

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

www.indianlaw.org

MAIN OFFICE
602 North Ewing Street, Helena, Montana 59601
(406) 449-2006 | mt@indianlaw.org



WASHINGTON OFFICE
601 E Street, S.E., Washington, D.C. 20003
(202) 547-2800 | dcoffice@indianlaw.org

ROBERT T. COULTER, ESQ.
Executive Director
JANA L. WALKER, ESQ.
CHRISTOPHER T. FOLEY, ESQ.
Admitted only in PA

ARMSTRONG A. WIGGINS
Director, Washington Office
LEONARDO A. CRIPPA, ESQ.
Admitted only in Argentina

May 17, 2022

Mr. Maman-Sani Issa

Director

Environmental and Social Safeguards and Compliance Department

African Development Bank Group

Avenue Joseph Anoma

01 BP 1387 Abidjan 01

Côte d'Ivoire

VIA EMAIL

RE: Comments on the African Development Bank's Updated Integrated Safeguards System with a focus on Indigenous Peoples-related Safeguards

Dear Mr. Issa,

1. The Indian Law Resource Center (Center) welcomes the opportunity to provide input on the African Development Bank's (Bank) Updated Integrated Safeguards System (ISS). On March 21, 2022, the Bank released its updated ISS for public comments. This policy update process is a critical opportunity for the Bank to harmonize its safeguard framework with other multilateral development banks' safeguard policies to both reflect the industry's best practices and address the particularities of indigenous issues in the African context.

2. Our comments and recommendations focus on the draft Environmental and Social Operational Safeguard 7 Vulnerable Groups (Safeguard 7), giving particular attention to safeguard measures relating to indigenous peoples. Based on a comparative policy analysis, we have divided our comments on Safeguard 7 into three sections: (1) policy approach; (2) gaps within the scope of application; and (3) shortcomings in due diligence procedures and safeguard measures. In so doing, as a matter of recommendation, we have decided to provide examples of peer institution's policy approach and safeguard measures to help the Bank meet its upward harmonization goals.

3. The Center is a U.S.-based non-profit law and advocacy organization established and directed by American Indians. We provide free legal assistance to indigenous peoples in the Americas who

are working to protect their lands, resources, human rights, environment, and cultural heritage. The Center has been advocating for better international law standards and policies on indigenous peoples within international organizations, including the United Nations and the World Bank Group, since 1980. For further information about our policy advocacy work, see <https://indianlaw.org/projects/mdb>.

I | Safeguard 7's Policy Approach

4. Generally, Safeguard 7's structure and safeguard measures follow those of peer institution's stand-alone indigenous peoples' policies. However, the Bank's attempt of making of this policy an umbrella policy to address all "Vulnerable Groups," including indigenous peoples, dilutes the strong indigenous peoples-focused safeguard protections contained in Safeguard 7.

5. We recommend the Bank rename Safeguard 7, adding "Indigenous Peoples" into its title so that it reads "Indigenous Peoples and Vulnerable Groups." The Bank should also develop a guidance note focusing exclusively on indigenous peoples. In addition, we recommend it devise safeguards measures to address the particularities that both indigenous peoples and vulnerable groups have within the African context. In so doing, the Bank will undertake the same policy development path that global (e.g., the World Bank, and the International Finance Corporation) and regional multilateral development banks (e.g., the Inter-American Development Bank, the European Bank for Reconstruction and Development, and the Asian Infrastructure Investment Bank) have been building for more than four decades.

6. Since the 1980s, a standalone indigenous peoples' policy has been the standard practice among multilateral development banks. In 1982, the World Bank led the effort by adopting its "Tribal Policy" (Operational Manual Statement 2.34 "Tribal People in Bank-financed Projects") because of two reasons: (1) "failure to design components of projects to benefit these poorest of the poor in developing member nations widens the gap between nationals and the tribal peoples, and may even result in the destruction of the tribal peoples;"¹ and (2) "failure to understand customary tribal rights to land will result in considerable implementation delays... Tribal groups may also, at some future date, resort to legal actions to claim reinstatement of their original territories or compensation for loss of these lands, if acquired in a manner inconsistent with acceptable customary laws and practice."² Simply stated, the lack of a standalone indigenous peoples policy encourages undue risks: the risk that the Bank will harm indigenous peoples; and risk that Bank-funded projects will be delayed or fail due to legal challenges.

7. The World Bank has embarked in—at least—two review processes to strengthen its stand-alone Indigenous Peoples Policy. In all three reviews, the World Bank renamed it to reflect its evolving policy approach to indigenous peoples. For example, in 2005, the policy was renamed as Operational Policy 4.10 Indigenous Peoples and updated to reflect best practices.³ In 2017, the policy was renamed again as Environmental and Social Standard 7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities and updated to address emerging issues and

¹ Robert Goodland, et. al, *Tribal People and Economic Development: Ecological Considerations*, in U.S. Congress' House of Representatives, Hearings before the Subcommittee on International Development Institutions and Finance of the Committee on Banking, Finance and Urban Affairs, 98th Congress, 1st Session (June 28 & 29, 1983), p. 548.

² *Ibid.*

³ World Bank, *OP 4-10 Indigenous Peoples* (July 2005), <http://web.worldbank.org/archive/website01541/WEB/0-2043.HTM>

the particularities of indigenous peoples in different regions, especially in the African and American contexts.⁴

8. The World Bank's four-decades-long policy approach to indigenous issues became the foundation for all global (e.g., the International Finance Corporation⁵) and regional multilateral development banks (e.g., the Asian Infrastructure Investment Bank,⁶ the European Bank for Reconstruction and Development,⁷ and the Inter-American Development Bank⁸). All these regional peer institutions have both developed their own standalone indigenous peoples' policy and updated it to reflect best practices and address regional indigenous particularities.

9. Renaming Safeguard 7 to explicitly refer to indigenous peoples and vulnerable groups will show the Bank's capability to adjust its approach to address both peer institution's policy approach and borrowing countries' new national laws recognizing the rights of indigenous peoples. The Republic of Congo has adopted a law that promotes and protects the rights of indigenous peoples.⁹ The Democratic Republic of Congo has also attempted to pass legislation recognizing the rights of indigenous peoples, though it is currently in front of the Senate, there is hope that it will soon be sent to the President to be signed.¹⁰ The Central African Republic¹¹ ratified the International Labor Organization Convention No. 169 recognizing the full measure of human rights of indigenous peoples. The Bank has the opportunity to follow these countries work in recognizing the rights of indigenous people in Africa as distinctive, legal, social, and political entities.

⁴ World Bank, *Environmental and Social Standard 7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*, in *The World Bank Environmental and Social Framework* (2017), <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf#page=89&zoom=80>

⁵ International Finance Corporation, *Performance Standard 7 Indigenous Peoples* (January 1, 2012), https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=jiVQI.D

⁶ Asian Infrastructure Investment Bank, *Environmental and Social Standard 3 Indigenous Peoples*, in *Environmental and Social Framework* (Approved February 2016) (Amended February 2019 and May 2021), <https://www.aiib.org/en/policies-strategies/download/environment-framework/AIIB-Revised-Environmental-and-Social-Framework-ESF-May-2021-final.pdf>, p. 71-76.

⁷ European Bank for Reconstruction and Development, *Performance Requirement 7 Indigenous Peoples* (December 2, 2020), https://www.ebrd.com/downloads/about/sustainability/ESP_PR07_Eng.pdf

⁸ Inter-American Development Bank, *Environmental and Social Performance Standard 7 Indigenous Peoples*, in *Environmental and Social Framework* (September 2020), <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-110529158-160>, p. 76-83.

⁹ Journal officiel de la République du Congo, Loi n° 5 - 2011 du 25 février 2011 (March 3, 2011) N° 09-2011 p. 315-318.

¹⁰ See, Assemblée Nationale République Démocratique du Congo, *Proposition de Loi Portant Protection et Promotion des Droits des Peuples Autochtones Pygmées*, (April 2021) 3^{ème} Législature de la 3^{ème} République. See also, European Network for Central Africa, *Press Release - Victory for civil society in the DRC: Adoption of the law on the protection of indigenous Pygmy peoples and launch of the PEUPLE project* (May 5, 2021) <https://www.eurac-network.org/en/press-releases/press-release-victory-civil-society-drc-adoption-law-protection-indigenous-pygmy>; United Nations, *New Congolese law 'significant' step for indigenous rights – UN expert* (January 7, 2011) <https://news.un.org/en/story/2011/01/363622-new-congolese-law-significant-step-indigenous-rights-un-expert>.

¹¹ "CAR voted in favour of the UN Declaration on the Rights of Indigenous Peoples in September 2007 and ratified ILO Convention 169 in August 2010. It was the first and only African State to ratify this Convention. On 11 August 2011, under the terms of the ILO Constitution, the Convention entered into force." International Work for Indigenous Affairs *The Indigenous World 2021: Central African Republic*, (March 18, 2021) <https://iwgia.org/en/central-african-republic/4209-iw-2021-central-african-republic.html>

10. Renaming Safeguard 7 will also help provide more clarity to both shareholders and borrowers that the seventh safeguard policy is about indigenous peoples. Vulnerability is not the right way to address indigenous peoples' issues because they are collective rights-holders, not minorities or inherently vulnerable groups. As stated in a 2006 report by the African Commission on Human and Peoples' Rights, "[t]he crucial difference between minority rights and indigenous rights is that minority rights are formulated as individual rights whereas indigenous rights are collective rights."¹² According to the African Charter on Human and Peoples' Rights, the most recent and advanced human rights treaty, indigenous peoples ought to be addressed as development partners because they are entitled to the right to self-determination (article 20)¹³ and the right to development (article 22).¹⁴

11. The Bank has committed to endorse a human rights-approach to development, especially when devising indigenous peoples-related safeguard measures. According to the Bank's Safeguard 7, "[t]he AfDB views economic and social rights as an integral part of human rights, and respects the principles and values of human rights as set out in the UN Charter and the African Charter on Human and Peoples' Rights. Through the requirements of this OS the Bank encourages Borrowers to observe international human rights norms, standards, and best practices and reflect in Bank operations national commitments made under, inter alia, International Human Rights Covenants and the African Charter on Human and Peoples' Rights."¹⁵

II | Gaps within Safeguard 7's Scope of Application

12. Safeguard 7 can be more comprehensive by addressing regional particularities of indigenous issues in the African context. We have identified very specific situations that other peer institutions have addressed by adopting a particular safeguard measure. They include transborder indigenous peoples, pastoralist and nomadic indigenous peoples, and indigenous families that seasonally migrate. These are real situations that many indigenous peoples encounter in the region, and their unique lifestyles should be taken into account for a more comprehensive safeguard coverage. We recommend the Bank address these regional particularities within Safeguard 7's scope of application.

Transborder Indigenous Peoples

13. The existence of indigenous peoples and communities divided by a border of two or more countries is a recognized particularity of indigenous peoples in Africa. However, Safeguard 7 provides no safeguard protection for indigenous peoples under such circumstances. A 2009 report by the International Labor Organization and the African Commission on Human and Peoples' Rights

¹² African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: The Forgotten Peoples?* (2006), p. 13, https://www.achpr.org/public/Document/file/Any/achpr_wgip_report_summary_version_eng.pdf.

¹³ *African Charter on Human and Peoples' Rights*, art. 20 (establishing that "[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen").

¹⁴ *African Charter on Human and Peoples' Rights*, art. 22 (stating that "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development").

¹⁵ African Development Bank Group, *E&S Operational Safeguard 7 Vulnerable Groups* (2022), p. 104, para 1.

identified this regional particularity in countries of North and West Africa, West and Central Africa, Central Africa, East Africa and Horn, and Southern Africa.¹⁶

14. The Inter-American Development Bank's recently updated Indigenous Peoples Policy provides guidance in this regard: "In regional projects involving two or more countries or in border areas where indigenous peoples are present, the borrowers will adopt measures to address adverse impacts of the project that might affect transborder peoples."¹⁷ This safeguard is due to the need and relevance of ensuring that the borrowers in question adopt pertinent measures that take into account not only the corresponding indigenous community or people, but also the national indigenous organizations through which an indigenous community or people is represented.

Pastoralist, Nomadic Indigenous Peoples

15. Safeguard 7 does address pastoralist and nomadic indigenous peoples, but does so in an obscure way under footnote 1. According to the same 2009 report discussed above, pastoralist indigenous groups are another example of groups in Africa that are considered indigenous. For example, the Peul people are pastoralist groups that exist in West and Central Africa.¹⁸ Because this specific particularity can only be found in the African context, we recommend the Bank move the reference from footnote 1 to paragraph 6.

16. The World Bank addressed this regional particularity of indigenous peoples in Africa in its recently updated Indigenous Peoples Policy: "This ESS also applies to forest dwellers, hunter-gatherers, pastoralists or other nomadic groups."¹⁹ As noted, this particularity, unique to Africa, was not addressed in a footnote. It is worth mentioning that the World Bank's updated safeguard framework was the first of its kind to specifically address indigenous issues particular to Africa.

Indigenous Families that Seasonally Migrate

17. The 2009 report mentioned above also identified indigenous hunter-gatherer groups with seminomadic lifestyles that temporarily and/or seasonally move to surrounding areas outside of their territories for varied reasons. This movement does not change their identification to the indigenous people or community of which they are members of nor lose them the special attachment to the indigenous territory where they live. These peoples include, but are not limited to, (1) the Tuareg, a sub-group of the Amazigh indigenous people, who have adopted a seminomadic lifestyle in North and West Africa;²⁰ and (2) the San people in Southern Africa who tend to live nomadic lifestyles involving seasonal hunting and gathering.²¹ Safeguard 7 currently provides no safeguard protection to indigenous families or groups under these circumstances.

¹⁶ International Labor Organization & African Commission on Human and Peoples' Rights, *Overview Report of the Research Project by the International Labor Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (2009), https://media.africaportal.org/documents/indigenous_overview_report_english.pdf, p. 5-7.

¹⁷ *Environmental and Social Performance Standard 7 Indigenous Peoples*, *supra* note 8, para. 11.

¹⁸ International Labor Organization & African Commission on Human and Peoples' Rights, *supra* note 16, p. 6.

¹⁹ *Environmental and Social Standard 7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*, *supra* note 4, para. 9.

²⁰ International Labor Organization & African Commission on Human and Peoples' Rights, *supra* note 16, p. 5.

²¹ *Idem*, p. 7.

18. The Inter-American Development Bank’s Indigenous Peoples Policy addresses a similar particularity of indigenous peoples in the Americas, especially those located throughout the Amazon River basin and Gran Chaco region. “Indigenous Peoples may include indigenous communities who seasonally migrate outside of their territories for economic and social purposes, including hunting and gathering and participating in spiritual ceremonies.”²²

III | Shortcomings in Safeguard’s 7 Due Diligence and Safeguard Measures

19. Safeguard 7 can be strengthened by providing for elements that are missing in well-addressed safeguard measures. We have identified concrete elements that make up such safeguards –elements that peer institutions have explicitly included into their indigenous peoples’ policies. These elements include prohibition of individual land titling and due process procedures in consultation processes aimed at obtaining free, prior, and informed consent. We recommend the Bank include them into Safeguard 7.

Prohibition of Individual Land Titling

20. Safeguard 7 falls short of prohibiting financial support to projects aimed at individual titling of collectively held indigenous lands. The practice of allotting indigenous lands or dividing up collectively held indigenous lands is one of the most destructive development practices because it undermines indigenous peoples’ cohesive social and political structures, as well as breaks apart indigenous peoples’ collective land tenure systems.

21. The Inter-American Development Bank’s Indigenous Peoples Policy includes strong, clear guidance in this regard by stating, “The borrower will not pursue projects that entail individual tiling in indigenous territories.”²³

Due Process in Consultation Procedures

22. Safeguard 7 also falls short of requiring that due process of law govern all consultation proceedings with indigenous peoples. “Due process” is a legal term that applies in criminal law, civil law, and in administrative procedures. It is also known as the right to a fair trial. Article 7 of the African Charter on Human and Peoples’ Rights strongly protects the right to a fair trial.²⁴ Due process of law is particularly important concept for procedures where human rights are at stake, such as consultations with indigenous peoples on projects that would affect their collectively held lands. Due process does not require a specific set of procedures for every case, but rather calls for the balancing of factors including the private interest that will be affected by the proposed action, the risk of a wrongful deprivation of that interest, and the likelihood that additional procedural safeguards would protect that interest, and the costs and burdens of implementing procedures.

²² *Environmental and Social Standard 7 Indigenous Peoples*, supra note 8, footnote 162.

²³ *Idem*, para. 17.

²⁴ *African Charter on Human and Peoples’ Rights*, Art. 7, stating that “1. Every individual shall have the right to have his cause heard. It comprises...4. The right to be tried in a reasonable time by an impartial court or tribunal.”

23. The recently updated indigenous peoples' policies of both the World Bank²⁵ and the Inter-American Development Bank,²⁶ require that borrowers offer project-affected communities "due process in the case of development of their lands, territories, and natural resources."

Without further ado, we take this opportunity to express our highest consideration and esteem.



Leonardo A. Crippa
Senior Attorney
Indian Law Resource Center



Kallie Dale-Ramos
Staff Attorney
Indian Law Resource Center



Miranda Carman
Program Assistant
Indian Law Resource Center

²⁵ *Environmental and Social Standard 7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities*, *supra* note 4, para. 30.

²⁶ *Environmental and Social Performance Standard 7 Indigenous Peoples*, *supra* note 8, para. 18.