



**British Institute of  
International and  
Comparative Law**

# The Role of Multilateral Development Banks in the Protection of Intangible Cultural Heritage

BIICL Working Paper  
21 October 2021

Berenika Drazewska and Kristin Hausler





**British Institute of  
International and  
Comparative Law**

## Suggested Citation

Berenika Drazewska and Kristin Hausler, 'The Role of Multilateral Development Banks in the Protection of Intangible Cultural Heritage', Working Paper, British Institute of International and Comparative Law, 20 October 2021 <<https://www.biicl.org/publications/the-role-of-multilateral-development-banks-in-the-protection-of-intangible-cultural-heritage>>

## Acknowledgements

The authors gratefully acknowledge the Dorset Foundation which supported this research. They are also thankful to Elke Selter for her comments on an earlier version of this Working Paper.

# Contents

Introduction .....	4
Part I: International Legal and Policy Framework.....	7
Part II: The Policies of Multilateral Development Banks.....	16
A: Policies Applicable to Intangible Cultural Heritage (ICH) .....	16
B: Policies Applicable to Consultation relevant for Intangible Cultural Heritage .....	20
Part III: Selected Cases .....	32
Initial Findings & Recommendations .....	40

# Introduction

1. Infrastructure construction projects have always raised difficult questions with regard to the protection of cultural heritage. In 1954, the decision to build the Aswan High Dam (Egypt), which threatened to flood the Upper Nile Valley led to the 'Nubia campaign' spearheaded by UNESCO to salvage the cultural sites in the area.<sup>1</sup> The campaign sparked a renewed interest in the area's cultural history, leading to broad-scale, intensified archaeological excavations in the subsequent decades, whose results allowed for a much better understanding of the Egyptian civilization.<sup>2</sup> Yet, this campaign model reconciling development and protection of cultural heritage, which was successfully implemented in Egypt, has rarely been replicated beyond the sphere of UNESCO-led restoration and development projects. Cultural heritage and development have a highly strained relationship, and the pursuit of projects aimed at the construction of infrastructure (be it communications, transport, water, waste management, or energy infrastructure, involving the construction of dams, roads, or bridges, for example) located in culturally rich areas tends to be riddled with difficulties and manifold risks.
2. Whilst the Nubia Campaign highlighted the possible impact of infrastructure construction projects on tangible cultural heritage, both material (tangible) and intangible cultural heritage (ICH) can be negatively impacted by such projects. The impact of infrastructure construction projects on tangible cultural heritage is easier to identify as it affects cultural objects, buildings, monuments or sites which are visible or recognisable. Intangible cultural heritage, including oral traditions, practices, local knowledge or traditional skills, are not visible or recognisable and may therefore be more difficult to identify and protect. Whilst ICH can be tied to a physical object or site, that object or site is generally not protected as cultural heritage *per se*. This is generally the issue faced by infrastructure construction projects as demonstrated in the four case studies presented in Part III: in Chile, the project not only affected sites of archaeological and paleontological interest but also some local traditions, including that of the muleteers (mule drivers); in Georgia, the project threatened the traditional ways of life, including the pasturing practices and rights of customary ownership to land (unrecognized by the government) of an ethnic minority group which lived in isolation in Upper Svaneti among the Caucasus mountains; in India, the project affected a sacred site and burial ground, as well as a place that was used to collect herbs for traditional medicine purposes; in Uganda, the project involved a natural site that is central to the culture and spirituality of an Indigenous group. Although none of those sites were protected under either the UNESCO World Heritage system<sup>3</sup> or under domestic law, they are (or were) instrumental for the continued existence of ICH.

---

<sup>1</sup> UNESCO, 'Nubian Monuments from Abu Simbel to Philae' (last updated 2021) <https://whc.unesco.org/en/list/88>.

<sup>2</sup> Fekri A. Hassan, 'The Aswan High Dam and the International Rescue Campaign' in Steven Brand and Fekri A. Hassan (eds), *Dams and Cultural Heritage Management: Final Report for the World Commission on Dams* (working paper prepared for the WCD), August 2000.

<sup>3</sup> While the Nenskra dam project in Georgia is not directly located in the World Heritage Site of Upper Svaneti, the project will involve construction in the same municipality of Mestia (Nenskra and Nakra Valley). In inscribing the Chazhashi village as a cultural landscape pursuant to Article 1 of the World Heritage Convention in 1996, the World Heritage Committee has referred to the whole of Upper Svaneti as being 'of outstanding universal value being an exceptional landscape that has preserved to a remarkable degree its original medieval appearance, notable for the distribution, form, and architecture of its human settlements', at the same time highlighting the need to delineate the site to ensure its representative character and proper management. World Heritage Committee, *Report from the 20th session (1996)*, WHC-96/CONF.20, 10 March 1997, 65.

3. Development is not always antagonistic to the protection of heritage; the two can work in synergy with each other. The UN Sustainable Development Goals (SDGs) – part of the 2030 Agenda for Sustainable Development - expressly flesh out a vision of sustainable development which supports the protection of cultural heritage. Among the 17 targets identified in 2015 and adopted by all UN Member States as part of their commitment to end poverty within a single generation, Target 11.4 expressly recognizes the need to ‘strengthen efforts to protect and safeguard the world’s cultural and natural heritage’ as an instrument for the realization of SDG 11 which foresees making cities and human settlements inclusive, safe, resilient and sustainable.<sup>4</sup> But the connections between cultural heritage and sustainable development reach further; according to UNESCO, culture is has an important role to play in the implementation of at least 9 other SDGs.<sup>5</sup> MDBs have repeatedly endorsed the 2030 Agenda and clearly voiced their commitment to helping realize the SDGs.
4. Multilateral Development Banks (MDBs), given their role in large infrastructure construction projects, have a particular role to play in the protection of cultural heritage, including ICH. Recognising their role, MDBs have adopted ever-more sophisticated policies in order to limit and manage the impacts of the projects they finance on cultural heritage. However, so far, the focus has primarily been on material (tangible) heritage; there is particular paucity of any practical guidelines which would clarify the content of the policies as far as ICH is concerned. Furthermore, significant and pervasive gaps between policy and practice clearly demonstrate the need for the elaboration of such guidelines to ensure the proper implementation of the Banks’ policies.
5. Starting off by examining the main international legal and policy instruments as well as concepts relevant to the protection of ICH in the context of infrastructure construction projects (Part I), this Working Paper undertakes a comparative analysis of relevant aspects of the sustainability policies of 7 leading MDBs to map out the requirements applicable to recipients of the MDBs’ funding insofar as the identification, avoidance, management and mitigation of project impacts on ICH is concerned, and their comparative compliance with international legal standards in the field of cultural heritage and human rights (Part II). In Part III, the Paper examines four case studies of different infrastructure construction projects supported by the MDBs in the last two decades: of a water-supply and sanitation project in Jharkhand, India and hydroelectric dams in San José de Maipo (Chile), Upper Svaneti (Georgia), Bujagali (Uganda). In all these cases the treatment of the impacts of the projects on ICH was deemed unsatisfactory, and resulted in adverse consequences for the affected communities, and/or for the projects themselves, such as complaints to the MDBs’ accountability mechanisms, popular or NGO protests, delays or bad press.
6. The four case studies identify a pattern involving failure to carry out appropriate consultations concerning ICH, which in turn tended to affect the identification of that heritage at the screening stage of impact assessments, as well as further avoidance and mitigation of impacts. Our recommendations include placing a much stronger emphasis on a culturally appropriate process of prior, comprehensive, meaningful and continuous consultations (or Free, Prior and Informed Consent, as appropriate) in good faith with the affected communities as early as possible. This Working Paper advocates for the development sector to adopt a holistic and human rights-based approach to the protection of cultural heritage, which takes into account the need to ensure

---

<sup>4</sup> UN General Assembly, Resolution 70/1 [Transforming our world: the 2030 Agenda for Sustainable Development], A/RES/70/1, 21 October 2015.

<sup>5</sup> Jyoti Hosagrahar, ‘Culture: at the heart of SDGs’, *UNESCO Courier* (April-June 2017), <https://en.unesco.org/courier/april-june-2017/culture-heart-sdgs> (retrieved 14 October 2021).

adequate safeguarding of ICH throughout the life of infrastructure construction projects financed by MDBs to guarantee the rights of affected communities, and offers initial guidance on good practice.

# Part I: International Legal and Policy Framework

7. **Cultural heritage**, whose various forms are protected under specific international treaties, includes: (1) tangible cultural heritage, which consists of movable cultural heritage (such as paintings, sculptures, coins, manuscripts),<sup>6</sup> immovable cultural heritage (such as monuments, archaeological sites)<sup>7</sup>, and underwater cultural heritage (shipwrecks, underwater ruins and cities)<sup>8</sup>; and (2) intangible cultural heritage (ICH), which refers to the 'practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.'<sup>9</sup> In light of the ICH Convention, **intangible cultural heritage (ICH)** is 'transmitted from generation to generation [...] constantly recreated by communities and groups **in response to their environment**, their **interaction with nature** and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.'<sup>10</sup> By being 'constantly recreated', ICH is seen as a **dynamic** concept.
8. Intangible (or 'living') cultural heritage may be associated with **tangible (material) elements** ('instruments, objects, artefacts and cultural spaces'), which may play an important role in its expression.<sup>11</sup> However, as discussed by Lucas Lixinski, the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) protects objects only 'because they derive from a larger cultural practice, and not the other way around'; the focus is on safeguarding the cultural processes behind these objects.<sup>12</sup> Thus, as observed by Benedetta Ubertazzi, what is protected is the manufacturing process involved in making a particular kind of pottery rather than the resulting objects; the craftsmanship and culture in preparing and sharing a particular dish rather than the dish itself, and the craft of musical instrument-making and associated

---

<sup>6</sup> The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) covers tangible cultural heritage which corresponds to the definition of 'cultural property' established by that convention (Article 1).

<sup>7</sup> The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention, 1972) covers immovable cultural heritage in the form of monuments, groups of buildings and sites, which have 'outstanding universal value' as defined by that convention (Article 1).

<sup>8</sup> The UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001) covers all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years (Article 1.1).

<sup>9</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Article 2. A number of initiatives led to the adoption of the 2003 Convention, including the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, and the 1993 Formal Proposal made to UNESCO for 'Living Cultural Properties' and the creation of Living Human Treasures program. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) (2005) defines 'cultural heritage' as 'a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time.' (Article 1a).

<sup>10</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Article 2.

<sup>11</sup> Francesco Francioni, 'Art.2(1): Defining Intangible Cultural Heritage', in Janet Blake and Lucas Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), 53-55.

<sup>12</sup> Lucas Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013), 9.

performance rather than the musical instrument itself.<sup>13</sup> Lixinski further explains that ICH can be considered as: (1) *dependent* on material element(s), such as cultural objects or buildings which can be the product of skills or beliefs; or (2) *independent* from material element(s) when ICH does not require to be fixating on a material object; this is for example the case of story-telling.<sup>14</sup> However, even when ICH can be considered as ‘independent’ from any tangible heritage, it is often linked to a tangible site, without it *resulting* from the practice of a skill or belief but, rather, because the ICH is rooted in that particular site. This could be because the site is considered sacred or contains a burial ground and thus is linked with ongoing worship practices, or has been used for generations to exercise traditional practices, such as pasturing or collecting herbal medicines, for example.

9. Similarly to the system established by the World Heritage Convention (1972), UNESCO manages a Representative List to safeguard ICH and showcase its significance and diversity all over the world. In order to be inscribed on the **Representative List**, an ICH element must be compatible with existing human rights instruments, as well as respectful of communities, groups and individuals, and of sustainable development.<sup>15</sup> An ICH element may be removed from the Representative List if it falls short of these requirements. Such was the case of the Aalst Carnival (Belgium), removed from the Representative List in 2019.<sup>16</sup> The listing process itself is sometimes criticised because of its top-down approach to safeguarding cultural heritage, with States rather than communities leading the selection process,<sup>17</sup> which reflects power differentials<sup>18</sup> in spite of the ICH Convention’s emphasis on the active involvement of concerned communities, groups and individuals in State activities concerning such heritage.<sup>19</sup> The decision to inscribe (or not) an element on the Representative List remains a politically-driven process. As the aim of the Representative List is only to showcase ICH that is representative of human creativity and global cultural diversity, most of the world’s ICH has not been inscribed on it.
10. Today the UNESCO Representative List counts over 500 diverse elements, from the tango (Argentina and Uruguay), to practices and know-how concerning the argan tree (Morocco), Jamaican reggae music, traditional violin craftsmanship in Cremona (Italy), Turkish coffee culture and tradition, Indonesian batik and Indian yoga. Some inscriptions on the List are more closely associated with, and possibly even dependent on specific tangible sites, landscapes or buildings including, for example, ‘transhumance’ - an ancient form of pastoralism involving the droving of livestock to various mountain altitudes following seasonal cycles. While transhumance was registered upon the Representative List upon the initiative of Austria, Greece and Italy,<sup>20</sup> it is manifested in one form or

---

<sup>13</sup> Benedetta Ubertazzi, ‘Art.2(2): Manifesting Intangible Cultural Heritage’, in Janet Blake and Lucas Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), 77-78.

<sup>14</sup> Lixinski, *Intangible Cultural Heritage in International Law*, 8.

<sup>15</sup> ICH Convention, Article 2.1.

<sup>16</sup> UNESCO, ‘Aalst Carnival removed from the Representative List of the Intangible Cultural Heritage of Humanity’ (press release), 13 December 2019, available at <https://en.unesco.org/news/aalst-carnival-removed-representative-list-intangible-cultural-heritage-humanity> (retrieved 14 October 2021).

<sup>17</sup> ICH Convention, Article 16.1.

<sup>18</sup> UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, 21 March 2011, A/HRC/17/38, para 10.

<sup>19</sup> ICH Convention, Articles 11 and 15.

<sup>20</sup> UNESCO, ‘Transhumance’, <https://ich.unesco.org/en/RL/transhumance-the-seasonal-droving-of-livestock-along-migratory-routes-in-the-mediterranean-and-in-the-alps-01470> (retrieved 14 October 2021). Transhumance has also been recognised as part of France’s intangible cultural heritage in 2020, in what was seen as a first step towards its inscription on the UNESCO Representative list. Ministère de l’Agriculture et de l’Alimentation, ‘La transhumance, reconnue au Patrimoine culturel immatériel en France, première étape vers une inscription à l’UNESCO’, 3 July 2020,

another in different parts of the world. Other examples of ICH associated with specific tangible sites include the practice of ancestral medical techniques of the Kallawayas which depends on plants found in the Bautista Saavedra region north of La Paz in Bolivia; the Mesir Macunu festival involving the scattering of a paste from a specific Mosque in Manisa, Turkey; or the Lum medicinal bathing of Sowa Rigpa of Tibetan people in hot springs in China, among many others.

11. Furthermore, a number of elements have also been placed on the **List of Intangible Cultural Heritage in Need of Urgent Safeguarding**. Inscriptions on the Urgent Safeguarding List usually take place at the request of the State Party concerned, although in cases of extreme urgency the Intergovernmental Committee may inscribe the element merely 'in consultation' with the State.<sup>21</sup> They serve to mobilize international cooperation and assistance for the safeguarding of the ICH in question, in order to ensure its continued viability (at risk despite the efforts of the community, groups and/or individuals and State(s) Party(ies) concerned), and/or protection from grave threats threatening the survival of the ICH.<sup>22</sup> The element may be removed from the Urgent Safeguarding List once that is no longer the case.<sup>23</sup>
12. Such an inscription may happen in relation to any kind of risk or grave threat, although the preamble of the ICH Convention and the Operational Directives identify processes of **globalization and social transformation** as an important source of such threats.<sup>24</sup> In fact, some intangible elements have been inscribed on the UNESCO List of Intangible Cultural Heritage in Need of Urgent Safeguarding due to development-related pressures and risks. For instance, the Mapoyo oral tradition and its symbolic reference points within their ancestral territory in Venezuela is under threat from the mining industry encroaching on the community's ancestral territories; in Brazil, the Enawene Nawe people's ritual (Yaokwa) for the maintenance of social and cosmic order is under serious risk due to, among others, mining and logging, unregulated processes of urban settlement, construction of roads, waterways and dams; the Colombian-Venezuelan tradition of work songs, born out of the Llano communities' sense of harmony with the natural environment and forming part of their traditional animal husbandry system, has been affected by changes in the use of the land and in ownership systems impacting the linked natural sites and causing a diminishing of the interest in Llano work, weakening the practice itself. Similarly, Mongolian traditional practices of worshipping sacred sites linked to spirits inhabiting elements of the natural environment, born in the context of a traditional nomadic lifestyle, are under threat from mining activities and rapid urbanization processes.<sup>25</sup>
13. To facilitate safeguarding, UNESCO has also established a Register of Good Safeguarding Practices, meant for sharing experiences and lessons learned in addressing challenges involved in safeguarding this 'living' (dynamic) heritage between stakeholders. However, the Register, whose entries are equally selected from proposals made by States Parties by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage during its yearly sessions, has so far enjoyed less attention than the two remaining lists; additionally, even the most successful

---

<https://agriculture.gouv.fr/la-transhumance-reconnue-au-patrimoine-culturel-immateriel-en-france-premiere-etape-vers-une> (retrieved 14 October 2021).

<sup>21</sup> ICH Convention, Article 17.

<sup>22</sup> Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage* (2020) (ICH Operational Directives), para 1.

<sup>23</sup> *ICH Operational Directives*, para 39.

<sup>24</sup> ICH Convention, preamble, rec. 3 and *ICH Operational Directives*, para 29.

<sup>25</sup> For a comprehensive list of threats to the 67 ICH elements currently inscribed on the Urgent Safeguarding List, visit <https://ich.unesco.org/dive/threat/> (retrieved 14 October 2021).

safeguarding programmes will not necessarily be a success when transposed to other contexts. As a result, UNESCO has set about exploring additional, 'softer' ways of sharing good safeguarding practices.

14. ICH is also people-centred and grounded in international **human rights** law, which includes the right to participate in cultural life.<sup>26</sup> The people-centric approach of this definition is manifested in its focus on two elements: the cultural community which creates and enacts the cultural practices, and the cultural practices themselves.<sup>27</sup> As Janet Blake further explains, the evolution in legal thinking about cultural heritage which led to the adoption of the Convention as a people-centric instrument has required

*...moving away from a purely intellectual property-type approach towards one that pays greater attention to the cultural character of this heritage and one that takes account of its social and cultural significance for its bearers and practitioners. This, in turn, involves placing an important focus on the skill and know-how of the communities (groups and individuals) who produce or enact it, to the importance of transmission of related knowledge and know-how, and to the social, cultural, and intellectual context of its creation. Hence, it becomes clear that the human context within which intangible heritage develops and is maintained itself requires safeguarding as much as the tangible 'product', a shift in perspective that introduces a strongly human rights-based approach towards safeguarding and one that places participation by cultural communities and associated groups and individuals at the centre of this process.<sup>28</sup>*

More in general, the human right to participate in cultural life has been specifically interpreted to include the **right to access and enjoy cultural heritage**.<sup>29</sup> As a result, States Parties to human right treaties which include the right to take part in cultural life must respect, protect and fulfil the right to access and enjoy cultural heritage, including ICH, with regard to all persons under their jurisdiction.<sup>30</sup> **This includes an obligation to maintain access of everyone**, including minorities and Indigenous peoples, to their own cultural and linguistic heritage and to that of others.<sup>31</sup> As confirmed by the UN Human Rights Committee, the right of minorities to enjoy their own culture (as defined in Article 27 of the International Covenant on Civil and Political Rights) cannot be undermined by, and must be balanced with, economic development.<sup>32</sup> States must also protect cultural heritage in all its forms, including ICH:<sup>33</sup> 'Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage

---

<sup>26</sup> Universal Declaration of Human Rights (1948), Article 27; International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), Article 15.

<sup>27</sup> Francioni, 'Art.2(1): Defining Intangible Cultural Heritage', 53.

<sup>28</sup> Janet Blake, 'Introduction: The Convention, from Inception to Young Adulthood', in Janet Blake and Lucas Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), 3-4.

<sup>29</sup> UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, 21 March 2011, A/HRC/17/38, paras 33-36 and Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 21*, 21 December 2009, para 15(b). See also Faro Convention, para 1(a).

<sup>30</sup> Note that 171 States are party to ICESCR, which states that 'The States Parties recognize the right of everyone (a) to take part in cultural life' (Article 15.1); and that 173 States are parties to the International Covenant on Civil and Political Rights (1966) (ICCPR), which states that 'persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language' (Article 27).

<sup>31</sup> CESCR, *General Comment no. 21*, paras 37 and 49.

<sup>32</sup> Human Rights Committee, *Poma Poma v. Peru*, 24 April 2009, CCPR/C/95/D/1457/2006, para 7.4.

<sup>33</sup> CESCR, *General Comment no. 21*, para 70.

creativity in all its diversity and to inspire a genuine dialogue between cultures'.<sup>34</sup> This may include caring and preserving historical sites, monuments and works of art,<sup>35</sup> or allocate resources for the preservation of cultural heritage.<sup>36</sup>

15. Individuals and communities cannot be viewed only as beneficiaries or users of cultural heritage; **effective participation** (including of local and source communities) in decision-making processes relating to cultural heritage is a necessary element of the rights of access and enjoyment of that heritage.<sup>37</sup> The right of access to and enjoyment of cultural heritage 'also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes'.<sup>38</sup> This is linked to the broader premise of participatory cultural heritage governance, which assumes that those affected by a policy, decision or other action concerning heritage should be included in the relevant decision-making to an appropriate extent. As a consequence, there is a need to identify the relevant stakeholders, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages, and take note of their rights with a view to establishing relevant consultation and participation procedures.<sup>39</sup> Participation has also been described as 'a key factor in any human rights approach', and as 'critical to ensure ownership of any cultural processes seeking to address societal challenges of discrimination, human rights violations, exclusion and violence', as well as an 'important part of taking part in cultural life'.<sup>40</sup> The development of international human rights law and cultural rights in particular has thus played a role in the development of cultural heritage law and the understanding of cultural heritage as a people-centred concept.
16. The ICH Convention has adopted a people-centered approach, requiring the effective participation of local communities, groups (including relevant NGOs), and individuals (CGIs) in its implementation.<sup>41</sup> These stakeholders have a role to play, among others, in the identification of ICH elements, their inscription on the relevant lists established by the ICH Convention, and accountability mechanisms (preparation of periodic reports),<sup>42</sup> all of which aim at the safeguarding of ICH as the core commitment undertaken by the Parties to the ICH Convention.<sup>43</sup> While Parties to the ICH Convention (currently 180 States) are encouraged to create a consultative body or a coordination

---

<sup>34</sup> Ibid, para 50.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, para 54.

<sup>37</sup> UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, 21 March 2011, A/HRC/17/38, para 58.

<sup>38</sup> Ibid, para 79. See also para 60.

<sup>39</sup> Ibid, paras 62-63.

<sup>40</sup> UN Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights*, 4 January 2018, A/HRC/37/55, para 75.

<sup>41</sup> ICH Convention, Articles 11(b) and 15.

<sup>42</sup> Janet Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention', *26 International Journal of Cultural Property* (2019) 113-137, at 114.

<sup>43</sup> A similar approach has been adopted by the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005) (Faro Convention), whose Parties commit to encourage everyone to participate in: the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage; and public reflection and debate on the opportunities and challenges which the cultural heritage represents; as well as to take into consideration the value attached by each heritage community to the cultural heritage with which it identifies (Faro Convention, Article 12 paras a) and b); *italics added*). The Faro Convention defines a heritage community as one that 'consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations' (Article 2 para b).

mechanism to facilitate the participation of communities, groups and, where applicable, individuals, in implementation activities such as identification of ICH elements, elaboration and implementation of programmes, projects and activities, or removal from one of the Convention's Lists,<sup>44</sup> the Intergovernmental Committee itself may also invite communities, groups (including relevant NGOs), and individuals with recognized competence in the field of ICH to participate in its meetings and consult them on specific matters.<sup>45</sup>

17. The duty to consult communities has been enforced by regional human rights courts in relation to cultural identity despite their lack of jurisdiction over alleged violations of the right to participate in cultural life. For instance, the Inter-American Court of Human Rights found that Ecuador had violated the right of property by failing to consult and violating the cultural identity of the Kichwa Indigenous People of Sarayaku in relation to the activities of an oil company on their lands.<sup>46</sup> Interestingly, Ecuador was found to be in violation of the duty to consult recognized as a general principle of international law.<sup>47</sup> Thus, as the Court stated, 'the obligation of States to carry out special and differentiated consultation processes when certain interests of [I]ndigenous peoples and communities are about to be affected is an obligation that has been clearly recognized', adding that an 'appropriate and effective interaction' must respect the particular consultation system of each people or community.<sup>48</sup>
18. Beyond and in addition to the duty to consult, the duty to obtain **Free, Prior, and Informed Consent (FPIC)** has also been underscored by UN human rights treaty monitoring bodies and the Inter-American Court of Human Rights.<sup>49</sup> In *Saramaka v Suriname*, the Inter-American Court of Human Rights sought to clarify the relationship between the duty to consult and to obtain FPIC in the context of a dispute pertaining to an alleged violation of the rights of the tribal community of Saramaka by Suriname, in relation to the activities of mining and logging companies on the Saramakas' ancestral territories for which Suriname had granted concessions. According to the Court, the duty to consult 'requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case (...) Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.'<sup>50</sup> At the same time, the Court also recognized that due to the likely profound impact of the project on their traditional and customary rights of the Saramaka people, there was a particular need to ensure *effective* participation, with Suriname having to obtain the FPIC of the Saramakas.<sup>51</sup> In *Poma Poma v. Peru*, the Human Rights Committee placed a similar emphasis on the effectiveness of participation in decision-making processes, stating that the legality of measures (State-authorized water diversion operations which caused the desertification of the lands of the

---

<sup>44</sup> *ICH Operational Directives*, para 80.

<sup>45</sup> *Ibid*, para 89, and ICH Convention, Article 8.4.

<sup>46</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR (Ser. C), No. 245 (2012), paras 137, 146-147, and 300; see also Kristin Hausler, 'Cultural Rights in the Inter-American Human Rights System', in Andrzej Jakubowski (ed.) *Cultural Rights as Collective Rights: An International Law Perspective* (Brill, 2016), 243.

<sup>47</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, para 164.

<sup>48</sup> *Ibid*, para 165.

<sup>49</sup> CESCR, *General Comment no. 21*, para 37.

<sup>50</sup> *Case of the Saramaka People v. Suriname*, Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations, and Costs), IACtHR (Ser. C), No. 172, para 133.

<sup>51</sup> *Ibid*, para 137. See also para 135.

Aymara community) that had a substantive impact on the right to enjoy the cultural life of the community depended on whether the effective participation its members, 'which requires not mere consultation but the free, prior and informed consent of the members of the community', was ensured.<sup>52</sup>

19. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) mentions the duty to consult and cooperate in order to obtain the FPIC of the Indigenous peoples concerned (Article 32.2.). UNDRIP mentions the need to secure FPIC inter alia with regard to confiscation, occupation, use or damage of their traditionally used or occupied lands and resources, as well as, importantly, 'the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources' (Article 32.2).<sup>53</sup> As explained by the Special Rapporteur on the Rights of Indigenous Peoples Rapporteur James Anaya, the principles of consultation and FPIC function as safeguards for many other rights of Indigenous peoples recognized in international treaties and other authoritative international sources, such as UNDRIP, including 'rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects'.<sup>54</sup>
20. In light of international standards, the Special Rapporteur on the Rights of Indigenous Peoples also noted that the consultative process should be: (1) conducted in good faith, prior to the taking of the relevant action and through Indigenous peoples' representative institutions; (2) continuous (potentially repeated at different stages of the project); (3) comprehensive (transcending the measures considered to have 'direct impacts'), and, last but not least, (4) culturally appropriate, (i.e. through Indigenous peoples' representative and decision-making institutions) and respectful, including of the Indigenous peoples' cultures and time frames.<sup>55</sup> In a similar fashion, the Akwé: Kon Guidelines adopted by the Secretariat to the Biodiversity Convention state that 'Notification and public consultation of the proposed development should allow for sufficient time to allow the affected [I]ndigenous or local community to prepare its response'.<sup>56</sup>
21. In 2018, UNESCO adopted a policy on engaging with Indigenous peoples<sup>57</sup> according to which Indigenous peoples are stewards of a significant part of the world's cultural and linguistic diversity and are partners in site conservation and protection activities. Accordingly, they 'have the right to be consulted regarding activities that concern their heritage and cultural expressions and all interactions with regard to their future development should be characterized by transparent collaboration, dialogue, negotiation and consultation'.<sup>58</sup> Since 2017, the International Indigenous Peoples Forum for World Heritage<sup>59</sup> functions as a reflection platform to involve Indigenous peoples

---

<sup>52</sup> *Poma Poma v. Peru*, para 7.6.

<sup>53</sup> See also UNDRIP, Articles 10, 11, 19, 28 and 29.

<sup>54</sup> Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 1 July 2013, A/HRC/24/41, para 28.

<sup>55</sup> Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 18 June 2020, A/HRC/45/34, paras 52-57. With regard to the requirement of cultural appropriateness of consultations, see also *Kichwa Indigenous People of Sarayaku v. Ecuador*, para 217.

<sup>56</sup> Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (2004), para 11.

<sup>57</sup> UNESCO, *Policy on Engaging with Indigenous Peoples* (2018), available at <https://en.unesco.org/indigenous-peoples/policy> (retrieved 14 October 2021).

<sup>58</sup> *Ibid.* para 77(j).

<sup>59</sup> The International Indigenous Peoples' Forum on World Heritage, <https://iipfwh.org> (retrieved 14 October 2021).

in the identification, conservation and management of World Heritage properties. The Operational Guidelines of the World Heritage Convention<sup>60</sup> - the periodically revised set of instructions pertaining to the implementation of that treaty - recognize the role of Indigenous peoples in identifying, managing, protecting and presenting World Heritage, including through full and effective participation of Indigenous peoples in the preparation of Tentative Lists. Since 2019, the Operational Guidelines also highlight the importance of Indigenous languages, which are tools of transmission of culture, for the safeguarding of World Heritage.

22. Beyond the field of human rights, environmental law has also contributed to the understanding of public consultation and participation as being a necessary part of impact assessments, as highlighted in such international treaties as the UNECE Aarhus Convention or the Espoo Convention.<sup>61</sup> Impact assessment was born in environmental law as a consequence of the precautionary principle, reflecting the idea that all likely impacts of potentially harmful projects, plans and programmes ought to be comprehensively assessed before the project is authorized.<sup>62</sup> With time, cultural heritage began to be increasingly featured in impact assessments either as part of environmental impact assessments (EIAs), or the more tailored cultural heritage impact assessments (CHIAs). Thus, for instance, the EU Environmental Impact Assessment Directive (2014/52/EU) requires not only the consideration of environmental factors in the EIA, but also cultural heritage and the landscape. However, that is narrowly construed as referring to a 'scenery' (i.e., refers to the need to consider the visual impact of projects).<sup>63</sup> In turn, the definition of 'impact' in the UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context extends to effects on cultural heritage.<sup>64</sup> Also according to the Special Rapporteur for Cultural Rights, States should rely on cultural impact assessments in the planning and implementation of development projects 'in full cooperation with concerned communities'.<sup>65</sup> The guidelines concerning the adaptation of the impact assessment process to cultural World Heritage sites adopted by ICCROM in 2011 also highlight the importance of early and continued consultation with relevant parties, including any affected community, although their specific focus is assessing the impacts on the Outstanding Universal Value of such heritage.<sup>66</sup>

---

<sup>60</sup> Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention* (2019) (*WHC Operational Guidelines*), WHC.19/01, available at <https://whc.unesco.org/en/guidelines/> (retrieved 14 October 2021).

<sup>61</sup> 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and 1991 Convention on Environmental Impact Assessment in a Transboundary Context (1991). For instance, in light of the Espoo Convention, with regard to activities likely to cause significant adverse transboundary impacts, the Parties (currently 45, including the European Union) shall establish an environmental impact assessment procedure that permits public participation, allowing the public to participate in relevant environmental impact assessment procedures as well as provided with to make comments or objections on the proposed activity (Articles 2.2, 2.6 and 3.8.).

<sup>62</sup> Astrid Epiney, 'Environmental Impact Assessment' (January 2009) in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia for Public International Law* (online edn.), paras 1-2.

<sup>63</sup> Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, preamble, recital 16.

<sup>64</sup> Espoo Convention, Article 1, para vii.

<sup>65</sup> UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, 21 March 2011, A/HRC/17/38, para 80 (e).

<sup>66</sup> ICOMOS, *Guidance for Impact Assessments for Cultural World Heritage Properties* (2011), [https://www.iccom.org/sites/default/files/2018-07/icomos\\_guidance\\_on\\_heritage\\_impact\\_assessments\\_for\\_cultural\\_world\\_heritage\\_properties.pdf](https://www.iccom.org/sites/default/files/2018-07/icomos_guidance_on_heritage_impact_assessments_for_cultural_world_heritage_properties.pdf) (retrieved 14 October 2021).

23. As highlighted by human rights law and environmental law, all concerned groups have to be included in the management of cultural heritage. Under Article 15 of the ICH Convention, 'Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.' To that end, States Parties are inter alia encouraged to establish cooperation among such communities, groups and individuals, as well as experts, centres of expertise and research institutes, and to create a consultative body or a coordination mechanism to facilitate their participation in activities implementing the Convention.<sup>67</sup>
24. As demonstrated in the previous sections, ICH is an integral part of international cultural heritage law and policy. Despite being centred on the immaterial nature of cultural heritage, it is often tied to material elements. When tied to specific sites, it may raise issues for the development of infrastructure projects and the institutions supporting them, including Multilateral Development Banks (MDBs). In addition, a number of standards have been developed regarding activities on land that may negatively affect cultural practices, including through international human rights law and environmental law.<sup>68</sup> In order to abide by those standards and avoid violating international law, a good understanding of what ICH consists of and how it may be tied to a particular site or land is often necessary for those involved in the development of infrastructure projects.

---

<sup>67</sup> *ICH Operational Directives*, paras 79-80.

<sup>68</sup> In addition to the standards mentioned above, see also the report of the World Commission on Dams from 2000, which sought to develop 'internationally acceptable criteria, guidelines and standards, where appropriate, for the planning, design, appraisal, construction, operation, monitoring and decommissioning of dams'. World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Report of the World Commission on Dams), Earthscan, London – Sterling, November 2000; see also UNEP, *Dams and Development: Relevant practices for improved decision-making. A Compendium of Relevant Practices for Improved Decision-Making on Dams and their Alternatives* (2007), 103-104. For standards applicable to the financial industry, see 'Equator Principles: A financial industry benchmark for determining, assessing and managing environmental and social risk in projects (July 2020 version)', available at <https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf> (retrieved 14 October 2021); see in particular IFC Performance Standards 7 and 8 with their corresponding Guidance Notes (2012): [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_policy\\_gn-2012](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_policy_gn-2012) (retrieved 14 October 2021)

## Part II: The Policies of Multilateral Development Banks

25. Part II of the Paper analyses the relevant policies of the MDBs to assess to what extent they reflect and meet international legal and policy standards applicable to ICH, as introduced in Part I. This part is divided into two sections. Section A, which addresses policies applicable to ICH, focusing especially on the policies' scope of applicability and how their definitions of ICH (if at all present) compare to the definition included in the ICH Convention. Section B looks at how the MDBs' policies approach the duty of consultation where it may relate to ICH, including where it pertains to the identification of cultural heritage which may be affected by a project, and whether the consultation processes themselves are required to be culturally appropriate.

### A: Policies Applicable to Intangible Cultural Heritage (ICH)

26. In order to comply with international standards, MDBs need to ensure that ICH is safeguarded within their policies and practice. For that reason, their policies must clearly detail how ICH should be approached and addressed in the framework of the infrastructure development projects they fund. All multilateral development banks (MDBs) have adopted policies to prevent, mitigate and manage the adverse social and environmental impacts of projects they fund. These policies include standards applicable to 'cultural heritage', as in the case of the World Bank (WB), the Inter-American Development Bank (IaDB), the African Development Bank (AfDB), the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD), 'cultural resources' (Asian Infrastructure Investment Bank, or AIIB) or 'physical cultural resources' (Asian Development Bank, or ADB). While some of them only include such standards under environmental policies (AfDB, ADB, AIIB), others (WB, IaDB, EIB and EBRD) have already adopted specific, more detailed Performance Standards (or Requirements) as standalone elements of the policies to regulate conduct with cultural heritage.
27. The focus on 'physical cultural resources' and 'cultural resources' in the ADB and AIIB's policies signifies that ICH is formally left outside of their scope of application. That said, the nearly identical definitions of 'cultural resources' (AIIB)<sup>69</sup> and 'physical cultural resources' (ADB)<sup>70</sup> make a reference to 'natural features and landscapes that have ... religious, aesthetic, or other cultural significance', and thus their protection may indirectly extend to the safeguarding of intangible cultural values associated with such features and landscapes, as may be the case of a sacred river or rock formation. Still, the very limited outlook of these policies as far as ICH is concerned is inconsistent

---

<sup>69</sup> The definition of Cultural Resources in the AIIB policy reiterates nearly verbatim the ADB's definition of Physical Cultural Resources: 'Cultural resources include movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance. Cultural resources may be located in urban or rural settings, and may be above or below ground, or under water. Their cultural interest may be at the local, provincial or national level, or within the international community.' AIIB, *Environmental and Social Framework* (2019), 34 para 37.

<sup>70</sup> In the ADB policy, Physical Cultural Resources (PCR) are defined as movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance. Physical cultural resources may be located in urban or rural settings and may be above or below ground or under water. Their cultural interest may be at the local, provincial, national, or international level. ADB, *Safeguard Policy Statement* (2009) (Appendix I: Environment), 39 fn. 13.

with international standards and with the commitments to respect, protect and fulfil cultural rights, including the human right to access and enjoy ICH, assumed by the Member States of these MDBs through ratifying (or signing<sup>71</sup>) the ICESCR or the UNESCO Intangible Cultural Heritage Convention.<sup>72</sup>

28. Furthermore, within the last decade, policies which expressly cover ICH have been adopted by the AfDB (2013), the WB (2016), the EIB (2018), the EBRD (2019) and the laDB (2020). However, the way MDBs integrate ICH within their policies is generally more limited than it is defined under international law. Additionally, some of their respective approaches to such cultural heritage may leave important questions unanswered (such as what is ICH, what must be protected and how), potentially hampering the understanding of the scope of obligations by borrowers<sup>73</sup> and the MDB staff insofar as identification, avoidance and mitigation of project impacts are concerned. These limitations (as well as the good examples) are discussed in the following paragraphs.

### **European Investment Bank (EIB)**

29. The EIB policy recognizes that 'cultural heritage is about far more than "stones and bones" from the past, the term including a wide variety, and incorporating all the aspects, of a community's past and present that it identifies as a reflection and expression of its constantly evolving values, beliefs, knowledge and traditions and which it considers valuable, and desires to sustain and transmit to future generations'. That can mainly take the form of tangible, or intangible cultural heritage, with the latter defined with reference to examples such as 'language, visual art, music, performance, religion, beliefs and customary practices like hunting and gathering.'<sup>74</sup> The policy on cultural heritage is triggered if it is established at the impact assessment phase that the project is likely to affect 'irreplaceable' cultural heritage<sup>75</sup> - seemingly to be determined in cooperation with communities, heritage experts and other stakeholders.<sup>76</sup> At the same time, the requirements of the policy 'apply to cultural heritage regardless of whether or not it has been legally protected or previously disturbed.'<sup>77</sup> As per the policy, the EIB 'promotes best practice principles of cultural heritage impact assessment and management that are based on the applicable international conventions and other legal instruments', including, among others, the UNESCO Intangible Heritage Convention (2003), the Faro Convention on the Value of Cultural Heritage for Society (2005) and the European Landscape Convention (2000).<sup>78</sup> But this extends to, inter alia, identifying the probable impacts of the project on the cultural life of communities, and including concepts such as dynamic character of heritage and care for good relationships with the communities in devising appropriate cultural heritage management.<sup>79</sup> Overall, the EIB policy is among the most advanced

---

<sup>71</sup> In light of the Vienna Convention on the Law of Treaties (VCLT), signatories of an international treaty are bound by that treaty's object and purpose, and therefore should not take actions which are contrary to it – for example, this applies to the US and the 'object and purpose' of ICESCR, of which it is a signatory.

<sup>72</sup> Currently, the ICH Convention has 180 States Parties; ICESCR has 171 Parties and 71 signatories.

<sup>73</sup> Instead of the terms 'Borrower', 'Client', or 'Promoter' used variously by the analyzed MDB policies, this Paper uses the generic term 'borrower' to refer to the entity whose environmental and social performance is assessed against the requirements of the policies.

<sup>74</sup> EIB, *Environmental and Social Standards* (2018), 37 (Standard 5, para 2).

<sup>75</sup> *Ibid*, 38 (Standard 5, para 5).

<sup>76</sup> Cf. *ibid*, 38 (Standard 5, paras 10-11).

<sup>77</sup> *Ibid*, 38 (Standard 5, para 5).

<sup>78</sup> *Ibid*, 37 (Standard 5, para 3).

<sup>79</sup> *Ibid*, 38-39 (Standard 5, para 8).

ones as far as ICH is concerned, with a broad and nuanced definition of such heritage, and without limitations on the scope of protection.

### **African Development Bank (AfDB)**

30. Despite **leaving out the requirement of conformity of ICH with human rights law**, the AfDB policy's definition is mostly in line with the definition contained in the 2003 UNESCO Intangible Heritage Convention. It adopts a segment of the Convention's Article 2, stating that ICH is 'practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups and in some cases individuals recognize as part of their cultural heritage and that are transmitted from generation to generation.'<sup>80</sup> While it does not separately acknowledge the dynamic and ever-changing character of ICH, it does so with regard to cultural heritage more broadly, which is defined as 'a group of resources inherited from the past that people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions'.<sup>81</sup> As a general rule, the borrower is responsible for ensuring that the siting, design, construction and operation of projects should avoid significant damage to cultural heritage (both physical and intangible). Like the EIB, the AfDB does not limit the protection of ICH to any particular circumstances – such limitations can, in turn, be found in the policies of the World Bank, the EBRD and the IADB. At the same time however, there is far more guidance pertaining to tangible heritage in AfDB operations compared to ICH in the relevant policies and documents – for example, the AfDB's guidelines on integrated environmental and social impact assessments in projects financed by the Bank adopted in 2015 only address physical cultural heritage among the 'safeguard issues'.<sup>82</sup>

### **World Bank**

31. **The policy of the World Bank (WB) underlines the need for the project to either have a 'material impact' on the ICH, or to plan to use it for commercial purposes for it to be covered by the policy.** The WB's most recent environmental and social policy, approved by the Board in 2016<sup>83</sup> added ICH into the scope of heritage protected in Bank-financed projects<sup>84</sup> as part of the now-expanded and updated definition of cultural heritage compared to the earlier policy on Physical Cultural Resources.<sup>85</sup> **However**, the new policy only applies to ICH insofar as 'a physical component of a

---

<sup>80</sup> AfDB, *Policy statement and operational safeguards* (2013), 27 fn 6.

<sup>81</sup> *Ibid.*

<sup>82</sup> AfDB, *Integrated Safeguards System Guidance Materials Vol 2: Guidance on Safeguard Issues* (2015), 29-31, available at [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/SSS\\_-\\_IESIA\\_Volume\\_2\\_-En.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/SSS_-_IESIA_Volume_2_-En.pdf) (retrieved 14 October 2021).

<sup>83</sup> The World Bank, *Environmental and Social Framework* (2016), effective as of October 2018.

<sup>84</sup> In light of the World Bank *Environmental and Social Framework* (2016), Cultural Heritage is therefore now defined as encompassing both tangible and intangible cultural heritage, with the respective components defined as:

- Tangible cultural heritage [...] includes movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance. Tangible cultural heritage may be located in urban or rural settings, and may be above or below land or under the water;
- Intangible cultural heritage [...] includes practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith— that communities and groups recognize as part of their cultural heritage, as transmitted from generation to generation and constantly recreated by them in response to their environment, their interaction with nature and their history.' World Bank, *Environmental and Social Framework* (2016), ESS8, para 4.

<sup>85</sup> The World Bank Operational Policy 4.11 (OP 4.11), which was applicable until October 2018, only concerned itself with Physical Cultural Resources, i.e. tangible cultural heritage. As confirmed by the guidebook prepared to facilitate

project will have a material impact on such cultural heritage or if a project intends to use such cultural heritage for commercial purposes',<sup>86</sup> though the policy itself does not clarify exactly what is meant by the 'material impact' that a project must have on such heritage (or indeed, give examples to elucidate the not entirely straightforward concept of a material impact on something immaterial). Additionally, in spite of the advanced definition of ICH which largely corresponds to the first part of the definition laid down in para 1 of Article 2 of the Intangible Cultural Heritage Convention,<sup>87</sup> WB officials and borrowers are likely to still struggle somewhat in practice with determining what types of ICH it does (and does not) cover. The relevant Guidance Note to Borrowers also does not help much in answering these questions.<sup>88</sup>

32. At the same time, as was already remarked above with regard to the ADB and AIIB policies, the protection of certain natural elements covered by the definition of tangible heritage in the World Bank's policy (i.e., 'natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance') may in practice often entail protection of the ICH associated with those elements. Such protection would be indirect, but potentially more comprehensive in scope than the direct protection of ICH as such in light of the policy, insofar as it does not impose any limitation on its applicability to tangible cultural heritage. Overcoming the limitations on the scope of protection tied to the 'material impact' and 'use for commercial purposes' requirements would help the Bank achieve an interpretation which is more in line with the Intangible Cultural Heritage Convention.

### **European Bank for Reconstruction and Development (EBRD)**

33. Since its most recent review, **the EBRD policy includes analogous 'material impact' or 'commercial use' conditions for its applicability to ICH.** Not unlike the World Bank policy, the applicability of the EBRD policy is thus limited to cases where 'the physical component of the project will have a material impact on [intangible] cultural heritage or if the project intends to use such cultural heritage for commercial purposes.'<sup>89</sup> At the same time, just like in case of the definitions of cultural heritage in the policies of the ADB, AIIB, the IADB and the World Bank, it may be expected that at least in some cases, the protection of natural elements as 'tangible cultural heritage' may in practice entail some degree of the protection of the associated intangible values. In terms of the definition of ICH itself, **EBRD's policy reiterates a part of the definition set forth in the Intangible Heritage Convention; interestingly however, it omits 'the instruments, objects, artefacts and cultural space' associated with that heritage,** which are instead likely to fall into the purview of the policy's definition of 'tangible

---

the implementation of the OP 4.11, '[t]here are also intangible cultural resources, such as language, poetry, music, dance and intellectual knowledge', adding that '[i]mportant though these aspects of human culture are, they are not covered by this policy.' See Ian Campbell, Charlotte Bingham, Arlene Fleming, Nicole Glineur, Stephen F. Lintner, Geoffrey Read, and L. Panneer Selvam, *The World Bank Physical Cultural Resources Safeguard Policy Guidebook*, 1<sup>st</sup> edn. (World Bank, 2009), <https://documents1.worldbank.org/curated/en/842681468339637585/pdf/713300WP00PUBL00Edition00March0209.pdf> (retrieved 14 October 2021), 10.

<sup>86</sup> In light of the ESS 8, 'The requirements of ESS8 apply to intangible cultural heritage only if a physical component of a project will have a material impact on such cultural heritage or if a project intends to use such cultural heritage for commercial purposes'. World Bank, *Environmental and Social Framework* (2016), ESS8, para 7.

<sup>87</sup> The definition in the World Bank's policy omits the requirement of compliance with international human rights and sustainable development, as well as the examples given in Article 1 para 2 of the Intangible Cultural Heritage Convention.

<sup>88</sup> World Bank, *Guidance Note for Borrowers: Environmental & Social Framework for IPF Operations* (ESS8: Cultural Heritage).

<sup>89</sup> EBRD, *Environmental and Social Policy* (2019), 42 (PR 8, para 8).

cultural heritage', without separately acknowledging the dynamic character of that heritage as recognized in Article 2 of the UNESCO Convention.<sup>90</sup> However, as in the case of the AfDB, the EBRD policy defines **cultural heritage** more generally in a dynamic key, i.e. as 'a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their evolving values, beliefs, knowledge and traditions.'<sup>91</sup> Similarly, while the policy's definition of ICH does not reference the requirement of compatibility with international human rights instruments, the EBRD has expressed its commitment to uphold international human rights elsewhere in the policy.<sup>92</sup>

### **Inter-American Development Bank (IaDB)**

34. The IaDB also puts an emphasis on commercial purposes of ICH. Although compared to earlier policies which only applied to cultural sites and artefacts,<sup>93</sup> the new policy<sup>94</sup> introduces a new, more comprehensive category of cultural heritage, its definition only includes 'certain instances of intangible forms of culture that are proposed to be used for commercial purposes, such as cultural knowledge, innovations, and practices of communities embodying traditional lifestyles', which may prima facie seem to leave any other ICH outside of its scope of application.<sup>95</sup> However, although it is not referred to as ICH, the policy also covers 'unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls',<sup>96</sup> which may in practice extend to the protection of intangible values without a commercial purpose; as mentioned before, such an approach would be more consistent with that of the Intangible Cultural Heritage Convention.<sup>97</sup>

## **B: Policies Applicable to Consultation relevant for Intangible Cultural Heritage**

35. In addition to policies aimed specifically at addressing cultural heritage, policies applicable to consultation and FPIC more in general must also adequately address ICH. All stakeholders in the relevant ICH must be included in consultation processes and in the obtaining of FPIC, including Indigenous peoples and other minorities, which may be marginalized and therefore may have less access to the governance of cultural heritage than other groups. Therefore, it is crucial for MDB policies to ensure that projects financed by MDBs do not place them at a disadvantage as far as decision-making relevant to their ICH is concerned, with a view to upholding their rights and adequately protecting ICH. Thus, this section of the paper looks at how the policies approach consultation and FPIC processes from the perspective of protecting ICH, *inter alia* looking at how

---

<sup>90</sup> 'Intangible cultural heritage refers to practices, representations, expressions, knowledge and skills that communities, groups and, in some cases, individuals recognise as part of their cultural heritage and which are transmitted from generation to generation.' Ibid, 42 (PR 8, para 6).

<sup>91</sup> Ibid.

<sup>92</sup> Ibid, 5 para 2.4.

<sup>93</sup> Previously applicable policies of the IaDB differentiated between 'critical cultural sites' - a limited category of immoveable character - and 'other non-critical cultural sites or artifacts'. IaDB, *Environment and Safeguards Compliance Policy* (2006), para 6.1.

<sup>94</sup> The Environmental and Social Policy Framework was adopted by the IaDB's Board of Executive Directors in September 2020. It is expected to enter into force at the end of 2021.

<sup>95</sup> IaDB, *Environmental and Social Policy Framework* (2020), 93, para 3, letter iii (ESPS 8: Cultural Heritage).

<sup>96</sup> Ibid, 93, para 3, letter ii.

<sup>97</sup> Note that Article 2 of that convention characterizes ICH as, *inter alia*, 'constantly recreated by communities and groups in response to their environment, their interaction with nature and their history.'

the ICH which may be affected by a project is determined; whether consultations extend to both tangible and intangible cultural heritage; if (and how) ICH is integrated into processes themselves (i.e., if they are culturally appropriate); if FPIC is sought when ICH could be affected; and if there are any rules on how much of a community's heritage may be affected (the extent to which the project may impact its cultural life).

### **The World Bank**

36. **The 2016 World Bank policy on cultural heritage names stakeholder consultation among its main objectives, and therefore reserves a lot of space for its discussion. The policy requires the borrower to identify stakeholders relevant for the cultural heritage** that is known to exist or is likely to be encountered during the project life cycle, which may include: '(a) project-affected parties, including individuals and communities within the country who use or have used the cultural heritage within living memory; and (b) other interested parties, which may include national or local regulatory authorities that are entrusted with the protection of cultural heritage and nongovernmental organizations and cultural heritage experts, including national and international cultural heritage organizations', **and carry out meaningful consultations<sup>98</sup> with them in order to identify cultural heritage that may be affected by the potential project;** consider the significance of the cultural heritage affected by the project (according to the value systems and interests of project-affected parties, including individuals and communities, and other interested parties); assess the potential risks and impacts; and explore avoidance and mitigation options.<sup>99</sup> The borrower must also identify, through research and consultation with project-affected parties (including individuals and communities), natural features with cultural heritage significance affected by the project (e.g. sacred hills, rivers, rock carvings or paintings), the people that value such features, and the individuals or groups with authority to represent and negotiate regarding the location, protection and use of the heritage place(s).<sup>100</sup> The relevant Guidance Note observes that for ICH, 'identification typically involves consultations with tradition bearers and practitioners of certain cultural practices.'<sup>101</sup> Consultations with users of previously accessible cultural sites are also required to ensure continued access to these sites, if the project site contains cultural heritage or prevents access to such sites.<sup>102</sup> Meaningful consultation with the project-affected parties is also the applicable general standard when it comes to allowing the use cultural heritage for commercial purposes<sup>103</sup> (unless such affected parties are Indigenous peoples, and their FPIC is therefore required: see next para).
37. Insofar as Indigenous peoples are concerned, the World Bank's policy discusses the specific requirements concerning Free, Prior and Informed Consent (FPIC) in ESS7 devoted to Indigenous

---

<sup>98</sup> In regard to 'meaningful consultations', the borrower to support the inclusion and cooperation of the various stakeholders through a dialogue with the appropriate authorities, including the relevant national or local regulatory authorities entrusted with the protection of cultural heritage, to establish the most effective means for addressing the views and concerns of the stakeholders and involving them in the protection and management of the cultural heritage. The ESF also underscores the need to provide stakeholders with timely, relevant, understandable and accessible information, and consult with them in a culturally appropriate manner, which is free of manipulation, interference, coercion, discrimination and intimidation. World Bank, *Environmental and Social Framework* (2016), 87 fn. 3 (ESS8) and 98 para 7 (ESS10).

<sup>99</sup> See *ibid*, 86-87, paras 13-14 and fn 4 (ESS8).

<sup>100</sup> *Ibid*, 88 paras 24-25 (ESS8).

<sup>101</sup> World Bank, *Guidance Note for Borrowers: ESS8, 4* (GN10.1)

<sup>102</sup> World Bank, *Environmental and Social Framework* (2016), 87 para 16 (ESS8).

<sup>103</sup> *Ibid*, 88 paras 29-30 (ESS8).

Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities.<sup>104</sup> The policy states that there is no universally accepted definition of FPIC, but that it builds on and expands the process of meaningful consultation<sup>105</sup> and must be established through good faith negotiation.<sup>106</sup> While 'it does not require unanimity and may be achieved even when individuals or groups within or among affected Indigenous Peoples explicitly disagree',<sup>107</sup> for the purposes of the policy, consent refers to the **collective support** of affected Indigenous peoples for the project activities that affect them, reached through a culturally appropriate process.<sup>108</sup> The policy does not clarify the meaning or methodology to understand the above terms. It is thus not clear how to determine the 'cultural appropriateness' of consultations (with the help of experts? The communities themselves?), or indeed how to gauge the 'collective support' required to establish the existence of FPIC, since unanimity is not required (would a simple majority be sufficient?). Without additional guidelines, it may be difficult to implement the policy in practice.

38. In light of the relevant Guidance Note for Borrowers, 'identification of appropriate representation of [IPs] is an important part of the process to establish FPIC';<sup>109</sup> the ESF requires the involvement of IPs' representative bodies and organizations (e.g., councils of elders or village councils, or chieftains) and, where appropriate, other community members).<sup>110</sup> If the Bank cannot ascertain that FPIC has been obtained, it will not proceed further with the relevant aspects of the project; where it has made the decision to adjust the project design accordingly and continue processing the project in other aspects, the borrower must make sure that the IPs and other traditional communities will not bear any adverse impacts during the implementation of the project;<sup>111</sup> however, the policy does not clearly state if the borrower shall bear any consequences should that not be the case.
39. FPIC (to be obtained with the assistance of experts), is required in circumstances in which the project will: (a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation; (b) cause relocation of Indigenous peoples from land and natural resources subject to traditional ownership or under customary use or occupation; or (c) have significant impacts on Indigenous peoples' cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected IPs' lives<sup>112</sup>- the prerequisites of 'significant impact' and 'heritage material to the identity of IPs' are to be established in what is referred to as a

---

<sup>104</sup> The ESS7 notes that regardless of the terminology used, it will apply to all groups which may variously be referred to as 'Indigenous Peoples', 'Sub-Saharan African historically underserved traditional local communities', 'indigenous ethnic minorities', 'aboriginals', 'hill tribes', 'vulnerable and marginalized groups', 'minority nationalities', 'scheduled tribes', 'first nations', or 'tribal groups'. Ibid, 76 (ESS7, para 6). In this Paper we use the broad term 'Indigenous peoples' (IPs).

<sup>105</sup> According to the relevant Guidance Note for Borrowers, approaches to meaningful consultation are 'most effective when they build on existing customary institutions and decision-making processes' utilized by the affected IPs; the Guidance Note also recommends seeking input from experts. World Bank, *Guidance Note for Borrowers* (ESS7), 9, GN23.2.

<sup>106</sup> World Bank, *Environmental and Social Framework* (2016), 80 para 25 (ESS 7)

<sup>107</sup> Ibid.

<sup>108</sup> Ibid, 80 paras 25(a) and 26 (ESS 7).

<sup>109</sup> 'These are the individuals who are considered by the majority of the affected [IPs] to be the legitimate authorities to make decisions on collective support on their behalf. The representatives may be chosen through a process that is culturally appropriate to the respective [IPs], such as through referendum or an assembly format, or they may be tribal chiefs or a council of elders, among others.' World Bank, *Guidance Note for Borrowers* (ESS 7), 10, GN25.1.

<sup>110</sup> World Bank, *Environmental and Social Framework* (2016), 79, para 23(a) (ESS 7).

<sup>111</sup> Ibid, 80 (para 27). See also World Bank, *Guidance Note for Borrowers* (ESS7), 11, GN27.1.

<sup>112</sup> World Bank, *Environmental and Social Framework* (2016), 79-80, para 24 (ESS7). The specific requirements for each of the circumstances are described in paras 29-33 of ESS7.

‘targeted’ social assessment (required when IPs are present in the area).<sup>113</sup> The scope of application of FPIC is thus quite broad, potentially requiring consent to a broad range of impacts viewed as unavoidable, including destruction or alteration of cultural heritage of IPs and other traditional communities.<sup>114</sup> As noted by the relevant Guidance Note for Borrowers, the scope and scale of consultation will be proportionate to the scope and scale of potential project risks and impacts as they may affect IPs.<sup>115</sup>

### **Inter-American Development Bank (IaDB)**

40. The IaDB’s 2020 Environmental and Social Policy Framework (ESPF) foresees several ‘levels’ of consultation-based decision-making as far as cultural heritage is concerned. As a general rule, the borrower engages stakeholders by conducting a culturally appropriate ICP (Informed Consultation and Participation) process for projects with potentially **significant** adverse impacts on project-affected people<sup>116</sup>. Firstly, where a project may affect cultural heritage, the policy ostensibly only requires ‘consultation’ with the project-affected people who use, or have used within living memory, the cultural heritage for long-standing cultural purposes; consultation is also required ‘to identify cultural heritage of importance’, and to incorporate the views of project-affected people into the Borrower’s decision-making processes.<sup>117</sup> Mere ‘consultations’ are also foreseen to ensure continued access to previously accessible cultural heritage sites affected by the project’s location, used by, or that have been used by the project-affected people within living memory for long-standing cultural purposes.<sup>118</sup>
41. Secondly, in ‘exceptional circumstances when impacts on critical cultural heritage<sup>119</sup> are unavoidable, the Borrower will use a process of [Informed Consultation and Participation] of the project-affected people’, based on good-faith negotiations and documenting their outcome, and will also ‘retain external experts to assist in the assessment and protection of critical cultural heritage.’<sup>120</sup> It is somewhat problematic that this kind of consultation is only required with ‘internationally recognized’ or ‘legally protected’ (or proposed for such designation by the government) – this potentially leaves out heritage which is very important to communities, but which for various reasons does not enjoy such designation, or international renown. The same standard of Informed Consultation and Participation is foreseen for where a project proposes to use cultural heritage for commercial purposes – this may include knowledge, innovations or practices of local communities. Before proceeding with a commercialization, the borrower must enter into a process of ICP and provide for fair and equitable benefit-sharing consistent with the customs and traditions of those communities.<sup>121</sup>
42. Finally, for projects with adverse impacts on Indigenous peoples (IP), the borrower is required to engage them in a culturally appropriate process of ICP and additionally, in certain circumstances

---

<sup>113</sup> World Bank, *Guidance Note for Borrowers (ESS7)*, 14, GN32.2.

<sup>114</sup> See World Bank, *Environmental and Social Framework (2016)*, 82, paras 32-33 (ESS7).

<sup>115</sup> World Bank, *Guidance Note for Borrowers (ESS7)*, 5, para 11.

<sup>116</sup> IaDB, *Environmental and Social Policy Framework (2020)*, 109, para 23 (ESPS10)

<sup>117</sup> *Ibid*, 94, para 9 (ESPS8).

<sup>118</sup> *Ibid*, 94, para 10 (ESPS8).

<sup>119</sup> Critical cultural heritage consists of one or both of the following types of cultural heritage: (i) the internationally recognized heritage of communities who use, or have used within living memory the cultural heritage for long-standing cultural purposes; or (ii) legally protected cultural heritage areas, including those proposed by the government for such designation (footnote inserted). *Ibid*, 95, para 13 (ESPS8).

<sup>120</sup> *Ibid*, 95, para 14 (ESPS8).

<sup>121</sup> *Ibid*, 96, para 16 (ESPS8).

must obtain their FPIC. These circumstances include cases of unavoidable relocation of the IPs;<sup>122</sup> cases of *unavoidable, significant impacts on cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives*<sup>123</sup>; and where a project proposes to use the cultural heritage including knowledge, innovations, or practices of Indigenous Peoples for commercial purposes.<sup>124</sup> When any of these circumstances apply, the borrower must engage external experts to assist in the identification of the project risks and impacts.<sup>125</sup> FPIC is established through good-faith negotiation, and applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous peoples. For the purposes of the relevant Standard (ESPS) 7, ‘consent refers to the collective support of affected Indigenous Peoples communities for the project activities that affect them, reached through a **culturally appropriate process, respectful of Indigenous Peoples customary decision making, through representatives chosen by themselves or any other form of decision-making process of their own governance structure.**’<sup>126</sup> In light of the ESPF, in circumstances requiring FPIC of Indigenous peoples under ESPS 7, the IaDB ‘**will ascertain the outcomes of the meaningful consultations and will not proceed further with any activity for which FPIC from the affected Indigenous Peoples could not be verified.**’<sup>127</sup> It is not clear whether the IaDB framework requires unanimity for FPIC to be regarded as valid, although it appears that the presence of dissenting views does not rule this out.<sup>128</sup> Additionally, the difference between ‘Consultation’, ‘Informed Consultation and Participation’ and ‘Meaningful Consultation’ is not entirely clear. The introduction of the former category may raise concerns as to the proliferation of standards applicable to different stakeholders, and it additionally might potentially relegate ‘(meaningful) consultation’ with stakeholders other than project-affected people (i.e., interested parties, such as e.g. NGOs) to a mere formality in practice.<sup>129</sup>

### **African Development Bank (AfDB)**

43. Insofar as consultation is concerned,<sup>130</sup> the policy of the AfDB refers to a duty of the borrower to conduct and provide evidence for **free, prior and informed (meaningful) consultation** with

<sup>122</sup> Ibid, 90 para 19 (ESPS 7).

<sup>123</sup> The examples provided include ‘natural areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks’. Ibid, 90, para 20 and corresponding fn 176 (ESPS 7).

<sup>124</sup> Ibid, 90-91, para 21 (ESPS 7).

<sup>125</sup> Ibid, 88, paras 14-15 (ESPS 7).

<sup>126</sup> Ibid, 88, para 15 (ESPS 7).

<sup>127</sup> Ibid, 12, para 3.19.

<sup>128</sup> Ibid, 88 para 15 (ESPS 7).

<sup>129</sup> In light of the ESPF, ‘[f]or projects with potentially significant adverse impacts on project-affected people, the Borrower will conduct an Informed Consultation and Participation (ICP) process that will build upon the steps outlined above in Meaningful Consultation and will result in the project-affected people’s informed participation. ICP involves a more in-depth exchange of views and information and an organized and iterative consultation, leading to the Borrower’s incorporating into their decision-making process the views of the project-affected people on matters that affect them directly or indirectly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.’ Ibid, 41, para 34 (ESPS 1).

<sup>130</sup> The relevant AfDB Guidelines define consultation as a two-way process by means of which ‘the project communicates with the people living in the project’s area of influence, as well as with other relevant stakeholders... On the project’s side, it allows the borrower to present information (mainly the objectives, scope, timing and potential environmental and social impacts and risks associated with a project) in a way that can be understood by all. On the affected communities’ / other stakeholders’ side, it creates the space and opportunity to allow such groups to respond and express their doubts, concerns and opinions on the project. Consultation also allows affected communities / other stakeholders the opportunity to share their knowledge, insights and understanding of the local context, and enables them to recommend modifications or changes to the project with an informed view.’ AfDB, *Integrated Safeguards System Guidance Materials* Vol 2: Guidance on Safeguard Issues (2015), 5.

communities likely to be affected by environmental and social impacts, and with local stakeholders.<sup>131</sup> According to the relevant guidelines, stakeholders typically to be consulted include affected communities, traditional leaders and vulnerable groups (e.g. Indigenous peoples).<sup>132</sup> In terms of identification of cultural heritage, the guidelines suggest consulting historical or traditional users and owners of physical cultural heritage and Traditional communities embodying traditional lifestyles, among other stakeholders.<sup>133</sup> While, somewhat inexplicably, the Guidelines only limit this suggestion to identifying tangible (physical) cultural heritage, they also admit that '[t]he knowledge of local communities is particularly important for identifying cultural heritage that may be tied to the natural environment and not evident to outsiders'<sup>134</sup> – which may in practice allow to discover (and safeguard) ICH as well. Further, among other things, consultation activities must be 'sensitive in terms of respecting local values and cultures', and tailored to their decision-making processes and language preferences; use of 'proverbs, stories, Indigenous categories and terms; taxonomies' is among the recommended options for participative methods to be used in consultation processes.<sup>135</sup> Cultural appropriateness of consultation is particularly emphasized with regard to Indigenous peoples; for instance, this may extend not only to accommodating the times and modalities of traditional decision-making, but also to the employment of intermediaries specializing in working with the Indigenous group (e.g. specialist NGOs).<sup>136</sup>

44. In particular, when a project can be expected to affect cultural heritage or access to it, 'the borrower consults with the communities that use or have used it within living memory and with relevant national or local regulatory agencies that are entrusted with protecting cultural heritage, draw on indigenous knowledge to identify its importance, and incorporate the views of these communities into the decision-making process.'<sup>137</sup> However, the purpose of that consultation is merely 'to assess, present, and agree with communities on acceptable financial and nonfinancial compensatory measures'<sup>138</sup> – the policy does not specify what happens if the consulted communities oppose the proposed impact.
45. Where Indigenous peoples are concerned, the consultation must yield 'broad community support' for projects affecting them.<sup>139</sup> The reference to 'broad community support'<sup>140</sup> may raise some misgivings as it seems it might not necessarily equivalent to the international legal standard of FPIC, even if it is obtained as a result of 'free, prior and informed consultation'. More broadly, it is

---

<sup>131</sup> AfDB, *Policy statement and operational safeguards* (2013), 27. See also AfDB, *Integrated Safeguards System Guidance Materials*, Vol 1: General Guidance on Implementation of OS 1, available at <https://esa.afdb.org/sites/default/files/IESIA%20Guidance%20Materials%20Vol%201%20ENGLISH.pdf>, p. 19. The AfDB has a handbook on participation and consultation in place since 2001; however, this document also does not refer to the need to obtain FPIC, or as much as mention Indigenous peoples. See AfDB, *Handbook on Stakeholder Consultation and Participation in ADB Operations* (2001) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Handbook%20on%20Stakeholder%20Consultaion.pdf>

<sup>132</sup> AfDB, *Integrated Safeguards System Guidance Materials* Vol 2: Guidance on Safeguard Issues (2015), 7.

<sup>133</sup> *Ibid*, 30.

<sup>134</sup> *Ibid*, 31.

<sup>135</sup> *Ibid*, 6, 8-9.

<sup>136</sup> *Ibid*, 14.

<sup>137</sup> AfDB, *Policy statement and operational safeguards* (2013), 27.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid*.

<sup>140</sup> Broad community support is a collection of expressions by the affected communities, through individuals or their representatives, of support for the project. It can exist even if some individuals or groups do not support the project. *Ibid*, fn 8.

somewhat confusing that in light of the AfDB policy it is the process (consultation) rather than the outcome (consent), which must be 'free, prior and informed'. It seems that the Bank could consider revisiting this aspect of the policy in future reviews.

### **European Bank for Reconstruction and Development (EBRD)**

46. Under the 2019 Environmental and Social policy of the **EBRD**, the borrower is required to carry out 'meaningful consultation and information provision in respect of the project with all key stakeholders with the view of: (a) identifying cultural heritage likely to be affected; (b) understanding the significance of cultural heritage to stakeholders, including local communities; (c) assessing the impacts and risks; (d) applying mitigation hierarchy; and (e) identifying opportunities for potential community benefit.'<sup>141</sup> The consultation will include 'custodians and key users of the identified cultural heritage'.<sup>142</sup> Additionally, where a project will entail 'the use of cultural resources, knowledge, innovations, or practices of local communities embodying traditional lifestyles' for commercial purposes, in order to proceed with such commercialization the borrower will enter into a good-faith negotiation with the affected communities and document 'their informed participation and the successful outcome of the negotiation', in addition to providing them with culturally appropriate benefit-sharing.<sup>143</sup> The policy could probably explain the meaning of 'local communities embodying traditional lifestyles' or 'successful outcome of the negotiation' (the communities may have well a different view as to what constitutes success in a negotiation concerning the use their traditional resources and knowledge) for greater clarity. That said, in contrast to other analyzed MDB policies which tend to view cultural heritage consultation from a one-sided and process-oriented lens, the result-oriented solution adopted by the EBRD acknowledges and allows to protect the rights and the cultural heritage of communities whose indigenous status is unclear (or may be denied them for various reasons), and who may thus not be deemed as covered by the FPIC process.
47. Regarding the engagement with Indigenous peoples, FPIC must be obtained (as a result of good-faith negotiation and meaningful consultation with the IPs, in accordance with their cultural traditions, customs and practices and with the assistance of qualified independent experts) where a project: (i) affects their customary lands or resources; (ii) relocates them from their traditional or customary lands; or (iii) affects or proposes to use their cultural resources.<sup>144</sup> Regarding the latter point, the policy clarifies that FPIC is required in case of unavoidable and significant project impacts on cultural heritage that is material to the identity and/or cultural, ceremonial or spiritual aspects of Indigenous peoples, or where the project proposes to use the cultural resources, knowledge, innovations, or practices of Indigenous peoples for commercial purposes.<sup>145</sup> In light of the EBRD policy, 'consent refers to the collective support of affected [I]ndigenous peoples for the proposed project activities that affect them';<sup>146</sup> it does not require unanimity and may be achieved even when individuals or groups within or among Indigenous peoples explicitly disagree.<sup>147</sup>

---

<sup>141</sup> EBRD, *Environmental and Social Policy* (2019), 42, para 9 (PR 8).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid, 43 para 16 (PR 8).

<sup>144</sup> Ibid, 40, paras 14-15 (PR 7).

<sup>145</sup> Ibid, 41, paras 20-21 (PR 7).

<sup>146</sup> Ibid, 40, para 13 (PR 7)

<sup>147</sup> Ibid.

## European Investment Bank (EIB)

48. The EIB policy expects the borrower to identify, and manage places, objects and practices of cultural significance in cooperation with ‘communities, government agencies and relevant stakeholders’<sup>148</sup> – a process which will likely need to involve consultations. Consultations are also foreseen in the process of devising appropriate mitigation measures to reduce and mitigate any adverse impacts on cultural heritage.<sup>149</sup> But most importantly, as per the policy, ‘where a project may affect cultural heritage, the promoter will consult with affected communities who use or have used the cultural heritage within living memory for longstanding cultural purposes to identify cultural heritage of importance, and to incorporate into the promoter’s decision-making process the views of the affected communities on such cultural heritage’.<sup>150</sup> Such ‘meaningful’ consultation is required whenever communities are, or are likely to be, affected by adverse impacts from a project.<sup>151</sup> If a project proposes to use the heritage knowledge or innovations of ‘local communities embodying traditional lifestyles for commercial purposes’, the promoter informs these communities of: (i) their rights under national law; (ii) the scope and nature of the proposed commercial development; and (iii) the potential consequences of such development.<sup>152</sup> Such commercialization may then only proceed if the informed participation of such communities, and a successful outcome of the (good-faith) negotiation, as well as equitable benefit-sharing are assured.<sup>153</sup> The policy does not specify what a ‘successful outcome’ is and how to gauge it - it appears that it might be interpreted as a less elevated standard than FPIC which applies only to Indigenous communities. Yet, just like the analogous solution adopted in this regard by the EBRD, this provision stands out against the mostly process-oriented approach of other MDB policies where consultation of non-Indigenous communities on the use of their ICH is concerned.<sup>154</sup> On the other hand, the EIB policy also only directly mentions the requirement of ‘cultural appropriateness’ of consultation mechanisms with regard to Indigenous peoples.<sup>155</sup>
49. Further, FPIC ‘refers to the process whereby the affected community of [I]ndigenous peoples arrives at a decision in accordance with their legal provisions, cultural traditions and practices’, which ‘should produce a clear endorsement or rejection by the [I]ndigenous peoples concerned of the proposed intervention and a statement of all accompanying mitigating and remedial measures and benefit-sharing agreements’.<sup>156</sup> Furthermore, ‘[t]he objective should be to reach a collective decision (involving [I]ndigenous peoples’ representative bodies and organizations e.g., councils of elders or village councils), as well as members of the affected communities of [I]ndigenous peoples; and any other local civil society organizations identified by the affected [I]ndigenous peoples’ communities’.<sup>157</sup> The EIB policy clarifies in detail the meaning of all elements of FPIC (free, prior and informed), observing that ‘consent’ should be premised on consultation and participation undertaken in good faith and full and equitable participation, although the EIB itself ‘is not prescriptive on what constitutes consent, rather that satisfactorily documented evidence of the

---

<sup>148</sup> EIB, *Environmental and Social Standards* (2018) 39 para 10 (Standard 5).

<sup>149</sup> *Ibid*, 39 para 14 (Standard 5).

<sup>150</sup> *Ibid*, 40, para 19 (Standard 5).

<sup>151</sup> *Ibid*, 79, para 35 (Standard 10).

<sup>152</sup> *Ibid* 41, para 21 (Standard 5).

<sup>153</sup> *Ibid* 41, para 22 (Standard 5).

<sup>154</sup> By contrast, in such situations the laDB policy only requires a ‘documented outcome’ of negotiations with project-affected peoples. laDB, *Environmental and Social Policy Framework* (2020), 96, para 16 (Standard 8).

<sup>155</sup> EIB, *Environmental and Social Standards* (2018), 58, para 27 c) (Standard 7).

<sup>156</sup> *Ibid*, 58, paras 31-32 (Standard 7).

<sup>157</sup> *Ibid*, 81, para 43 (Standard 10).

meaningful engagement of the whole body of a participating community is provided'.<sup>158</sup> Furthermore, in line with the EIB's commitment to human rights, the FPIC process should be guided by the respect and protection of Indigenous peoples' human and collective rights.<sup>159</sup> The policy also emphasizes that FPIC is different than 'broad community support'<sup>160</sup> and from 'Free, prior and informed engagement', which is a standard applicable to consultation and participation.<sup>161</sup> Although the policy states that FPIC is triggered by specific circumstances and strictly defined project impacts, it does not offer a list of circumstances in which it is applicable;<sup>162</sup> instead, it states more generally that '[i]n all instances involving [I]ndigenous peoples, an Indigenous Peoples Development Plan must be prepared, abiding by the principle of free, prior and informed consent (FPIC)', and *inter alia* also accounting 'for the duty of the state to consult them, [and] the safeguarding of both their tangible and intangible cultural heritage'.<sup>163</sup> Even in cases where the host government has already approved the project, the FPIC process must still be carried out.<sup>164</sup> The EIB policy makes it clear that FPIC is fundamental to the IP's inherent right to self-determination.

### Asian Infrastructure Investment Bank (AIIB)

50. The 2019 AIIB Environmental and Social Framework presents a fairly narrow view of consultation as far as cultural issues are concerned. The principal duty of the borrower as far as conserve cultural resources are concerned is to 'avoid destroying or damaging them under the Project by using field-based surveys that employ suitably qualified and experienced experts for the assessment'<sup>165</sup> – other stakeholders such as local communities thus seemingly do not need to be consulted; this also gives the impression that the duty to avoidance of destruction is fulfilled merely by preparing required documentation with the help of experts. This top-down approach is equally present in the requirement that in determining whether the disclosure of information regarding cultural resources would compromise or jeopardize the safety or integrity of the cultural heritage, the borrower of is only required to consult with the Bank.<sup>166</sup> While as a general rule, the Bank requires the borrower to engage in a process of culturally appropriate and 'meaningful' stakeholder consultation to allow the consideration of their views in decision-making, it seems odd that stakeholder consultation is not mentioned with regard to the identification of cultural heritage, or the assessment of impacts on that heritage.
51. As far as Indigenous peoples are concerned, some levels of participation of the IPs is foreseen for the preparation of the Indigenous Peoples plan, which is to 'draw on indigenous knowledge and participation by the affected Indigenous Peoples communities' (and also with the help of experts); the plan must also contain a framework for continued (meaningful and culturally appropriate<sup>167</sup>) consultation with these affected Indigenous peoples and their concerned organizations during

---

<sup>158</sup> Ibid, 80-81, paras 40 and 42 (Standard 10).

<sup>159</sup> Ibid, 80, para 41 (Standard 10).

<sup>160</sup> Ibid, 75, para 5 (Standard 10).

<sup>161</sup> Ibid, 75, para 6 (Standard 10).

<sup>162</sup> With the exception of the observation that FPIC is required for projects that may lead to physical displacement of Indigenous Peoples, and that as a matter of good international practice, EIB also requires FPIC for projects Reducing Emissions from Deforestation and Forest Degradation, regardless of whether IPs or other communities are affected. Ibid, 76, fn 63 (Standard 10).

<sup>163</sup> Ibid, 57, para 25 (Standard 7).

<sup>164</sup> Ibid, 59, para 32 (Standard 7).

<sup>165</sup> AIIB, *The Environmental and Social Framework* (2019), 34 para 37.

<sup>166</sup> Ibid, 34 para 38.

<sup>167</sup> Ibid, 44 para 3 h).

project implementation.<sup>168</sup> Further, the policy differentiates between FPIC and FPICon, i.e. ‘free, prior and informed consultation’, treating the latter as the principal standard, achieved in the presence of ‘broad support’ of the Indigenous peoples – a term whose definition is not provided in the policy. Regarding FPIC, the policy merely states that the AIIB may determine that the borrower is required to apply FPIC (rather than FPICon) if the laws of the country in which the project is located so require.<sup>169</sup> While many of the requirements pertinent to FPICon are effectively identical or similar to those articulated by other MDBs in their policies with respect to FPIC,<sup>170</sup> the focus on the process rather than the outcome may raise concerns, even if the AIIB policy asserts that the Bank will exclude from the project those activities that would affect those Indigenous peoples if it is unable to ascertain that broad community support has been obtained from them.<sup>171</sup> The policy effectively substitutes the FPIC requirements where impacts on Indigenous peoples are concerned with those of FPICon, observing i.a. that ‘there is no universally accepted definition of FPICon’, and requiring the borrower to engage in FPICon, organized with the help of experts, with the affected Indigenous peoples in case where activities under the project would: ‘(a) have impacts on land and natural resources subject to traditional ownership or under customary occupation or use; (b) cause relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary occupation or use; or (c) have *significant* impacts on Indigenous Peoples’ cultural heritage’<sup>172</sup> – though it is not clear who determines their significance and on what basis (in light of the policy, it appears that this assessment is made prior to engaging with the experts and the Indigenous communities themselves). Equally worryingly, where the commercialization of their cultural resources is concerned, the policy only refers to informational duties and benefit-sharing, without mentioning the need to obtain consent or even consultation involving the opportunity of the Indigenous peoples to present their views on the issue – a limitation additionally incompatible with the just mentioned provision.<sup>173</sup> As the commercial use of ICH carries a risk of distortion, or even trivialization of such heritage, it is crucial that the communities maintain some degree of control over its enactment and transmission to ensure its authenticity and safeguarding,<sup>174</sup> which in development contexts can only be achieved by through meaningful and ongoing engagement in consultation and FPIC processes.

### Asian Development Bank (ADB)

52. Where consultation and identification of cultural heritage is concerned, in light of the **ADB** policy, the borrower is required to identify the risks to ‘physical cultural resources and determine their significance and scope, in consultation with stakeholders, including affected people and concerned NGOs’ an early stage of project preparation.<sup>175</sup> Furthermore, ‘when a project may affect physical cultural resources, the [borrower] will consult with affected communities who use, or have used them

---

<sup>168</sup> Ibid, 42 para 3 b).

<sup>169</sup> Ibid, 22 para 61.

<sup>170</sup> The policy states that: ‘(a) the scope of FPICon applies to Project design, implementation arrangements and expected outcomes related to risks to, and impacts on, the affected Indigenous Peoples; (b) FPICon builds on the process of meaningful consultation and requires good faith negotiation between the [borrower] and these affected Indigenous Peoples; (c) the [borrower] documents: (i) the mutually accepted process of consultation between the [borrower] and these Indigenous Peoples; and (ii) evidence of broad community support of these Indigenous Peoples on the outcome of the negotiations; and (d) FPICon does not require unanimity and may be achieved even when individuals or groups within or among these affected Indigenous Peoples explicitly disagree with support for the Project’. Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid, 22, para 60 (italics inserted).

<sup>173</sup> Ibid, 44 para 3 g).

<sup>174</sup> See Francioni, ‘Art.2(1): Defining Intangible Cultural Heritage’, 55.

<sup>175</sup> ADB, *Safeguard Policy Statement* (2009), 30, para 4 (Appendix 1: Environment)

within living memory, for long-standing cultural purposes to identify physical cultural resources of importance and to incorporate the views of the affected communities on such resources into the borrower's [...] decision-making process.<sup>176</sup> While some differences persist, this requirement is an important point of convergence between most of the analyzed policies: that of the ADB, the EIB, the IADB, the AfDB and the World Bank.

53. As far as Indigenous peoples are concerned, the ADB policy does not refer to FPIC as such at all.<sup>177</sup> Instead, the document requires that the borrower seek (presumably any form of) 'consent' of the affected Indigenous peoples communities' in deciding whether to proceed with a project involving (i) commercial development of the cultural resources and knowledge of Indigenous peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous peoples.<sup>178</sup> Thus, if the ADB policy is to be interpreted literally, consent is seemingly not mandatory in regard to any non-commercial uses or other impacts of Indigenous people's cultural heritage (e.g. damaging or alteration thereof) – a solution which is in contrast to the corresponding one adopted in the AIIB policy, as referred to above.<sup>179</sup> Consent is defined as a collective expression by the affected Indigenous peoples communities of 'broad community support' for the abovementioned project activities following a meaningful consultation; ADB will not finance the project if such support does not exist.<sup>180</sup> As already noted in the case of the AIIB policy which includes an analogous provision, the interpretation of 'broad support' as the main factor in determining the existence of consent may raise some issues – while the policy suggests that no unanimous agreement is required, 'broad' does not even necessarily mean 'majority'; it would be beneficial to further clarify this requirement in the policy.
54. In conclusion, not all MDBs have adopted policies which directly recognize and protect ICH. However, in cases of the AIIB and ADB policies, it may in some cases be possible to interpret the relevant provisions in a manner that would accommodate intangible values linked with natural sites. Further, where safeguards and performance requirements to protect ICH have been expressly adopted by the MDBs, **the way MDBs integrate ICH within their policies is generally more limited than it is defined under international law.** Additionally, specific, practice-oriented guidelines meant to ensure effective implementation have not yet been articulated in an effort to bridge theory and practice. The WB in particular has noted that 'international **good practice relating to intangible cultural heritage** is limited and evolving. Knowledge and skills on the topic are expected to grow. In many cases this will be complemented by national and local expertise'<sup>181</sup>. The production of such documents (as well as a continual refinement of the relevant policies themselves) is of crucial importance for adequate protection of ICH from adverse impacts of development, as the cultural practices, representations, expression, knowledge, or skills which enter into its purview are not always easy to identify and safeguard in an appropriate manner. As far as consultation and FPIC

---

<sup>176</sup> Ibid, 39, para 46 (Appendix 1: Environment)

<sup>177</sup> In the introductory section, the Safeguard Policy Statement merely notes that in 2007 the UN General Assembly adopted the UNDRIP 'which refers to "obtaining Indigenous communities' free, prior, and informed consent prior to the approval of any project affecting them"', adding that "[t]his non-binding declaration was supported by many countries in Asia and the Pacific.' Ibid, 10, para 33.

<sup>178</sup> Ibid, 60, paras 30, 34-36 (Appendix 3: Indigenous Peoples).

<sup>179</sup> Cf. AIIB, *The Environmental and Social Framework* (2019), 44 para 3 g).

<sup>180</sup> ADB, *Safeguard Policy Statement* (2009), 60, paras 31-32 (Appendix 3: Indigenous Peoples).

<sup>181</sup> *The World Bank Environmental and Social Framework (ESF) Implementation Update*, September 2020, available at <https://pubdocs.worldbank.org/en/982711602165538091/ESF-Implementation-Update-October-2020.pdf>.

are concerned, there are disparities in the manner in which the relevant processes are shaped in the different policies. Some of the terms used in the policies, such as ‘broad support’ ‘significant impacts’ (in relation to FPIC) or ‘FPICon’ are not reflected in international law, and may additionally cause some confusion. That said, most policies tend to place more weight on FPIC (or similar processes) to be held with Indigenous peoples, devoting less attention to other stakeholders such as local communities which for various reasons may not be associated with indigenous status. Further, while most of the policies (with the exception of AIIB) clearly link cultural heritage impacts with the need to consult affected communities i.a. in the process of its identification, not all refer to the need for consultations themselves to be culturally appropriate (i.e., to integrate ICH into the consultation processes), and even fewer of them (EIB,<sup>182</sup> EBRD,<sup>183</sup> and the World Bank<sup>184</sup>) require (albeit to a different extent) that impact assessments cover the extent to which a project may affect the cultural life of Indigenous or local communities, even though this is a matter of international human rights. On the other hand, it is commendable that the EIB and the EBRD policies extend the requirement of consent for the project’s use of the cultural resources and traditional knowledge beyond Indigenous peoples and onto ‘local communities embodying traditional lifestyles’ – a reflection of an increasing tendency in international law to treat them as equally entitled to FPIC, at least as a matter of good practice.<sup>185</sup>

---

<sup>182</sup> EIB, *Environmental and Social Standards* (2018) 38-39, para 8 (Standard 5) (with regard to Indigenous Peoples and local communities).

<sup>183</sup> EBRD, *Environmental and Social Policy* (2019), 39, para 3 and corresponding fn. 92, and 40, para 9 (PR 7) (with regard to Indigenous Peoples).

<sup>184</sup> World Bank, *Environmental and Social Framework* (2016), 79, para 20 and corresponding fn. 11 (ESS 7) (with regard to Indigenous Peoples).

<sup>185</sup> See UN Convention on Biological Diversity (1992), Article 8(j), and Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments* (2004), *passim*. See also FAO, ‘Free Prior and Informed Consent An indigenous peoples’ right and a good practice for local communities – Manual for project practitioners’ (2016), available at <http://www.fao.org/3/i6190e/i6190e.pdf>.

## Part III: Selected Cases

55. Part III discusses MDB-financed or co-financed infrastructure construction projects which did not adequately address ICH. In each of the cases, this resulted in negative consequences for the project itself, such as complaints brought to the accountability mechanism of relevant MDB and ascertained policy breaches, protests, or delays. The following cases aim to demonstrate some of the common challenges and problems faced by such projects where ICH is concerned, with a view to help the MDBs abide by current international standards applicable to ICH. While all the selected projects have also involved negative impacts on human rights and the environment (or threatened to potentially involve such impacts, as in the Georgian hydropower project, which after some initial works came to a standstill in 2020), this section only engages with the cultural impacts, attempting to identify the most salient gaps in the projects' treatment of ICH issues.

### *Rural Water Supply and Sanitation Project for Low Income States, India (World Bank):*

56. In **India**, *Rural Water Supply and Sanitation Project for Low Income States* project (co-funded by India and the World Bank) aimed for the development of water supply infrastructure for 4 poor states: Assam, Bihar, Uttar Pradesh and Jharkhand.<sup>186</sup> The project, located in a culturally significant area of Jharkhand, involved a failure to consult the local Santhal and Ho (Adivasi) Indigenous communities and a desecration of important heritage sites, affecting cultural and spiritual practices maintained by these communities for generations. Project infrastructure was built inter alia on the *Jaher (Santal) Sthal* or *Than* – a sacred grove and cremation/burial grounds on a hilltop at the edge of the settlement, believed to be inhabited by manifold ancestral guardian spirits and deities (*bonga*). Sacred groves of the Indigenous communities are the location of various festivals tied to the seasons and elaborate ritual ceremonies held to placate the spirits in order to ensure the wellbeing of the community.<sup>187</sup> They are of great spiritual importance for the community, and strict rules prohibit even an inadvertent desecration or destruction thereof. Apart from the sacred groves' role in the sociocultural and religious life of the Indigenous communities, the worship of forests dedicated to ancestral spirits also works as a tool to protect the environment through a system of social taboos and sanctions – for example, some tribes believe that a tree from a sacred grove may only be felled for religious purposes, e.g. to build or repair a temple.<sup>188</sup> The hilltop affected by the project also had been the place where the local Adivasi community collected herbs used in traditional medicine as well as clay used for many purposes, including painting houses. Project infrastructure was also built on another significant site, the *Shaheed Sthal* – a place of remembrance of martyrs who gave their life for the independence of Jharkhand, a place of community prayer and yearly celebrations of martyrdom day – which was not only destroyed, but also altered through

---

<sup>186</sup> Anirudha Nagar, 'From Juukan to Jharkhand: Demanding Accountability for Desecration of Indigenous Cultural Heritage', *The Wire*, 22 October 2020, available at <https://thewire.in/rights/juukan-jharkhand-world-bank-accountability-desecration-indigenous-cultural-heritage> (retrieved 14 October 2021).

<sup>187</sup> See V. K. Kochar, 'Village Deities of the Santal and Associated Rituals', 61 *Anthropos* 1/2 (1966), 241–257.

<sup>188</sup> See e.g. Vibha Singhal, Jyotirmoy Ghosh & Sheeraz Saleem Bhat, 'Role of religious beliefs of tribal communities from Jharkhand (India) in biodiversity conservation', 64 *Journal of Environmental Planning and Management* 13 (2021), 2277–2299, and Laxman Singh Kandari, Vinod Kumar Bisht, Meenakshi Bhardwaj and Ashok Kumar Thakur, 'Conservation and management of sacred groves, myths and beliefs of tribal communities: a case study from north-India', *Environmental Systems Research* 3 (2014) article no. 16 (unpaginated).

erecting monuments which are not part of the communities belief system and without consulting the communities themselves.<sup>189</sup>

57. In 2018 the communities lodged complaints with the accountability mechanism of the World Bank, alleging lack of freely accessible information about the project in a language they could understand; lack of culturally appropriate, prior, inclusive and meaningful consultations, including sidestepping the consent of Gram Sabha (a deliberative body consisting of all the adults of a village, which in light of Indian law must be consulted in matters pertaining to the development of community lands, as well as the customs and cultural identity of the Adivasi), and overlooking impacts on the Indigenous cultural resources of the Adivasi and the environment which were disruptive of their way of life and customs. In effect, consultations only took place after the project was commenced; the district authorities also used coercion to obtain the consent of communities; additionally, women had less access to the consultative processes than men. The WB Inspection Panel's report (2019) found a long list of shortcomings, the chief of which was the failure to apply the then applicable cultural resources policy (OP 4.11), and lack of sufficient consultation.<sup>190</sup>

### **Alto Maipo Hydroelectric Project, Chile (laDB)**

58. In **Chile**, the *Alto Maipo Hydroelectric Project*, involving the construction of two run-of-the-river hydroelectric power plants of combined capacity of 531 MW, and additionally access roads, bridges, transmission lines in the Maipo Valley (*Cajón del Maipo*) in the Andes mountain range near Santiago, has caused severe environmental and social impacts, sparking protests from communities and NGOs. The affected sites include sites of archaeological and paleontological interest, and the traditional activities and culture of those who live in the project's area of influence, including the *arrieros*, or muleteers (mule drivers). For generations, the muleteers have used the high mountain sectors of the project's area of influence for traditional cattle farming and grazing, and organized mountain tourism riding trips; the project works have affected the traditional paths, and areas in the higher reaches of *Cajón del Maipo* used by them. Yet, in light of the project's documentation the project would have no significant impacts on cultural heritage as it would not be close to places or sites where manifestations of the culture or folklore of any people, community or human group are carried out, and that there are no religious ceremonies, pilgrimages, processions, celebrations, festivals, tournaments, fairs or markets in the area. This is a limited view of ICH which does not fully embrace its diverse manifestations as ways of life and how they may be affected by radical changes in the natural environment in which they were born. As per the ICH Convention, ICH may also involve practices and skills created and cultivated in response to the natural environment and in interaction with nature which go beyond the more celebrated expressions of cultural creativity and folklore. Similar to transhumance, muleteering is an ancient practice involving the movement of the herds into different altitudes according to the weather and season, intrinsically linked to natural the geological environment.<sup>191</sup> *Cajón del Maipo* is currently seeking recognition as a UNESCO

---

<sup>189</sup> As reported by member of an NGO which advised the Jharkhand communities on the case during its consideration by the World Bank Inspection Panel. See Nagar, 'From Juukan to Jharkhand: Demanding Accountability for Desecration of Indigenous Cultural Heritage'.

<sup>190</sup> World Bank's Inspection Panel, *Report No. 134474-IN (2019): The Inspection Panel Report and Recommendation on Requests for Inspection; INDIA: Rural Water Supply and Sanitation Project for Low Income States (P132173)*, 12 February 2019, [https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/128-129-Inspection%20Panel%20Report%20and%20Recommendation-12%20February%202019\\_0.pdf](https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/128-129-Inspection%20Panel%20Report%20and%20Recommendation-12%20February%202019_0.pdf) (retrieved 14 October 2021).

<sup>191</sup> Cf. fn 21 above.

Geopark<sup>192</sup> - status awarded to sites of international geological significance.<sup>193</sup> In another mountainous region of Chile, a community of muleteers has received the Living Human Treasures (*tesoros humanos vivos*) recognition awarded by the Ministry of Culture, Arts and Heritage of Chile in implementation of a UNESCO programme which preceded the 2003 Intangible Cultural Heritage Convention.

59. The affected communities and NGOs lodged formal complaints to the accountability mechanisms of the World Bank Group's IFC (International Finance Corporation - private-sector arm of the World Bank Group, lending to companies rather than governments)<sup>194</sup> and the Inter-American Development Bank (IaDB), alleging in compliance with the banks' policies on environmental and social impacts.<sup>195</sup> In 2020, the Independent Consultation and Investigation Mechanism (MICI) of the IaDB found that the project breached the bank's policies in numerous aspects. These included, inter alia, failure to consider the project's likely impacts on ICH in the impact assessments (lack of consideration of the project's impacts on the activities of the mule drivers, who are part of the area's cultural tradition), and lack of consultation with that stakeholder group.<sup>196</sup>

### **Nenskra Hydropower Plant Project, Georgia (EIB and EBRD)**

60. In **Georgia**, the Nenskra dam construction project in the Upper Svaneti region of north-western Georgia has long raised concerns among the Indigenous Svan communities living near the proposed plant, as well as the general public in Georgia and in the EU. The Svans, a self-sufficient, culturally distinct, ethnic minority and an Indigenous group (though not recognized as such by Georgian laws), have maintained their own language, ancient tribal traditions, belief systems, law and ways of life, including e.g. ancestral rules on land ownership and pasturing practices among the Caucasus mountains, for 7,000 years of their almost perfect isolation from outside influences. In 2018, EIB and EBRD approved loans for the project, but complaints over impacts on the Indigenous population were lodged with their respective accountability mechanisms even before the banks have officially signed the loan documents.<sup>197</sup> Acting on behalf of the affected communities,

---

<sup>192</sup> Camilo Vergara Daskam and Cristóbal Estay Daskam, 'Cajón del Maipo aspiring UNESCO Global Geopark, Central Chile: Outstanding geological heritage as a tool for local development', presentation at Oxford Geoheritage Virtual Conference (May 2020), abstract available at [https://www.researchgate.net/publication/345311611\\_Cajon\\_del\\_Maipo\\_aspiring\\_UNESCO\\_Global\\_Geopark\\_Central\\_Chile\\_Outstanding\\_geological\\_heritage\\_as\\_a\\_tool\\_for\\_local\\_development](https://www.researchgate.net/publication/345311611_Cajon_del_Maipo_aspiring_UNESCO_Global_Geopark_Central_Chile_Outstanding_geological_heritage_as_a_tool_for_local_development) (retrieved 14 October 2021).

<sup>193</sup> UNESCO, 'UNESCO Global Geoparks (UGGp)' (2021), available at <https://en.unesco.org/global-geoparks> (retrieved 14 October 2021).

<sup>194</sup> Although it is part of the same World Bank Group, the IFC has its own Performance Standards (2012), not entirely aligned with that of the World Bank. For instance, insofar as ICH is concerned, the IFC's Performance Standard on Cultural Heritage (PS8) only applies to 'certain instances of intangible forms of culture that are proposed to be used for commercial purposes, such as cultural knowledge, innovations, and practices of communities embodying traditional lifestyles.' IFC, Performance Standards on Environmental and Social Sustainability (2012): Performance Standard 8 (Cultural Heritage), para 3. For a broader comparison of a number of cultural heritage policies of private-sector lenders (including the IFC), see Andrew R. Mason and Meng Ying, 'Evaluating Standards for Private-Sector Financial Institutions and the Management of Cultural Heritage', 8 *Advances in Archaeological Practice* 1 (2020), 1-14.

<sup>195</sup> As far as cultural heritage is concerned, the previous policies on physical cultural resources of the World Bank (OP 4.11) and IaDB's OP-703 (Environment and Safeguards Compliance Policy) were applicable.

<sup>196</sup> IaDB Independent Consultation and Investigation Mechanism, *Compliance Review Report: Alto Maipo Hydroelectric Power Project* (2020), MICI-BID-CH-2017-0115, <https://iadbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1800453186-3869>, 45. On the IFC side, following the compliance investigation by CAO (the independent accountability mechanism for projects supported by IFC) the investigation report is currently forthcoming.

<sup>197</sup> The AIIB and the ADB are currently considering backing the project.

two NGOs have alleged that both the EIB and EBRD have wrongly excluded the Svans from Indigenous peoples status for the purposes of the project, bypassed them in conducting consultations,<sup>198</sup> and that the project's cultural heritage impact assessment failed to consider the potentially very serious adverse impacts on Svan culture, including values, traditions and language. As surmised by the complainants, the exclusion of the Svans from Indigenous peoples status was a direct consequence of conducting the impact assessment on the basis of the more restrictive policies of the EBRD and the ADB rather than the EIB's own Indigenous peoples eligibility criteria, which should have been applied instead.<sup>199</sup> As far as ICH is concerned, the complainants alleged in particular that the project may threaten the cohesive values and traditions of the Svan families who have long lived alone in the mountain valleys through the inflow of workers linked to the project into the area, and furthermore it 'may impact the Svan language [recognised by UNESCO as an endangered language] if it undermines cohesive values and traditions of the Svans.'<sup>200</sup>

61. While language per se is not covered by the definition of ICH in the 2003 UNESCO Convention, it is protected insofar as it is a vehicle of the ICH (Article 2.2 a).<sup>201</sup> In fact, Svaneti is one of the regions famed for its complex polyphonic signing, one of the expressions of the Georgian polyphonic singing inscribed on the Representative List in 2008.<sup>202</sup> The performing style and songs in the Svan language have been described by ethnologists as very distinctive partly due to the peculiarities of Svan language and its phonetics.<sup>203</sup> The Svan culture is also known for the very unique medieval building traditions combining family homes with defensive fortresses; these remarkably preserved the tower houses blending in seamlessly with the mountain landscape earned Upper Svaneti a World Heritage List inscription in 1996.<sup>204</sup> Additional studies requested by the EBRD in 2017 to supplement the environmental and social impact assessments of 2015 highlighted the presence of 174 'intangible cultural heritage elements in the Zemo Svaneti region, including the ancient Svan musical instrument "Chuniri"; the tradition of cutting on the wood; the technology of producing Svan hats and Khachapuri with millet; Svan salt; and local women's dancing', further acknowledging that 'polyphony singing, dances, and many rituals and ceremonies specific to Svaneti are important elements of the Svans' intangible cultural heritage.'<sup>205</sup>

---

<sup>198</sup> In 2018, a Svan council meeting (Lalkhor) issued a statement in which it denied its consent for the project and protested against the destruction of its cultural heritage and the natural environment. The declaration of the Lalkhor is available in Manana Kochladze, 'The never ending saga of the Nenskra HPP', *Bankwatch*, 17 September 2020, available at <https://bankwatch.org/blog/the-never-ending-saga-of-the-nenskra-hpp> (retrieved 14 October 2021).

<sup>199</sup> EIB Complaints Mechanism, *Nenskra HPP (Complaint SG/E/2018/32): Conclusions Report*, 7 February 2020, <https://www.eib.org/attachments/complaints/sg-e-2018-32-nenskra-hpp-cr-3-06-2020-docx.pdf>, 5.

<sup>200</sup> Cited in EBRD Project Complaint Mechanism, *Nenskra HPP Compliance Review Report (Case 2018/08)*, July 2020, 52, para 4.4.1. The report is available at <https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.

<sup>201</sup> See Francioni, 'Art.2(1): Defining Intangible Cultural Heritage', 52.

<sup>202</sup> UNESCO, 'Georgian Polyphonic Singing' (2021), available at <https://ich.unesco.org/en/RL/georgian-polyphonic-singing-00008> (retrieved 14 October 2021).

<sup>203</sup> See e.g. Nana Mzhavanadze, 'An Articulation Phenomenon in Svan Singing Repertoire' (2015), presentation at the International Conference on Regional Investigations of Musical Folklore; Vilnius, Lithuania, 2-5 December, 2015. Paper available at [https://www.researchgate.net/publication/341682490\\_An\\_Articulation\\_Phenomenon\\_in\\_Svan\\_Singing\\_Repertoire](https://www.researchgate.net/publication/341682490_An_Articulation_Phenomenon_in_Svan_Singing_Repertoire) (retrieved 14 October 2021).

<sup>204</sup> UNESCO, 'Upper Svaneti' (World Heritage List), available at <https://whc.unesco.org/en/list/709> (retrieved 14 October 2021).

<sup>205</sup> EBRD Project Complaint Mechanism, *Nenskra HPP Compliance Review Report*, 55, para 4.4.3.

62. In 2020, both the EIB and EBRD complaint mechanisms found that the banks' policies regarding Indigenous peoples' criteria had been violated, in particular regarding consultation on matters pertaining to ICH, in addition to substantive standards concerning the environment and the protection of ICH. The EBRD Project Complaint Mechanism asserted incompliance with the 2014 policy on cultural heritage, impacts on ICH were not considered at all - the project's impact assessment only focused on the tangible heritage in the project's area of influence. Specifically, it was found that the impact assessments do not include 'conclusive evidence that Project-affected communities were consulted as part of the intangible cultural heritage assessment', so there was no proof that their views were considered in the Project decision-making around ICH, or that important potential impacts to Project-affected people were adequately identified and mitigated.<sup>206</sup> The EIB Complaints Mechanism also found that impacts on ICH have not been considered, and recommended further assessment and management of risks.<sup>207</sup>

### ***Bujagali Hydropower Project, Uganda (AfDB)***

63. The *Bujagali Hydropower Project* (BHP) in **Uganda** (2007-2017) involved the construction of 250 MW dam at the Bujagali Falls on the Nile River, and the infrastructure to connect it to the national power grid. The construction of the dam necessitated the inundation of the Bujagali Falls, a site central to the culture and spirituality of the ancient Basoga (Busoga) Kingdom. The Basoga are a distinctive, vulnerable group whose indigenous status and rights are recognized by the Constitution of Uganda. While each of the 100 Basoga clans worships one or more of the spirits living at the Bujagali Falls site, it is also the home of the most important spirit in the Basoga cosmology – Budhagaali. It was clear from the outset that the impacts of the dam on the Basoga culture would be very profound; an expert employed by the World Bank apparently compared it to 'flooding the Vatican',<sup>208</sup> while other commentators and members of the Basoga have argued that it will cause the cultural and spiritual death of the Indigenous group as it shatters the link between environment, culture and spirituality which is key in the shaping of their identity.<sup>209</sup> According to an early study, the flooding would affect 16 islands, 32 shrines, 10 large trees, 6 rocks, 20 burial grounds, 2 fireplaces and a culturally important forest as well as areas where local medicinal herbs were collected for practicing traditional medicine.<sup>210</sup>
64. Already in 2007, a complaint was lodged with the AfDB's Independent Review Mechanism (IRM) by an environmental NGO.<sup>211</sup> While at that time the AfDB did not have its own policy on addressing

---

<sup>206</sup> Ibid, 56, paras 4.4.3- 4.4.4.

<sup>207</sup> EIB Complaints Mechanism, *Nenskra HPP (Complaint SG/E/2018/32): Conclusions Report*, 25.

<sup>208</sup> After Josh Klemm, 'World Bank Reneges on Its Promise to Protect Key Biodiversity Site on Uganda's White Nile', *International Rivers*, 27 February 2018, available at <https://archive.internationalrivers.org/blogs/352/world-bank-reneges-on-its-promise-to-protect-key-biodiversity-site-on-uganda%E2%80%99s-white-nile> (retrieved 14 October 2021).

<sup>209</sup> F.C. Oweyegha-Afunaduula and Afunaduula Isaac, 'Bujagali as Ethnocide: Cultural and Spiritual Death of the Indigenous Community of Basoga, Uganda' (unpaginated), NAPE/SBC Occasional Paper on 'Linking Culture, Spirituality and Rights in Sustainable Development', NAPE/SBC-CSR-SD-1/2005, Kampala, Uganda, June 28, 2005, available at [https://www.researchgate.net/publication/337212129\\_BUJAGALI\\_AS\\_ETHNOCIDE\\_CULTURAL\\_AND\\_SPIRITUAL\\_DEATH\\_OF\\_THE\\_INDIGENOUS\\_COMMUNITY\\_OF\\_BASOGA\\_UGANDA](https://www.researchgate.net/publication/337212129_BUJAGALI_AS_ETHNOCIDE_CULTURAL_AND_SPIRITUAL_DEATH_OF_THE_INDIGENOUS_COMMUNITY_OF_BASOGA_UGANDA) (retrieved 14 October 2021).

<sup>210</sup> After Terje Oestigaard, 'Dammed Divinities: The Water Powers at Bujagali Falls, Uganda', 62 *Current African Issues* (Nordiska Afrikainstitutet, Uppsala 2015), available at <https://www.files.ethz.ch/isn/189696/FULLTEXT02.pdf>, 49.

<sup>211</sup> In total, the project had 10 lenders, including, the AfDB, the EIB and the World Bank's IFC. The complaint raised to the World Bank's dispute resolution mechanism regarding the Bujagali project concerned other matters, and therefore is not considered here.

vulnerable groups and so it relied on the World Bank's former OP 4.11 policy on physical (i.e., only tangible) and cultural resources in dealing with cultural and spiritual issues, the complaint alleged incompatibility with applicable policies in a number of areas. These included insufficient regard for the cultural and spiritual significance of the Bujagali Falls; lack of adequate consultations with all the spiritual leaders of the Basoga, and finally, lack of adequate compensation of the Basoga for the loss of their spiritual site at the Bujagali Falls.<sup>212</sup> The issue of redress for violation of spiritual and cultural rights tied to the loss of that ancestral and sentimentally valuable spiritual site was one of the central issues raised.

65. In response to the complaint, incompliance with the Bank's policies was found in a number of areas, including failure to account for impacts on cultural property in the early project documentation, and lack of comprehensive consultation (not all relevant stakeholders, especially not all spiritual leaders were consulted). The Independent Review Mechanism (IRM) of AfDB considered the case over a total of 12 years, i.e., beyond the project's completion, until a final report was issued in 2019.<sup>213</sup> Among the lessons learned from the project, the IRM's final report states that '[p]rotection of cultural heritage and sites of sentimental and spiritual value to the local community by large-scale operations such as the Bujagali Projects is complex and can only be mitigated if project sponsors, governments, and the donors find a platform and remain engaged in consultations and reconciliation processes with affected traditional leaders and communities.'<sup>214</sup> In May 2020, the AfDB's IRM also published a separate document discussing the lessons learned from the Bujagali projects on cultural heritage and spiritual issues to 'generate knowledge products for institutional learning.'<sup>215</sup> Among other issues, the document emphasizes the need to revise the sustainability safeguards of the AfDB to include the requirement to obtain the FPIC of vulnerable people adversely impacted by AfDB-financed operations, such as Indigenous peoples.<sup>216</sup> Equally, for projects involving complex ancestral/spiritual and cultural and decision-making dynamics such as the Bujagali project, the document recommends conducting socio-anthropological studies to understand those dynamics early on (part of the impact assessment procedures) in order to ensure that the consultations will be truly meaningful in the given context.<sup>217</sup>

## 66. Part III (Cases): Conclusions

- There is a growing recognition of the importance of protecting cultural heritage and cultural rights in infrastructure construction projects even among the civil society. Projects which do not respect the safeguards for cultural heritage, be it tangible or intangible, contained in the relevant policies are therefore given increasing attention, including by the accountability mechanisms of the relevant MDBs;

---

<sup>212</sup> Analogous requests were also submitted to the accountability mechanisms of other lenders, including the World Bank, the European Investment Bank (EIB), and the International Finance Corporation (IFC).

<sup>213</sup> AfDB Independent Review Mechanism (BCRM Department), *Report on Closure of the Request and Monitoring by the Independent Review Mechanism (IRM) Bujagali Hydropower Project and Bujagali Interconnection Project – Uganda*, March 2019, available at [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM\\_Closure\\_Report\\_-Bujagali\\_Hydropower\\_Project\\_and\\_Bugali\\_Interconnection\\_Project-Uganda.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM_Closure_Report_-Bujagali_Hydropower_Project_and_Bugali_Interconnection_Project-Uganda.pdf)

<sup>214</sup> *Ibid*, 12.

<sup>215</sup> *Ibid*, 1.

<sup>216</sup> AfDB Independent Review Mechanism, *Bujagali Projects in Uganda: Lessons Learned on Cultural Heritage and Spiritual Issues*, May 2020, 18.

<sup>217</sup> *Ibid*, 21.

- None of the analyzed MDB policies appear to contain sufficient information to avert risks of disrespecting ICH in practice. As all stakeholders involved in a project must have an adequate understanding of the practical application of the policies with regard to ICH, it appears that the MDBs might consider prioritizing this aspect in future reviews, ideally on the basis of detailed case-studies similar to those undertaken by the World Bank to examine the development of Indigenous peoples in projects it has financed,<sup>218</sup> supplemented by practice-oriented workshops and training for the staff;

In particular, comprehensive, meaningful and respectful consultations with the project-affected communities early on must be prioritized in order to understand the full range of impacts the project may have on their cultural life as a matter of international human rights, as demonstrated by the Nenskra case (Georgia). In addition, the Bujagali case highlights that it is preferable to address any issues (e.g. involving consultation) as early on as possible. Prompt response increases the chances of an effective resolution (and with relatively fewer resources).<sup>219</sup>

- In preparing for the consultation process, it is important to integrate elements of the consulted communities' ICH into the process itself to ensure that the consultation is respectful of their traditions and customs (culturally appropriate). It is crucial to find out in advance who should be consulted, i.e. whether the person or group has authority within a community to discuss and possibly give consent regarding the ICH on behalf of that community on the basis of applicable laws and customs (this was a contentious issue in the Bujagali case). Respectful and culturally appropriate consultation cannot involve sidestepping the appropriate governance bodies and persons (such as community elders or chieftains), as also shown by the Rural Water Supply and Sanitation Project in Jharkhand (India);
- Most cases involved clear issues with incomplete impact assessments, participation (including the duty of information) and lack of adequate, comprehensive and meaningful consultation and FPIC, where appropriate. It is important to fully investigate the likely immaterial impacts of the projects on the cultural life and cultural rights of the communities to be affected rather than focusing only on the loss of the tangible cultural heritage;
- In all of the cases, omissions at the earliest, screening stage of the impact assessment tended to result in further omissions and violations of rights. A less than thorough identification of heritage which will likely be affected by the project may affect the triggering of appropriate policies. Therefore, it is crucial to engage in adequate and respectful consultations with the affected stakeholders from the very beginning of the project, to understand as early as possible in the project cycle how their culture may be affected. Such stakeholders are also best placed to indicate any natural sites linked with intangible values;
- Joint financing of projects by different MDBs cannot lead to lowering of applicable standards of protection. In the Nenskra case (Georgia), the EIB CM decided that the Bank ought not to have opted for the more elevated threshold for the qualification as a group as Indigenous as per the policies of other MDBs involved in the project, as in practice it meant a denial of protection to a group which otherwise would have enjoyed it in light of the EIB's own policy. This further

---

<sup>218</sup> See fn. 240 below.

<sup>219</sup> AfDB Independent Review Mechanism, *Bujagali Projects in Uganda: Lessons Learned on Cultural Heritage and Spiritual Issues*, 18.

demonstrates the importance of a human-rights based approach; thus, if there is any uncertainty as to whether communities have Indigenous status, it is best to proceed in a precautionary manner and assume that they do, rather than to risk denying them their rights dependent on that designation;

- In the Bujagali case, where the acting bank's policies were found wanting in a certain aspect, another bank's more advanced or detailed policy was applied. As a matter of good practice, in similar situations, out of several alternatives, the policy most in line with international standards on ICH should always apply.

# Initial Findings & Recommendations

67. The understanding of cultural heritage and the relevant rights and responsibilities call for a **rights-based approach to its protection**, reflective of a broader framework which sees cultural diversity as a common good – a value to be cherished and safeguarded within the international society.<sup>220</sup> On the other hand, articulating access to one’s own culture as a universal right (‘of everyone’) and the corresponding obligation to respect and protect culture of all groups and communities, especially those disadvantaged and marginalized, such as Indigenous peoples, including ‘protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations’<sup>221</sup> ushered in an expansive view of culture and of cultural heritage considered worthy of protection. The shift of focus from mostly elitist, material views of culture into intangible and dynamic elements (beliefs, language, knowledge, customs and traditions) and ways of life<sup>222</sup> necessarily entails transcending the State-centric paradigms of culture, and deferring to the communities themselves for the identification of expressions of culture considered worthy of protection.<sup>223</sup> This in turn emphasizes the importance of participation of such stakeholders in decision-making through consultation and FPIC processes.
68. Not all MDBs have so far separately addressed ICH in their policies; the focus of ADB and AIIB policies is limited to tangible cultural heritage. This limited outlook ignores the contemporary understandings of heritage which transcend its material elements, and is highly unlikely to suffice to avoid impacts of projects on ICH, some of which could be very serious. It also risks compromising the promise of sustainable development as fleshed out in the SDGs. At the very least, we recommend that AIIB and ADB should follow in the footsteps of the other MDBs (EIB, EBRD, IADB, AfDB and the World Bank) and expand the scope of definitions of cultural heritage as a first step toward preventing impacts on ICH of the projects they fund.

---

<sup>220</sup> See CESCR, *General Comment no. 21*, para 50. See also generally Ana Filipa Vrdoljak, ‘Human Rights and Cultural Heritage in International Law’ in Ana Filipa Vrdoljak and Federico Lenzerini (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Nature and Culture* (Hart 2014) 139-175.

<sup>221</sup> CESCR, *General Comment no. 21*, paras 50.b and c.

<sup>222</sup> *Ibid*, paras 11, 68 and 70. See also the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, which recalls that ‘culture is not merely an accumulation of works and knowledge which an elite produces, collects and conserves in order to place it within reach of all; or that a people rich in its past and its heritage offers to others as a model which their own history has failed to provide for them; [and] that culture is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate’ (preamble rec 5). Additionally, ‘for the purposes of the Recommendation [...] (a) the concept of culture has been broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities’ (para 3.a).

<sup>223</sup> See the Faro Convention’s definition of cultural heritage (Article 2.a), as well as Article 12 of that convention, under which the States Parties undertake to encourage everyone to participate in ‘the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage’, and to ‘take into consideration the value attached by each heritage community to the cultural heritage with which it identifies.’ In a similar vein, the 1976 UNESCO Recommendation encourages Decentralization of facilities, activities and decisions among the measures through which UNESCO Member States may ensure the participation and contribution of people at large in cultural life. 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, para 6.

69. In turn, those MDBs that have addressed ICH in their policies have yet to ensure the adequate implementation of their standards pertaining to such heritage in practice. So far, where ICH is concerned, the focus of existing policies is mostly on definitions – no specific guidelines listing the particular risks facing such heritage in the context of infrastructure construction projects, or how it may be shielded from them, are available. MDBs have also not adopted comprehensive consultation guidelines to ensure that ICH is addressed effectively during consultation processes. Overall, the current policies of the MDBs do not appear to contain sufficient information to avert risks of disrespecting ICH in practice. We therefore recommend taking more practice-oriented steps to enable all those involved in the project to gain an adequate understanding of the practical application of the policies relevant to ICH.
70. There seems to be some reluctance among the MBDs to shape the policies entirely in line with international standards. Three areas may be highlighted which would require further attention during further reviews: (1) the matter of whether the policy applies to ICH (ADB, AIIB); and of adopting a definition of ICH which covers all forms of ICH and is in line with international law; (2) the choice of words to address the issue of consent (the ADB's bare requirement of 'consent' with the omission of the 'free, prior and informed' qualifiers falls short of the international standards in the field), as well as (3) the issue of FPIC vs consultation. With regard to the latter issue, the policies of AfDB and AIIB tend to replace FPIC with 'free, prior and informed consultation'. This focus on the process rather than the outcome does not correspond to the current standards concerning Indigenous peoples in international law pursuant to which the purpose of consultation is to obtain the Free, Prior and Informed Consent; consultation should not be an end in itself.<sup>224</sup>
71. Further with regard to language, some of the other terms used in the policies may involve difficult and potentially arbitrary judgments, and cause confusion in practice. In particular, it should be highlighted that some policies use different adjectives to describe consultations on different occasions. For instance, the laDB policy applies different standards to consultations (which may be 'meaningful' or 'informed'), while the AIIB refers variously to 'meaningful', 'culturally appropriate', 'transparent' or 'prior and informed' consultations, raising the question whether 'consultations' as such (i.e., where the policy does not employ any adjectives) don't need to be any of these things. Such interpretation of the policy might result in fairly weak standards applied to consultations, including with regard to ICH.
72. The protection of ICH may also be impacted by the policies' use of other qualifiers which will involve subjective judgments in practice (e.g. 'broad' or 'collective' support, or 'significant' impact on cultural heritage used in the World Bank, laDB or AIIB policies), without specifying how this is to be gauged, by whom (experts?) and using what procedures (community consultation?). The interpretation of such subjective terms might affect the applicability of the duty to consult or to obtain

---

<sup>224</sup> See e.g. UNDRIP, Article 32.2. Use of expressions such as 'broad community support', 'free, prior and informed consultation' (or 'engagement') which do not appear in the UNDRIP or the ILO 169 raises some concerns as to the possible diluting of FPIC as the international standard applicable to Indigenous peoples. It seems that a lot will depend on how these policies will be interpreted in practice, and what weight will be given to international standards (e.g., the EIB policy refers to UNDRIP and the ILO Convention 169 as guiding documents in this regard, which is a commendable solution), and other sources of international best practices in implementing those policies. It should be recalled in this regard, however, that UNDRIP is a non-binding declaration, and ILO 169 only creates legal obligations for its (currently 24) States Parties. That said, soft law may also (and does) shape behaviours and policy-making, e.g., by being adopted into municipal law, or within the realm of international law itself – for instance, through the so-called 'network effects' of soft law (on this see Bryan H. Duzin, 'Why does Soft Law Have any Power Anyway?' 7 *Asian Journal of International Law* 2 (2017), 361-378).

FPIC (including in cultural heritage matters) as per the policy, or indeed the determination of whether FPIC has been successfully obtained. Arguably, the interpretation really ought to be left to the stakeholders rather than the borrower, who may possess little knowledge of these issues and additionally have little incentive to insist on the application of more elevated standards. Such terms do not appear in international law,<sup>225</sup> and their use raises concerns as unduly limiting the scope of protections linked to cultural rights offered by these policies. Insofar as addressing the protection of ICH in infrastructure construction projects is concerned, a human rights-based approach (HRBA) should be adopted<sup>226</sup>; a conceptual framework that is based on international human rights standards and directed at promoting and protecting human dignity. Under the HRBA, policies (and actions) are anchored in a system of human rights and corresponding obligations established by international law, including cultural rights. These policies focus on developing the capacities of both 'duty-bearers' to meet their obligations, and 'rights-holders' to claim their rights. In practical terms, when embarking on consultative processes, it is important to follow the requirements fleshed out *inter alia* by the UN treaty monitoring bodies, UN special procedures mandate-holders (i.e. Special Rapporteurs), and regional human rights courts.

73. Given the material culture bias, the identification of intangible values (such as narratives, stories and meanings) through consultation with the relevant stakeholders should equally be considered as the starting point and the primary mechanism for identifying physical heritage sites.<sup>227</sup> This approach may indeed help to grasp the full significance of ICH, where the material element may seem inconspicuous to those unfamiliar with the cultural context in question. Nearly all MDBs have recognized the need to involve stakeholders in consultations towards the identification of cultural heritage (which ought to include its intangible forms); such consultations must be prioritized in order to identify early on all kinds of potentially affected heritage in the impact assessments. This is particularly important for ICH as it may often be more difficult to identify compared to tangible cultural heritage.
74. Not all MDBs have adopted policies which specifically recognize and protect ICH; the ones that have not (AIIB and ADB) should consider doing so. Even where specific safeguards and performance requirements to protect ICH have been adopted by the MDBs, the way MDBs integrate ICH within their policies is generally more limited than it is defined under international law. With reference to future policy review, it would be advisable to aim for broadening their relative definitions and scopes to ensure greater convergence with international law. In addition, where several MDB policies pertinent to ICH may be deemed applicable, we recommend that as a matter of good practice, the policy most in line with international standards on ICH should always apply.
75. The MDBs that have addressed ICH in their most recent policies now also have to effectively implement them. Therefore, it appears that a comprehensive analysis of applicable standards pertaining to the identification and protection of ICH in international law and practice, building on this Working Paper, would be particularly timely so as to inform the next steps towards the

---

<sup>225</sup> Cf. UNDRIP, ILO 169, the World Heritage Convention, the ICH Convention and the Faro Convention.

<sup>226</sup> See, among others, Janet Blake, 'Taking a Human Rights Approach to Cultural Heritage Protection' (2011), 4 *Heritage & Society* 2, 199-238; William Logan, 'Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice', 18 *International Journal of Heritage Studies* (2012) No. 3, 231-244; and Josephine Gillespie, 'World Heritage Protection and the Human Right to Development: Reconciling Competing or Complimentary Narratives Using a Human Rights-Based Approach (HRBA)?', 5 *Sustainability* (2013), 5, 3159-3171.

<sup>227</sup> Cf. Celmara Pocock, David Collett and Linda Baulch, 'Assessing stories before sites: identifying the tangible from the Intangible', 21 *International Journal of Heritage Studies* (2015) No. 10, 962-982.

implementation of those policies. In that regard, more research is recommended to facilitate a good understanding of the interrelationship between ICH and tangible objects and sites. That is particularly the case in view of the unclear limitation of the applicability of World Bank and EBRD policies to projects where a physical component of a project will have a material impact on ICH.<sup>228</sup>

76. For the time being, the MDBs policies do not address the issue of consultation where ICH is concerned in any detail. It would be advisable to emphasize this aspect in the potential Good Practice Notes, to ensure that ICH is addressed effectively during consultation processes, and in an entirely respectful and meaningful manner. Safeguarding of ICH is usually much more complex and nuanced than the protection of material culture. The case studies discussed above demonstrate how easy it is to miss some of the less conspicuous impacts that infrastructure construction projects may have on the cultural life of communities, which only further emphasizes the crucial importance of consultation processes. Targeted efforts aimed at increasing the understanding of these matters among the addressees of the policies, and thus maximizing the practical impact of these policies in the area of safeguarding of ICH in infrastructure construction projects could help realign the practice of MDBs with the vision of sustainable development as fleshed out in the Sustainable Development Goals (SDGs), which addresses the need to protect the world's cultural heritage, be it tangible or intangible, as a matter of potentially achieving multiple SDG targets.

---

<sup>228</sup> The publishable outputs of such research could take the form of a 'good practice note', or a detailed case study report similar to the 2015 report which addressed Indigenous Peoples development in projects financed by the World Bank (see Luis Felipe Duchicela, Svend Jensby, Jorge Uquillas, Jelena Lukic, and Karen Sirker, 'Our People, Our Resources: Striving for a Peaceful and Plentiful Planet', The World Bank Group, 2015), but devoted specifically to ICH to help the Banks fill this gap. It could also involve the organization and of thematic workshops and training.

Charles Clore House  
17 Russell Square  
London WC1B 5JP

T 020 7862 5151  
F 020 7862 5152  
E [info@biicl.org](mailto:info@biicl.org)

[www.biicl.org](http://www.biicl.org)

A company limited by guarantee  
Registered in England No. 615025  
Registered Charity No. 209425



**British Institute of  
International and  
Comparative Law**