



**Comments of EarthRights International on the World Bank's Second Draft
Environmental and Social Framework (July 2015)**

March 2016

EarthRights International (ERI) welcomes the opportunity to provide comments on the World Bank's review of its environmental and social policies and the second draft of its Environmental and Social Framework ["Draft Framework" or "Framework"].

ERI is a non-governmental organization based in the United States, the Amazon region, and Southeast Asia that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. We have followed the World Bank consultation process and participated in the recent consultation in Washington, D.C., on February 22-24, 2016.

Our comments focus solely on the aspects of the Draft Framework that address grievance redress and the definition of Indigenous Peoples and their right to free and prior informed consent (FPIC). The narrow focus of our comment should not be taken as an endorsement of the remainder of the Framework; rather, we join and support the comments submitted by other civil society organizations – in particular, Indian Law Resource Center, Human Rights Watch, Oxfam International, and Inclusive Development International – expressing concerns about other aspects of the Framework, as well.¹

I. Grievance Redress

We applaud the World Bank for including grievance redress as a specific component in the Framework but propose a number of clarifications, additions, and changes to ensure that the World Bank's approach to grievances is consistent with its vision of sustainable development. In general, our recommendations aim for:

- Greater clarity on the roles and responsibilities of each Grievance Redress Mechanism or Service, and the relationships between them;
- Greater clarity on the design, minimum requirements for, and measures used to ensure compliance with each Grievance Redress Mechanism or Service;
- Express inclusion of supervision of Project-Level Grievance Mechanisms (PLGMs) in the Bank's due diligence on Borrowers and projects; and

¹ As a matter of orientation, our specific recommendations throughout this comment are underlined to set them apart from general analysis and explanation. Where we have proposed edits to the text of the Framework itself we have done so in red-line, i.e. additional text is underlined and deleted text is ~~struck through~~.

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- Meaningful and participatory stakeholder engagement in the grievance redress process (including the design, implementation, and oversight and monitoring) that gives project-affected people a leading role.

These recommendations are drawn from our experiences on the ground in communities in our areas of focus, and from our expertise as international lawyers and advocates.

A. General Recommendations

1. Greater clarity on the roles and responsibilities of each Grievance Redress Mechanism or Service, and the relationships between them

a. Relationships between Mechanisms

The Draft Framework leaves too much ambiguity with respect to the relationships between various grievance mechanisms and services. For example, according to the Framework, “Project-affected parties will have access, as appropriate, to project grievance mechanisms, local grievance mechanisms, the Bank’s corporate Grievance Redress Service and the World Bank Inspection Panel.”² At the consultation in February 2016, a World Bank representative stated that PLGMs will be the “primary mechanism.” If this is the case, then the primacy of PLGMs should be clearly expressed, and the Bank should explain the implications of this decision. As a general matter, ERI recommends against including an exhaustion requirement. Complainants should have the ability to choose their forum for filing a grievance, and an exhaustion requirement may act as a barrier preventing individuals from filing complaints.

If there is a primary mechanism, the Framework should also clearly articulate when and how stakeholders will have the right to access other available mechanisms. For example, the Framework should explain whether there are any hurdles to accessing alternative mechanisms – such as an exhaustion requirement or a prohibition on appealing to two mechanisms simultaneously. Additionally, the Framework should expressly allow the Grievance Redress Service (GRS) to receive complaints about the functioning of the PLGMs. Bank representatives appeared to allude to this function during the consultation in February 2016, and ERI supports this function.

Regarding the relationship to the Inspection Panel, at the consultation in February 2016, the World Bank representatives stated that the relationship is not sequential, and that users can access the Inspection Panel without first going through the GRS. We note, however, that language in the proposed Framework indicates otherwise: “*After bringing their concerns directly to the World Bank’s attention and giving Bank Management a*

² World Bank, *Environmental and Social Framework: Setting Environment and social Standards for Investment Project Financing*, Second Draft for Consultation (July 1, 2015) (hereinafter, “Environmental and Social Framework”), p. 3, para. 11. For similar language *see also id.* p. 20, para. 58.



*reasonable opportunity to respond, project-affected parties may 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.”*³ Civil society organizations at the consultation expressed concern that in practice the requirement to bring concerns directly to the World Bank's attention means bringing a complaint to the GRS. To ensure that the GRS does not preclude direct access to the Inspection Panel, this language should be removed.

b. Individual Mechanisms

i. The GRS

To ensure that the stakeholders for whose use they are intended have an understanding of how to use the mechanisms, the Framework should clarify how each individual mechanism functions. We recognize that the GRS does not specifically form part of this Framework; however, given its interconnection to the topic of grievance redress addressed in the Framework, we include the following comments based on the current GRS website. We hope that the following comments can inform revisions to the related sections of the Framework and can lead to changes for the GRS.

As it stands from the website, the GRS has a number of barriers in place which may prevent its usage. For example, it is unclear who bears the cost of translation for complaints submitted in languages other than the World Bank's working languages. We emphasize that it would be cost-prohibitive for many complainants to bear that cost, and recommend that the World Bank commit to shouldering such costs when the complainant cannot afford them. This should likewise be a cost assumed by the Borrower in PLGMs.

Additionally, the GRS does not accept anonymous complaints. If requested, complaints will be kept confidential, but anonymity is not allowed.⁴ This is another discord between the GRS and the Framework, which allows for anonymous complaints.⁵ The safety of complainants must be a priority in grievance redress. Anonymity is one important means of protecting complainants from reprisals, as well as ensuring their comfort and trust of the process, by providing a safe space. As provided for in the Framework, the Bank should ensure that the GRS accepts anonymous complaints.

Limitations placed on the GRS also limit its ability to provide an effective remedy. For example, the GRS is unable to provide compensation. The website also lists a number of

³ *Id.*

⁴ The World Bank, “Grievance Redress Service: Overview” available at <http://www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service#1>

⁵ See: Environmental and Social Framework, p. 127, para. 27(b); See also *infra* Section B. vii.



substantive issues that are beyond its scope.⁶ Grievance mechanisms should not have such limitations; they should not exclude any particular forms of relief or assistance.

Moreover, the website is also silent on whether there is an appeals process, and whether the process is available for cases that existed before the GRS was established. ERI notes and welcomes that the Framework requires grievance mechanisms to have an appeals process. ERI recommends that the GRS also include the possibility of an appeal, and all mechanisms should allow for retroactivity.

In general, we are also concerned that an internal complaints service that is run entirely from within the Bank risks not being seen as objective, which may impair the legitimacy of the service from the perspective of the potential users. The Bank should consider establishing the GRS as a service whose operations are separate from those of the Bank itself, either by hiring a third party to run the mechanism or giving the GRS formal independence from the Bank.

ii. The PLGMs

While Annex 1 of ESS 10 offers some guidance for the Borrower on how to establish a PLGM, it is not clear whether these are the minimum requirements or the full extent of expectations. In any event, as we discuss *infra* Section B, the requirements as set out are insufficient. In addition, at minimum the Framework should require all PLGMs to meet the effectiveness criteria for non-judicial grievance mechanisms set out in the United Nations Guiding Principles on Business and Human Rights.⁷

c. *Transparent Outreach Plan that covers all of the Mechanisms*

It is essential that the potential users know about all of these mechanisms and how to access them. The Bank should develop a comprehensive plan to ensure that the information on said mechanisms reaches all potential users. In developing this plan, and in conducting outreach, the Bank should seek assistance from civil society groups with knowledge and expertise on effectively reaching out to stakeholders.

2. Expressly include supervision of Project-Level Grievance Mechanisms (PLGMs) in the due diligence that the Bank conducts on Borrowers and projects

The existence of a mechanism in itself is not an indicator of good practice. In fact, poorly-designed and implemented mechanisms exacerbate harms and escalate tensions.

⁶ The World Bank, “Grievance Redress Service: Eligibility” available at <http://www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service#2>

⁷ United Nations Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights, Principle. 31, UN Doc. HR/PUB/11/04 (2011) (hereinafter, “Guiding Principles”), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.



Experts have noted that it is much easier to put a good mechanism on paper than to actually implement it.⁸ At the February 2016 consultation, World Bank representatives stated that the Bank's due diligence includes monitoring the Borrower's implementation of the Environmental and Social Safeguards. This monitoring should include inquiring into the operation of any applicable PLGM and, if it is not operating according to the Bank's standards, the Borrower should be required to take corrective action.

3. Meaningful and participatory stakeholder engagement in the grievance redress process, including design, implementation, and oversight and monitoring, that gives Project Affected People a leading role

Stakeholder participation should be central to the design and implementation of a grievance mechanism. The Framework should include clear standards requiring meaningful and participatory stakeholder engagement. For example, in the design and implementation of PLGMs, the Bank should require an active decision-making role for affected stakeholders. Simply informing potentially-affected people about a grievance mechanism is not engagement. Asking for feedback without using it to improve an existing mechanism is not meaningful engagement.

The CAO has cautioned against grievance mechanisms that are designed without the meaningful participation of affected stakeholders, noting that they “[r]einforce power inequities,” “[s]ignificantly limit procedural choices available for solving the problem,” “[p]revent the complainant from having much influence in crafting a solution,” “[o]mit stakeholders from involvement in the design of the grievance mechanism,” “[r]ely upon individuals without specific training or capacity in grievance resolution to manage the system,” and “[a]dapt through trial and error.”⁹ These negative results can be seen in the dissatisfaction on the part of the users,¹⁰ who are faced with using a mechanism that does not satisfy their interests and will not provide them an effective remedy. At best, they are

⁸ Barbara Linder, Karin Lukas, & Astrid Steinkellner, *The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations* (Ludwig Boltzmann Institute of Human Rights, April 2013) (hereinafter, “*The Right to Remedy*”), p. 57, available at http://bim.lbg.ac.at/files/sites/bim/Right%20to%20Remedy%20Extrajudicial%20Complaint%20Mechanisms%202013_1.pdf (assessing Anglo-American’s SEAT Toolbox).

⁹ The Office of the Compliance Advisor/Ombudsman, “A Guide to Designing and Implementing Grievance Mechanisms for Development Projects,” Advisory Note (CAP, 2008), p. 10, available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

¹⁰ See e.g. Taylor Fulton, et al., “What Is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report” (SIPA, Columbia University, Dec. 2015), available at <http://accessfacility.org/sites/default/files/Listening%20to%20community%20voices%20on%20effective%20remedy.pdf>; C. Daniel, K. Genovese, M. van Huijstee & S. Singh (Eds.), “Glass Half Full? The State of Accountability in Development Finance,” (SOMO, Jan. 2016), available at <http://grievancemechanisms.org/resources/brochures/glass-half-full>; Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, “Righting Wrongs? Barrick Gold’s Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned” (Nov. 2015) available at <http://www.rightingwrongsproject.org/>.



dissatisfied. At worst, they may end up in a worse situation than before filing a complaint – for example, if the mechanism discloses confidential information that would endanger them, or if it allows for applicable statutes of limitations to expire without providing an adequate remedy.

We believe that the best way to correct these shortcomings is to give affected communities a stronger decision-making role in the design and implementation of PLGMs.¹¹ Without these improvements, we believe that PLGMs will often be undermined by the conflict of interest inherent in allowing a Borrower to design and control the mechanisms through which the harms it causes will be remedied.¹² Moreover, we expect that many Borrowers may welcome the choice to give affected communities a stronger role, as a community-designed mechanism is more likely to enjoy community support and lead to a longer-term positive relationship between stakeholders.

Moreover, we counsel the Bank to require binding, concrete provisions to ensure that the Borrower complies with the outcomes of a grievance process. Experts have observed that companies often do not cooperate with PLGMs due to a lack of high-level buy-in, either due to a lack of trust in the community, a fear of losing power, a lack of desire to take the process seriously due to the existing imbalance of power, and a concern that complaints are seen as some sort of failure.¹³ During the February 2016 consultation, the Bank itself recognized that the Borrowers can be “defensive.” Binding provisions will therefore assist the Bank to enforce its Framework.

B. Specific Recommendations on ESS 10

Based on our recommendations above, we have identified specific concerns with some of the provisions in ESS10. Overall, the provisions provide the Borrower with too much control and discretion, and do not provide enough safeguards to ensure that the design and implementation of the mechanism is a participatory process between the Borrower and affected stakeholders. To ensure such a process, ESS10 should emphasize that the company itself is a participant in the mechanism, and not the ultimate arbiter of rules, procedures, and outcomes.

¹¹ ERI is developing a comprehensive methodology for so-called Community –Driven Operational Grievance Mechanisms, and is working with government, corporate, and community stakeholders at a project site in Myanmar to pilot the model. We would be pleased to discuss the model further with Bank representatives.

¹² See Guiding Principles, *supra* note 6, at Principle 31, commentary (h) “Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”

¹³ See e.g., International Council on Mining & Metals, “*Human Rights in the Mining & Metals Industry: Handling and Resolving Local Level Concerns & Grievances*” (ICMM, Oct. 2009), p. 3, available at <http://www.icmm.com/document/691>; Emma Wilson & Emma Blackmore (Eds.), “*Dispute or dialogue? Community perspectives on company-led grievance mechanisms*” (International Institute for Environment and Development, 2013), p. 31, available at <http://pubs.iied.org/pdfs/16529IIED.pdf>.



An additional concern that repeatedly arises is the absence of a provision for external (i.e. Bank, or community) supervision of the grievance mechanism. Oversight and monitoring is essential, as implementation, feedback collections, and noncompliance are common weaknesses in existing mechanisms.

i. Paragraph 12 on Retention of Third Party Specialists

ERI welcomes the recognition of the need to maintain independence in stakeholder identification and engagement through the use of independent third party specialists. However, this provision does not set out when a third party should be retained – what risks trigger this obligation? ESS10 should set out a transparent process, that involves the participation of stakeholders, to determine when a third party is needed that is and. It should also set out a participatory process for selecting the third party and designating his or her role.

We therefore recommend the following edits to Paragraph 12:

12. When the project's risks or impacts are of a magnitude and specialized character that they require an expert to measure, establish, or value harm; apportion responsibility; or devise a remedial plan, and the community agrees to the appointment of an expert
~~Depending on the potential significance of environmental and social risks and impacts, the Borrower may be required to retain independent third party specialists to assist in the stakeholder identification and analysis to support a comprehensive analysis and the design of an inclusive engagement process. Affected stakeholders should be able and encouraged to take a leading role in the process for selecting and designating the roles of specialists.~~

ii. Paragraphs 13-18 on the Stakeholder Engagement Plan (SEP)

This section lays out requirements for SEPs but does not include a process for supervision. Instead, it provides the Borrowers with full discretion over the design and implementation of a SEP. For example, paragraph 13 states, “The Borrower will develop and implement a Stakeholder Engagement Plan (SEP) proportionate to the nature and scale of the project and its potential risks and impacts.”

The act of drafting a SEP alone is insufficient to guarantee adequate and meaningful stakeholder participation. In particular, project-affected stakeholders should have the authority and capacity to supervise and participate in both the design and implementation stages of the mechanism. Civil society supervision should extend to the review and approval of the SEP, as well as implementation monitoring, including a method for recourse if the SEP is not being properly implemented.



iii. Paragraph 19 on Information Disclosure

ERI is concerned about the quality of information that will be provided and required, as well as the process for preparing this information, which appears to be left to the discretion of the Borrower and does not require the participation of stakeholders. We recommend that the Bank improve the quality and quantity of required information disclosure, and require that the Borrower include – rather than merely inform – stakeholders with respect to designing the grievance redress process.

We therefore recommend the following changes to Paragraph 19:

(c) Potential risks and impacts of the project on local communities, and the proposals for mitigating these, highlighting potential risks and impacts that might disproportionately affect vulnerable and disadvantaged groups and describing the differentiated measures taken to avoid and minimize these. This section should also propose and discuss alternative project ideas, comparing the alternatives to the current proposal to show why this proposal is the best option. The Borrower must seek stakeholder input on mitigation measures, and alternatives to harmful aspects of the project, and include the method of consultation and the stakeholder views in the report.

...
(f) The process and means by which grievances can be raised and will be addressed will include information on all available grievance redress options, not simply the PLGM. This grievance mechanism should be the product of a participatory design process with stakeholders.

iv. Paragraph 22 on Meaningful Consultation

Certain provisions of Paragraph 22 do not go far enough to ensure meaningful consultation in practice. Meaningful consultation cannot just be encouraged, it is a fundamental requirement for all grievance mechanisms. For consultation to be meaningful, the Borrower must be open to making changes based on the feedback provided. Consultation must take place at the outset, when ideas are generated and decisions are made. The process should encourage stakeholders to express their views and concerns and know that their views will be incorporated.

Additionally, the Framework must provide requirements for the documentation and disclosure of consultation practices, when reporting must occur, the content of the report, and who it should be sent to for review.

We therefore recommend the following edits to Paragraph 22:

22. Meaningful consultation is a two-way process, that:



(b) ~~Requires~~ Encourages stakeholder feedback and participation, particularly in as a way of informing project design and engagement by stakeholders in the identification and mitigation of environmental and social risks and impacts;

...

(e) Considers, incorporates and responds to feedback;

...

(h) Is documented and disclosed by the Borrower to the Bank and affected stakeholders. The consultation report should disclose who was consulted, when the consultation occurred, what was discussed, and what information was shared with stakeholders, and it should be provided to stakeholders with enough time for them to respond and object if consultation has been inadequate.

v. Paragraph 24 on Engagement During Project Implementation and External Reporting

We are pleased that Paragraph 24 requires borrowers to seek feedback from stakeholders, but the Bank should provide further details on what the Borrower will do with that feedback. As with our recommendation on Paragraph 22(e), incorporating the feedback is an essential element that should be included in the requirements to the Borrower.

We therefore recommend the following edits to Paragraph 24:

24. The Borrower will continue to conduct stakeholder engagement in accordance with the SEP, and will build upon the channels of communication and engagement already established with stakeholders. In particular, the Borrower will seek and incorporate feedback from stakeholders on the environmental and social performance of the project, and the implementation of the mitigation measures in the ESCP.

vi. Paragraph 26 on the Grievance Mechanism

This Paragraph provides too much discretion to the Borrower, and it does not provide an adequate role to affected stakeholders in the design of the PLGM. For the reasons discussed above, the Borrower should participate in a PLGM, but should not be in charge of designing, implementing, and overseeing it. Affected stakeholders must have a participatory role in designing and implementing the grievance mechanism, and must have the authority to approve (or reject) the final mechanism in order to ensure that it is legitimate, accessible, based on engagement and dialogue.

We therefore recommend the following edits to Paragraph 26:

26. The Borrower will respond to concerns and grievances of project-affected parties related to the environmental and social performance of the project in a timely manner. For this purpose, the Borrower will, ~~propose and implement~~ together with affected stakeholders, adopt and implement a grievance mechanism that has been designed and



approved with the strong participation and leadership of affected stakeholders, to receive and facilitate resolution of such concerns and grievances.

vii. Paragraph 27 on the Grievance Mechanism

We welcome the inclusion of provisions recognizing that grievance mechanisms must address concerns in a culturally-appropriate manner, without cost to project affected parties and in a manner which protects against retribution – including through the filing of anonymous complaints. We also particularly welcome the requirement that grievance mechanisms should not prevent access to judicial or administrative remedies.

However, by leaving too much discretion to the Borrower on when to apply these provisions, and not making clear the provisions for the Bank's supervision of its own criteria, the provisions do not go far enough to ensure that these expectations are fulfilled. And, echoing our above comments, these provisions give the Borrower too much control and discretion, and there is no provision for the Bank to inquire into the operations of the grievance mechanism in order to insist on corrective measures if it is not operating properly.

We therefore recommend the following edits to Paragraph 27:

27. The grievance mechanism will be proportionate to the potential risks and impacts of the project and will be accessible and inclusive. ~~Where feasible and suitable for the project, the~~ The grievance mechanism will utilize existing formal or informal grievance mechanisms, supplemented as needed with project specific arrangements. Further requirements on grievance mechanisms are set out in Annex 1. If existing formal or informal grievance mechanisms cannot be used, the Borrower will report this to the Bank and to affected stakeholders and explain why.

(a) The grievance mechanism is expected to address concerns promptly and effectively, in a transparent manner that is culturally appropriate and readily accessible to all project-affected parties, at no cost and without retribution. Considerations of culture and community should influence all aspects of the mechanism design, such as the scope of the mechanism, the mode of investigating complaints, decision making processes, methods of access to the grievance mechanism, and the types of remedies that are available. The mechanism, process or procedure will not prevent access to judicial or administrative remedies, and the Borrower will not require complainants to waive any legal rights in order to accept a remedy through the grievance mechanism. The Borrower will continuously inform the project-affected parties about the grievance process in the course of its community engagement activities, and will make publicly available a record documenting the responses to all grievances received; and

(b) Handling of grievances will be done in a culturally appropriate manner and be discreet, objective, sensitive and responsive to the needs and concerns of the project-



affected parties. The mechanism will also allow for anonymous complaints to be raised and addressed. The Borrower will take measures to protect against retaliation for all complainants, including by establishing zero-tolerance corporate policies for retaliation and funds and services for physical protection of complainants.

viii. Paragraph 28 on Organizational Capacity and Commitment

Paragraph 28 assigns significant responsibilities to the Borrower but says nothing about the resources required to properly fulfill those responsibilities. During the consultations, the World Bank recognized that it needed to provide greater detail regarding the budget for grievance redress processes. We reiterate this important need. Studies have shown that stakeholder engagement and company-community relations are at a greater risk of tension when resources are not sufficient or are supplied too late.¹⁴ They have also shown that “the success of a grievance mechanism depends for the most part on the adequacy of resources provided for its implementation.”¹⁵

We therefore recommend the following edits to Paragraph 28:

28. The Borrower will define clear roles, responsibilities and authority as well as designate specific personnel to be responsible for the implementation and monitoring of stakeholder engagement activities and compliance with this ESS. The Borrower will also allocate adequate financial and human resources to operate the mechanism and provide appropriate remedies.

ix. Annex 1 on the Grievance Mechanism

Overall, we applaud the Bank’s decision to make grievance procedures mandatory, and to also provide a list of minimum requirements for PLGMs. However, the requirements provided are inadequate to ensure that PLGMs serve the needs of affected communities and that harms are remedied appropriately, in that they:

- Provide for inadequate stakeholder participation in the design and implementation of the mechanism;
- Give inadequate detail on the appeals process;
- Confusingly refer to the availability of mediation;
- Do not adequately outline the Bank’s expectations for public outreach about the grievance mechanism; and
- Fail to provide for the right balance of public accountability and private confidentiality.

¹⁴ See e.g., Rachel Davis & Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector,” Corporate Social Responsibility Initiative Report No. 66. (Harvard Kennedy School, 2014), pp. 10, 32, available at http://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

¹⁵ *The Right to Remedy*, *supra* note 7, p. 91.



We therefore recommend the following edits to the criteria in Annex 1:

2. *The grievance mechanism will include the following:*

(a) *Different ways in which users can submit their grievances, which may include submissions in person, by phone, text message, mail, email or via a web site. The user can select their preferred method.*

(b) *A log where grievances are registered in writing by an independent party, and maintained as a database. The administering party should balance public accountability with private confidentiality by protecting complainants' personal information but publishing information on the number of complaints received, the status, and resolution.*

(c) *Publicly advertised procedures, setting out the length of time users can expect to wait for acknowledgement, response and resolution of their grievances. Additionally, specific outreach plans must be designed and implemented, in collaboration with civil society and affected stakeholders, for each particular community to ensure their awareness of the grievance process and the opportunity to participate in its design, implementation, and supervision.*

(d) *Transparency about the grievance procedure, governing structure, ~~and~~ decision makers, and conflict of interest policies in the form of reports, written materials, and oral presentations in formats and languages intelligible to all stakeholders; and*

(e) *An appeals process that is independent of the Borrower (including the national judiciary) to which unsatisfied grievances may be referred when resolution of grievance has not been achieved. This process – like all aspects of the grievance mechanism – should be designed with full participation of affected stakeholders, and its processes should be disclosed and described to the community at large.*

3. *The Borrower may provide mediation as an option where users are not satisfied with the proposed resolution. The mediator(s) must be approved by both parties. Mediation should be available at any stage of the grievance process and is not a replacement for the right to appeal.*

II. Indigenous Peoples

The following recommendations are limited to addressing the Framework's definition of Indigenous Peoples and the protection of their right to free and prior informed consent (FPIC). ERI commends the Framework's broad definition of Indigenous Peoples and the recognition that FPIC includes a community's ability to withhold consent. However, the



respective provisions are drafted in a manner which raises concerns about the State's ability to deny recognition of Indigenous Peoples and their right to FPIC.

A. ESS7 Paragraphs 5-6 on Definition of Indigenous Peoples

ERI agrees with Paragraph 6 of the Bank's proposed ESS7 and the ILO Indigenous and Tribal Peoples Convention ("ILO Convention No. 169") that *self-identification* as indigenous or tribal is a fundamental criterion for determining which groups qualify for safeguards reserved for "Indigenous Peoples."¹⁶ ERI also commends the Bank for including additional key factors from the Convention in its generic definition of "Indigenous Peoples."

However, Paragraph 5 appears to give Borrowers flexibility on the definition of "Indigenous Peoples" that could undermine these fundamental principles. Specifically, we are troubled that one plausible interpretation of Paragraph 5 is that a Borrower could rely on "alternative terminology" that does not incorporate the defining characteristics identified in Paragraph 6 in order to derogate from the generic definition, which is accepted under international law. Giving Borrowers flexibility in applying "alternative terminology" without requiring baseline factors could supply an excuse for States to interpret the term "indigenous" in an exclusionary and discriminatory way.

This is not merely a theoretical concern. By limiting FPIC rights only to peoples they have formally recognized as indigenous according to their own narrow criteria, some States have attempted to circumvent bright-line definitions of indigeneity recognized by international law. In recent decades, based on work and experience in Peru we have seen that the Peruvian state's refusal to recognize traditional Andean peoples as indigenous, despite previously classifying them as native, ignores these groups' historical claims to ancestral lands based on several centuries of collective use, occupation, and management. This opportunistic approach to indigeneity has conveniently allowed the Peruvian government to green-light mines, dams, and other major development projects in resource-rich areas without conducting consultations with and acquiring consent from affected *campesino* communities in accordance with international standards.

In order to ensure that every Borrower's classification of Indigenous Peoples is consistent with widely-cited sources of international law that inform the rights of indigenous peoples (including the right to FPIC), such as the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),¹⁷ we recommend the following additions to Paragraph 5:

¹⁶ Convention concerning Indigenous and Tribal Peoples in Independent Countries, art. 1, Geneva, 76th ILC session (Jun. 27, 1989), entered into force Sept. 5, 1991. Hereinafter, "ILO Convention No. 169.").

¹⁷ United Nations Declaration on the Rights of Indigenous Peoples, 61st Sess. Supp. No. 49, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).



5. *There is no universally accepted definition of Indigenous Peoples. Indigenous Peoples may be referred to in different countries by such terms as “indigenous ethnic minorities,” “aboriginals,” “hill tribes,” “minority nationalities,” “scheduled tribes,” “first nations,” or “tribal groups.” As the applicability of such terminology varies widely from country to country, the Borrower may agree with the Bank on an alternative terminology for the Indigenous Peoples as appropriate to the circumstances of the Borrower.*

However, the use of alternative terminology may not under any circumstances result in the exclusion of groups that otherwise meet the definition of indigenous peoples under the widely accepted standards established in ILO Convention No.169 and the United Nations Declaration the Rights of Indigenous Peoples, and reflected in Paragraph 6 of this Standard.

B. World Bank Environmental and Social Policy for Investment Project Financing Paragraph 52

While ERI acknowledges communities often reach operative, collectively-binding decisions without requiring unanimous consent from every individual member, Paragraph 52 of the Environmental and Social Policy gives Borrowers and the Bank alarming discretion to declare that consent has been obtained in the absence of unanimity. ERI commends the World Bank for recognizing that a community’s right to willingly give *or withhold* its consent is an essential component of FPIC. However, we are concerned that the Bank offers no guidance on how it will determine that an affected community has obtained the requisite consensus for a decision, or the steps it will take to ensure that those participating in FPIC consultations are indeed the relevant stakeholders, with the authority to represent their community’s interests. Indeed, as the Inter-American Court of Human Rights observed in its 2012 decision for *Kichwa Indigenous Peoples of Sarayaku v. Ecuador*, an FPIC has not been carried out in good faith if the State attempts to circumvent the traditional decision-making processes of the affected community.¹⁸

The World Bank should be mindful of the increasing prevalence of illegitimate consultations, where States engage with select groups of individuals in decision-making processes surrounding prospective development projects rather than with the affected people’s traditional government structures.¹⁹ In some cases, governments have even been accused of financing and establishing shadow indigenous federations to deny actual stakeholders the right to partake in consultations and their FPIC rights.²⁰

¹⁸ *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-American Court of Human Rights, Judgment (Merits and Reparations) (Jun. 27, 2012), para. 177.

¹⁹ Lauren Johnson, “Ecuador’s Indigenous Leaders Oppose New Oil Exploration Plans in Amazon Region,” *Earth Island Journal* (Nov. 13, 2012), available at http://www.earthisland.org/journal/index.php/elist/eListRead/ecuadors_indigenous_leaders_oppose_new_oil_exploration/.

²⁰ EarthRights International, “ERI’s July 2014 Filing in the TIPNIS Case: A Summary,” (2014), available at https://www.earthrights.org/sites/default/files/tipnis_legal_summary.pdf.



In light of the above, ERI recommends that the Bank ensure that the Borrower, at the FPIC consultations stage of a project, engages with the actual communities to be impacted by the project, and through the communities' traditional decision-making and governing structures. In addition to the existing text, we recommend that the Bank develop guidelines on FPIC consultations and community consensus, with input from civil society.

Furthermore, the World Bank should perform due diligence at the project appraisal phase to be aware of any antagonistic relations or conflicts between the Borrower State and the country's indigenous populations. Where it is evident that the Borrower has had a history of discriminating against, marginalizing, and/or criminalizing either indigenous peoples generally or specifically the community/people at hand, the World Bank should require stricter third-party monitoring of any consultations between the Borrower and the community.

We therefore recommend the following edits to Paragraphs 52 and a new Paragraph 53:

52. In addition, the 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. At a minimum, however, it does require that the Borrower engage in good faith with the traditional decision-making structures of the community in question, rather than selective engagement with particular sub-groups with whom the Borrower is more comfortable or familiar.

53. In determining whether consent has been obtained from affected Indigenous Peoples, the Bank will scrutinize the consultations through which the project has been discussed with affected indigenous communities to ensure that all necessary stakeholders have been adequately engaged. Where there is a history of antagonism, discrimination, criminalization, or marginalization of indigenous communities in a given country, the Bank will require stricter third-party monitoring of any project consultations. 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.

Conclusion

ERI commends the World Bank for its inclusive consultation process on the Framework. We appreciate this opportunity to contribute to the World Bank's review of its



environmental and social policies and new environmental and social standards. We hope that our comments will help inform the Bank's update of its safeguard policies and will lead to a strengthened Framework that protects the rights of those it impacts.

Please do not hesitate to contact us if we can provide further information or elaboration on the content of this submission.

Sincerely,

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