

Submission

to

The World Bank Safeguards Policies Review Team

on

The World Bank Draft Environmental and Social Framework

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INTRODUCTION

1. The Centre for Applied Legal Studies ('CALs') welcomes the opportunity to make submissions to the World Bank Safeguards Policy Review Team ('Review Team') on the World Bank Draft Environmental and Social Framework ('Safeguards').
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS' vision is a country and continent where human rights are respected, promoted, protected and fulfilled by states, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils its mandate by:
 - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations,
 - providing professional legal representation to survivors of human rights abuses; and
 - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.
4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The business and human rights programme was formed in 2013 and seeks to ensure that corporate entities acknowledge their power to: influence the treatment of human rights, respect human rights and actively protect, promote and fulfil them. Financial institutions are well placed to advance human rights' compliance by corporations and states because they provide funding that may facilitate or exacerbate human rights' abuse. Therefore, by attaching human rights'-related conditions to the provision of finance, financial institutions can ensure that human rights are respected, protected, promoted and fulfilled.
5. The World Bank is an international financial institution that provides development finance to developing countries.¹ It can ensure the protection and advancement of human rights, gender equality, poverty reduction, and the protection of marginalised communities by adopting a policy that conditions human rights protection and advancement in the granting and utilisation of development finance.
6. The World Bank attempts to eradicate poverty by drafting the Safeguards and giving communities, borrowers and other interested parties the opportunity to

¹ The terms states, borrowers and countries are used interchangeably.

comment on them. The fact that an extensive period for comment on the Safeguards has been given is an indication of the seriousness with which the Review Team treats environmental and social issues. This is commended. These submissions serve to assist the Review Team in ensuring that the commitment to the protection and advancement of human rights is carried out right through the Safeguards.

7. The Safeguards, as they currently read, fall short of these protections and advancements. The World Bank should include the protection and advancement of human rights, gender equality, poverty reduction and marginalised communities because it is a specialised agency of the United Nations ('UN'), it is founded on principles of human rights; and is a standard setter for other development banks and commercial banks that provide development finance. CALS, therefore submits that the Safeguards should be amended to:

- 7.1. Integrate a gendered approach;
- 7.2. Include measures that address poverty;
- 7.3. Mainstream human rights; and
- 7.4. Disallow opting-out of Free Prior, and Informed Consent.

SUBSTANTIVE AREAS OF CONCERN

A) MAINSTREAM HUMAN RIGHTS

8. The World Bank's main goals are to end extreme poverty and promote shared prosperity.²
9. To best achieve the aforementioned goals, the World Bank should incorporate into the Safeguards, a human rights-based approach. Regarding this very issue, the UN Committee on Economic, Social, and Cultural Rights said that "the application of the international human rights normative framework . . . helps to ensure that essential elements of anti-poverty strategies, such as non-discrimination, equality, participation and accountability, receive the sustained attention they deserve".³
10. There has been a debate about the role of the World Bank and its human rights obligations.⁴ However, it should be recognised that the World Bank as an

² The World Bank, *World Bank Mission*, available at <http://www.worldbank.org/en/about/what-we-do>

³ UN Committee on Economic, Social, and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2001/10, May 4, 2001, at 9, available at:

<http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>.

⁴ Gernot et al, *Center for Human Rights Policy Working Paper T-01-05*

international organisation and as a UN specialised agency has legal obligations to respect and protect human rights.⁵ In order to address poverty effectively, one must take into consideration “that poverty is about more than economic needs and that growth centred development has to address more complex and fundamental causes of poverty and inequality such as discrimination, exploitation and abuse.”⁶

11. Even if poverty reduction were not an objective of the World Bank it would still be obliged to found the Safeguards on human rights. This is because the 188 Member States of the World Bank have specific human rights obligations as parties of international human rights treaties in the UN. The Special Rapporteur on Adequate Housing also recognised this fact in its submissions to the World Bank during the Safeguard’s consultation process. It was emphasised that:

“the obligations of State parties to international human rights treaties should be understood as extending to their membership of the World Bank and their role as Executive Directors, including decisions to support the adoption of operational policies and approval of lending, credit and grant proposals.”⁷

12. The Safeguards currently under review only refer to human rights in the “Vision” section.⁸

13. CALS submits that the World Bank’s projects should meet specific human rights standards in order to meet its vision. The only way to support and encourage human rights is to incorporate a human rights-based approach in the Safeguards. This will ensure that borrowers comply with the conditions attached to finance provision provided by the World Bank and therefore protect, respect, promote and fulfil their human rights obligations in terms of international, and in some cases domestic, law.

“The World Bank and Human Rights”, available at:

<http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf>

⁵ United Nations, *Charter of the United Nations*, article 55, available at

<http://www.un.org/en/documents/charter/>

⁶ Boesen and Martin, *Applying a Rights-Based Approach, an inspirational guide for civil society*, at 9, available at <http://www.acfid.asn.au/aid-issues/files/applying-a-rights-based-approach-2013-an-inspirational-guide-for-civil-society>

Special Rapporteur on Adequate Housing, *Submission to the World Bank’s Safeguard Review and Update Process*, at 3, available at

https://consultations.worldbank.org/Data/hub/files/un_special_rapporteur_submission_to_safeguard_review_consultations_adequate_housing_right_to_adequate_standards.pdf

⁸ World Bank, *Environmental and Social Framework* (‘Safeguards’), available at

http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/first_draft_framework_july_30_2014_0.pdf, page 5 paragraph 3 reads as follows:

“The Bank operations are supportive of human rights and will encourage respect for them in a manner consistent with the Banks Articles of agreement.”

14. The human rights based approach has been discussed and incorporated in other international organisations and agencies which have recognised the importance of human rights in carrying out their specialised mandates.⁹ The World Bank would not be the first international financial institution to incorporate human rights. The African Development Bank states that it seeks to “encourage states to observe human rights norms, standards, and best practices as committed to in terms of international and regional law.”¹⁰
15. CALS submits that the Safeguards should take a human rights’-based approach in three ways. Firstly, the Safeguards should acknowledge the centrality of internationally and regionally recognised human rights to development finance and state that human rights compliance in terms thereof is the bare minimum standard for all borrowers. Secondly, the Safeguards should emphatically stipulate that human rights may not be violated in projects financed by the World Bank. Failure to abide by this principle should result in penalties for states and corporations involved in projects financed by the World Bank. Thirdly, the World Bank should actively seek to finance projects that are aimed at ensuring the realisation of human rights. Projects that seek to provide shelter, food security, water, education, health care services, environmental health and civil and political rights should be preferred by the World Bank over those that do not.
16. In conclusion, CALS submits that the grievance mechanism set out in the Safeguards is limited. The grievance mechanism should have extraterritorial jurisdiction and the authority to make binding decisions on issues pertaining to human rights. This mechanism should have direct means of access for persons alleging human rights violations; and, its binding decisions should be reviewable by independent courts of law. Furthermore, the Safeguards should include, among others, the following methods of remediation for victims of human rights violations consequent to World Bank development projects: compensation, reparation, restoration, non-repetition, and admission of wrongdoing.

B) GENDERED APPROACH

17. The Safeguards should take a gendered approach for a number of different reasons. Firstly, due to the social construction of gender, women are often the people most affected by development projects. Secondly, as noted in the Safeguards, women, affected by development projects are often denied the

⁹ UNICEF, *Programming Framework*, available at http://www.unicef.org/about/who/index_mission.html; European Investment Bank, *EIB Statement of Environmental and Social Principles and Standards (2009)*, United Nations Development Programme, *UNDP Social and Environmental Standards (2014)*.

¹⁰ African Development Bank, *Integrated Safeguards System: Policy Statement and Operational Safeguards*, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf ('Safeguards'), preamble, p 1.

opportunity to speak or make recommendations on development projects.¹¹ And thirdly, poverty, around the world is “feminised”; any attempt to address poverty has to be mindful of its gendered nature.

18. In order to fulfil its goals of ending extreme poverty and sustainable development by fostering income growth, the World Bank recognises a vision to “give due consideration to indigenous people, minority groups, and those disadvantaged by age, disability, gender or sexual orientation.”¹² The fact that gender has been included in a list of considerations is lauded. This statement, however, is lacking in clarity, and vision.
19. The statement does not provide borrowers, who will be bound by Safeguards, any guidance on the meaning of gender or “due consideration” and does not mention what purpose that consideration is meant to serve. The Safeguards do not provide guidance on the relationship between development and gender.
20. A number of states around the globe have committed to gender equality in terms of the Convention on the Elimination of all forms of Discrimination against Women (‘CEDAW’). Sixty-six percent of African states have ratified or acceded to the Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa, which provides that states will take measures to prevent discrimination against women.
21. The commitment to gender equality in international and regional instruments by some states was followed by the Millennium Development Goals (‘MDGs’). Designed to achieve eight goals by 2015, the MDGs set specific targets with specific deadlines for each; all of them are related to gender. MDG 1 speaks to the eradication of extreme poverty and hunger and MDG 3 speaks to the promotion of gender equality and the empowerment of women.¹³ In the World Bank’s own words, it committed to the MDG’s “because, simply put, these goals are our goals.”¹⁴
22. The Safeguards, as they currently read allow the borrower to disregard commitments made to gender equality under international law. The fact that Environmental and Social Safeguard (‘ESS’) 1, at paragraph 27 and 28, provides that borrowers must evaluate and ameliorate the social risks that may impact individuals based on their gender, does not save the Safeguards from critique based on gender discrimination. This is because ESS 1 does not align with international and regional instruments that speak to gender equality and does not protect sexual minorities and gender non-conforming people.

¹¹ Safeguards, Environmental and Social Safeguard (‘ESS’) 5, paragraph 14 read with footnote 16.

¹² Safeguards, page 6, paragraph 5.

¹³ United Nations Development Programme, *Action 2015*, available at

<http://www.un.org/millenniumgoals/beyond2015-overview.shtml>.

¹⁴ World Bank, *Making 2015 Happen*, available at <http://www.worldbank.org/mdgs/>.

23. Borrowers are required to undertake environmental and social assessments in terms of the Safeguards. In so doing, the Safeguards provide that borrowers (i.e. states) “take into account in an appropriate manner” international treaties and agreements. This effectively gives states the right to disregard the commitments they have made under international law, such as the commitment to gender equality. It also allows states the opportunity to consider international commitments to gender equality but not weight them heavily. The same can be said for all international treaties.
24. Moreover, the Safeguards treat gender inequality as a “social risk”.¹⁵ Gender inequality is a violation of a human right,¹⁶ it is not a risk that should be financially quantified and, *if possible*, averted. Furthermore, discrimination against women cannot always be viewed as a “social risk”. The discrimination against women, as defined in CEDAW and by the Committee on the Elimination of Discrimination against Women,¹⁷ acknowledges that gender discrimination can occur at a number of different levels and manifests in a number of different ways. It manifests in the home, community, religious institutions, states and corporate structures as well as societal structures. Most of these do not fit neatly into the “social risk” category.
25. CALS submits that the Safeguards should meet the standards set by states and the World Bank in international and regional *fora* by: noting the gendered impact of development finance in each ESS, integrating a gendered approach, and mandating that measures be taken by borrowers and project implementers to avoid, reduce and eliminate the adverse gendered impact of development projects. In addition, CALS submits, that the commitment made by states to gender equality should apply to Safeguards regardless of whether they constitute a “social risk”.
26. The requirement that the Safeguards must only comply with the national law of the borrower is not sufficient for purposes of protecting sexual minorities and gender non-conforming people. The main standard of compliance should include

¹⁵ Safeguards, ESS 1, paragraph 26 and 27, read with footnote 23.

¹⁶ Universal Declaration on Human Rights, articles 2; International Covenant on Civil and Political Rights articles 2(1) and 3; and International Covenant on Economic, Social and Cultural Rights articles 2(2) and 3.

¹⁷ According to article 1 of CEDAW, discrimination against women is defined as:

“distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

And according to General Recommendation 19 of the Committee on the Elimination of Discrimination against Women, the definition of discrimination against women includes:

“gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”

international standards. A majority of countries in the Human Rights Council, and the General Assembly of the UN, have through their voting patterns, indicated a “deep concern” for violence committed against sexual minorities and gender non-conforming people.¹⁸ The same states, cannot be permitted, by the Safeguards to obviate that concern with regards to projects financed through the World Bank.

27. Therefore, CALS further submits that by requiring compliance with only national law the World Bank lowers the standard of protection to sexual minorities and gender non-conforming people. Therefore, the Safeguards should be amended to demand such protection in World Bank financed projects.

C) POVERTY REDUCTION

28. The realities of poverty are hard hitting. Poverty expansive — in that it affects a large number of people — and severe — its impact on poor people’s lives is grave and multifaceted. International non-governmental organisation, Oxfam, presented these realities at the 2015 World Economic Forum. According to Oxfam, 50 percent of the world’s wealth sits in the hands of one percent of the world’s population.¹⁹ In reality the poorest people in the world (who account for 80 percent of the world’s population) share 5.5 percent of the world’s wealth. By 2016, more than half of the world’s wealth will sit in the hands of one percent of the world’s population; this trend is set to continue if drastic measures are not taken.

29. Globally, the statistics may seem abstract; but their effect becomes clear when one takes a closer look at the continent. The World Bank statistics show that 46.8 percent of the people living in Sub-Saharan Africa live in a state of poverty.²⁰ A report released by the United Nations Development Programme in 2014 indicated that Sub-Saharan Africa has the lowest Human Development Index Value, life expectancy, and schooling of any region in the world.²¹ These factors cannot be viewed in isolation from each other. Poverty is not merely a lack of financial resources, it affects people’s lives in all areas; in essence, poverty hampers the

¹⁸ Human Right Council, Resolution on Human rights, Sexual Orientation and Gender Identity (adopted on 14 July 2011), A/HRC/19/41; Human Right Council, Resolution on Human rights, Sexual Orientation and Gender Identity (adopted on 2 October 2014) A/HRC/RES/27/32; General Assembly, Resolution on Extrajudicial, Summary or Arbitrary Executions (adopted 20 December 2004) A/RES/59/197; General Assembly, Resolution on Extrajudicial, Summary or Arbitrary Executions (adopted 19 December 2006), A/RES/61/173; General Assembly, Resolution on Extrajudicial, Summary or Arbitrary Executions (adopted 18 December 2008), A/RES/63/182; General Assembly, Resolution on Extrajudicial, Summary or Arbitrary Executions (adopted 21 December 2010) A/RES/65/208; and General Assembly, Resolution on Extrajudicial, Summary or Arbitrary Executions (adopted 20 December 2012), A/RES/67/168.

¹⁹ Oxfam, *Wealth: Having it All and Wanting More*, available at http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf, at 2.

²⁰ World Bank, *Poverty and Equity Regional Dashboard: Sub-Saharan Africa*, available at <http://povertydata.worldbank.org/poverty/region/SSA>.

²¹ United Nations Development Programme, *Human Development Index Report*, available at <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>, at 34.

realisation of human rights. Former UN Secretary General, Kofi Annan said the following on this point:

“People who live in poverty generally describe it as a vicious circle, since they are confronted by a wide range of misfortunes which are interlinked and hard to overcome. Indeed, being deprived of resources makes it impossible for anyone to afford the most basic human needs or to enjoy the most fundamental human rights specified in the Universal Declaration of Human Rights, such as the right to housing, to a decent standard of living, to education, to health, to work, to life, and to participate in social, cultural, civil and political life, among others. Living in poverty involves the denial of human rights as a whole.”²²

30. The World Bank Group is well placed to address poverty. Its logo, vision and mission speak to the eradication of poverty. The World Bank Group’s logo is “Working for a World Free of Poverty” and its two goals are aligned to that.²³ This objective appears in the Safeguards too.²⁴

31. Although the objective of reducing poverty is stated in the overview of the Safeguards, it is not carried through the document. The only ESSs that mention poverty are ESS 2 (which relates to working and labour conditions) and ESS 7 (which relates to indigenous peoples). This despite the fact that the objective of the Safeguards, and thus every ESS in it, is to reduce poverty. Extrapolating on the manner in which every ESS affects poverty and can reduce it, would lengthen this submission significantly. For the sake of brevity we detail the way in which environmental degradation impacts poverty and the manner in which the Safeguards could be amended to ensure first that the environment is protected and secondly that poverty is reduced. It is hoped that this example will be used in the revision of all of the ESSs in the Safeguards.

32. The relationship between poverty and environmental degradation can be described as circular in nature: environmental degradation causes poverty and poverty causes environmental degradation. Poor people depend on the environment for food, shelter, and water. This leads to overreliance and degradation. On the other hand, the destruction of the natural environment leads to hunger, malnutrition and

²² K Annan, *Poverty: An Obstacle to Human Rights*, available at <http://www.un.org/rights/poverty/poverty5.htm>.

²³ World Bank Group, *What We Do*, available at <http://www.worldbank.org/en/about/what-we-do>, sets out the two goals (to be achieved by 2030) of the World Bank Group:

“End extreme poverty by decreasing the percentage of people living on less than \$1.25 a day to no more than 3% [and p]romote shared prosperity by fostering the income growth of the bottom 40% for every country”.

²⁴ Safeguards, page 1, paragraph 1.

ill-health and thus exacerbates poverty.²⁵ This relationship is not noted or addressed by ESS 3 of the Safeguards.

33. Paragraph 9 of ESS 3 provides that borrowers should assess the potential cumulative impacts of a proposed project's water use on communities and mitigate adverse effects. This places the responsibility for assessment and mitigation squarely and exclusively in the hands of the borrower for an environment related issue. It is not in borrowers' interest to identify and mitigate adverse environmental impacts. And, where the assessment and mitigation is lacking, it is poor people who suffer. These are the poor people the World Bank seeks to assist by providing development finance and drafting and implementing the Safeguards. CALS recommends that paragraph 9 be amended to the following effect:

“An independent and qualified assessor appointed by the Borrower, in consultation with the World Bank, will assess, as part of the environmental and social assessment, the potential cumulative impacts of water use upon communities, other users and the environment, as well as the related impact of water use on poverty and will demonstrate that the proposed water use is not likely to have adverse impacts on water resources or exacerbate the affected communities' poverty levels. As part of the environmental and social assessment, the Borrower will identify the mitigation measures, in consultation with the independent and qualified assessor and affected community, and will implement the mitigation measures after approval of such by the affected communities.”

34. Furthermore, the gap between the environment and poverty could also be addressed by the acknowledgement of the impact of environmental degradation on poor people and attempts to address the same by, for instance:

- 34.1. continuous review and assessment of measures designed to prevent adverse impacts,
- 34.2. continuous engagement with affected community members, and
- 34.3. the imposition of penalties against states, borrowers and corporations involved in development finance projects when measures designed to prevent adverse impacts are not taken.

Principles of this nature can be applied to all ESSs in the Safeguards.

35. CALS, therefore, submits that every ESS should mention and seek to address poverty because every project of the World Bank is aimed at reducing the same and every project financed by the World Bank affects poverty. This is especially

²⁵ F O Ibimilua 'Linkages between Poverty and Environmental Degradation' Vol. 5 (1) (2011) *International Multi-Disciplinary Journal* 475, at 479.

the case when one has regard to the wide ranging extent and impact of poverty, the World Bank's objective to eradicate it, and the World Bank's power to eradicate it by providing development finance in accordance with poverty eradicating Safeguards.

D) FREE PRIOR AND INFORMED CONSENT

36. Free, Prior and Informed Consent ("FPIC") was first adopted by the UN in the Declaration on the Rights of Indigenous Peoples in 2007.²⁶ It calls for control by indigenous people over development projects that affect them and their land. FPIC was developed after the recognition of the human rights violations suffered by indigenous communities across the world.
37. The World Bank is lauded for incorporating FPIC into the Safeguards. However, the incorporation by the World Bank of FPIC is not aligned with the principles of FPIC as outlined by the UN or the African Union, and thus falls short of a clear commitment to FPIC or the rights of indigenous people. This is because borrowers are given permission, in the Safeguards, to use an "alternative approach" to engage with indigenous communities.
38. ESS 7 provides that FPIC will apply in three circumstances.²⁷ The circumstances under which FPIC applies in terms of the Safeguards are similar, though not identical, to those in the Declaration on the Rights of Indigenous Peoples; this is applauded.²⁸
39. However, whatever benefit this expansive application might provide to indigenous people is erased by the fact that borrowers have been given the right to suggest an alternative approach to engaging with indigenous peoples. Where a borrower chooses to adopt an alternative approach to engaging with indigenous peoples, they are in effect, given permission to "opt-out" of FPIC even in situations where indigenous people are present, and have the internationally recognised right to free, prior and informed consent. In effect, this means that indigenous people may be treated as other affected communities, and thus only be entitled to the lower threshold of consultation (as opposed to the higher threshold of consent). This is a violation of international and regional human rights, as stipulated in UN and African Union Instruments.

²⁶ General Assembly Resolution 61/295, *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007).

²⁷ Safeguards, ESS 7, paragraph 19 provides that FPIC will apply when the project will: (i) impact land and natural resources subject to traditional ownership or customary use or occupation; (ii) cause the relocation of indigenous people; or (iii) impact on indigenous people's cultural heritage.

²⁸ Among others, articles 10, 11, 28, and 32 of the Declaration on the Rights of Indigenous Peoples provide that indigenous people have the right to operationalise free, prior and informed consent in: (i) relocation, (ii) cultural practices, (iii) redress, and (iv) development decisions.

40. The alternative approach also results in the intersectional discrimination of indigenous women both as members of indigenous communities and as women (who because of gender roles are particularly disadvantaged by development projects).
41. When states adopted the Declaration on the Rights of Indigenous Peoples they committed to operationalising FPIC in projects that had an impact on land.²⁹ The same is true of the African Charter on Human and Peoples' Rights, which speaks of 'peoples' right to self-determination, dispose of their natural resources and social and economic development.³⁰ This right extends towards indigenous people on the African continent.³¹
42. Development in Africa has both constitutive and instrumental elements. The African Commission has said that the requirements of the right to development are: equity, non-discrimination, participation, accountability and transparency, with equity and choice as important, over-arching themes.³²
43. It is clear therefore that under international law indigenous peoples have the right to consent (or refuse consent) where relocation is proposed. Under African law, however, development may not take place without the participation of indigenous peoples; participation is more expansive and collaborative than consent. Choice, the over-arching theme, is also important on the African continent. It ensures that development decisions are chosen, not by borrowers, but by the 'people' themselves.
44. These commitments, made by states around the world, cannot be renounced in World Bank related financed project. To the contrary, UN commitments should be borne out in projects financed by the World Bank as the latter is a body of the UN. By allowing borrowers (i.e. states) to opt-out of FPIC, the World Bank is in essence allowing it to deviate from the commitments it made in international law and regional law. And, to do so with the consent and funding of the World Bank. This flies in the face of the World Bank's attempts to develop countries as it does not comply with the notion of development as stipulated in the Declaration on the Rights of Indigenous Peoples, or in the case of African borrowers, the Charter on Human and Peoples Rights.

²⁹ Declaration on the Rights of Indigenous People, article 10.

³⁰ African Charter on Human and Peoples' Rights, articles 20, 21 and 22. In *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009), the African Commission for Human and Peoples' Rights at paragraph 178 held that the term 'people' is a group of people who have a distinct identity which attracts collective rights.

³¹ For a non-exhaustive list of indigenous people on the African continent see, African Commission *Indigenous Peoples in Africa: The Forgotten Peoples?*, available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf, page 15 and 16.

³² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) ANRLR 75 (ACHPR 2009), at para 277.

45. CALS submits, firstly, that where a higher benchmark of rights and responsibilities exists in international or regional law states be obliged to meet it in order to qualify for World Bank funding. The following wording is suggested for ESS 1, paragraph 24:

“The Borrower will ensure that the environmental and social assessment ***complies with and advances*** all issues relevant to the project, including: (a) the country's applicable policy framework, national laws and regulations, and institutional capabilities (including implementation) relating to environment and social issues; variations in country conditions and project context; country environmental or social studies; national environmental or social action plans; and obligations of the country directly applicable to the project under ***ratified or accessioned*** international treaties and agreements; (b) applicable requirements under the ESSs; and (c) the EHSR, and other relevant GIIP. The assessment of the project, and all proposals contained in the assessment, will be consistent with the requirements of this paragraph.”

46. Secondly, CALS submits that the ‘alternative approach’ be eliminated and that FPIC be binding to all projects affecting indigenous people.

CONCLUSION

47. The World Bank is in a unique position. It is both a financial institution and a UN Agency. It thus has dual roles: providing development finance and thus eradicating poverty on the one hand and ensuring the protection of human rights on the other. These roles, however, are not mutually exclusive. They are, in fact, mutually enforced. By attaching the protection of human rights to development finance, the World Bank meets its mandate of providing finance in a manner that is inclusive of all and reduces poverty.

48. The Safeguards should acknowledge the complementary nature of the World Bank’s roles. It should do so by taking a human rights-based and gendered approach, incorporating measures to reduce poverty, and ensuring Free, Prior and Informed Consent. Only in so doing, will the mandate of the World Bank be met.

49. The extension of the deadline for comments on the Safeguards by the Review Team is applauded. It indicates a commitment to the notion of development as set out in international and regional instruments, that is, development that is inclusive and transparent. CALS thanks the World Bank for the opportunity to contribute to

the review of the Safeguards by making the submissions and looks forward to continuing to work with the World Bank in the quest to eradicate poverty and bring about sustainable and inclusive development. Please do not hesitate to contact Nomonde Nyembe at Nomonde.Nyembe@wits.ac.za should you wish to discuss any of these submissions further.