Both ENDS assessment of the Policy framework and ESS 1 in light of World Bank President Kim's commitment to "no dilutions" of existing Bank safeguards.

What protections does the Bank's second draft Safeguard policy fail to provide for communities and the environment?

Pieter Jansen, Both ENDS.

Contents

Executive summary
1 Introduction.
2 Shortcomings of the draft new Environmental and Social Policy
3 Dilutions of the existing policy
4 Implications of the newly proposed policy for the communities and the environment
5 Conclusion and recommendation

Executive Summary.

This comment presents an analysis of the second draft Safeguard Policy of the World Bank. The content is based on a first read of the second draft Environmental and Social Policy and Environmental Social Standard 1 (ESS1) currently under review, in the light of President Kim's commitment that the Safeguards Review would not entail any dilution of the Bank's environmental and social safeguards.

The new Safeguard policy consists out of a policy (framework) part, a vision and ten different Environmental and Social Standards plus annexes. The Policy sets out the mandatory requirements that apply to the Bank; and the Environmental and Social Standards, together with their Annexes, set out the mandatory requirements that apply to the Borrower and projects.¹

In this comment, shortcomings and dilutions of the Policy and ESS 1 are highlighted since that all environmental and social risks and impacts assessments have to be in accordance with ESS 1. Subsequently, ESS 2 to 10 address risks that may require particular attention. This paper has not the intention to cover all the shortcomings of all the ESSs. For our other main concerns we refer to the talking points, written by different organizations that can be found in the annex to this text.

A sound understanding of the proposal for a new Safeguard Policy Framework in the end is vital for civil society groups and affected communities in order to shape the right pre-condition for successfully monitoring projects and the prevention against destructive project outcomes.

An understanding of the newly proposed safeguards, in the context of existing safeguard requirements and implementation record is also important for parliamentarians, in order to better inform the Government's appraisal of the proposed new Policy prior to its finalization. This is important in order to ensure positive development outcomes and prevent destructive project outcomes, as a (direct or indirect) result of public financial support. Also, as a matter of parliamentary concern, the existing substantial weaknesses in the policies themselves, will be the

cause of controversy surrounding projects that have harmful impacts on communities and the environment.

The key shortcomings and dilutions of the new Safeguard Policy Framework can be summarized as follows:

- The proposed safeguards apply only to investment lending, and not to the two other main lending instruments that the Bank has, Program for Results (P4R) and Development Policy Loans (DPL). Given that (at current levels) half of all Bank funding is channelled through instruments other than Investment Lending, the safeguards should apply to all instruments to ensure consistency over all Bank financed activities and avoid excessive risk-taking and reputation-damage in large parts of the Bank’s portfolio.

- The draft weakens existing mechanisms for transparency, oversight, and accountability;

- The power of the Inspection Panel of the Bank is weakened, because of the reliance on national frameworks.

- it eliminates essential protections for communities displaced by Bank projects;

- initiate an over-reliance on the borrowers’ national systems and those of financial intermediaries, in place of World Bank safeguards, while eliminating the current due diligence requirements found in the Bank’s Country Systems Safeguard.

- The Policy doesn’t spell out on what criteria, principles and rules the Bank’s due diligence of the borrower’s national framework is based.

- negotiated agreement between Bank and Borrower supersedes mandatory Policy provisions

- The existing requirement is removed that the Environmental Impact Assessment of a project with significant environmental and social impacts be released for public comment prior to appraisal (approximately 120 days prior to board vote), which currently allow for full public input prior to Board vote.

- To avoid harm no longer appears to be a mandatory provision in the new draft Policy.

- There has been vague language used in many instances that could be subject to the Bank’s interpretation.

- Not all projects and Sub-projects are required to comply with all the requirements of the ESSs.

1 Introduction.

This comment is an expression of our deep concerns over the direction the Bank currently seems to consider.

Safeguards aim to protect communities from the harmful impacts of Bank financed projects. Evaluations of the Bank itself however show, that far too often safeguards fail to make sure that people harmed by its projects are protected or compensated for losses.²

² e.g. Involuntary Resettlement Portfolio ReviewPhase II: Resettlement Implementation, Social Development Department, 2014.
As part of its review, the World Bank has released a second draft Safeguard policy for public comments. General strengths in the proposed new policy are language on labor fairness, climate change, and the rights of persons with disabilities, a.o.. However, the second draft at the same time may represent a dilution of the existing Protections of the environment, people and their livelihoods. It could ultimately result in worse outcome of the intended beneficiaries of World Bank finance and of the environment. Therefor we ask attention for the shortcomings mostly to ensure that the safeguards are improved and strengthened.

This comment summarizes the key shortcomings of some of the essential portions of Policy as a whole, namely the draft Environmental and Social Policy (ESP) and ESS 1. This is followed by a brief comparison with the existing policies. It then draws out the implications for communities and the environment.

2 Shortcomings of the new draft.

Safeguard policies are key for protecting communities from the unintended harmful impacts of projects. This chapter provides an overview of shortcomings of the new draft ESP framework and ESS1 which are of importance for the Bank in order to be considered a responsible and accountable institution.

Overall shortcoming.

- Bank responsibility

The Bank’s Inspection Panel asked some pertinent questions about the draft, that we would like to reiterate here first.

- In paragraph 16, the proposed policy states that the Bank will “require” the borrower to prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank. The current policy, however, calls for the Bank “to ensure” the consistency of the borrower’s actions with applicable safeguard policies. Management has to elaborate on whether this change in terminology also entails a change in the Bank’s responsibilities and a potential shift of accountability away from the Bank in the event harm is caused by operations financed by the Bank.

- management should elaborate on whether there would be any change in the Bank’s responsibility for harm caused to project-affected people in case the ESSs are not properly implemented by the borrower.

- the requirements for the Bank to follow up on the borrower’s obligations in case the borrower does not comply with the requirements of the Environmental and Social Commitment Plan (ESCP) and does not meet the ESSs must be clear.

- The draft policy emphasizes that the Bank’s monitoring of the implementation of the ESSs needs to be “proportionate to the environmental and social risks of the project”. Management provide more detail on how this proportionality concept, which is rather vague, will be operationalized and on the criteria that will be used to evaluate the quality of the reporting information provided by the Borrower.

The new draft Policy initiates an over-reliance on the borrowers’ national systems and those of financial intermediaries, in place of World Bank safeguards, while replacing the current due diligence requirements found in the Bank’s existing Country Systems Safeguard. This means

---

3 Questions for Clarification from the Belgian Treasury, Environmental and Social Safeguard Policies Update and Review Phase 3 Consultation Meeting – Brussels, January 25/27, 2016
that, having replaced the Bank’s existing Country Systems Safeguard (CSS) which provides relatively clear rules for evaluating whether a national system is, indeed, equivalent in terms of content and implementation track record to that of the World Bank, (parts of) a borrowing country’s legal and institutional framework would be applied in regard to the social and environmental impacts of a project instead of the World Bank safeguard policy requirements.4

The Bank’s existing CSS was developed as a result of many inputs by affected communities, Bank staff, government officials and Civil Society Organizations, finding deficiencies, including in terms of implementation, enforcement of the rule of law, accountability mechanisms in national frameworks, which raised significant concerns about the use of national project assessments in place of Bank safeguards in the absence of the due diligence, as specified in the CSS. The Bank’s own analysis of the Country Systems pilot projects identified significant difficulties in the implementation of all the pilot projects that made use of country systems.5 The Bank acknowledges the shortcomings of national frameworks and currently, with the Country Systems Safeguard (CSS), provides a relatively robust tool and methodology for analysis to determine the appropriate use of any national system: Where national systems are determined adequate to replace the Bank’s safeguards, they must provide environmental and social protections at least equivalent to those required by Bank safeguards.6

The new draft Policy not only replaces the existing CSS but also contains “flexible” provisions at multiple levels, making the obligations for Borrower and Bank ambiguous, obligations for Borrower compliance vague, and calling into question the ability of the Inspection Panel to function properly under these circumstances. Even if this flexibility in approach is reported to be accompanied by some (as of yet undefined) enhanced oversight and accountability, the removal of the Bank’s main clear screening tool represents a substantial threat to communities and the environment, as well as a dilution of the existing policy.

According to the new draft Policy, the Bank will conduct due diligence to assess and appraise the national protections and their equivalence to the safeguards. Having replaced the existing Country Systems Safeguard, the draft Policy however doesn’t spell out on what criteria, principles and rules the Bank’s due diligence of the borrower’s national framework is based. Overall, the draft seems to propose that the Bank rely, almost entirely, on the due diligence information provided by the borrower – i.e. borrower self-assessment.7 There is no clear enough or routine way for any provision of information by civil society or for any independent assessment of the borrower’s track record, other than that self-reported by the borrower.

Moreover, when due diligence efforts find that national systems prove not adequate to meet the standards of Bank safeguards, projects, including special project types (high and substantial risk sub projects and financial intermediary high and substantial risk sub projects), may still be approved for finance, after being subject to some sort of prior review by the Bank.8 Again here, the policy does not spell out the criteria, principles and rules for the review.

Next, the draft new Policy allows the borrower a so-called flexible application of the policy. There is a move towards flexibility on what standard will be applied to each project and when, and the standards themselves are no longer treated as a clear and mandatory condition, easy for affected communities to understand. This means that, especially with the elimination of requirements to seek input from affected communities prior to appraisal (approximately 120

---

4 ESS 1, par. 4; ESS 1, p.23 par. 5, 3rd bullet, p.24.
5 e.g. Evaluation of the Initial Phase of the Pilot Program for Use of Country Systems for Environmental and Social Safeguards, 2008.
6
7 par. 30. p 16.
8 D. Special Project Types, par. 36, p. 17 and par. 43, p.18.
days prior to Board decision making) it will be difficult, not only for affected communities to learn about and make their assessments known prior to a Board vote, but it will also be difficult for the Board to obtain anything other than self-reported data from the borrower prior to a Board decision on project approval and fund disbursement.

To illustrate this: in several places the application of the ESSs is based on the borrower's self-assessment of whether the application of certain environmental or social protections will be "technically or financially feasible" to the borrower including for providing compensation for "residual risk". This raises certain concerns about conflicts of interest given that a borrower may simply decide that it is "too expensive" and thus not "financially feasible" to protect communities or the environment from harm.

And finally, language has been used in many instances that is subject to the Bank's interpretation – i.e. that of the project manager - instead of clear requirements understood by affected communities and able to be enforced by the Inspection Panel.

For example, and of most importance there is interpretable language in the draft about what the Bank requirements are: Borrowers have to meet the requirements of the Environmental and Social standards in a manner and within a time frame acceptable to the bank, instead of mandatory procedures or timing requirements. It hasn't been specified how the borrower framework will be determined acceptable by the Bank. In addition to depriving communities of the right to clear knowledge about the safeguards applied to protect them and their resources, it is very difficult to understand how any sort of accountability claim or Inspection Panel involvement could be triggered by projects developed or implemented under this language. How would the Panel show a violation of Bank safeguards for environmental and social requirements which would be implemented "in a manner and within a time frame acceptable to the Bank"? By contrast, the current rule requiring public comment on EIAs for projects with substantial impacts prior to appraisal is simple to understand and easy for the Panel to verify.

- predictability and reliability.

The new draft policy, proposes a shift to be made from achieving safeguard requirements at project approval to agreeing on a general framework, more of a "promissory note" or a "promise" to fulfill safeguard standards during project execution. The Bank and borrower therefore lay out any actions the borrower or the Bank takes to achieve over a specified timeframe and maintain equivalence in the Environmental and Social Commitment plan (ESCP). The draft does not specify what the Bank’s minimum due diligence requirements prior to appraisal and Board approval are. The Board no longer has the right to obtain comments from communities likely to be significantly affected by a Bank project, prior to appraisal, diminishing Board oversight.

For the Borrower this would imply that there is no longer a need to ensure compliance with the Bank's safeguards prior to Board appraisal of a proposed project. Instead of a detailed and time bound and mandatory procedure, or remedies to be taken by the Bank, including the cancellation of the project or a withdrawal of funds in case that the Borrower fails to comply with the safeguards, the Bank instead could require the borrower to repair the bits and pieces that are non-compliant through revisions to the promissory note, the ESCP. In the words of the

---

9 e.g. ESS 1 Objectives (d), footnote 2 and 3, p. 24.
10 e.g. Scope of Application, par. 7., p.12. See also, Bank Requirements par. 16, p.13.
11 B. Use and strengthening of Borrower’s Environmental and Social Framework, par. 26, p.15.
12 H. Monitoring and Implementation Support, par. 56, p.20.
Policy the Bank might require the Borrower to prepare an adaptive management of proposed project changes. There seem no important drawbacks for violating the ESCP, though the Bank preserves itself the right to apply the Bank’s remedies if the Borrower fails to implement corrective or preventive measures and actions in the timeframes specified. However, one should take in regard here that this would happen at a project stage after project approval, when (most of) the money is disbursed and, after disbursement, most leverage to assure that projects meet safeguards requirements is lost. In addition, this deferred compliance has significant and negative impacts on any possible use of the Bank’s own accountability mechanisms including the Inspection Panel.

Substantial dilution of Board authority and responsibility:

The open-endedness as well could imply that projects receive approval for a loan from the Bank before potentially affected people are being informed, consultations are being held, or a resettlement action plan is designed and being shared with them. And this then could result in that Board members are no longer receiving the inputs of public consultations in a timely enough manner to ensure that their decision making is carried out on a fully informed basis.

-avoidance of harm, precautionary principle.

In the Vision of the Policy it is written that within the parameters of the project the Bank seeks to avoid or mitigate impacts. The objectives and principles of the ESP state that the Bank has defined ESSs to avoid, minimize, reduce or mitigate risks and impacts. To avoid harm is nowhere exactly described as mandatory though. The objective of ESS 1 neither says this. Instead, the identification, evaluation and management of risk and impact as well the adaption of a Mitigation hierarchy approach are the objectives. the application of the Mitigation hierarchy is meant to anticipate and avoid risk and impact, and where this is not possible to minimize the risk and impact. The Policy does not specify here what 'where this is not possible' means.

Compliance

Not clear is what projects and subprojects are classified as high risk. The difference between high risk and substantial risk is not explained. And some of the most important safeguards seem to apply solely to “high risk” projects and not to those of “substantial risk”. It would be better if the Bank would categorize certain types of projects by default as high risk, for example large infrastructure projects, and extractives industries.

Also, all projects should comply with all of the requirements of the ESSs, including those of substantial risk. According to the draft not all projects and sub projects are required to comply with all of the requirements of the ESSs. Special project types, for example sub projects and Financial Intermediary sub projects, with substantial, moderate and low risk have to be in accordance with national frameworks and with only those ESSs the Bank itself deems relevant to the subproject. Again, this makes it difficult not only for affected communities to understand the safeguards which apply to them, but also for the Inspection Panel to enforce Bank safeguards.

accountability.

The Inspection panel, the World Bank’s Accountability Mechanism, enables affected communities to file a complaint, based on the violation of the Bank’s own safeguard policies, if they feel that they have suffered harm.

13 E. Environmental and Social Commitment Plan, par. 47, p. 18.
14 E. Environmental and Social Commitment Plan par 47, p.18.
The Bank's reliance on the use of a national framework, in fact, risks a weakened power of the Inspection Panel, incapable to respond in a meaningful manner, and thus leaves the Bank powerless and incapable of implementing its own accountability mechanism when the national framework, instead of the Bank's Safeguard Policies, is applied to a project.

The Resolution establishing the Inspection Panel prescribes that the affected party may only file a request to the Panel if it demonstrates that "its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect." (para 12) Under this mandate, it is obvious that the Panel has no jurisdiction to investigate whether the borrower has failed to follow its national framework in a project. And one of the key objectives of this new policy is, having stripped away Bank requirements for analysis of equivalency of national systems with Bank safeguards (CSS), to utilize national systems as much as possible, however having eliminated the core due diligence requirements for doing so.

Therefore, when the community believes it is adversely affected by a project to which the national framework is applied, it may only request the Panel to investigate whether the Bank has violated its policies of "the use of the national framework" in its decision of using such a framework, but it may not request the Panel to investigate whether the borrower has violated the national framework and therefore affected the rights and interest of the community. In other words, once the national system replaces the Bank's Safeguard Policies, local communities are likely to lose their access to the Bank's own accountability mechanism.

*independency and legitimacy: Borrower self-assessment*

The removal of the Bank's clear, mandatory equivalency due diligence measures at the same time as the institution over-reliance on borrower self-assessment represents a dilution of existing protections. An independent assessment by an independent third party remains lacking with the newly proposed draft. The Bank, interpreting its own policy and in a non independent manner monitoring the implementation of it, ultimately causes doubt about the legitimacy of that same Policy in the end.

- ESS 1

- ESS1 sets out the Borrower's responsibilities for assessing, managing and monitoring environmental and social risks and impacts, in order to achieve environmental and social outcomes consistent with the ESSs. However, not mentioned here is the requirement of preventing and avoiding harm. Neither it is clear if the requirement for project safeguards to be "consistent" with the ESSs means the same as the current requirement that projects must meet the mandatory requirements of existing safeguards.

- The Environmental and Social Standard 1 (ESS 1) specifies that the objectives are to identify, evaluate and manage risk and impacts. The Bank does not say that the objective is to avoid harm. It mentions the adaptation of a mitigation hierarchy as the objective instead.

To have the objective to adopt a mitigation harmony is a confusion of goals and means. The

---

16 ESS1, Introduction, par. 1, p. 23.
17 ESS1, Objectives, par. 5, 2nd bullet, p. 23.
avoidance portion of the mitigation hierarchy has not been given full weight in the objectives, in this and in other places in the text. Since that the Bank requires that all environmental and social assessment are conducted in accordance with ESS 1 and ESS 2 -- ESS10 additionally deal with risks and impacts that require particular attention, it could mean that the avoidance portion, because of lacking in the objectives of ESS 1, neither has the full weight in each ESS, compared to the mitigate, or compensate portions.

- Nowhere are mandatory rules to be found in the Policy, for what exactly constitutes an Environmental or Social risk and Impact Assessment. The Annex to ESS 1 describes the EIA as an toolbox of different instruments in the hands of the Borrower, which are to be used, depending on the 'scale and nature' of projects, though it mentions some general criteria at the same time, e.g. where it concerns consultations, namely that these will include and take into account coordination and consultation with affected people and other interested parties, particularly at an early stage.\(^{18}\) As well it asks Borrowers to initiate the environmental and social assessment as early as possible in project processing.\(^{19}\) It provides an indicative outline for an EIA.\(^{20}\) Indicative is different from mandatory though.

- Ensuring that the “zero option” of not developing a project is required in the EIA is an important key to prevent harm. To do so would contribute to strengthening the 'avoid' and prevent portion of the mitigation hierarchy compared to the mitigate, reduce or compensate portions. ESS1 - Annex 1, which is about EIA, states that in the indicative outline for EIA’s a proposed project has to be compared with feasible alternatives, including the "without project" situation—in terms of their potential environmental and social impacts.\(^{21}\)

- ESS 1 allows borrowers to utilize national institutions and law in the project assessment whenever appropriate.\(^{22}\) It is a question here if the Inspection Panel would have a mandate or jurisdiction under such policy language.

3. Dilutions of the existing policies

The proposed structure of the new Policy differs substantially from the existing policies. In addition, the content represents a dilution of the Bank’s existing environmental and social protections. A sound understanding of the Bank’s chosen direction with a framework, characterized by a delegation of responsibility by the Bank and its replacement with borrower self-assessment, and the replacement of clear and mandatory safeguards with a regime of deferred compliance with unclear protections, is of vital importance.

The Bank’s current safeguards require that the Environmental Impact Assessment of a project with significant environmental and social impacts be released for public comment prior to appraisal and 120 days prior to Board votes, to allow for full public input prior to the Board’s vote. This has been eliminated in the new draft.

4. Implications of the newly proposed policy for the communities and the environment

Alarming, the Bank is removing environmental and social protections at the same time that it intends to finance more high-risk projects, quite often re-packaged versions of sometimes very controversial initiatives earlier designed. This poses a direct threat to communities and the environment, as well as reputation risk to the Board and the Bank.

5. Conclusion and recommendations.

\(^{18}\) ESS1 - Annex 1, EIA, A. General, par. 4, p. 34. Also par 7. j, p. 37.

\(^{19}\) ESS1 - Annex 1, EIA, par. 8, p.38.

\(^{20}\) ESS1 - Annex 1, EIA, D. Indicative Outline of ESIA, par. 15, P.39.

\(^{21}\) ESS1 - Annex1, D. (G) Analysis of Alternatives, par. 15, p. 41.

\(^{22}\) ESS1, Objectives, par. 5, 3rd bullet, p. 24.
The new draft represents a dilution of the Bank’s environmental and social safeguards, renders it difficult for the Inspection Panel to function, hampers the right of communities to analyze and respond to proposed projects with potential substantial impacts on their lives and livelihoods prior to appraisal and Board approval, hampers the right of the Board to hear from communities likely to be impacted by Bank projects prior to making a decision, replaces clear mandatory safeguards, including mandatory due diligence for the analysis of borrower systems and, at the same time, over-relied upon the use of self-reporting by borrowers and borrower systems.

• We therefore encourage the Bank to ensure that stronger and improved safeguards are put in place.

• We encourage the Bank to ensure an adequate budget and structural changes needed at the World Bank to ensure adequate implementation and monitoring of the Safeguards (in line with the IEG recommendation).

• the Bank has to ensure that the requirement for the Bank to conduct its own due diligence is maintained, including adhering to the requirements of the existing Country Systems Safeguard, and not deferring responsibilities to clients or rely on dubious client “self-assessment”

• In quite some respects the ADB safeguards is a recommendable example for the World Bank ESP, including its stance on a 120 days consultation period prior to project approval, instead of promised notes.

• Ensure the safeguards apply to all Bank activities, as in the case of the ADB safeguards;

• see the Annex for some of our other main concerns.