 70.1. Annex 1 to ESS 10 should be expanded to include the characteristics of a good grievance mechanism identified in the paragraph above;
  - 70.2. The World Bank operating provisions should be aligned with the Framework;
  - 70.3. The Framework should prescribe the range of consequences for non-compliance with the social and environmental standards contained in the Framework;
  - 70.4. The Framework should provide for urgent or anticipatory relief to the provided to communities and PAPs in appropriate circumstances.

## Conclusion

71. It is stated in the Framework that “*[w]hile this Framework will not by itself guarantee sustainable development, its proper implementation will ensure the application of standards that provide a necessary foundation for that objective, and provide a leading example for activities outside the scope of Bank-supported projects*”.
72. There are two inescapable realities in relation to the World Bank: firstly, as the largest international financial institute, the reach of the impact of its financing is unparalleled; and secondly, as we continue to see the emergence of a number of new development banks, these banks appear to be inclined towards considering the World Bank’s approach to sustainable development and human rights as an indicator of international best practice.
73. It is therefore incumbent on the World Bank, if it is truly committed to the Vision, to set a proper example. We submit that this commitment can only truly and effectively be achieved if the submissions made above are incorporated into the Framework, and that this will go a long way in enhancing community involvement and accountability. It is only then that the goal of sustainable development can actually be realised.
74. We commend the World Bank and the CODE for undertaking this review and inviting comments on the Framework. The LRC appreciates the opportunity to make this submission, and wishes to thank the relevant entities within the World Bank for their consideration of this submission. We look forward to participating further in the third phase of the consultation process.

75. Should we be able to offer any further assistance, please do not hesitate to contact us at [avani@lrc.org.za](mailto:avani@lrc.org.za).

**LEGAL RESOURCES CENTRE**

**1 MARCH 2015**

## Resources

Various resources were consulted in the preparation of this submission. Some of the key resources include:

- Accountability Counsel, *The Asian Development Bank's accountability mechanism*, undated
- Asian Development Bank, *Designing and implementing grievance redress mechanisms: A guide for implementers of transport projects in Sri Lanka*, 2010
- Beilfuss R, *A risky climate for Southern African hydro: Assessing hydrological risks and consequences for Zambezi River Basin dams*, September 2012
- Bosshard P, *Infrastructure for whom? A critique of the infrastructure strategies of the Group of 20 and the World Bank*, May 2012
- Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya, communication 276/03
- Doyle C, *Free prior informed consent (FPIC) – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector*, December 2008
- Tamang P, *An overview of the principle of free, prior and informed consent and indigenous peoples in international and domestic law practices*, January 2005
- Wicomb W and Smith H, *Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision* (2011) 11 African Human Rights Law Journal 422-446