



**Submission from the Center for International Environmental Law (CIEL)
on the Draft Guidance Notes for the Environmental and Social Standards
of the World Bank ESF**

December 20, 2017

The Center for International Environmental Law (CIEL) seeks to protect and defend the environment and people's human rights against the adverse impacts of development. Our work focuses on ensuring that laws and policies governing development activities are consistent with those protecting the environment and human rights; and to hold governments, corporations, and the banks that finance them accountable for their actions. To this end we have engaged in the World Bank Safeguard Policy Review process since it began in 2012, now we have prepared written comments on the Draft Guidance Notes for the Environmental and Social Standards (ESSs) of the World Bank Environmental and Social Framework (ESF).

In the following, we will present detailed comments and recommendations on the Draft Guidance Notes for **ESS2, ESS3, ESS4, ESS7, ESS8, and ESS10**. Bretton Woods Project contributed specific input regarding greenhouse gas emissions in the recommendations on the Guidance Note for ESS3.

Additionally, we should note that we have submitted comments jointly with partners from Accountability Counsel, Bank Information Center, Human Rights Watch, and International Accountability Project and others on the Draft Guidance Notes for **ESS1 and ESS10**. We have also endorsed a submission on **ESS9 on Financial Intermediaries** that was written primarily by Inclusive Development International, Ulu Foundation and Oxfam.

The following comments are limited in focus, but this is not an indication of endorsement for the Guidance Notes as a whole or for parts of the Guidance Notes on which we have not commented here.

The Guidance Notes are a critical piece of the implementation of the ESF as they explain how the Borrowers can meet their environmental and social obligations. Throughout the safeguards review process, the Guidance Notes were long presented as a critical element of policy implementation. These Guidance Notes were described as a place where the necessary detail would exist to describe how environmental and social due diligence should be carried out. However, these Guidance Notes overall are severely lacking in substance and in many instances instead of offering actual guidance, merely reiterate the Environmental and Social Standard (ESS) or use vague language to describe Borrower's obligations. To help improve Borrower Systems and, more importantly, to ensure that Bank funded projects do not harm people and the environment, the Guidance Notes need to be significantly improved by providing a greater level of detail.

We must also note some concern with discrepancies between Guidance Note documents released by the World Bank. We detected that word document and pdf versions were not identical. Naturally, the Bank should ensure that the documents released for consultation have been verified for consistency so as to avoid confusion when reviewing and consulting on these documents.

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Guidance Note for ESS1 Assessment and Management of Environmental and Social Risks and Impacts

Beyond specific comments presented in the joint submission on ESS1 referenced above we have not included additional information. However, we would note that the Guidance Note for ESS1, like others, lacks significant and important details that would truly guide the Borrower on proper implementation of the requirements and procedures in ESS1.

Additionally, we want to reiterate that in the Guidance Note for ESS1, as well as the others, it would be best for the Bank to include reference to sources of relevant information and existing guidance from the World Bank, the IFC, or other institutions. For example, the World Bank Inspection Panel's Emerging Lessons Series No. 3; Environmental Assessment,¹ which the Panel developed based on their cases over 25 years.

Guidance Note for ESS2 Labor and Working Conditions

As ESS2 is the first safeguard on labor and working conditions at the World Bank, it is crucial for the Guidance Notes to provide Borrowers with substantive information on implementation.

First, we welcome the fact that the Labor Guidance Note includes the Core Labor Standards set forth by several International Labour Organization and United Nations Conventions. The inclusion of freedom of association and organization, collective bargaining, abolition of forced labor, minimum age, child labor, and equal pay are welcome advances and necessary to ensure that World Bank financed projects are not violating these fundamental labor standards.

ESS2 rightly includes the need for there to be grievance mechanisms for workers. More information is needed on how to set up the ESS2 grievance mechanisms and it should not just reference the ESS10 Guidance Notes as grievance mechanisms for workers are inherently different from project-level grievance mechanisms for affected people. However, while these differences exist, some of the same principles apply, such as that the grievance mechanism should be legitimate, accessible, predictable, equitable, transparent, and rights-based.² GN22.1 touches on some of these principles, but more detail would better help

¹ World Bank Inspection Panel, Emerging Lessons Series No. 3: Environmental Assessment (Apr. 2017), <http://ewebapps.worldbank.org/apps/IP/IPPublications/Emerging%20Lessons%20Series%20No.%203%20-%20Environmental%20Assessment.pdf>.

² See e.g., United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, Principle III (Access

Borrowers understand how to ensure that these grievance mechanisms for workers are effective and responsive.

Additionally, in regards to ensuring accessibility, GN21.3 should be more explicit about how to guarantee that information is “clear, understandable, and accessible to workers.” It should include that information will be provided in the primary language(s) of the workers and in a culturally appropriate manner. Further, the Guidance Notes on ESS2, paragraph 21 should include details about how to protect against reprisals. As noted below in regards to ESS10, reprisals or retaliation should not be tolerated in relation to Bank-financed projects. Further, fear of reprisals or retaliation will undermine the accessibility of the grievance mechanisms as workers will not feel safe enough to submit a complaint/grievance. The Guidance Notes should also explicitly state that there must be confidentiality provisions and that workers’ identities will be kept confidential if the worker requests it.

Further, the Guidance Notes should explicitly state that the grievance mechanism must be equitable. There is an inherent power imbalance between workers and their supervisors or the company for whom they work. As such, to be equitable, workers should be allowed to have colleagues, representatives, or counsel with them when using the mechanism.

Lastly, it is critical that paragraph 23 be complied with in all projects. In many situations collective-bargaining agreements have established grievance procedures that have been agreed on by the union and management. A Guidance Note for paragraph 23 should be added to state that Borrowers will not force workers to use a grievance mechanism established under ESS2 nor will it be used as a replacement for or impinge on other grievance mechanisms that have been established.

Guidance Note for ESS3 Resource Efficiency and Pollution Prevention and Management

The Guidance Note for ESS3 provides some useful examples for policy implementation containing descriptions of how to approach requirements; some clear suggestions of what constitutes good practice; and most notably references to several international conventions on the use and management of chemicals, hazardous materials and pesticides, and genetically modified organisms, including the use of mercury, among others.

to Remedy) (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; see also C. Daniel, K. Genovese, M. van Huijstee & S. Singh, *Glass Half Full? The State of Accountability in Development Finance* (SOMO, Jan. 2016), available at glass-half-full.org.

The way in which the Guidance Note for ESS3 was prepared should be seen as an example for the modification of other guidance notes. By referencing standard international practice and conventions by name, and including actual examples and suggestions for best practice, the Borrower will be better equipped not only to understand, but to implement and comply with the environmental and social standards set forth in the ESF.

The language in ESS3 and the respective Guidance Notes will help Borrowers in the development of sound chemicals management. As a member of the Inter-organization Programme for the Sound Management of Chemicals, the World Bank participates in the Strategic Approach to International Chemicals Management process (SAICM)³, the overarching goal of which is the achievement of sound management of chemicals throughout their lifecycle.

As we have maintained in previous instances there are certain chemicals that cannot be soundly managed and should be avoided, therefore the Guidance Notes for ESS3 should include a reference to this list of substances for Borrowers. The **ChemSec SIN list**⁴ comprises chemicals that have been identified as “Substances of Very High Concern,” in line with the criteria set forth by the European Union chemicals regulation, REACH. Additionally, the Guidance Note for ESS3 should instruct Borrowers to use the ***Food and Agriculture Organization of the United Nations' International Code of Conduct on Pesticide Management - Guidelines on Highly Hazardous Pesticides***.⁵

It should also be noted that the World Bank and IFIs have developed existing best practice on emission reporting. However, that is largely absent from these Guidance Notes and should be included as it can help Borrowers comply with ESS3. The following are specific comments on the Guidance Notes related to “Management of Air Pollution.”

Footnote 11 says: “Cost-effectiveness is determined according to the capital and operational cost and financial benefits of the options considered over the life of the project.” Here the accompanying guidance note should encourage Borrowers to consider whether there are significant public health costs of air pollution over the life of a project. An additional point of guidance referring to Footnote 11 should be added, noting that: “Cost-effectiveness is determined according to the capital and operational cost and

³ SAICM, <http://www.saicm.org/Home/tabid/5410/language/en-US/Default.aspx>.

⁴ International Chemical Secretariat, SIN list, available at: <http://chemsec.org/what-we-do/sin-list>.

⁵ See Food and Agriculture Organization of the United Nations, Highly Hazardous Pesticides List, <http://www.fao.org/3/a-i5566e.pdf>; see also PAN International List of Highly Hazardous Pesticides (June 2015), at http://www.pan-germany.org/download/PAN_HHP_List_150602_F.pdf.

financial benefits of the options considered over the life of the project, including, where possible, the health costs of air pollution.”⁶

Best practices related to greenhouse gas accounting, for use broadly and for specific types of projects, should be included as a reference for Borrowers in these Guidance Notes.

IFI agreed methodology for greenhouse gas (GHG) accounting should be incorporated into several guidance notes. **GN15.2 (footnote 12)** should have an explicit reference to the *IFI Approach to GHG Accounting for Energy Efficiency Projects*.⁷ Further, **GN15.3 (footnote 12)** should make a specific reference to the *IFI Approach to GHG Accounting for Renewable Energy Projects*.⁸

Additionally, **GN16.2** should reference IFI agreed methodology on GHG accounting as presented in the *International Financial Institution Framework for a Harmonised Approach to Greenhouse Gas Accounting*.⁹ Another example of best practice that could be integrated is the GHG Protocol methodology, which, as noted by the Task Force on Climate-related Financial Disclosures, is the most widely recognized and used international standard for calculating GHG emissions.¹⁰

We are concerned that GN15.4: Footnote 12 is too limited, and this would be strengthened by including additional language that connects it to countries’ commitments under the Paris Agreement. **GN15.4: Footnote 12** states: "Options for reducing GHG emissions may include alternative project locations; adoption of renewable or low carbon energy sources; alternatives to refrigerants with high global warming potential.... (etc)". This is extremely limited, especially since it appears to be the only place in the guidance documents where climate change and Paris Agreement-alignment is considered. The World Bank should also be suggesting alternative low-carbon options for infrastructure in line with the 1.5-degree pathway, such as low-energy sustainable transport options which result in lower public health costs, or low-carbon building designs. So it is vitally important that alternative project options are considered to reduce GHG emissions. Otherwise this guidance will ignore climate change and stranded assets altogether. In light of this, **we suggest that an**

⁶ Refer to World Bank (2016) *The cost of air pollution : strengthening the economic case for action*. <http://documents.worldbank.org/curated/en/781521473177013155/The-cost-of-air-pollution-strengthening-the-economic-case-for-action>.

⁷ IFI Approach to GHG Accounting for Energy Efficiency Projects https://www.thegef.org/sites/default/files/file_attach/Joint-IFI-EE-GHG-Accounting-Approach.pdf.

⁸ IFI Approach to GHG Accounting for Renewable Energy Projects https://www.thegef.org/sites/default/files/file_attach/Joint-IFI-RE-GHG-Accounting-Approach.pdf.

⁹ International Financial Institution Framework for a Harmonised Approach to Greenhouse Gas Accounting http://www.worldbank.org/content/dam/Worldbank/document/IFI_Framework_for_Harmonized_Approach_to_Greenhouse_Gas_Accounting.pdf.

¹⁰ Recommendations of the Task Force on Climate-related Financial Disclosures <https://www.fsb-tcfd.org/publications/final-implementing-tcfd-recommendations/>

additional note should be added stating that projects should be in line with a 1.5-degree pathway under the Paris Agreement or at the very least avoid locking countries into a high-emission pathway that is not in alignment with the Paris Agreement.

Lastly, **GN16.2 or GN16.3** should provide guidance to Borrowers on how to calculate a 'shadow price of carbon', which, as was recently announced, the World Bank will undertake in its own analysis for IBRD & IDA projects beginning this year.¹¹

Guidance Note for ESS4 Community Health and Safety

The Guidance Note on ESS4 provides Borrowers with some examples of good practice to follow. Some positive points in the GN for ESS4 include: instructions on groups that may be particularly vulnerable to health and safety risks due to age, gender, disability, etc.; recommendations regarding interaction with project workers with references to *World Bank's Guidance Note on Managing Risks Related to Labor Influx*; and some examples of high-risk locations that take into account climate change considerations, among others.

CIEL's recommendations for ESS4 focus on the guidance provided regarding Security Personnel hired to safeguard personnel and property. The use of Security personnel at project sites has led to increased tensions with communities in project areas when those hired are not aware of the challenges that arise from the mere existence of security teams.

Understanding the risks and impacts on communities posed by the existence of security personnel is critical to avoiding conflict in the first place. The role of private security companies has been the subject of important studies which offer valuable insights into good practice and proper management of these services. To that end we recommend that the following guides and reports be included in the GN for ESS4 as reference for Borrowers, as they contain valuable instructions regarding the role of private security:

- With a regional focus: ***Armed private security in Latin America and the Caribbean: Oversight and accountability in an evolving context*** was developed by the United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean (UNLIREC) and the Geneva Centre for the

¹¹ Press Release: World Bank Group Announcements at One Planet Summit, point 3(II) (Dec. 12, 2017), http://www.worldbank.org/en/news/press-release/2017/12/12/world-bank-group-announcements-at-one-planet-summit?CID=ECR_FB_worldbank_EN_EXT_OnePlanet.

Democratic Control of Armed Forces (DCAF) within the framework of the joint DCAF/UNLIREC project entitled Strengthening Oversight and Building Capacities for Small Arms Control and Nonproliferation in the Private Security Sector in Latin America and the Caribbean.¹² “The purpose of this study is to contribute to regional and international debates in the fields of good governance, oversight and regulation, and small arms control within the (armed) private security sector in Latin America and the Caribbean.”

- Another initiative is **The International Code of Conduct for Private Security Service Providers (ICoC)**,¹³ whose aim is to clarify international standards and improve oversight and accountability regarding private security companies. The ICoC not only sets forth principles related to the operations of such firms, but also targets the proper management of these companies, including the processes by which they hire personnel and manage weapons.

Guidance Note for ESS7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities

As the first multilateral financial institution to create a safeguard policy on Indigenous Peoples, it follows that the World Bank should continue to protect the rights of this vulnerable group of approximately 370 million people in more than 90 countries around the globe in its policies. As CIEL has stated in the past, we welcome the fact that the World Bank has captured indigenous peoples’ rights within the Environmental and Social Framework to now include the right to Free, Prior and Informed Consent (FPIC). The implementation of this right is a complex and delicate matter which can be facilitated when taking into account the experiences of other institutions, borrowers, and, most of all, indigenous communities.

As ESS7 recognizes that the human rights, dignity, aspirations, identity, culture, and livelihoods of indigenous peoples must be respected, it follows that the international legal instruments which have established these rights and the many instruments containing good practice examples should be included in the guidance notes for the Borrower.

¹² DCAF & UNLIREC, *Armed private security in Latin America and the Caribbean: Oversight and accountability in an evolving context* (2016), <https://www.dcaf.ch/armed-private-security-latin-america-and-caribbean-oversight-and-accountability-evolving-context>.

¹³ International Code of Conduct for Private Security Service Providers (ICoC) (2015), https://icoca.ch/en/the_icoc (available in eight languages).

These include **Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples**¹⁴ (ILO Convention 169) and the **United Nations Declaration on the Rights of Indigenous Peoples**¹⁵, adopted by the General Assembly in September 2007 (UNDRIP or UN Declaration on Indigenous Peoples). Additionally, it should include regional agreements like the American Declaration on the Rights of Indigenous Peoples,¹⁶ adopted by the General Assembly of the Organization of American States in June 2016. Another important tool for Borrowers which should logically be referenced within the Guidance Notes is **Emerging Lessons Series No. 2 on Indigenous Peoples** by the World Bank Inspection Panel.¹⁷

In Latin America, recognition of indigenous peoples' rights has crystallized with the creation of international standards by the Inter-American Commission on Human Rights (Inter-American Commission or IACHR) and the Inter-American Court of Human Rights (Inter-American Court). These standards are recognized as principles to follow and good practice to facilitate proper implementation of the rights of indigenous peoples. Moreover, the IACHR has published several seminal reports on the rights of indigenous people which include the following:

- IACHR Indigenous Women and Their Human Rights in the Americas (*hereafter Indigenous Women Report*)¹⁸
- IACHR - Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities (*hereafter Indigenous Peoples, Communities of African Descent Extractive Industries*)¹⁹

¹⁴ Convention 169 of the ILO on the Rights of Indigenous and Tribal Peoples

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

¹⁵ UN Declaration on the Rights of Indigenous Peoples (2007), available at

<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (including links to the document in multiple languages).

¹⁶ American Declaration on the Rights of Indigenous Peoples (2016), available at

<http://indianlaw.org/sites/default/files/ADRIP%201-17-17.pdf>; https://iitccdn-earthwebtechnolo.netdna-ssl.com/wp-content/uploads/AG07150E06_web.pdf.

¹⁷ Inspection Panel Emerging Lessons Series No. 2 Indigenous Peoples (Oct. 2016), available at

<http://ewebapps.worldbank.org/apps/IP/IPPublications/Emerging%20Lessons%20Learned%20No.%20%20-%20Indigenous%20Peoples.pdf>.

¹⁸ IACHR Indigenous Women and Their Human Rights in the Americas (2017),

<http://www.oas.org/en/iachr/reports/pdfs/IndigenousWomen.pdf> [hereinafter *IACHR Indigenous Women Report*].

¹⁹ IACHR - Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities (2016),

<http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>.

- IACHR - Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources - Norms and Jurisprudence of the Inter-American Human Rights System (*hereafter Ancestral Lands report*)²⁰

It should be noted that through the years the right of indigenous peoples to free, prior, and informed consent has been an essential factor in the creation and evolution of these international standards and instruments.

Why do indigenous people require a different and higher level of consideration?

By creating the original safeguard on Indigenous Peoples, the World Bank acknowledged the fact that indigenous peoples must not only be recognized but also should receive a different level of attention when it comes to development finance operations. This stems from the situation of marginalization faced historically by indigenous peoples. Therefore, it is worthwhile to be reminded of the reasons for this higher level of consideration as this will give context to Borrowers so they can be ever vigilant in identifying potential impacts on the rights of indigenous peoples.

To that end we refer to international standards when defining the Borrower's obligations and due diligence requirements: "[t]he State's general obligation acquires additional content in the case of indigenous and tribal peoples and their members. The IACHR has recognized that States must adopt special and specific measures aimed at protecting, favoring and improving the exercise of human rights by indigenous and tribal peoples and their members. **The need for special protection arises from the greater vulnerability of these populations, their historical conditions of marginalization and discrimination, and the deeper impact on them of human rights violations. This positive State duty of adopting special measures is enhanced when it comes to indigenous children and women, given that their level of vulnerability is even greater.**"²¹

Additionally, "[t]he IACHR has explained that a central element underlying the relevant norms and principles of international law "is a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, **this has included identification of the need for special measures by states**

²⁰ IACHR - Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources - Norms and Jurisprudence of the Inter-American Human Rights System (2009), <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> [hereinafter *IACHR Ancestral Lands Report*].

²¹ IACHR Ancestral Lands Report, *supra* note 20, at para. 49.

to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.”²²

The situation of women also takes on a different dimension within indigenous and tribal communities, thus a special distinction should and must be made with regard to indigenous women, again as the IACHR has recognized “... the lives of the vast majority of indigenous women in the hemisphere are still marked by major impediments to the fulfilment of their civil, political, economic, social, and cultural rights. Among others, **[women] are faced with severely restricted opportunities to enter the labor market; unique geographic and economic challenges in order to gain access to health and education services; limited access to social programs and services; high rates of illiteracy; scarce participation in the political process; and social marginalization.**”²³

“This political, social, and economic marginalization of indigenous women contributes to a continuous situation of structural discrimination and makes them particularly susceptible to a variety of acts of violence”²⁴ which are prohibited by the *Inter-American Convention on the Prevention, Eradication and Punishment of Violence against Women* (Convention Belém do Pará). “This marginalization and vulnerability of indigenous women is enhanced when States fail to produce comprehensive and disaggregated statistics, and do not properly document the differentiated forms of violence that affect indigenous women.”²⁵

In emphasizing the Borrower’s role with regard to indigenous women’s rights when it comes to designing and implementing development projects, we point to the “States’ obligations in the area of equality and non-discrimination [which] constitute the cornerstone for the protection of indigenous women’s rights. Indigenous women face numerous forms of discrimination and marginalization based especially on their sex, gender, ethnic origin, age and socio-economic circumstances and, therefore, it is essential to bear in mind the intersection of all of these factors. The many forms of discrimination to which they are subjected raise significant barriers for them to access basic health and education services, food, decent and quality employment, and to fully participate in public and political life in their countries therefore hampering their ability to fully exercise their human rights.”²⁶

²² Idem at para. 50.

²³ IACHR Indigenous Women Report, *supra* note 18, at para. 6.

²⁴ Idem, at para. 7.

²⁵ Idem.

²⁶ Idem at paragraph 52.

Scope of Application

Guidance Note 6.1 identifies the fact that ESS7 applies to communities and peoples collectively rather than individuals. However, it does not provide clarity on the importance of this policy applying to indigenous peoples collectively. GN 6.1 should be modified to give additional guidance to and make Borrowers more cognizant about the right to collective ownership of indigenous and tribal peoples over their lands, territories and natural resources. The UN Declaration on the Rights of Indigenous Peoples provides important language that could serve to clarify this collective nature, namely:

“Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.” (Preamble)

“Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” (Article 1)

Closely related to this is the fundamental right to “self-identification” and “self-determination,” which are lacking in the Guidance Notes. Important references are for example,

Article 1 of ILO Convention 169 states:

“1. This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

Furthermore, ILO Convention 169, Article 1(2) states, “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

Additional resources could be cited, referenced, or quoted in the Guidance Notes to help Borrowers understand who indigenous peoples are and how they identify themselves. For example, the IACHR Ancestral Lands Report states that:

“the UN Working Group on Indigenous Populations concluded that the factors relevant to understand the notion of “indigenous” include:

- (i) priority in time, with regard to the occupation and use of a specific territory;
- (ii) voluntary perpetuation of cultural specificity, which can include aspects of their language, social organization, religion and spiritual values, modes of production, legal forms and institutions;
- (iii) self-identification, as well as recognition by other groups, or by State authorities, as differentiated collectives; and
- (iv) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether these conditions persist or not.

These factors, [...] do not constitute, nor can they constitute, an inclusive or comprehensive definition; they are, rather, factors which can be present to a greater or lesser degree in different regions and national or local contexts, for which reason they can provide general guidelines for the adoption of reasonable decisions in practice. The United Nations Declaration on the Rights of Indigenous Peoples, in turn, opts for not defining the indigenous peoples who are the beneficiaries of its provisions; nonetheless, Article 33.1 establishes that “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.”²⁷

Additionally, the *Committee for the Elimination of Racial Discrimination* has also concluded that indigenous peoples’ territorial rights are unique, and encompass a tradition and a cultural identification of indigenous peoples with their lands which has been generally recognized.²⁸ The IACHR also elaborated on the close connection between indigenous peoples’ cultural identification and their lands and in the IACHR Indigenous Women Report said:

“Indigenous peoples have a close tie to their land, territory, and natural resources, inasmuch as these sustain their cultural identity, knowledge, and spirituality. In light of this, both the Commission and the Court have concluded that the failure of the State to guarantee indigenous communities’ right to their ancestral territory can impede the exercise of a range of other rights, as their effective access to their lands

²⁷ IACHR, Ancestral Lands report, *supra* note 20, at para. 30.

²⁸ Committee for the Elimination of Racial Discrimination, Decision 2(54) on Australia, par. 4; cited in: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130, footnote No. 97.

is directly related to the preservation of their means of survival and way of life. Indigenous peoples' right to property has been construed as both an individual and a collective right. In this regard, the Commission highlights that Articles VI and XV of the **American Declaration on the Rights of Indigenous Peoples** have reaffirmed the collective nature of indigenous peoples' rights, including their right to their lands, territories and resources, and how these are indispensable for their existence, well-being, and integral development as peoples. Although this collective conception of property differs from the more classic understanding of the right to property, the Commission and the Court have been clear that collective property is entitled to full protection under Article 21 of the American Convention. The preservation of their lands is a fundamental element to effectively guarantee their human rights and, therefore, the legal framework regarding distribution and use of communal lands must be in accordance with their customary law, values, and customs."²⁹

The Guidance Notes also fail to provide substantial guidance on tribal groups or others who are indigenous peoples, but do not necessarily use that term. It could include reference to the IACHR, which has provided information about "tribal peoples" in its report on Communities of African Descent and Extractive Industries;

"...Regardless of the denomination received internally by the community or that its existence is formally recognized or not, the key element is that it maintains its own traditional cultural practices and its members self-identify as part of a group with a distinct identity. The IACHR notes that, as indicated by the Inter-American Court, "[t]he fact that some individual members of [a tribal] people may live outside of the traditional [...] territory and in a way that may differ from other [members] who live within the traditional territory and in accordance with [the people's] customs does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property". In this vein, the Commission has affirmed that while "[a] key element in the determination of when a given group can be regarded as indigenous or tribal is the historical continuity of its presence in a given territory **[t]his does not imply, however, that indigenous or tribal peoples are static societies that remain identical to their predecessors.**" As human communities, indigenous and tribal peoples have their own social trajectory, which adapts to the change of times, maintaining all or part of the cultural legacy of their ancestors."³⁰

²⁹ IACHR Indigenous Women Report, *supra* note 18, at para. 60.

³⁰ IACHR Indigenous Peoples, Communities of African Descent Extractive Industries, *supra* note 19, at para. 31.

The Guidance Notes should include greater explanation about self-identification and the characteristics of indigenous peoples to help Borrowers better understand this and their rights.

Meaningful Consultation of Indigenous Peoples

In all aspects regarding the application and implementation of ESS7, it must be clear to the Borrower that indigenous peoples should be the ones who determine their processes for consultation and decision-making as it relates to FPIC, among others. The Borrowers should look to ensure that they are engaging with indigenous peoples in a manner and language understandable to them. Further indigenous peoples should be meaningfully consulted on all aspects of a proposed project that may impact them, including, but not limited to the development of an Indigenous Peoples' Plan.

The guidance notes in the section titled *Meaningful Consultation Tailored to Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities* would provide greater clarity if they referenced international standards directly. This would allow the Borrower to get a better understanding of the reasons for the level of engagement and due diligence that is required of the consultation process in general. Specifically GN23.1, 23.2, and 23.3 would benefit from additional guidance from international standards.

For example, the UN Special Rapporteur phrased the general obligation of consultation as: “[i]n accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, **States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent.** Premised on an understanding of indigenous peoples’ relative marginalization and disadvantaged conditions in regard to normal democratic processes, **this duty derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent;** and it is a corollary of related human rights principles. //”

The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State’s general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests.”³¹

³¹ UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 62-63.

Specifically, for further clarification regarding meaningful consultation for GN23.2 we turn to the Inter-American Commission which “highlights that it is necessary that the consultation process has a mechanism or procedure elaborated with indigenous and tribal peoples’ participation, collaboration and coordination. The [commission] has stated that “all issues related to the consultation process [...] must be determined and resolved by the [indigenous or tribal] people in accordance with their traditional customs and norms.” **This includes defining how the consultation process will be conducted.** The former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has defined said process as “consultations on consultations.” According to the former Rapporteur, **this process is a key element in achieving “a climate of confidence and mutual respect for the consultations, which should ensure that the consultation procedure itself is the product of consensus.”**³²

Circumstances Requiring Free, Prior and Informed Consent (FPIC)

ESS7 rightly recognizes that there is not one “universally accepted definition of FPIC” and that it is closely connected to “meaningful consultation.” Given this recognition it is important that the Guidance Notes provide thorough and detailed guidance to help Borrowers understand the process of FPIC and as currently written they do not.

FPIC is a complicated process the details of which will differ depending on the indigenous peoples in the project area, and the Guidance Notes should reflect that by providing significantly more detail to the Borrowers on how to achieve FPIC, beginning with the need to *consult on consultations* and then elaborating on the whole FPIC process. And at all points, the Guidance Notes should specify that determinations about process, representatives, and whether FPIC has been given, among others, should be made by the indigenous peoples themselves and not the Borrower.

FPIC first requires a robust and meaningful consultation with indigenous peoples to determine how the consultations will be carried out.

Indigenous peoples have their own processes and customs for decision-making, thus the representatives who will engage in the consultation more directly will have to be determined by the indigenous group collectively. The Borrower will need to be respectful of these processes and timelines for the selection of indigenous representatives, to then work together with the indigenous leaders selected in the development of the consultation

³² IACHR Indigenous Peoples, Communities of African Descent Extractive Industries, *supra* note 19, at para. 195.

plan fully. It is only after a consultation on how to consult with the specific indigenous peoples involved, that the process to reach FPIC can begin.

Prior consultation and consent are required for the adoption of any decision that can affect, modify, or reduce indigenous property rights;

For the Inter-American Commission, the general international legal principles applicable in regard to indigenous peoples' human rights include the right to have their legal title to the property and use of territories and resources "changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property."³³

As recognized internationally, this extends from the rights to equality, due process and a fair trial, and the right to property. Therefore, Borrower countries should take special measures to ensure that particular and collective interests of indigenous peoples to their traditional lands and resources and their right not to be deprived of this interest is recognized.

With particular interest for development finance activities and project design and to improve the usefulness of the Guidance Notes in helping Borrowers implement the Standards set forth in the World Bank's Environmental and Social Framework we would underscore that, "[t]he **duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions** in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein. **Indigenous peoples' participation through their own institutions and distinctive forms of organization is required before the approval of investment or development plans or projects over natural resources.**"³⁴

The Guidance Notes should also define the elements of FPIC so that Borrowers understand the consent they are attempting to receive. For example, "free" means that there is no coercion or intimidation during the process. "Prior" means that this process should first occur in advance of any project being designed or starting and that it should be sufficiently "prior" taking into account the decision-making process of the indigenous peoples. Lastly, "informed" takes on two dimensions, first that the indigenous peoples are provided with information regarding all aspects of the project in an accessible manner, and second that indigenous communities are sufficiently apprised of the scope and reach of the project to

³³ IACHR Ancestral Land report, *supra* note 20, at para. 281.

³⁴ *Idem* at para. 283.

fully understand, discuss and assess so as to make an informed decision. This process will differ based on each indigenous peoples' group and so the Guidance Notes should provide more details to enable the Borrower to understand its obligations.

The Food and Agriculture Organization of the United Nations (FAO) publication titled *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities, Manual for Project Practitioners*³⁵ offers a very comprehensive list of what constitutes the informed aspect of FPIC:

“**Informed** refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process. Information should be:

- Accessible, clear, consistent, accurate, and transparent;
- Delivered in the local language and in a culturally appropriate format (including radio, traditional/local media, video, graphics, documentaries, photos, oral presentations, or new media);
- Objective, covering both the positive and negative potential of the proposed activities and consequences of giving or withholding consent;
- Complete, including a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits;
- Complete, including the nature, size, pace, duration, reversibility and scope of any proposed project, its purpose and the location of areas that will be affected;
- Delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
- Delivered with sufficient time to be understood and verified;
- Accessible to the most remote, rural communities, including youth, women, the elderly and persons with disabilities, who are sometimes neglected; and
- Provided in an ongoing and continuous basis throughout the FPIC process, with a view to enhancing local communication and decision making processes.”

In addition to having an understanding about how to consult with the specific indigenous peoples with whom they are working, the Borrower must also comprehend how their decision-making process works. GN25.1 correctly notes that it is important for the Borrower to know who the appropriate indigenous peoples' representatives are. However, GN25.1 needs to clarify that it is the indigenous peoples themselves who identify their appropriate representation as it is not up to the Borrower to make this identification. Additionally, GN25.1 acknowledges that “the representatives may be chosen through a

³⁵ Food and Agriculture Organization of the United Nations (FAO) publication titled *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities, Manual for Project Practitioners* (2016): <http://www.fao.org/3/a-i6190e.pdf> at pages 15-16.

process that is culturally appropriate” However, this should not be “may,” they should be chosen through the indigenous peoples’ own processes and what that process is will vary with each indigenous peoples group. Further, while it is useful to acknowledge different ways of identifying representatives, GN25.1 should phrase them as examples, i.e. “For example, this process could be through a meeting or assembly, or could be a council of elders or tribal chiefs; however, this is not an exhaustive list. Ultimately how they are determined and who they are will vary by group.”

While the indigenous peoples may choose representatives who will ultimately consult with the Borrower and indicate whether FPIC has been given, the Guidance Notes should also recognize that the process of obtaining FPIC should be determined by the indigenous peoples themselves.

GN25.6 is problematic and should be deleted. While FPIC is a process and a collective decision, the phrasing of GN 25.6 risks undermining it as this requires additional information. As noted above, FPIC is achieved through a process that is determined by the indigenous peoples themselves. This process will likely include ways to deal with differences of opinion, including dissenting views, and the indigenous peoples’ process should be respected. Critically, the Guidance Notes must make clear that, as with the other elements related to indigenous peoples, whether FPIC is achieved is determined by the indigenous peoples themselves, not the Borrower. Only the indigenous peoples can say whether their consent has been given.

Lastly, the guidance notes should clarify that consultation and FPIC are not a one and done measure. While FPIC must be obtained early in the project cycle, it is an iterative process and will need to be sought throughout the lifecycle of the project.

In general, the guidance notes should also reference and incorporate guidance from other sources regarding **FPIC**:

- According to ILO Convention No. 169, Article 6, States must consult indigenous peoples “through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.” The Convention also clarifies that such consultations must be carried out “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”
- Article 19 of the UNDRIP states the duty of consultation is as follows: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and

informed consent before adopting and implementing legislative or administrative measures that may affect them.”³⁶

- IFC PS Guidance Notes: GN33. “The FPIC process and outcome do not require unanimous support from all members of Affected Communities of Indigenous Peoples. FPIC should be viewed as a process that both allows and facilitates Affected Communities of Indigenous Peoples to build and agree upon a collective position with regard to the proposed development cognizant that individuals and groups within the Affected Communities may retain differing views on various issues pertaining to the proposed development. Such collective “community consent” should derive from the group of Affected Communities as a whole, representing their view vis-à-vis the proposed development. Thus, an FPIC agreement captures the Affected Communities’ broad agreement on the legitimacy of the engagement process and the decisions made.”

Grievance Mechanisms for Indigenous Peoples

It is important to have grievance mechanisms that are appropriate and accessible to indigenous peoples. As the UNDRIP recognizes in Article 11(2), “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”³⁷ However, GN 34.1 and 34.2 do not provide adequate detail to ensure this. For example, GN 34.2 only recognizes that grievance mechanisms may take into account cultural attributes of indigenous peoples. However, to be in line with both good practice and the UNDRIP, GN34.2 should specify that the Borrower should consult with indigenous peoples on the design of the grievance mechanism. Also, the second sentence should say “grievance mechanism” not “grievance method.”

Additionally, GN 34.1 should be modified to reflect the effectiveness criteria set forth in the UN Guiding Principles on Business and Human Rights.³⁸ As such, it should say that “The grievance mechanism ... should be inclusive and legitimate, accessible, predictable,

³⁶ IACHR Ancestral Lands report, *supra* note 20, at para 284.

³⁷ UNDRIP, Art. 11(2).

³⁸ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework*, Principle III (Access to Remedy) (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; see also C. Daniel, K. Genovese, M. van Huijstee & S. Singh, *Glass Half Full? The State of Accountability in Development Finance* (SOMO, Jan. 2016), available at glass-half-full.org.

equitable, transparent, rights-compatible, and a source of continuous learning.” These principles are further elaborated in the section on the Guidance Note for ESS10.

Additionally, while resolving grievances “promptly” is good, it is more important that grievances are resolved adequately and equitably in the minds of the person or people who submitted the grievance. Thus, the Guidance Notes should make clear that resolving grievances and providing remedy is the goal of a grievance mechanism. Further, while it is good to provide examples for the Borrowers, GN 34.1 needs to clarify that the “examples of grievances of affected IP/SSAHUTLC)” are not limited to what is listed in the third sentence of GN 34.1 as many others may also arise, including, for example, inadequacy of consultation or failure to consult. As such the sentence should be modified by adding “among others” or “include but are not limited to.”

Guidance Note for ESS8 Cultural Heritage

As has been mentioned in regards to the Guidance Notes for other ESSs, the Guidance Note for ESS8 could be improved through the inclusion of reference to international conventions, standards, and best practice. Having acknowledged the existence of World Heritage sites in GN 17.1, the guidance note should then include a full description of what encompasses these sites and their reason for being. As such it would be of value for Borrowers to reference the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage³⁹ directly. Additional sources of information that can be informative for Borrowers when assessing project **location** and **proximity to any cultural heritage** also exist in the form of the World Heritage List⁴⁰ and the List of World Heritage in Danger⁴¹.

It should be noted that the **List of World Heritage in Danger** comprises the properties on the list that require major operations to fulfill conservation as requested by the Convention. This list of properties considered to be in danger includes “property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, **large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land;** major alterations

³⁹ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) <http://whc.unesco.org/en/conventiontext/>

⁴⁰ The World Heritage List <http://whc.unesco.org/en/list/>

⁴¹ The List of World Heritage in Danger <http://whc.unesco.org/pg.cfm?cid=86>

due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves.”⁴²

These sources could help instruct Borrowers when they have to make serious considerations regarding the siting of development projects that may have direct or indirect impacts on the cultural heritage sites which have been granted this special protection status.

Additionally the **Convention on the Protection of the Underwater Cultural Heritage**⁴³ also adopted by UNESCO would be of use to Borrowers with regard to projects located in coastal areas or which may have effluents or impacts downstream from water bodies.

We recognize that GN7.1 speaks to the considerations necessary regarding intangible cultural heritage, and applaud the inclusion of language regarding the risks and impacts on intangible cultural heritage from an environmental and social point of view. We would point out that the commercial use of cultural heritage has direct bearing on a breadth of issues related to intellectual property. As such the Bank needs to provide clear guidance for Borrowers in GN29.1, 29.2 and 29.3 on how to ensure that the rights of local communities are protected in regards to their intellectual and cultural property rights.

To this end, the **UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage**⁴⁴ sets precise guidelines to the safeguard the uses, representations, expressions, knowledge and techniques that communities, groups, and individuals, recognize as an integral part of their cultural heritage. The convention recognizes that manifestations of intangible heritage are found in many forms such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship knowledge and techniques.

This definition, which is provided in Article 2 of the Convention, also comprises the instruments, goods, objects of art and cultural spaces inherent to intangible cultural heritage. A reference for Borrower to this UNESCO Convention would serve to further explain the intricacies of ESS8 to ensure the protection of the intangible cultural heritage of communities worldwide.

⁴² UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage article 11.4.

⁴³ UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)
<http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/>.

⁴⁴ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003),
<https://ich.unesco.org/en/convention>.

Furthermore, reference to UNDRIP can offer precise guidance for Borrower on the subject of Indigenous Peoples cultural heritage, as set forth in Article 31:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Guidance Note for ESS10 Stakeholder Engagement and Information Disclosure

The Guidance Note for ESS10, which provides requirements for stakeholder engagement, information disclosure, and grievance mechanisms, is critical to the implementation of the ESF as these elements are present across the ESSs. As CIEL has long advocated, it is critical to ensure that people and communities have sufficient access to information to be able to meaningfully engage with the World Bank and Borrowers on projects, and have access to effective accountability mechanisms when they are harmed or likely to be harmed by World Bank financed projects. Unfortunately, the Guidance Note on ESS10 is lacking the details and actual guidance necessary to help Borrowers implement meaningful consultation and robust stakeholder engagement or develop an effective grievance mechanism capable of providing remedy to communities.

This is especially significant given the current political climate where civil society space is ever-shrinking and environment and human rights defenders are under nearly constant threat.⁴⁵ The Guidance Notes for ESS10 barely mention problems related to attacks on

⁴⁵ See, e.g., Human Rights Watch, *At Your Own Risk: Reprisals against Critics of World Bank Group Projects*, June 22, 2015, https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf; Global Witness, *On Dangerous Ground* (June 2016), available at <https://www.globalwitness.org/en/reports/dangerous-ground/> (noting that 2015 was the deadliest year for land and environmental defenders worldwide); Frontline Defenders, *Annual Report on Human Rights Defenders at Risk in 2016* (2016), available at <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rightsdefenders-risk-2016> (highlighting that in 2016, over 1,000 human rights defenders were killed, harassed, detained, or subjected to smear campaigns against them); Article 19, Center for International Environmental Law & Vermont Law School, *A Deadly Shade of Green: Threats to Environmental and Human Rights Defenders in Latin America* (2016) (noting that Latin America is the most dangerous region for environmental and human rights defenders due to a number of factors including lack of guarantees for human rights protection, weak rule of law, and shrinking civil society space).

environment and human rights defenders, only doing so in GN 27.5, which relates to grievance mechanisms, stating “[u]sers of a grievance mechanism may not be subject to retaliation, abuse or any kind of discrimination. Allegations of retaliation, abuse or discrimination are expected to be addressed and corrected promptly by the Borrower.” However, retaliation, abuse, discrimination, and other attacks do not only occur after people file complaints with grievance mechanisms.

As such, the Guidance Notes should not limit this concern to this section. Environmental and human rights defenders who speak against projects or attempt to participate in stakeholder engagement activities also face threats of retaliation or actual attacks. This must be acknowledged explicitly in sections on stakeholder engagement and meaningful consultation in the Guidance Notes with the ultimate goal of ensuring that people are protected against retaliation and reprisals. Not doing so undermines the objectives and requirements of ESS10.

Both the World Bank Inspection Panel and Compliance Advisor Ombudsman (CAO) of the IFC have guidance on protecting against retaliation. The Guidance Notes should therefore include a reference to the **Inspection Panel’s Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process**,⁴⁶ and **CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations**.⁴⁷

Additionally, it is extremely disconcerting that there is no mention of the Inspection Panel anywhere in the Guidance Notes. For almost 25 years, the Inspection Panel has served as the independent accountability mechanism and as the primary avenue for affected people and communities harmed by World Bank funded projects to seek redress. Further, it has recently started producing a series of reports on lessons learned based on its history of investigations over the years, known as the Inspection Panel **Emerging Lessons Series**.⁴⁸ We highly recommend that the entirety of these lessons learned reports be referenced in the Guidance Notes. Given that projects can and do cause harm, it is important for people and communities to know where to seek remedy for harms or potential harms. The Guidance Notes should explicitly state that the Borrower must disclose the existence of the World Bank Inspection Panel to project-affected or potentially affected people and how to

⁴⁶ Inspection Panel Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process (March 30, 2016), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2016%20Retaliation%20Guidelines.pdf>

⁴⁷ CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations, <http://www.cao-ombudsman.org/newsroom/documents/CAOApproachtoReprisals.htm> (the CAO is currently in the process of finalizing its approach and plans to fully operationalize it by the end of December 2017. The current draft, which reflects comments received, but may be changed in response to further comments, is available).

⁴⁸ World Bank Inspection Panel, Emerging Lessons Series, <http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx>.

contact it in all of its communications with stakeholders and communities, including, but not limited to, project documents.

Stakeholder Engagement, Meaningful Consultation, and Information Disclosure

A key component to ensuring that development projects lead to positive development outcomes is robust stakeholder engagement throughout the project cycle beginning during project design and continuing throughout. In addition to being central to the implementation of the ESF, access to information and public participation in environmental decision-making is a right.⁴⁹ Robust stakeholder engagement includes meaningful consultation, which, as discussed above, can only be done in an environment where people are free from reprisals, and requires disclosure of information in a timely, culturally appropriate, and understandable (including in local language(s)) manner. As currently written, the Guidance Notes fail to provide adequate and detailed information so Borrowers are able to make sure of this. Borrowers need substantially more information on “how” to conduct effective stakeholder engagement, meaningfully consult, and disclose information since it is not enough to merely recognize the importance of doing so. The Inspection Panel Emerging Lessons Series No. 4 on Consultation, Participation & Disclosure of Information⁵⁰ provides valuable lessons, which also demonstrate the fact that this is often not done well in World Bank-funded projects.

The Guidance Note on ESS10 correctly understands the importance of stakeholder engagement, but does not seem to include enough details to help Borrowers meet the requirements of the ESS. While GN 4.1 notes that “engagement begins as early as possible in project preparation,” the Guidance Notes should specify that robust stakeholder engagement and meaningful consultation is an ongoing process that should begin at project design and continue throughout the life of the project in a Guidance Note for paragraph 6 of ESS10. Additionally, the Guidance Notes should specify that it requires continual outreach, communication, and updating of all stakeholders about new information, and potentially including outreach to new stakeholders depending on the project or changes to the project.

For example, there needs to be more guidance on how to identify stakeholders in GN10.1, beyond just saying that the Borrower should do so in a way that “[pays] special attention to identifying disadvantaged and vulnerable groups,” listing relevant groups, or consulting social media. The Guidance Notes should be more comprehensive, for example, by including an indicative list of who stakeholders may be, i.e. local communities,

⁴⁹ Rio Declaration on Environment and Development, principle 10, June 13, 1992, 31 I.L.M. 874.

⁵⁰ World Bank Inspection Panel, Emerging Lessons Series No. 4: Consultation, Participation & Disclosure of Information (2017), <http://documents.worldbank.org/curated/en/891651511972161278/pdf/121756-WP-PUBLIC-ADD-SERIES-IPNConsultationReportFinalwebwithlinks.pdf>.

organizations in the region who frequently engage with the Bank, communities downstream on a river, etc. By providing a list and examples, the Bank can better guide Borrowers who may have less experience. Additionally, there needs to be more guidance on how to document engagement, how to make decisions about engagement, etc. Borrowers who have no experience in meaningful stakeholder engagement should be able to understand how to carry this out based on the Guidance Notes.

Further, the Guidance Notes need to provide more details on how to ensure the participation of and how to meaningfully consult with disadvantaged and vulnerable groups, including, but not limited to, women, children, and persons with disabilities, among others. It should instruct Borrowers to enable participation of these groups in a way that is consistent with international conventions, i.e. **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)**,⁵¹ the **Convention on the Rights of the Child**,⁵² and the **Convention on the Rights of Persons with Disabilities**,⁵³ among others. Additionally, the Guidance Notes should clarify that “culturally appropriate” does not mean that consultations can exclude women, persons with disabilities, children, or other marginalized groups.

Specifically, the Guidance Notes should not include caveats to undermine stakeholder engagement. Consequently, “as appropriate” should be removed from GN 13.3 as stakeholder feedback should always be incorporated in the draft Stakeholder Engagement Plan, and “where appropriate” should be removed from GN22 as the aim of consultations should always inform the Borrower’s decisions.

Additionally, robust stakeholder engagement and meaningful consultation are not possible without comprehensive, accessible, timely, and culturally appropriate information disclosure. Information disclosure needs to begin early in the project cycle as stakeholders need to have adequate time to receive and fully comprehend the information given to them about a project. The Guidance Notes need to define and better explain terms included in this Guidance Note, such as “timely” for it to ensure that it is done in an appropriate timeframe. For example, the Guidance Notes on ESS10, paragraphs 19-20 should include examples of the length of time considered reasonable for disclosure, i.e. the 120 day requirement for projects with significant impacts. Further, the Guidance Notes need to clarify that the Borrower is responsible for disclosing relevant information, by providing

⁵¹ Convention on the Elimination of all Forms of Discrimination Against Women (1979), <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

⁵² Convention on the Rights of the Child (1989), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁵³ Convention on the Rights of Persons with Disabilities (2007), <https://www.un.org/development/desa/disabilities/resources/general-assembly/convention-on-the-rights-of-persons-with-disabilities-ares61106.html>.

concrete details regarding the full scope of information to be disclosed, for example, all draft, final, and amended environmental and social assessments and management plans, in an appropriate place and in a manner and language(s) that is understandable to all stakeholders.

As it is not necessarily obvious how to disclose information in an accessible and culturally appropriate manner, the Guidance Notes need to provide more detail on this topic. For example, that Borrowers should provide information in a non-technical summary so that it is more easily understandable by project affected communities and all stakeholders. The Guidance Notes should also specify that Borrowers should disclose information verbally if all stakeholders are not literate and guidance on how to ensure that the documents are accessible to persons with disabilities.

Overall, the Guidance Notes on ESS10 need substantially more information throughout the sections on stakeholder engagement, information disclosure, and meaningful consultation so that all Borrowers understand how to comply with the requirements that stakeholder engagement and disclosure of information facilitates meaningful consultation in a way that includes all stakeholders and is conducted free of coercion and intimidation.

Grievance Mechanisms

Access to remedy is a fundamental right⁵⁴ and crucial for communities affected or potentially affected by World Bank-funded projects. Grievance mechanisms are not merely part of stakeholder engagement, and should not be seen as such. But instead they are avenues for harmed or potentially harmed communities to obtain remedy. Operational and project-level grievance mechanisms (PLGMs) can provide one option for communities to raise grievances and access remedy in theory. However, if not designed carefully, they run the risk of exacerbating the problems or further deepening the grievance felt by the complainants. These problems can also be compounded by the fact that PLGMs are often designed and operated by project management, who may be the perpetrators of the harm. Thus, PLGMs often lack independence, trust, and oversight, which can make them inappropriate for addressing grievances, protecting against reprisals, and ensuring accountability. As such, the Guidance Notes for paragraphs 26-27 of ESS10 need to provide substantially more guidance on how to design and develop an operational or project-level grievance mechanism. In doing so, they should include reference to existing materials such as the CAO's Grievance Mechanism Toolkit,⁵⁵ the CAO's *A Guide to Designing and Implementing*

⁵⁴ Rio Declaration on Environment and Development, principle 10, June 13, 1992, 31 I.L.M. 874.

⁵⁵ CAO, Grievance Mechanism Toolkit, <https://www.cao-grm.org/>.

Grievance Mechanisms for Development Projects,⁵⁶ and the World Bank's Approach to Grievance Redress in Projects,⁵⁷ among others.

The Guidance Notes should reference and include the UN Guiding Principles on Business and Human Rights' effectiveness criteria for non-judicial grievance mechanisms as they provide an international best-practice standard for what is a suitable and effective PLGM. Thus, GN26.1 should be amended to explicitly state that the PLGMs should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.⁵⁸

Legitimacy is a key concern for PLGMs because, as noted earlier, they are often run by project management. The Guidance Notes could help alleviate these concerns by providing more information for Borrowers about how to create an independent PLGM. For example this could be ensured by housing it outside of management and having the people in charge of it be completely separate and independent from those who were involved in project design. This shows how to take measures to ensure the PLGM's legitimacy. Another example of these measures is instructing the Borrowers to engage and consult with the affected and potentially affected community on how to design the PLGM in the first place.

A PLGM cannot be effective unless it is accessible. GN27.3 acknowledges this and provides some initial guidance on making the PLGM accessible, including making the process easier to understand, free of charge, and noting the importance of accessibility for disadvantaged and vulnerable individuals and groups. However, this is not enough nor does it provide sufficient detail. Merely stating "accessibility for disadvantaged and vulnerable individuals or groups is important" is not sufficient as it does not give the Borrower any guidance on how to ensure that it is. Instead GN27.3 should include more specificity about how to ensure the PLGM is accessible for these groups, i.e. having offices with ramps and online portals that can be used by people who are blind, among others.

Additionally, GN27.3 should provide more information on how to overcome barriers to accessing the PLGM, including barriers related to language and literacy, among others. GN27.3 should specify that all informational materials about the PLGM should be provided

⁵⁶ CAO Advisory Note, A Guide to Designing Grievance Mechanisms for Development Projects (2008), <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

⁵⁷ The World Bank's Approach to Grievance Redress in Projects (January 2014), <http://documents.worldbank.org/curated/en/155861468158375837/The-World-Banks-approach-to-grievance-redress-in-projects>.

⁵⁸ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, Principle III (Access to Remedy) (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; see also C. Daniel, K. Genovese, M. van Huijstee & S. Singh, *Glass Half Full? The State of Accountability in Development Finance* (SOMO, Jan. 2016), available at glass-half-full.org.

in all local languages and any documents generated should be translated into the primary languages spoken and understood by the complainants. Additionally, the people who work at the PLGM should be required to communicate in, or at least understand, local languages or to have a translator on staff. PLGMs should also allow for complaints to be submitted orally or by video to overcome barriers related to illiteracy, and, relatedly, outreach should be done verbally to assist in reaching those who are illiterate. As GN27.5 indirectly acknowledges, fear of reprisals and retaliation can also impact accessibility and as discussed in detail above, the Guidance Notes should provide more information related to preventing and not tolerating retaliation or reprisals beyond just stating that users of PLGMs “may not be subject to retaliation, abuse or any kind of discrimination” and saying that the Borrowers should address it when they are.

The Guidance Notes need to provide more details to the Borrowers on how to ensure the PLGM is predictable. For example, providing more information on how to develop policies and procedures for the PLGM, which should be done in a transparent and inclusive manner with stakeholder engagement. The procedures should include information on timelines and information disclosure, including related to language and accessibility. Further the Guidance Notes could provide examples of good practice so that Borrowers understand what procedures should look like.

PLGMs are often not equitable as there is a power imbalance between the Borrowers and project managers and the affected people. Thus, the Guidance Notes should include information on how to ensure that affected people have access to independent advisors or legal counsel to assist them in accessing the mechanism. Further, as discussed above, consultation and public participation is important throughout project design and implementation, and this includes in developing remedial actions in response to a complaint filed at a PLGM.

To ensure legitimacy, a PLGM must also be transparent. The Guidance Notes should include information on how to ensure transparency, such as maintaining a publicly available case registry and the information that should be included in such a registry, i.e. date complaint was filed, stage in the process, etc.

PLGMs should be rights-compatible and the Guidance Notes should reflect this by including details on how Borrowers can ensure this. For example, that the PLGMs should monitor the remedial actions being taken for their rights-compatibility.

Lastly, PLGMs can be an important source of learning for the Borrower. As can be seen in the documents produced by the Inspection Panel in its Emerging Lessons Series and the information given by the Advisory function of the CAO, grievance mechanisms can see

patterns in the complaints that allow them to provide lessons to the project implementers on how to avoid these harms. As such the Guidance Notes should instruct the Borrowers to create PLGMs that include ways to gather information, distil lessons learned, and provide feedback to the project management. The PLGM should also have a way to receive feedback from stakeholders, including, but not limited to, the people who have filed complaints.

As noted above, the absence of an explicit requirement for Borrowers to disclose the existence of the Inspection Panel is a crucial oversight. Affected or potentially-affected people and communities may not feel safe or may have reasons for not wanting to access the project-level grievance mechanism. Therefore, they should not be forced to do so for any reason, including ignorance regarding the existence of the Inspection Panel. The Inspection Panel is always open to people affected by World Bank-funded projects and the Guidance Notes should reflect that. As such, they should be amended to also include the Borrower's obligation to disclose the existence of the Inspection Panel and information about how to reach them in a culturally appropriate manner and language(s), not only in project documents but also in information about the project-level grievance mechanism.

Additionally, the Guidance Notes should remind Borrowers that there is no requirement for affected or potentially affected communities to use a project-level grievance mechanism prior to accessing the Inspection Panel. They should instead direct Borrowers to inform stakeholders, both during consultations and in any other communications, that using a PLGM is not required nor is it a prerequisite for accessing the Inspection Panel nor does it preclude them from accessing local, national, or international judicial mechanisms or non-judicial mechanisms. The information that Borrowers are required to provide for stakeholders about the Inspection Panel and their own project-level grievance mechanisms should make this clear.

Closing Remarks

We appreciate the opportunity to comment on the ESF Draft Guidance Notes. We hope the World Bank will carefully consider the suggestions and recommendations CIEL has prepared in this document and provided via other joint submissions.

We would reiterate the request made in the December 4th joint letter from civil society organizations to OPCS, primarily that a substantial revision of the Guidance Notes is warranted to ensure the Bank's ESF is implemented properly. In order to do that, we again request that the Bank develop a revised, more comprehensive set of drafts for public comment.

We urge the World Bank to take time to develop more robust guidance notes that may serve Borrowers in implementing and complying with the ESSs. We are available to engage with the Bank further on these issues and welcome opportunities to respond to questions and provide additional comments.

Sincerely,

Carla García Zendejas Erika Lennon

Center for International Environmental Law

Washington, D.C. December 20, 2017