

Submission on Second Draft of the World Bank Environmental and Social Framework

March 2016

Introduction

The undersigned organizations welcome the opportunity to comment on the Second Draft for Consultation of the World Bank Environmental and Social Framework (Second Draft). While the consultation process on the revision to the Bank's existing operational policies has room to improve, the Bank has engaged with many different rights holders and stakeholders during the review process, and we recognize the complexities involved in organizing and taking into account the various views on the safeguards that the Bank ultimately adopts.

We commend the Bank for the improvements that have been made in the Second Draft. These improvements include:

- The deletion of the so-called "opt-out" clause from ESS7. The deletion of the opt-out clause is a major improvement for several reasons. First, it will help to ensure that ESS7 is consistently applied to all projects that impact indigenous peoples. Second, it will not serve as precedent for other development finance institutions and development agencies to emulate in their own policies. Third, it shows that the Bank listened to the numerous submissions calling for the deletion of the opt-out clause, including those made by the African Commission on Human and Peoples' Rights (ACHPR).¹
- The requirement that the Bank consult with indigenous peoples in order to determine the applicability of ESS7 in the Environmental and Social Policy paragraph 51.

Despite these improvements, there are a number of remaining issues that need to be addressed before the Second Draft is finalized. These include:

- The content and application of the Bank's Waiver Policy;
- Vague language regarding use of borrower systems;
- Increased emphasis on project grievance mechanisms; and
- The ESF only covers Investment Project Financing.

¹ Letter of Chairperson of the African Commission's Working Group on Indigenous Populations/Communities in Africa to Dr. Jim Yong Kim (1 September 2014).

Calls to Weaken ESS7

Before discussing the continuing issues in the Second Draft, it is important to reflect on the deleted opt-out clause and why its removal is so critical for the integrity of the ESF. This is particularly relevant in light of the continuing position of finance ministers from certain African countries on the indigenous peoples policy.² While it is true that African states have generally avoided the specific terminology of “indigenous peoples,”³ the Bank must resist the call by finance ministers to weaken ESS7 in the manner they propose for several reasons.

First, the term “indigenous peoples” encompasses a set of concepts that are not covered by classifications such as “minorities” or “marginalized groups.” The “nature of the types of rights ascribed to indigenous peoples and minorities in international law differs considerably.”⁴ The Bank cannot change the terminology that it uses for its indigenous peoples policy without weakening its current safeguards. This is because the “merging of indigenous peoples into categories with a broader meaning or scope poses the risk that their specificities and internationally recognised rights are not sufficiently taken into account.”⁵ ESS7 already presents a compromise between accepted international practice and national contexts by allowing Borrowers to “agree with the Bank on an alternative terminology for the Indigenous Peoples as appropriate to the circumstances of the Borrower.”⁶

Second, the claims by some governments that specifically recognizing the rights of indigenous peoples would in and of itself be discriminatory or somehow undermine a country’s “unity” have been refuted by the African Commission on Human and Peoples’ Rights. The term “indigenous peoples” recognizes the fact that certain marginalized groups face discrimination based on their culture, modes of production, and other factors which other groups within the state do not suffer from. “It is legitimate for these

² See http://www.francophonie.org/IMG/pdf/khartoum_declaration_en.pdf (2014) and <http://bit.ly/1QrKea1> (2015).

³ International Labour Organization, Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries (2009) at vi.

⁴ ACHPR and International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006), at 13. The main difference is the collective character of the rights that indigenous peoples have demanded. James Anaya, *Indigenous Peoples and Populations in International Law* (2004), at 59.

⁵ International Labour Organization, Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries (2009), at 5.

⁶ ESS7 para. 5.

marginalized groups to call for protection of their rights in order to alleviate this particular form of discrimination.”⁷ It does not grant special rights to a certain group of people. Instead, it levels the field for those whose rights are being denied.⁸

Additionally, it is not the recognition of groups that creates conflict. Instead, conflict is created “when certain dominant groups force through a sort of ‘unity’ that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives.”⁹

Continuing Issues in the Second Draft

1. Waiver Policy

While the deletion of the opt-out clause is essential to the integrity of the final ESF, the Bank has indicated that its Waiver Policy (currently OPCS5.06-POL.01¹⁰), which was issued and became effective on 7 April 2014, may be utilized in regard to ESS7.¹¹ However, Borrowers should not be allowed to turn the Waiver Policy into an opt-out clause by another name.

The Waiver Policy as it is currently drafted is perfunctory and vague. It states that “Once the need for the Waiver is identified,” either Management or the Board as circumstances warrant can grant a waiver. The Policy does not explain the process for identifying the “need for a Waiver.” And it does not provide any criteria for deciding

⁷ ACHPR and International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006), at 12.

⁸ International Labour Organization, *Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries* (2009) at 29 (“In order to achieve substantive equality and ensure non-discrimination against historically- marginalised groups, including indigenous peoples, there may be a responsibility on governments to adopt ‘special measures’.”)

⁹ ACHPR and International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006), at 12.

¹⁰ http://siteresources.worldbank.org/OPSMANUAL/112526-1124459412562/23552954/Policy_OperationalPolicyWaivers_Final_April_2014.pdf

¹¹ The Bank has identified a list of issues to be discussed during the Phase 3 consultations. The list is organized by ESS, and in regard to ESS7, the Bank has identified the following issue: “circumstances (e.g. criteria and timing) in which a waiver may be considered”. Waivers are not mentioned in regard to any other ESS. See *World Bank, Issues for Phase 3 Consultations* (August 3, 2015) available at <http://bit.ly/1gVkcio>.

whether to grant a waiver beyond the stipulation that waivers “may be granted only in response to clearly delineated individual circumstances, so as to allow staff to proceed with processing or implementation steps that are pending at the time the Waiver is requested.”

Taking the Waiver Policy on its face, the Bank needs to clarify several issues, including:

- Whether Borrowers will be allowed to request a waiver of ESS7;
- Who can request a waiver;
- The process for evaluating a waiver request;
- How FPIC will be ensured if a waiver of ESS7 is requested;
- How transparency regarding the request of waivers will be ensured, and what reporting requirements exist;
- Depending on these issues, the necessity of revising the Waiver Policy to ensure clarity and consistency in its application.

Any decision on the part of the Bank that would permit the application of the Waiver Policy to ESS7 (or any other relevant ESS) should go through an appropriate process that allows for the full and effective participation of indigenous peoples.¹² If it is decided that ESS7 could be waived, the process for granting such a waiver needs to be clearly delineated to ensure that the rights of indigenous peoples are respected to the same extent set forth in ESS7.

2. Language on Use of the Borrower’s Environmental and Social Framework

The Bank’s current Operational Policies contain a policy on “Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects” (OP4.00). OP4.00 is based on the principle of equivalence. In order to use a Borrower’s system, it must “be equivalent to the Bank’s.”¹³ Equivalence is determined based on whether the borrower’s system is designed to achieve certain objectives and operational principles that are clearly delineated in OP4.00.¹⁴

¹² The Bank has conducted at least two reviews of the process, in 2011 and 2012, respectively. 2011 Review available at: <http://bit.ly/1NYUtog>; 2012 Review available at <http://bit.ly/1KUMaaH>.

¹³ OP4.00 para. 2.

¹⁴ OP4.00 para. 2 and Table A1. Additionally, the Bank must find the borrower system acceptable: “Before deciding on the use of borrower systems, the Bank also assesses the acceptability of the borrower’s implementation practices, track record, and capacity.” OP4.00 para. 2.

The new ESF also allows the use of Borrower systems—now called the Borrower’s “Environmental and Social Framework,” or “ES Framework” for short.¹⁵ ES Frameworks no longer need to be equivalent to the Bank’s. Instead, “the Bank supports the use of the Borrower’s [ES Framework] in the assessment, development and implementation of projects ..., providing this is **likely** to be able to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs (emphasis added).”¹⁶

First, the word “likely” should be deleted from this paragraph because it sets the bar for using the Borrower’s ES Framework far too low. An ES Framework that is only “likely” to fulfill its requirements is not good enough. If the the Borrower’s ES Framework is to be substituted for the ESF, it must unequivocally be able to address the project’s risks and impacts and enable it to fulfil the requirements set forth in the ESF.

Second, the phrase “objectives materially consistent with the ESSs” is problematic because it introduces ambiguity into the test for determining the appropriateness of using a Borrower’s ES Framework. According to the Bank, the phrase is designed to give it more flexibility in determining whether a Borrower’s ES Framework is appropriate. However, that flexibility comes at the expense of clarity as to what protection the Borrower’s ES Framework must be capable of providing in order for it to be considered “materially consistent.” While the Bank has drafted objectives for each ESS, which are set out as brief bullet points at the beginning of each standard, it is difficult to capture the full spirit of the requirements of each ESS in the objectives.

Finally, the standard for when assessment of specific aspects of the Borrower’s ES Framework is required needs to be clarified. Currently, the ES Procedure states that “Depending on the nature of the risks and impacts of the project, the review of the Borrower’s ES Framework **may** include an assessment of the consistency of specific aspects of the Borrower’s ES Framework against specific requirements of the ESSs (emphasis added).”¹⁷ As currently drafted, this standard is effectively meaningless because (1) there is no threshold given as to what level of risks and impacts would trigger an assessment, and (2) even if an assessment is triggered, the word “may” makes conducting one entirely discretionary. ES Procedure para. 40 should be revised to (1) articulate the link to ESS1 para. 20 which sets out the risk classification of projects, and (2) establish a threshold for when an assessment will be triggered. At the

¹⁵ ES Frameworks are addressed in the Bank’s Environmental and Social Policy for Investment Project Financing (ESP) Section B. and Environmental and Social Procedure, Deliberative Working Draft July 1 2015 (ES Procedure) para. 40.

¹⁶ Environmental and Social Policy for Investment Project Financing (ESP) para. 23 (emphasis added).

¹⁷ Environmental and Social Procedure, Deliberative Working Draft July 1 2015 (ES Procedure) para. 40 (emphasis added).

very least, this threshold should be triggered if projects are classified as having Substantial Risk or High Risk.

The Bank's current goal in OP4.00 of "building borrower capacity beyond individual project settings" through the use of Borrower systems is an important one.¹⁸ However, it is critical that the Borrower's ES Framework be substituted only if it maintains the same standards and protections as the Bank's ESF.

3. Grievance Mechanisms

Since 1993, the World Bank Inspection Panel (the Panel) has been providing a compliance review function to address grievances raised by project-affected people. Although the Panel is not without its issues, the existence of an independent institutional level grievance mechanism is critical for those affected by Bank-financed projects, as detailed in a recent report on development finance institutions and their associated grievance mechanisms.¹⁹ The ESF should require Borrowers to disclose the existence of the Panel to project-affected people.

Despite the existence of the Panel, the ESF places great emphasis on Borrower-implemented project grievance mechanisms (see ESS1 para. 58, ESS7 para. 29, and ESS10 Section C). However, serious questions exist regarding the capability of project grievance mechanisms to provide appropriate redress for project impacts.²⁰ Project grievance mechanisms implemented by Borrowers face inherent conflicts of interest given that the Borrower (or the Borrower's agents) will be the subject of the complaint. This creates significant challenges to meet the effectiveness requirements set forth in the UN Guiding Principles on Business and Human Rights (UNGPs), including in areas such as equitability, transparency, and rights compatibility.

ESS7 para. 29 states that "The Borrower will ensure that a grievance mechanism is established for the project, as described in ESS10, which is culturally appropriate and accessible to affected Indigenous Peoples, and takes into account the availability of judicial recourse and customary dispute settlement mechanisms among Indigenous Peoples." This fails to meet the standard set forth in the UNGPs that "affected stakeholder groups" be engaged about the design and performance of the project

¹⁸ OP4.00 para. 1.

¹⁹ Glass Half Full? The State of Accountability in Development Finance (2016), Centre for Research on Multinational Corporations, available at <http://grievancemechanisms.org/resources/brochures/glass-half-full>.

²⁰ See, e.g. Letter of April 22, 2014 from MiningWatch Canada and Rights and Accountability in Development to African Barrick Gold regarding African Barrick Gold's non-judicial grievance mechanisms at North Mara, Tanzania, available at <http://business-humanrights.org/sites/default/files/documents/letter-on-north-mara-22-april-2014.pdf>.

grievance mechanism “to help ensure that it meets their needs ...”²¹ At a minimum the ESF should require Borrowers to meaningfully engage with communities in the design of any project grievance mechanisms.

4. ESF Only Applies to Investment Project Financing

Finally, the coverage of the ESF remains a fundamental issue that the Second Draft fails to address. As has been noted in many prior submissions on the ESF, the fact that other categories of Bank lending, notably Development Policy Loans and Programs for Results, are not governed by the ESF. This issue was highlighted by the Inspection Panel, which recently called on the Bank to provide clarity “regarding the percentage of the Bank’s portfolio that will be covered by the proposed ESF, and how harmonization with projects governed by different frameworks is planned in order to ensure consistency in the application of the safeguard instruments across the portfolio.”²²

Conclusion

These are just a few of the major issues that remain in the Second Draft. Many others, including the overall shift in responsibility from the Bank to Borrowers and the lack of any meaningful references to human rights²³ are adequately documented in other submissions. We encourage the Bank to take careful account of these submissions in order to ensure that the ESF is in line with the highest international standards and appropriately reflects the Bank’s position as a leader in international development.

Sincerely,

Natural Justice
Chiadzwa Community Development Trust (Zimbabwe)
Fundación Ambiente y Recursos Naturales (Argentina)
Save Lamu (Kenya)

²¹ UNGPs Operational Principle 31, Commentary para (h).

²² World Bank Inspection Panel, Comments on the Second Draft of the Proposed Environmental and Social Framework (June 2015) at para. 6.

²³ Report of the Special Rapporteur on extreme poverty and human rights, A/70/274 (4 August 2015).