

The World Bank's Environmental and Social Standard on Indigenous Peoples: A Case Study on Global Governance

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Abstract: Secondary law-making by international organisations is an increasingly important phenomenon, as it directly affects individuals and communities worldwide. However, the internal regulation does not always keep pace with the growing number of responsibilities entrusted to global actors. This article analyses the developments of global administrative law by assessing the recent reform of the World Bank's safeguard policies. In particular, it examines in detail the World Bank's regulation of projects involving Indigenous Peoples, whose social marginalisation often reflects a weak position to defend their rights. It gives an overview of the main innovations brought about by the World Bank's new Environmental and Social Framework. In light of the looser wording adopted by the safeguards, it advocates for a purposive interpretation by the Inspection Panel, the Bank's internal adjudicatory mechanism, in order to guarantee a satisfactory protection of Indigenous Peoples. It concludes that the expectations of a new gold standard for Indigenous Peoples did not take into account the global context, and that labelling the reform as a dilution of precedent standards is a premature assessment.

A. Introduction

Fifty years ago at the World Bank,¹ “development” happened without much concern for environmental sustainability and protection of Indigenous Peoples (“IPs”).² In the name of development, Indigenous Peoples' rights have been ignored or violated, as national governments implemented projects financed by the World Bank and other international financial institutions (“IFIs”).

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- 1 The name “World Bank” is used to indicate the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).
- 2 *Robert Wade*, *Boulevard of Broken Dreams: The Inside Story of the World Bank's Polonoroeste Road Project in Brazil's Amazon*, Grantham Research Institute on Climate Change and the Environment, London 2011, pp. 3-4.

Today, recognition of Indigenous Peoples' rights may be found in international declarations and conventions ratified by a growing number of countries. At the global regulatory level, IFIs have created sophisticated systems of secondary law in reaction to calls for increased sustainability of their activity. The World Bank ("WB" or the "Bank") has been a pioneer under this respect. As the first development financial institution to take an interest in human environment,³ it has set the standard for other multilateral development banks starting from the early Eighties.⁴ On the 4th of August 2016, the Bank has published its latest safeguards, amidst the hopes of a new gold standard for Indigenous Peoples.

While the regulation of global governance has spread to other international organisations and is increasingly studied as an emerging field of international law, a fresh assessment of its significance for the estimated 370 million Indigenous Peoples worldwide is required. The Bank's much-awaited Environmental and Social Framework ("ESF") offers the opportunity not only of making such assessment, but also of considering the reform's importance in relation to the normative development of Indigenous Peoples' protection internationally.

Therefore, this article will examine the content of the reform with specific focus on Indigenous Peoples' protection, and evaluate the results reached by the Environmental and Social Framework (B). To better understand the practical impact of the safeguards on Indigenous Peoples, their implementation in practice must be taken into account. Thus, the analysis will focus on the World Bank's internal adjudicatory mechanism, the Inspection Panel (the "Panel"), considering its past approach to make a projection on the future interpretation of the reviewed safeguards relating to IPs (C). An analysis of the global context will follow in order to understand the interests at stake (D) and, finally, evaluate the normative significance of the reform, given that IPs' protection in the ESF may be seen as a paradigmatic phenomenon of the challenges and opportunities of global administrative law (E).

B. The new Environmental and Social Framework

On the 4th of August 2016, the Board of Executive Directors approved the 2016 Environmental and Social Framework. The policies' stated aim is to "serve to identify, avoid and minimise harms to people and the environment",⁵ which is liable to "respond to the new

3 *Bogomir Chokel*, Transcript of Interview with Dr. James Lee, The World Bank/IFC Archives Oral History Program, 1985, pg. 6, http://siteresources.worldbank.org/EXTARCHIVES/Resources/James_Lee_Olive_Nash_Oral_History_Transcript_1985_44_02.pdf (last accessed on 3 April 2017).

4 OMS 2.34 "Tribal People in Bank-Financed Projects" dates back to 1982.

5 World Bank, *Safeguard Policies: The New Environmental and Social Framework - Protecting the Poor and the Environment in Investment Projects* ("ESF" in following), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html> (last accessed on 25 January 2017).

and varied development demands and challenges that have arisen over time”.⁶ The standards are binding for the WB's staff, and their alleged breach may be brought by project-affected people before the Inspection Panel. The safeguards' first formulation, dating back nearly half a century, has noticeably developed in the course of time, both in terms of areas covered and normative content.⁷

Amongst the standards reformed, Environmental and Social Standard 7 (“ESS-7”) is dedicated to “Indigenous Peoples / Sub-Saharan African Historically Underserved Traditional Local Communities”. The IPs' policy is considered one of the Bank's most complex safeguards, considering its politically-charged implications and the expertise necessary for its implementation.⁸ In the following section, the process leading to the reform and the analysis of its outcome, the ESF, will be assessed.

1. *The road to the new safeguards*

A first important remark concerns the process which has led to the adoption of the Standards.⁹ The reform process undertaken by the Bank in the last four years has involved almost 8,000 participants, engaging stakeholders in consultations conducted across 63 countries.¹⁰ As we can read in a document released during this process, “the procedure for policy revisions, even small ones, has proved to be so cumbersome and time consuming that there is great reluctance to revise and improve the policies even when the lessons of experi-

6 *Ibid.*

7 Originally, the safeguards were mere voluntary guidelines, intended to indicate how development assistance should be carried out with respect to environment and health (a “checklist of things to watch for”, in the terms of Wade: see *Robert Wade*, *Greening the Bank*, in: *Devesh Kapur, John Lewis, Richard Webb* (eds.), *The World Bank: It's First Half Century*, Vol. 1, Washington D.C. 1997, p. 620). In 1982, the first guidelines for the protection of Indigenous Peoples in Bank operations were adopted (in *Operational Manual Statement 2.34*, “Tribal People in Bank-Finances Projects”). Following mounting criticism from civil society organisations and NGOs, together with pressure from certain World Bank member States, the OMS was revised, and resulted in the release of *Operational Directive (OD) 4.20* in September 1991. Finally, in the mid-90s, the Bank announced a broad revision of the *Operational Directives*, which, following consultations, led to the adoption of ten “Operational Policies” accompanied by their “Bank Procedures” (the Indigenous Peoples' safeguards were contained in *OP/BP 4.10*). For an overview of the safeguards relating to Indigenous Peoples and their initial developments, see: *Shelton H. Davis*, *The World Bank and Indigenous Peoples*, World Bank, 1993; *Andrew Gray*, *Development Policy - Development Protest: The World Bank, Indigenous Peoples, and NGOs*, in: *Jonathan Fox and David Brown* (eds.), *The Struggle For Accountability: the World Bank, NGOs and Grassroots Movements*, Cambridge 1998; *Fergus MacKay*, *Indigenous Peoples and International Financial Institutions*, in: *David B. Hunter* (ed.), *International Institutions and International Law*, Alphen aan den Rijn 2010..

8 World Bank, *Emerging Lessons Series No. 2 - The Inspection Panel, Indigenous Peoples*, Washington D.C. 2016, p. iv.

9 On the law-making process at the World Bank in general, see *Philipp Dann*, *Entwicklungsverwaltungsrecht*, Tübingen 2012, pp. 164-167.

10 World Bank, note 8.

ence suggest that this would be beneficial.”¹¹ The reform process in itself is a striking example of the application of the principles of transparency and participation to international institutions’ secondary law-making.

Anticipating an evaluation of the ESF, it is - in one word - promising. It is the result of a compromise between competing interests of Member States with wide-ranging economic and political needs and civil society representatives and affected communities. In the next section, the overall results reached by the compromise will be reviewed, with specific consideration being given to ESS-7 and its implications for the protection of Indigenous Peoples’ rights.

II. Overall results and Indigenous Peoples’ protection under the new ESS-7

An in depth analysis of the overall changes introduced by the new Environmental and Social Framework goes beyond the aim of this paper, and may be found elsewhere.¹² For present purposes, it is sufficient to note the following: the past safeguards’ somewhat chaotic structure has been replaced by a clear framework, which may be roughly systematised in three levels: (1) an overarching, aspirational document - “Vision for Sustainable Development”; (2) a main body of binding rules for the Bank and the Borrower - respectively contained in “World Bank Environmental and Social Policy for Investment Project Financing” and “Borrower Requirements - Environmental and Social Standards 1 - 10”; and (3) additional documents containing guidelines for a project’s preparation and implementation.¹³

The standards are not directly binding on borrowing countries, but only on the World Bank, which is compelled to require the Borrower, by means of the conditions attached to the loan agreement, to meet the ESF’s requirements. Therefore, the Borrower’s obligations are set out in the Environmental and Social Commitment Plan (“ESC Plan”), while the Bank supervises the Borrower’s compliance during the project preparation and implementation.

- 11 World Bank Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World - An Independent Evaluation of World Bank Group Experience*, Washington D.C. 2010, pg. 8, <https://openknowledge.worldbank.org/bitstream/handle/10986/2339/636830PUB00WB000Box0361524B0PUBLIC0.pdf;sequence=1> (last accessed on 26 January 2017).
- 12 An overview of the main changes introduced by the reform has been well illustrated by *Philipp Dann* and *Michael Riegner*, *Safeguard-Review der Weltgruppe: Ein neuer Goldstandard für das globale Umwelt- und Sozialrecht?*, Study for Gesellschaft für Internationale Zusammenarbeit (GIZ), Berlin 2017. For an assessment of the second draft of the ESF, with particular focus on involuntary resettlement, see *Natalie Bulgaski*, *The Demise of Accountability*, *American University International Law Review* 31 (2016), pp. 1-56.
- 13 Namely, “Bank Directive: Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups”, “Bank Procedure: Environmental and Social Procedure” and “Information Note: Assessing the Borrower’s Environmental and Social Framework”.

The standard of protection under the ESF is essentially unchanged, and therefore falls short of expectations of a new “gold standard” by civil society and academia.¹⁴ Nonetheless, the ESF’s broader scope of application (encompassing new areas, such as climate change and labour) and the introduction or strengthening of international principles such as non-discrimination and participation, bring the safeguards in line with the level of protection afforded by other international organisations.¹⁵

The wider scope of application can be observed in ESS-7, applicable to Indigenous Peoples. As far as its wording is concerned, the definitions are broader and include communities which do not formally identify as “Indigenous Peoples”, but materially present their characteristics.¹⁶ Furthermore, the safeguard extends to communities living in voluntary isolation, expanding the scope of application of the old safeguard, Operational Policy / Bank Procedure 4.10 (“OP/BP 4.10”).¹⁷

Pursuant to ESS-7, and as was the case already under OP / BP 4.10,¹⁸ the World Bank is required to undertake a screening to determine whether IPs will be affected by the proposed project, involving experts, the Borrower and the indigenous communities. Where the Bank ascertains that Indigenous Peoples are present or have collective attachment to land within the project area, the Borrower must conduct consultations with them in accordance with ESS-7.¹⁹ Based on the consultations’ outcome and the Bank’s due diligence, the Bank will decide whether to proceed or not with the project.²⁰

The ESS-7 draft provided for an “alternative approach”. If the Borrower raised valid concerns regarding the application of ESS-7, the Bank could agree on the application of national standards, provided that project-affected indigenous communities were treated at least as well as other project-affected people. This “opt-out” provision was harshly criticised during the consultations, out of the fear that it would dilute IPs’ protection. For example, the African Commission on Human and Peoples Rights stressed the risk that the alternative approach could hinder recognition of Indigenous Peoples’ rights: these may well be

14 *Dann/Riegner*, note 12.

15 Such as those of the European Bank of Reconstruction and Development (EBRD), which have been used as a model by the World Bank in its reform: see NGO Comments on Safeguard Policies & Project Implementation, EBRD Safeguards and the EBRD-ization of the World Bank, <http://www.safeguardcomments.org/ebrd-as-a-model-.html> (last accessed on 6 February 2017).

16 The same title of ESS-7 has been modified, so that it now applies not only to Indigenous Peoples, but also to “Sub-Saharan African Historically Underserved Traditional Local Communities”; par. 1, ESS7, specifies that the standard applies also when different terminology is used, such as “minority nationalities”, “tribal groups”, “aboriginals”, etc.

17 ESS-7, par. 19.

18 OP 4.10, par. 8.

19 *Ibid.*, par. 51.

20 *Ibid.*, par. 51.

recognised by international treaties, but they are often entirely disregarded by national governments.²¹ Thankfully, the provision has been taken out of the final version.

Despite this, the national system plays a greater role under the new ESF and is applicable anyway. The safeguards adopt a “Borrower-centric approach”,²² shifting the focus from the Bank to the Borrower, with the aim of enhancing responsibility and ownership of the project. The Bank is responsible for conducting due diligence of the proposals, appraising the project and monitoring its implementation.²³

More specifically, the national system is still applicable pursuant to the novel option of using country systems instead of the ES-Standards. The Bank may authorise the use of country systems when the protection afforded by the Borrower’s national framework is “likely to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs”.²⁴ The provision offers an example of the use of indistinct terms and expressions that has been generally criticised in relation to the ESF, which leaves Bank Management with a noticeable margin of appreciation (how *likely* should it be that the IPs’ protection under the national system is materially compliant with the standard of protection contained in ESS-7?).²⁵ From this perspective, the concerns expressed by the United States, that call for a clearer definition and benchmarking of the conditions under which borrower systems can be used, are well-founded.²⁶

Indeed, Indigenous Peoples’ protection in many countries falls below the standard set by ILO Convention No. 169, albeit its ratification by several of those very countries.²⁷ India and Brazil object to the new FPIC requirement, although they supported the adoption of the U.N. Declaration of the Right of Indigenous Peoples.²⁸ In order to ensure a stronger protection of Indigenous Peoples, borrower systems should be strengthened, and local communi-

- 21 Communication to Dr. Jim Kim from Commissioner Soyata Maiga, Chairperson of the African Commission’s Working Group on Indigenous Populations/Communities in Africa, 4 July 2014, cited in: AIPP and FPP Commentary, p. 4. The criticised paragraph is par. 9, ESS-7.
- 22 International Organizations Clinic, Empowering the Inspection Panel: The Impact of the World Bank’s Safeguards Review, NYU School of Law, p. 7.
- 23 World Bank Environmental and Social Policy for Investment Project Financing (in following “WB ESP”), paras. 27-28.
- 24 WB ESP, par. 23; ESS-1, par. 19 (Assessment and Management of Environmental and Social Risks and Impacts).
- 25 *Dann/Riegner*, note 12, p. 12, underline such risk in relation to expressions such as “appropriate” or “in a manner or timeframe acceptable to the Bank”, or deadline-requirements (“as early as possible”).
- 26 United States on the World Bank Safeguard Review, 29 April 2014, p. 3, <https://www.treasury.gov/resource-center/international/development-banks/Documents/United%20States%20Comments%20on%20WB%20Safeguards%20Review.pdf> (last accessed on 29 March 2017)..
- 27 The 22 countries that have ratified the “Indigenous and Tribal Peoples Convention, 1989, No. 169, in force since September 1991, may be viewed here: http://ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 (last accessed on 7 March 2017).
- 28 See, for example, the concerns listed by the Special Rapporteur in relation to the protection of IPs in Asia: *James Anaya*, Report of the Special Rapporteur on the rights of indigenous peoples

ties should secure accountability. The Centre for International Environmental Law (“CIEL”), in evaluating the impact of the Country Systems Pilot Projects launched by the Bank in 2005, notes the WB’s shortcomings in its current approach, which weakens the safeguards’ protection and fails to facilitate enduring, legally-binding improvements in the borrower countries’ systems.²⁹ Therefore, it is likely that using borrower systems, while increasing cost-effectiveness, will entail the watering down of IPs’ protection, without introducing long-term improvements in the Borrower’s legal framework.

CIEL has also noted that the use of country systems increases to the difficulty of holding the Bank accountable for adverse impacts of the projects it funds, given that the standards are formulated in a principled way.³⁰ The Borrower is entrusted with the identification of indigenous communities, the appraisal of a project’s impact, the implementation of culturally adequate means of consultation and participation of the affected communities, and so on. The applicable rules are those of the Borrower’s national framework, so that violations of the ESS-7 standards are difficult to assess by the Inspection Panel or other means of redress (such as the new project-based grievance redress mechanism introduced by ESS-10). This aspect will be addressed more closely later on.

The same broader, principle-based approach³¹ could also limit the extent to which Management and Borrower conduct can be reviewed. Important innovations introduced by the review are at risk of remaining dead letter. One such innovation concerns the involvement of indigenous communities. Under the old safeguards, broad community support by IPs was ensured through “free, prior and informed consultations”. ESS-7 requires “free, prior and informed *consent*” (“FPIC”) to proposed projects, as a condition to proceed with the project. The IPs’ right to FPIC has been recognised by a number of international legal instruments in recent years.³² Its introduction in ESS-7 follows the example set by the Euro-

(A/HRC/24/41/Add.3), 31 July 2013, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41-Add3_en.pdf (last accessed on 29.03.2017).

29 Centre for International Environmental Law, *The Use of Country Systems in World Bank Lending: A Summary of Lessons from the Pilot Projects and Recommendations for a Better Approach*, 2008, http://www.ciel.org/Publications/WorldBank_CountrySystems_Jan08.pdf (last accessed on 29.03.2017). The use of borrower systems was previously regulated under Operational Policy 4.00 (“Piloting the Use of Borrower Systems to Address Environmental and Social Safeguards Issues in Bank-Supported Projects”).

30 Centre for International Environmental Law, note 29, pp. 4 ff.

31 International Organizations Clinic, note 22, p. 7.

32 See, for example, the Declaration on the Rights of Indigenous Peoples, passed by the UN General Assembly in September 2007, Art. 32(2); see also the statement by the UN Commission on Human Rights, which acknowledges the obligation by corporations and business enterprises to respect the principle of FPIC of communities affected by development projects: UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights E/CN.4/Sub2/2003/38/Rev. 2, par. 10(c). It must be noted, however, that ILO Convention No. 169 - a binding legal instrument, rather than a declaration - merely provides for consultation with project-affected IPs: see Art. 15, par. 2, ILO Convention No. 169.

pean Bank of Reconstruction and Development (“EBRD”),³³ and had been widely supported by stakeholders in the course of the consultations. Pursuant to par. 25, lett. (d), FPIC does not require unanimity, and is deemed to be met even when individuals or groups within or among affected Indigenous Peoples do not agree. When IPs as a whole do not give their consent, the Bank may approve only the parts of the project that do not affect them.³⁴

The ESF has been met with widespread disappointment by NGOs and civil society organisations, which consider it a “huge step backward for human rights”³⁵ and “a race to the bottom in a shameful scramble to eliminate requirements for careful environmental and social due diligence”³⁶. The shift of focus to the Borrower has been seen as a way for the World Bank to avoid acknowledging its obligations, and an anticipation that “it [the WB] will be able to violate human rights without consequence”³⁷.

An example may illustrate how the shift of focus and increased flexibility of the ESS-7 could impact its effectiveness. FPIC, whilst in itself a welcome introduction, is required on three circumstances which are established by the Borrower, i.e. in case of: (a) adverse impacts on Indigenous Peoples’ lands and territories; (b) involuntary resettlement of IPs; and (c) significant impacts on cultural heritage, material to the identity and/or culture, ceremonial, or spiritual aspects of the affected lives. Especially the first and the third situation leave a wide margin of interpretation to the Borrower, whose appreciation of the threshold required under “adverse”, “significant” and “material” may be questionable.

In the following section, the safeguards’ reform will be evaluated in terms of its judicial implementation. To begin with, a brief overview of the past decisions by the Bank’s adjudicatory organ will give a flavour of the problems that may arise from the safeguards’ interpretation (I). The second section seeks to verify the impact of ESS-7’s different wording on the chances for Indigenous Peoples to obtain redress before the Inspection Panel (II).

C. Implementing Indigenous Peoples’ protection at the World Bank: the Inspection Panel

The relationship between the World Bank and IPs may be analysed through the lens of the Inspection Panel, an organ created to address the harshly criticised harmful effects of WB-financed projects. The need for a permanent review mechanism led to the Inspection Pan-

33 EBRD, Performance Requirement 7. On the topic, see *Fergus MacKay*, note 7.

34 ESS-7, par. 27.

35 *Upasana Khatri*, EarthRights International, 17 August 2016, <https://www.earthrights.org/blog/world-banks-new-environmental-and-social-framework-huge-step-backward-human-rights/> (last accessed on 30 January 2017).

36 *Korinna Horta*, Urgewald, cited by Environment News Service, 28 July 2016, <http://ens-newswire.com/2016/07/28/ngos-world-banks-new-safeguards-weaken-protections/> (last accessed on 30 January 2017).

37 *Jessica Evans*, Human Rights Watch, cited by Environmental News Service, 28 July 2016, <http://ens-newswire.com/2016/07/28/ngos-world-banks-new-safeguards-weaken-protections/> (last accessed on 30 January 2017).

el's establishment in 1994, with the mandate of receiving and investigating complaints submitted by people allegedly harmed by Bank-financed projects.³⁸

The Panel is the first independent semi-judicial body created in a multilateral development bank. If a person or a community believes that they have been, or potentially will be, adversely affected by a project financed by the World Bank, they can submit it for review before the Panel. Under this respect, by verifying the World Bank's compliance with its safeguard policies and procedures, the Panel represents a major step towards ensuring accountability on behalf of an international organisation. Persons have a direct means of redress against an international organisation through a quasi-judicial oversight mechanism.³⁹ Since its creation, 19 cases brought before the Panel have involved Indigenous Peoples' issues, covering 15 countries in four regions.⁴⁰

The Panel has had an important role in defining the World Bank's safeguards in relation to Indigenous Peoples.⁴¹ Indeed, this means of redress is particularly important to indigenous communities, which are often in a weaker position to defend their rights.⁴² Given the mounting pressure and encroachment on indigenous lands from commercial interests linked to resource-exploitation, IPs - "the poorest of the poor", "the most vulnerable and marginalized"⁴³ - are increasingly at risk of losing lands or access to natural means of survival.⁴⁴

Given that ESS-7 has yet be implemented, its material impact on the protection of Indigenous Peoples before the Inspection Panel cannot be assessed.⁴⁵ Nonetheless, past decisions may cast light upon the Panel's future interpretation of the standards.

38 World Bank, note 8, p. iv.

39 For a critical assessment on the potential of the Inspection Panel, and how far it has contributed to the development of normative standards in the compliance review process, international human rights and public participation in decision-making, see *Andria Naudé Fourie*, *The World Bank Inspection Panel's Normative Potential: a Critical Assessment, and a Restatement*, *Netherlands International Law Review* 59 (2012), pp. 199-234.

40 World Bank, note 8, p. iv.

41 On which: *infra*.

42 World Bank, note 8, p. 17.

43 World Bank, Policy Brief - Indigenous Peoples, http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN_indigenous_clean_0421.pdf (last accessed on 29 January 2017).

44 World Bank, note 8, p. 17.

45 The new ESF is expected to take effect in early 2018: World Bank, Fact Sheet - The World Bank's New Environmental and Social Framework, 4 August 2016, <http://pubdocs.worldbank.org/en/748391470327541124/SafeguardsFactSheetenglishAug42016.pdf> (last accessed on 29 January 2017).

1. The Inspection Panel's findings in relation to Indigenous Peoples: an overview of issues emerged

Since the Panel's creation, it has received 114 requests for inspection, 87 of which have been registered and 34 investigated.⁴⁶ The 19 cases involving IPs have been reviewed by the World Bank, that published an "Emerging Lessons" report ("the Report") based on the Panel's case-law until 2016.⁴⁷ The Report highlights the most frequent controversial issues brought before the Panel, analysing why the World Bank failed to comply and how the policies should be interpreted and applied. The issues relate to consultation and broad community support, social assessment and customary rights.⁴⁸

Four lessons learned concern the project preparation phase: therefore, "getting it right" from the beginning is particularly important.⁴⁹ A correct identification of the Indigenous Peoples affected and the use of appropriate - and, where necessary, alternative - terminology is key to protecting these communities and their rights, ensuring maximisation of benefits or mitigation of adverse effects. Indeed, the Report shows that borrowing governments tend to be reluctant to recognise project-affected people as IPs, and that mis-identification often stems from the lack of specialised expertise, inadequate screening and domestic resistance to the concept of Indigenous Peoples.⁵⁰ For example, in the Kenya Electricity Expansion Project, involving the relocation of Maasai villages, the harm caused by the project could have been avoided or mitigated, had the communities affected been properly identified. This would have ensured the availability of the material in the local language, essential prerequisite to a meaningful consultation.⁵¹

Interestingly, the Panel noted that when applying a "functional equivalent" approach, the Bank mostly fails to ensure the application of the policy's protections.⁵² This was the case in the Ethiopia Protection of Basic Services Project III, where the Bank's standards for Indigenous Peoples was considered incompatible with the Ethiopian Constitution. Therefore, Management purportedly followed a functional equivalent approach. However, the Panel found no evidence that the functional equivalent approach had been applied. This failure prevented to take into account the livelihood, well-being and access to basic services by the Anuak community.⁵³

46 World Bank, note 8, p. iv.

47 Therefore, the analysis covers the experience under the ancient safeguards namely, Operational Directive 4.20 and Operational Policy/Bank Procedures on Indigenous Peoples 4.10; World Bank, note 8.

48 *Ibid.*, p. 4.

49 *Ibid.*, p. iv.

50 *Ibid.*, p. 5.

51 *Ibid.*, p. 6.

52 *Ibid.*, p. 6.

53 *Ibid.*, p. 6.

The cases brought before the Panel highlight the importance of obtaining IPs' broad community support through free, prior and informed consultations in order to protect their rights and avoid opposition to the project. Comprehensive assessments should be undertaken to verify all potential impacts on Indigenous Peoples.⁵⁴ In order for participation to be effective, disclosure of project information must occur in a culturally appropriate form, manner and language,⁵⁵ and it must involve the identification of the legitimate communities' representatives.⁵⁶ Interestingly, the Panel's history shows that policy implementation failures have arisen from insufficient understanding of borrowing countries' legal and institutional framework, and that, in turn, Borrowers have an insufficient understanding of IPs' issues.⁵⁷

The Panel's experience reveals the importance of active supervision, which may ensure adaptation to changing circumstances. An expert-managed supervisory phase in the implementation of a project is particularly relevant in relation to IPs' projects, which have proven more complex on average than other projects.⁵⁸ This can be pivotal to understand the environment and better adapt the project thereto. With a view to long-term benefits, a project's positive effects are maximised where customary rights are respected and the project operates in a culturally compatible manner.⁵⁹

II. *The ESF and the Inspection Panel: possible impacts?*

With regard to the ESF, one of the most immediate concerns relates to the less prescriptive nature of the Bank's obligations, given the safeguards' broader wording. This can limit the Panel's scrutiny, which would seriously hinder the redress mechanism's effectiveness. For instance, where Indigenous Peoples are found to be present in, or have collective attachment to the project area, the "Borrower *may be required* to seek inputs from appropriate specialists (...)"⁶⁰ According to the old provision, following the determination of IPs' presence, "the borrower *undertakes* a social assessment [and] *engages* social scientists whose qualifications, experience, and terms of reference are acceptable to the Bank".⁶¹ It is uncertain, in this and in similar cases, whether the different wording entails a different responsibility for the Bank. More specifically, the new provision could imply a shift of account-

54 *Ibid.*, p. 10.

55 *Ibid.*, p. 9.

56 *Ibid.*, p. 8.

57 *Ibid.*, p. 11. Lack of thorough understanding has emerged in relation to the Kenya Natural Resource Management Project, where the community was found insufficiently prepared to implement the project and involve Indigenous Peoples in forest management (*ibid.*, p. 12).

58 *Ibid.*, pp. 14-15.

59 *Ibid.*, p. 16.

60 ESS-7, par. 10 (emphasis added).

61 OP 4.10, par. 9 (emphasis added).

ability for harm caused to Indigenous Peoples by Bank-financed operations to the Borrower.⁶²

An analysis of the past approach adopted by the Panel points - to a certain extent - to a different conclusion. Indeed, the Panel tended, in past decisions, to go beyond a strictly literal interpretation of the safeguards, applying, instead, a test of reasonable care and common sense when judging the Bank's conduct.⁶³ Therefore, it concluded that "the directives cannot possibly be taken to authorise a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding."⁶⁴ It is questionable whether the Inspection Panel may find a "clearly binding" obligation in this case: the wording *may be required* does not clarify the circumstances where the Bank is compelled to require a similar obligation by the Borrower. A literal interpretation could lead to conclude that the changes in the provision leave Bank Management with a wider margin of discretion. However, further specification could be inserted in the agreement entered into by the Bank and the Borrower, where the latter's responsibilities are detailed.⁶⁵

The possibility of entrusting these determinations to the Bank and the Borrower on a "nebulous" case-by-case basis is not entirely satisfactory.⁶⁶ This is even more so, in consideration of the Bank's interest to reach an agreement and approve the loan, a circumstance that could push the WB to settle for lower standards of protection for IPs that are cost-efficient for the Borrower.⁶⁷

Nonetheless, even if the Inspection Panel were to face a claim where the safeguards are not better defined by contractual obligations binding on the parties (for instance, in the financing agreement), it could - and should - apply a broad test of reasonableness in its interpretation, relying on the objectives of ESS-7. Pursuant to these objectives, the safeguard's purpose is to ensure that "the development process fosters full respect for the human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of Indigenous

62 As the Inspection Panel underlined itself when submitting its comments on the second draft of the ESF. See: Inspection Panel, Comments on the Second Draft of the Proposed Environmental and Social Framework, 17 June 2015, p. 2.

63 Inspection Panel, Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project, (P001409), Panel Report and Investigation, 18 August 1998, par. 13, <http://documents.worldbank.org/curated/en/330111468757224465/pdf/28416.pdf> (last accessed on 1 February 2017).

64 Inspection Panel, China: Western Poverty Reduction Project (P046564), Investigation Report, 18 June 1999, par. 38, [http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Investigation%20Report%20(English).pdf) (last accessed on 1 February 2017).

65 See ESS-1, par. 56: "The Bank will monitor the environmental and social performance of the project in accordance with the requirements of the legal agreement (...)."

66 *N. Bulgaski*, note 12, p. 55.

67 The Wapenhans report has been the first to underline this "cynical" aspect of the Bank's culture, which "incentivizes project approvals and increased business in much the same way as that of a private sector bank" (*N. Bulgaski*, note 12, p. 55): see World Bank, Effective Implementation: Key to Development Impact ("Wapenhans report").

Peoples”, “to avoid adverse impacts of projects on Indigenous Peoples”, “to promote sustainable development benefits and opportunities for Indigenous Peoples” and “to improve project design and promote local support by establishing and maintaining an ongoing relationship based on meaningful consultation”. This last objective, in particular, is a persuasive argument in favour of the adoption of a purposive interpretation by the Inspection Panel. In this way, where specialist support is necessary to ensure meaningful consultation and a better project design, the Bank and the Borrower are compelled to require such specialist support (which, as seen above, plays a fundamental role in projects where IPs are involved). For the same reasons, where harm caused to IPs by a project could have been avoided through specialist input, the Bank should be held accountable for having failed to require the Borrower to meet this requirement.

Additionally, it must be kept in mind that the Bank is compelled to support the Borrower in the implementation of the project, in order to ensure a compliant environmental and social performance thereof.⁶⁸ “Where appropriate” the Bank is bound to require the Borrower to engage stakeholders and third parties, such as independent experts.⁶⁹ Both of these obligations would lead to conclude that the Inspection Panel may legally hold the Bank *per se* accountable of harmful - and avoidable - consequences.

The above conclusion is strengthened by considering the Panel’s approach in past decisions. Indeed, it found that a certain standard must be upheld by the Bank when exercising its supervisory functions: the Bank has to “succeed in guiding appropriately the Borrower”,⁷⁰ meeting an acceptable level of “rigor and robustness”.⁷¹ In the Nepal Power Development Project, for instance, the Panel found that the Bank had failed to provide sufficient assistance to the Borrower during project preparation and implementation. Among others, it found that this led to a failure by the Bank to ensure that adequate, timely and meaningful consultations with Indigenous Peoples had occurred.⁷²

A similar purpose-oriented approach was also adopted by the Panel in relation to timing provisions. As remarked above, many deadlines are now worded in an indefinite way.⁷³ ESS-7 is no exception: where the provisions do mention timing, it frequently occurs in an imprecise and rather vague manner. For example, ESS-7 requires the Borrower to compile a

68 ESS-1, par. 57.

69 *Ibid.*, par. 58.

70 Inspection Panel, Argentina: Santa Fe Road Infrastructure Project (P070628), Investigation Report, 13 September 2007, par. 98, [http://ewebapps.worldbank.org/apps/ip/PanelCases/51-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/51-Investigation%20Report%20(English).pdf) (last accessed on 1 February 2017).

71 *Ibid.*.

72 Inspection Panel, Nepal: Power Development Project (P043311), Investigation Report, 12 February 2015, par. 255, <http://documents.worldbank.org/curated/en/55472146799985844/pdf/985241NVR-P043311-INSP-R2015-0002-2-Box393172B-PUBLIC.pdf> (last accessed on 1 February 2017).

73 *Dann/Riegner*, note 12, p. 12.

“time-bound” plan (without further defining what timing may be considered acceptable)⁷⁴ and generically recognises the importance of “early engagement with stakeholders”.⁷⁵

Once more, the safeguard’s objectives could guide the Inspection Panel in its interpretation of the provisions. Amongst its objectives, ESS-7 clearly states that Indigenous Peoples should be given the opportunity to adapt to changing conditions in “a manner and *in a time-frame acceptable to them*.”⁷⁶ Although the timeframe is not further described, the Indigenous Peoples’ interests are considered, enabling the Inspection Panel to take them into account when evaluating the compatibility of the Borrower’s conduct (and the Bank’s related supervisory functions) during the project’s preparation and implementation.

Despite the foregoing, in many instances the reform has wholly omitted time references. In addition to requiring “early” screening by the Bank in project preparation,⁷⁷ the old applicable safeguard to Indigenous Peoples, OP/BP 4.10, contains a number of references to timing. For example, it requires the Borrower to provide affected IPs with relevant information “at each stage of project preparation and implementation”,⁷⁸ and it requires the Borrower to undertake certain steps “before” proceeding to the next phase⁷⁹ or “throughout the project cycle”⁸⁰ - effectively imposing on the Borrower a timing obligation. These references have disappeared in ESS-7, leaving the Borrower with a wider margin of flexibility in carrying out its obligations.

However, in the Cambodia Forest Concession Management and Control Pilot Project, when confronting indefinite wording, the Inspection Panel found that “a safeguard postponed is a safeguard denied.”⁸¹ Consistently with the ESS-7’s objectives, the Panel should maintain this approach when interpreting the new provisions, so as to avoid that the protections afforded to protect IPs’ interests are materially disregarded by the Borrower. This interpretative approach would impose on the Borrower a standard of reasonableness in timing, limiting its discretion and enhancing the safeguard’s protective effectiveness.

As noted above, there the new framework shifts its focus, directly entrusting many obligations to the Borrower, and assigning the Bank a supervisory role over their implementation.⁸² This could mean that the Inspection Panel will be unable to find the Bank’s direct responsibility, when breaches are committed by the Borrower. Therefore, as the NYU Inter-

74 ESS-7, paras. 13 and 17.

75 WB ESP, par. 53.

76 ESS-7, Objectives, p. 108.

77 OP 4.10, par. 8.

78 *Ibid.*, par. 10, lett. c.

79 See, e.g., OP 4.10, paras. 14-15, 17.

80 See, e.g., BP 4.10, paras. 1-2.

81 Inspection Panel, Cambodia: Forest Concession Management and Control Pilot Project (P060003), Investigation Report, 30 March 2006, par. 212, <http://documents.worldbank.org/curated/en/206011468231848248/pdf/35556.pdf> (last accessed on 1 February 2017).

82 As a general remark, it may be simply observed that the Bank’s duties are set out in less than 15 pages, whilst the Borrower’s obligations fill up nearly 115 pages.

national Organizations Law Clinic observes, it may become necessary for project-affected communities to prove that the harm suffered stems from the Bank's failure to conduct proper due diligence or risk assessments.⁸³ Although this was already the case under the old safeguards, the current burden is arguably heavier, given the widespread shift of responsibilities to the Borrower.

Under the old safeguards, the Panel repeatedly found that although a third party is the primary addressee of an obligation, the Bank may incur into responsibility.⁸⁴ The Panel interpreted the Borrower's and the Bank's obligations as closely connected. Thus, non-compliance by the Borrower gives rise to a rebuttable presumption that the Bank did not comply, lowering the claimant's evidentiary burden.⁸⁵ Under the ESF, the Bank may only support projects which meet ESS-7 requirements,⁸⁶ and it has due diligence obligations to this end.⁸⁷ Therefore, the Inspection Panel's past interpretative approach should be applicable notwithstanding the above mentioned changed wording. In this case, the Panel could find that the Bank is responsible, when a breach of its supervisory obligations led the Borrower to implement a harmful project.

This would be directly relevant for the protection of IPs' rights. As seen above, the free, prior and informed consent of project-affected IPs is required to approve a project. Consent has to be obtained by the Borrower,⁸⁸ and ascertained by the Bank.⁸⁹ Although the Bank does not have to carry out the consultations itself, its supervisory role implies that it also bears responsibility for the fulfilment of the Borrower's obligations. This is consistent with the Panel's approach in the Ghana/Nigeria: Western African Pipeline Project case, where it found that "Management failed to ensure that the Sponsor had in place an effective grievance process to identify and redress resettlement issues".⁹⁰ Therefore, the Panel should be able to verify the Bank's compliance with the safeguards. It must be added, however, that the Panel will have to exercise particular care when carrying out this function, so as to avoid conducting an implicit judicial review of the Borrower's compliance with its own na-

83 International Organizations Clinic, note 22, p. 14.

84 See, for example: Inspection Panel, Bangladesh: Jute Sector Adjustment Credit Project (P009553), Eligibility Report, 14 March 1997, par. 4, [http://ewebapps.worldbank.org/apps/ip/PanelCases/6-Eligibility%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/6-Eligibility%20Report%20(English).pdf) (last accessed on 1 February 2017).

85 International Organizations Clinic, note 22, p. 14; this statement is supported by a number of cases, see: Inspection Panel, Ghana/Nigeria West African Gas Pipeline, (P095050), Investigation Report, 22 May 2014, par. 149, [http://ewebapps.worldbank.org/apps/ip/PanelCases/40-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/40-Investigation%20Report%20(English).pdf) (last accessed on 1 February 2017); Albania Power Sector Generation and Restructuring Project, (P077526), Investigation Report, 7 August 2009, par. 5, [http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20(English).pdf) (last accessed on 1 February 2017).

86 WB ESP, par. 5.

87 *Ibid.*, paras. 30 ff.

88 ESS-7, par. 24.

89 ESS-7, par. 27.

90 Inspection Panel, Ghana/Nigeria: Western African Gas Pipeline Project, note 85.

tional framework, which could be regarded as an undue interference. In the case of the FPIC requirement, the Panel could refer to authoritative decisions by international courts and tribunals, that have broadly defined the standard, finding that it is a general principle of international law.⁹¹

In light of the results reached by the ESF, and specifically by ESS-7, the Panel could be critical to ensure the effective protection of IPs under the safeguards. Through its interpretation, the margins of uncertainty left open by the safeguard's looser wording can be reduced, and the Panel can impose a higher standard on the Borrower and the Bank. Although an incautious decision by the Panel is undesirable, due to the tension it would create with the Borrower and Bank Management, it is argued that the Panel has jurisdiction over alleged violations of ESS-7, and it should exercise this jurisdiction to promote the safeguard's effectiveness.

Lastly, the introduction of a project-based redress mechanism opens an additional, immediate means of addressing claims of safeguards' violations. Two positive consequences ensue: firstly, affected individuals and communities can immediately raise their concerns, which can adjust the Borrower's conduct in order to avoid further damage. This would make an *ex post* investigation by the Inspection Panel potentially superfluous, as the claims would be addressed at an earlier stage. Secondly, the conclusion reached by the same redress mechanism would be more acceptable to the Borrower, with beneficial effects not only on immediate compliance, but also on the future relationship between the Borrower and the Bank.

D. A compromise solution: understanding the interests at stake

A compromise solution is often perceived as unsatisfactory by all sides. Indeed, it is undeniable that the broader flexibility could endanger effective protection and lead to the standards' dilution. From a pragmatic viewpoint, however, the compromise has also enabled the Bank to introduce important requirements, such as the conditioning of projects' approval to IPs' support. The challenges and opportunities of the ESF may only be verified in due course, once it is put into practice. A better understanding of the reasons underlying the reform's outcome is reached by considering the factors arising from the global context, and thus the interests of two key actors in the reform: the Member States and the Bank itself.

Today, the World Bank is only one of the international financial institutions from which countries can obtain a loan.⁹² Next to the Bank, states can go to other MDBs, such as the European Bank for Reconstruction and Development (EBRD), the African Development

91 For an overview of international case-law on Indigenous Peoples' rights, see: *Derek Inman*, From the Global to the Local: the Development of Indigenous Peoples' Land Rights Internationally and in Southeast Asia, *Asian Journal of International Law* 6 (2016), pp. 62-69.

92 *Benjamin Duerr*, How the World Bank is relaxing its human rights standards, *Agenda for International Development (A-id)*, 9 February 2016, <http://www.a-id.org/en/news/how-the-world-bank-is-relaxing-its-human-rights-standards/> (last accessed on 10 February 2017).

Bank (AfDB), the Inter-American Development Bank (IADB), the Asian Development Bank (ADB) and the BRICS New Development Bank (NDB). Alternatively, there are other candidates to which states turn: for example, new investment banks and funds, such as the Asian Infrastructure Investment Bank (AIIB) and the Brazilian Development Bank (BNDES).

The increasingly competitive market is a leading factor in what has been seen as a “race to the bottom”, a lowest bid auction among international financial institutions in order to maintain a competitive edge.⁹³ The position can be summarised as follows: “the Bank’s primary reason for existence is to assist the developing countries in undertaking development projects. If we go ahead with this kind of imposition of standards, the Bank is likely to go out of business.”⁹⁴

For instance, the AIIB, operative since January 2016, has approved its own ESF in February 2016. As far as Indigenous Peoples are concerned, the standard settled upon in the AIIB ESF merely requires free, prior and informed consultation, which is significantly less burdensome in comparison to the FPIC under the WB’s ESF.⁹⁵ Considering that two-thirds of the estimated 370 million IPs worldwide are in Asia, the conditions offered by the AIIB make its loans more attractive to many Asian development projects, which could detrimentally impact on the protection of indigenous communities in the region.⁹⁶

This may not necessarily be the case. As Kingsbury observes, the high standards set the Bank apart as a “demanding lender with external credibility”, so that other financing agencies “often want the Bank’s imprimatur on a project”.⁹⁷ However, many governments are

- 93 *William Laurance*, Development banks threaten to unleash an infrastructure tsunami on the environment, *The Conversation*, 5 April 2016, <https://theconversation.com/development-banks-threaten-to-unleash-an-infrastructure-tsunami-on-the-environment-57037> (last accessed on 11 February 2017). However, a different view on the “watering down” of safeguards by one such IFI, the Asian Infrastructure Investment Bank, is illustrated by *Martin Edwards & Katayon Qahir*, US should stop blocking China’s AIIB and join allies in new club, *The Conversation*, 6 April 2015, <https://theconversation.com/us-should-stop-blocking-chinas-aiib-and-join-allies-in-new-club-39406> (last accessed on 11 February 2017).
- 94 *Subhash Chandra Gard*, Executive Director for Bangladesh, Bhutan, India and Sri Lanka, Brief of Statement at the Committee on the Development Effectiveness on 24 June and 1 July, 2015 on ESF: https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/final_statement_by_ed_subhash_garg_eds12_on_esf.pdf (last accessed on 13 February 2017).
- 95 AIIB, Environmental and Social Framework, ESS-3, February 2016, <https://www.aiib.org/en/policies-strategies/download/environmental-framework/20160226043633542.pdf> (last accessed on 13 February 2017).
- 96 This concern has been highlighted by a number of CSOs and NGOs. To name one among many, see the call made by Asia Indigenous Peoples Pact during the safeguards’ consultation process led by the AIIB: <http://aippnet.org/aipp-calls-for-greater-respect-for-indigenous-rights-in-the-safeguard-of-asian-infrastructure-investment-bank/> (last accessed on 13 February 2017).
- 97 *B. Kingsbury*, Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in *G. S. Goodwin-Gill* (ed.), ‘The Reality of International Law - Essays in Honour of Ian Brownlie’, Chapter 14, p. 336.

concerned that the application of the ESF will heighten transaction and project implementation costs, given the added complexity of the project design and the high cost of human and institutional resources needed throughout all project phases. This is the view expressed, among others, by India, that held that “the proposed clauses (...) can lead to legal complications, delays, increase in costs and delay in project execution.”⁹⁸

As a consequence, an excessive burden on Borrowers could make development projects too expensive. Therefore, these would not be pursued at all, or Borrowers could resort to other financing sources, such as private capital markets. For this reason, governments have stressed the need for the Bank to adopt a flexible, outcome-oriented approach, building on the “developing countries’ context, circumstances and policies, and an understanding by the Bank of the feasible advances for each one”.⁹⁹ In the words of the Indian delegation, “the engagement of the World Bank should be in the spirit of partnership, and should be non-intrusive”.¹⁰⁰

Many countries have expressly objected to the language in ESS-7. For instance, several African states argued that the expression “Indigenous Peoples” does not comply with the spirit of their constitutions, that do not recognise “more indigenous” ethnic groups than others.¹⁰¹ Indeed, it has been held that the use of similar language - “discriminatory, sensitive, offensive and unacceptable”¹⁰² - could become a source of tension and social instability, giving rise to “violent consequences”.¹⁰³

98 Indian Government, India’s written response on World Bank’s consultation on “Update and Review of the World Bank’s Safeguards Policies & Proposed Environmental and Social Framework”, 19 January 2015: https://consultations.worldbank.org/Data/hub/files/comments_of_govt_of_india_on_the_wb_consultation_of_new_ess_framework_19_01_2015.pdf (last accessed on 13 February 2017); referred to by Asia Indigenous Peoples Pact (AIPP), Press Release: Indigenous peoples raise concern over India’s position on World Bank safeguards, 16 April 2015, <http://aipp.net.org/press-release-indigenous-peoples-raise-concern-over-india-s-position-on-world-bank-safeguards/> (last accessed on 13 February 2017).

99 Brazilian Secretary for International Affairs, Letter to Mrs. Deborah L. Wetzel, 19 December 2014, <http://www.conectas.org/arquivos/editor/files/Posicao%20Gov%20Brasileiro.pdf> (last accessed on 12 February 2017).

100 As referred by *Nitin Sethi*, Govt against consent of tribals for displacement, *Business Standard*, 31 March 2015, http://www.business-standard.com/article/economy-policy/govt-against-consent-of-tribals-for-displacement-115033100028_1.html.

101 See, for example, the position expressed by the Tanzanian government and reported by medias, e.g. *Sasha Chavkin & Dana Ullman*, World Bank Allows Tanzania to Sidestep Rule Protecting Indigenous Groups, The International Consortium of Investigative Journalists, 20 June 2016, <https://www.icij.org/project/world-bank/world-bank-allows-tanzania-sidestep-rule-protecting-indigenous-groups> (last accessed on 12 February 2017).

102 Delegate for Kenya, Meeting of African Governors of the World Bank Group and the International Monetary Fund - Fourth Session: Update and Review of the World Bank’s Safeguard Policies (Statements by Delegates), 27-28 August 2015, Luanda, Angola.

103 Delegate for Ethiopia, Meeting of African Governors of the World Bank Group and the International Monetary Fund - Fourth Session: Update and Review of the World Bank’s Safeguard Policies (Statements by Delegates), 27-28 August 2015, Luanda, Angola; see also the summary of

This issue is also related to the principle of sovereignty. The Ethiopian delegation, for example, “expressed frustration that the Bank still uses the term ‘indigenous peoples’ despite the many times in which members of the African caucus have objected to it. [The delegate] termed this as unfair and disturbing and concluded by saying that *no one has the right to impose a certain terminology as a reference for groups in a sovereign country (...)* the Bank should make every effort to be part of the solution and not the source of problems for its clients.”¹⁰⁴

Additionally, a number of WB members criticised the FPIC requirement. The Indian government, for instance, told the World Bank that it is “not comfortable” with mandatory need for FPIC, arguing that “domestic laws of acquisition and protection of such communities already provide for adequate safeguards” and that “the Bank thus needs to rely on such domestic laws/guidelines where the domestic laws rules etc. take care of such issues.”¹⁰⁵ In a joint statement with Bangladesh, Bhutan and Sri Lanka, it has declared that “the concept of ‘Free, Prior & Informed Consent’ is likely to create insurmountable hurdles to development.”¹⁰⁶

In general, the views expressed by BRICS governments, other borrowing governments and donor governments give a flavour of the different priorities for each group of States. The delegations for BRICS and other borrowing governments emphasised the need to harmonise the safeguards with national systems, relying on Borrowers’ institutions and standards and focusing on capacity building.¹⁰⁷ On the other hand, donor governments have asked for greater harmonisation between donors and the Bank procurement reform, and strongly recommended to improve the safeguards’ implementation and efficiency and to consider human rights. Furthermore, they are the only group of countries that requested the Bank not to dilute its standards, and believe more strongly than the others that the current policies work well in relation to the establishment of international standards.¹⁰⁸ The need to improve the policy on Indigenous Peoples emerged only in multi-stakeholder meetings, although BRICS and other borrowing governments find that the policy should align with the national context.¹⁰⁹ The U.S., the greatest WB donor, released a statement on the review

the Nigerian delegate’s statement, *ibid.* This concern has also been underscored by academics; see, e.g., *Galit Sarfaty*, *The World Bank and the Internalization of Indigenous Rights Norms*, pp. 1804-1805.

104 Delegate for Ethiopia, note 103.

105 Indian Government, note 98.

106 *Subhash Chandra Garg*, note 94.

107 The main recommendations and the percentage of requests in relation to each issue have been published by the World Bank, and may be viewed here: <http://siteresources.worldbank.org/EXTSAFEPOL/Resources/584434-1306431390058/SafeguardsReviewStatusReportBoardBriefingJuly232013.pdf> (last accessed on 13 February 2017).

108 *Ibid.*

109 *Ibid.*

and update of the safeguard policies, where it declares itself “pleased with much in the new standard on Indigenous Peoples”, although it asks for greater clarity on their protection.¹¹⁰

E. Conclusion

By considering the global context, and the different interests involved, a first set of difficulties may be grasped, that may be called the *narrow and broad legitimacy dilemma*. The Bank is primarily a bank, that is prohibited from interfering in the political affairs of any Member State.¹¹¹ However, its purpose is “to promote economic and social progress in developing countries (...) so that their people may live a better and fuller life.”¹¹² Thus, Member States expect the Bank to carry out its functions within the strict limits of its mandate, exercising the powers it has been conferred in the Articles of Agreement (*narrow legitimacy*). At the same time, civil society expects the Bank to ensure the sustainability of its action (*broad legitimacy*), without which the Bank’s very purpose is put into question. These are two concurrent legitimacy expectations, where political insulation and political acceptability are simultaneously postulated. How to combat corruption whilst refraining from intervening in a country’s political affairs? How to ensure sustainability, transparency and participation without overstepping the Bank’s economic mandate and, ultimately, interfering in the sovereign management of internal matters? How to implement accountability without creating a mechanism of judicial review?¹¹³

Expectations of a radical reform, with the introduction of a new “gold standard” by the Bank through its safeguards, do not sufficiently consider the global context. The compromise reached in the ESF accommodates at least three sets of interests. First, the need for more extensive protections, called for by civil society representatives and certain capital-importing States (such as the U.S.). This has led, for example, to the introduction of the FPIC requirement in ESS-7, to the safeguard’s broader scope of application and to the final rejection of the “alternative approach” for Indigenous Peoples. Second, the need for greater flexibility, so that the means of implementing the standards is compatible with sovereign interests. The shift of focus to the Borrower is an evident response to this need. Another

110 U.S. Position on the Review and Update of the World Bank’s Safeguard Policies, 4 August 2016, p. 4.

111 World Bank, IBRD Articles of Agreement, Art. IV Se. 10 (“Political Activity Prohibited”).

112 David D. Driscoll, *The IMF and the World Bank: How Do They Differ?*, in: International Monetary Fund, August 1996, <https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm> (last accessed on 15 February 2017).

113 See World Bank General Counsel, *Issues of Governance in Borrowing Members—The Extent of Their Relevance under the Bank’s Articles of Agreement*, Legal Memorandum of the General Counsel, December 21, 1990 (SecM91-131, February 5, 1991); *Prohibition of Political Activities in the Bank’s Work*, Legal Opinion of the General Counsel, July 11, 1995 (SecM95-707, July 12, 1995); *Ibrahim Shihata, Corruption—A General Review with an Emphasis on the Role of the World Bank*, paper based on a keynote address delivered at the International Symposium on International Crime, Jesus College, Cambridge 1996.

example is the introduction of a project-based redress mechanism, which seeks to avoid intervention by the Inspection Panel. Finally, but importantly, the Bank's own need to remain competitively attractive on the market. The adoption of stringent, inflexible obligations would have failed to reach this result. Rather than advancing social and environmental protection in development projects, it would have entailed fewer loan requests to the Bank, and potentially more to other IFIs with less stringent requirements, much to the detriment of the overall standards applied.

How are the interests of Indigenous Peoples affected? The reform's results, as embodied in ESS-7, are overall promising. The compromise solution may well lead to a dilution, but it may also lead to a progressive internal reform by borrowing countries, which are nudged into compliance with principles they have been so far hesitant to adopt. The possibility of relying on country systems, for example, could imply stronger capacity building and a democratically acceptable adaptation of internal legislation to international standards. It is arguable whether the same outcome would have followed the imposition of a stringent, inflexible regulation, which many States would perceive as an undue interference in their sovereignty.

Therefore, labelling the ESF as a dilution of precedent standards is a premature assessment. There is certainly the risk that the practical impact of the new safeguards will be unsatisfactory. However, this would occur in the case of a jointly ineffective approach by the Bank, the Borrower and the redress mechanisms, amongst which - and crucially - the Inspection Panel. The possibility that the Inspection Panel will require a high standard by Bank Management, in light of the Panel's past approach, is considered likely. Further, ESS-7 offers the opportunity of *softly* reaching a material result, enabling the involvement of IPs in a project's different phases and avoiding or mitigating the project's adverse effects. The Borrower's enhanced ownership and responsibility suggests that there is a greater chance of success in the standards' implementation. Additionally, long-term beneficial effects are favoured: with the introduction of consistent practice, expectations would form among individuals and communities *vis à vis* national institutions and the Bank itself, so that the leeway for future - pejorative - action would be constrained.