

Impact case study (REF3)

Institution: Brunel University London		
Unit of Assessment: 18 Law		
Title of case study: Regulating the protection of indigenous peoples in the World Bank projects		
Period when the underpinning research was undertaken: 2007 - 2016		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Alexandra Xanthaki	Role(s) (e.g. job title): Professor of Law	Period(s) employed by submitting HEI: 09/2004 - present
Period when the claimed impact occurred: July 2015 – December 2020		
Is this case study continued from a case study submitted in 2014? N		

1. Summary of the impact (indicative maximum 100 words)

Indigenous peoples suffer severely from projects funded by the World Bank. These are the most vulnerable people and their survival and identity depends directly on their physical environment. The revision of the World Bank guarantees allowed the opportunity to minimize the negative impacts of such projects. In 2015, the UK Department for International Development (DfID) commissioned Prof Xanthaki to review the UK position on the then draft Environmental and Social Framework (ESF), with the focus on its Environmental and Social Standard 7 (ESS7) which relates to guarantees that must be in place for the protection of indigenous peoples by the World Bank projects. Following her analysis included in 2 documents and discussed in several meetings among the author, the DfID and the FCO, the UK adopted most of the changes suggested by Prof Xanthaki, supported the more protective alternatives and ensured that the revised ESF was adopted, thereby improving the guarantees for indigenous peoples. The new standards apply to all World Bank projects from 1 October 2018 and so far have resulted in the increased protection of approximately 22,000,000 indigenous peoples on 3 continents.

2. Underpinning research (indicative maximum 500 words)

In the last 2 decades, Prof. Xanthaki's work has argued in favour of stronger protection of indigenous peoples under current international law (esp. Prof. Xanthaki's 2007 monograph and publications on indigenous rights). Her main argument has been that the international obligations that States have undertaken for the protection of human rights necessitate stronger protection of indigenous peoples, including consent on matters that affect them, positive measures that promote their identity and wide protection of their lands. Since the adoption of the 2007 Declaration on the Rights of Indigenous Peoples, Prof. Xanthaki discusses the steps that have to be taken for its implementation at the international and domestic level (Ref.3; Ref. 4). Her work on indigenous rights has moulded UN reports (cited therein more than 4 times) and has influenced both scholarship (more than 550 citations) and policy-making (e.g. in Finland, Malaysia and the UK) at a time of positive change for indigenous rights.

The Bank is an international financial institution that provides investment project financing to developing countries for physical and social infrastructure projects. Its funded projects have had disastrous effects on indigenous nations, often including forced removal from their traditional lands, destruction of their traditional ways of life, and deterioration of their health, and even

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death. Taking into account that there are approximately 370,000,000 indigenous peoples around the world, in approximately 90 countries, usually living in lands rich in resources, and the special relationship that these peoples have with their lands, one can appreciate the importance of the guarantees that the Bank sets on the peoples affected. The new ESF was meant to address such concerns in a more effective way than the previous Bank policy on indigenous peoples, Operational Policy 4.10 (OP 4.10). In June 2015, the DfID commissioned Prof. Xanthaki (then, Reader) to solicit her expert opinion and analysis regarding the language of the then rigorously negotiated draft ESF, particularly as it related to the rights of indigenous peoples under international law. She was asked to provide an expert opinion on:

- The impact of revisions that had already been made in the draft following repeated international consultation phases;
- Whether the draft language conformed with existing international standards;
- Issues that the UK government should advocate for during the subsequent round of consultations with the Bank; and
- Whether the UK government should ultimately endorse the current draft for further consultation.

Drawing on her legal analysis included in a series of outputs (refer to specific references listed in section 3), Prof. Xanthaki made a key recommendation for the removal of the 'alternative approach' embedded within the ESF which would have allowed borrowers to 'opt-out' of the indigenous safeguards in Environmental and Social Standard 7 (ESS7), if it 'would create a serious risk of exacerbating ethnic tension or civil strife', as judged by the state in question. Prof. Xanthaki advised that such a provision would most certainly fall below existing international standards. In addition, Prof. Xanthaki:

- Criticised the application of a second, already existing broader 'waiver' policy that can allow the borrowing state to ignore ESS7 upon approval by the Bank's board of directors. This included, excluding them from guarantees against their removal from their lands without their Free Prior and Informed Consent (FPIC) or/and rejecting their special treatment necessitated by their indigeneity. Prof. Xanthaki provided an extensive analysis of the legality and applicability of the Bank's existing 'waiver policy' to the DfID and FCO. Her analysis concluded that such 'waiver policy' must be deleted or at least minimized to the greatest possible degree.
- Advised that FPIC was an emerging standard of international law and that any exceptions to state obligations concerning FPIC should not fall below current standards. She counselled that if FPIC was not possible, state borrowers needed to ensure that no adverse impacts result during or after the implementation of the project.
- Recommended that the ESF make general references to human rights standards.
- Recommended that the definition of 'indigenous peoples' in ESS7 should (1) remove any requirement for a distinct language or dialect and (2) include a criterion on non-dominance, with a reference to exclusion and marginalisation.

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- Advised that ESS7 should be revised to clarify that indigenous peoples affected in general (not just those with projects on their lands) fall within the scope of safeguards.

3. References to the research (indicative maximum of six references)

Ref. 1 Confidential Report by Alexandra Xanthaki entitled 'Comments on the Second Draft of the WB Safeguard Policies Environmental and Social Framework (ESF) (CODE2015-0039 of June 10, 2015) dated June 15, 2015 and provided to the UK Department of International Development and the UK Foreign & Commonwealth Office. Available upon request to HEI.

Ref. 2 Confidential Report by Alexandra Xanthaki entitled 'Waiver in WB Second Draft ESF' dated June 2015 and provided to the UK Department of International Development and the UK Foreign & Commonwealth Office. Available upon request to HEI.

Ref. 3 Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (CUP, 2007).
<https://doi.org/10.1017/CBO9780511494468>

Ref. 4 Alexandra Xanthaki, 'Rights of Indigenous peoples under the Light of Energy Exploitation' (2013) *German Yearbook of International Law* 315-350.
<http://www.gyil.org/?article=rights-of-indigenous-peoples-under-the-light-of-energy-exploitation>

Ref. 5 'Developments on Indigenous Rights over the Last Ten Years and Future Developments' (2009) *Melbourne Journal of International Law- 10th Anniversary Celebratory Issue*, 27-36.
https://law.unimelb.edu.au/__data/assets/pdf_file/0009/1686060/Xanthaki.pdf

4. Details of the impact (indicative maximum 750 words)

Several of Prof. Xanthaki's recommendations to DfID directly influenced the position of the Secretary of State and the Executive Director to the Bank in the adoption of effective revisions and the approval of a more protective for indigenous peoples version of the ESS7 and the ESR. This resulted in significant strengthening of indigenous protection compared to the initial draft of ESR and the previous Operational Directive. These standards now apply to all Bank projects initiated after the 1st October 2018, ensuring increased protections for all indigenous peoples in all parts of the world where Bank-financed projects are implemented.

Impact on the 'Alternative Approach' Provision

This 'Alternative Approach Provision', a highly disputed point at a time, allowed the potential for borrower states to opt-out of complying with the standards applicable to indigenous peoples in their entirety and without Bank approval if it 'would create a serious risk of exacerbating ethnic tension or civil strife.' (E1) The adoption of such an approach would deprive indigenous peoples from any guarantees of their survival depending solely on the state's narrative of the domestic situation.

At the time of Prof. Xanthaki's submission to DfID, UK representatives were actively participating in the ESF consultation process and were supportive of a version of an 'alternative approach' provision. Prof. Xanthaki's strong opposition to such an approach influenced a change of the UK position. The revised UK position was *verbatim* the recommendation made by Xanthaki as also confirmed in correspondence (DfID) to Prof. Xanthaki, wherein they thanked Xanthaki '*for [her] very helpful comments on the Framework*' (E10).

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As a result of Prof. Xanthaki's research and recommendations, the DfID and FCO put forward a revised position on the 'alternative approach' to the UK Secretary of State, who also concurred that the language should be removed. This was again confirmed in correspondence from DfID to Prof. Xanthaki (E10). It is also evidenced by the UK Statement on the World Bank Safeguards Review (UK Statement) wherein the UK government stated that it '*welcome[d] the progress made in the second draft of the revised [ESF],*' and that they '*support the changes in the new draft ESS7 for protecting Indigenous Peoples in line with international practice.*' (E2). The second draft of the ESF did not include the 'alternative approach' revision. The UK government further commented that it welcomed the '*strengthening of the [ESF] with regards to protections for vulnerable and marginalised groups.*' (E2). Although the idea of an 'opt-out' remained an issue in subsequent rounds of consultation, the final version of the ESF adopted by the Bank did not include the offending provision (E2).

Impact on Human Rights Language

Prof. Xanthaki's reports also recommended that the Bank include additional human rights language in the ESF to increase the guarantees on indigenous peoples' rights, including women and children. The UK final statements aligned with Prof. Xanthaki's position (E2). The final version of the ESF adopted by the Bank did in fact introduce additional human rights language through references to the principle of non-discrimination and the Universal Declaration on Human Rights (E3).

Impact on the beneficiaries of the ESR protection

Prof. Xanthaki's reports also recommended that the definition of indigenous peoples in the ESF include a reference to 'exclusion' or 'marginalization', as more empowering language. The previously used term 'disadvantaged' corroborated in the portraying of indigenous peoples as victims. The UK approved of the final version of the ESF which replaced the term 'disadvantaged' with the term 'marginalized' in referencing what Indigenous Peoples may be called in disparate contexts (E3).

Bank Executive Director Approval

As a founding member of the Bank and a major shareholder, the UK position on ESR guarantees was of great significance. This is because the UK holds a disproportionate block of voting shares in the Bank's institutions compared to the majority of other states, hence its support of the final draft was paramount in order for it to pass. Subsequently, the Bank's Executive Directors adopted the ESF by consensus on 4th of September 2016. (E4).

Subsequent impact on safeguarding indigenous peoples

Since the 1st October 2018, the rights of approximately 370,000,000 indigenous peoples are better guaranteed. This is because after the Bank began applying the newly-adopted ESF to all new Bank projects. No state can withhold the guarantees of the ESF ESS7 on indigenous peoples randomly on the mere basis of its subjective judgment. This is a major milestone for the survival and protection of basic rights of indigenous peoples. A number of proposed Bank projects in the concept or appraisal stage of the Bank's project life cycle are currently being designed *in accordance with ESS7*. These include, but are not limited to the following projects:

- Tanzania's Productive Social Safety Net Phase II (PSSN II) project, which aims to help extremely poor households move into sustainable livelihoods through increased access to health, education and resources. Contrary to a 2016 Bank project in Tanzania, where Tanzania was able to opt out of the previous indigenous peoples policy with disastrous effects on indigenous nations (E6), now the project's Vulnerable Groups Planning

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Framework includes guarantees such as indigenous ability to *'participate in, and benefit from the development process in ways that do not threaten their unique cultural identities and wellbeing.'* (E5). Approximately 466,700 indigenous peoples live currently in Tanzania (source: Minority Rights Group).

- The Productive Alliances Project in Paraguay (P168153), an agricultural project aimed at creating long-term economic opportunities for the rural poor and vulnerable, specifically includes a discussion on the applicability of ESS7 to the project. (E7). The bank's documents identify approximately 116,000 indigenous peoples in Paraguay (source: Project Information Document).
- China's Renewable Energy and Battery Storage Promotion Project which will be deploying battery storage systems and renewable technology applications across the country, including indigenous areas, also discusses ESS7 and in particular the need of loan applicants to obtain the FPIC of indigenous peoples (called ethnic minorities) (E8). More than 21,000,000 indigenous peoples live in China and as the project will have wide coverage, many of them will be affected (source: Minority Rights group)
- The Transforming the Mekong Delta GCF Program for Vietnam project is an agricultural development project in the upper provinces of Vietnam's Mekong Delta. An initial screening indicated that the project activities will take place in areas where ethnic minority groups reside. In light of this, the project's Environmental and Social Review Summary confirmed that an ethnic minority framework would be prepared describing the provisions and procedures for implementing ESS7 (E9). Around 500,000 indigenous peoples live in Vietnam (source: Minority Rights Group).

5. Sources to corroborate the impact (indicative maximum of 10 references)

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- E1** World Bank, 'Environmental and Social Framework,' First Draft for Consultation, July 30, 2014
- E2** UK Statement on the World Bank Safeguards Review dated January 25, 2016.
- E3** World Bank, 'Environmental and Social Framework' (2017)
- E4** Minutes of the Meeting of the Executive Directors of the Bank and IDA held in MC13-121 on 4 August 2016
- E5** Tanzania Social Action Fund Production Social Safety Net II (PSSN II), Vulnerable Groups Planning Framework, April 2019
- E6** Policy Waiver Sparks Fears: World Bank Allows Tanzania to Sidestep Rule Protecting Indigenous Groups, International Consortium of Investigative Journalists, 17 June 2016, <https://www.icij.org/investigations/world-bank/world-bank-allows-tanzania-sidestep-rule-protecting-indigenous-groups/>
- E7** Productive Alliances Project (P168153), 12 November 2018
- E8** Environmental and Social Review Summary, China Renewable Energy and Battery Storage Promotion, 16 April 2019
- E9** Environmental and Social Review Summary, Transforming the Mekong Delta GCF Program for Vietnam, 22 March 2019
- E10** Corroborating email from DfID, 18 June 2015