Amnesty International - Submission to the World Bank on the second draft of the Environmental and Social Framework

Amnesty International acknowledges that the second draft of the Environmental and Social Framework (ESF) incorporates a number of improvements in relation to the first draft. In particular, Amnesty International welcomes the removal of the alternative approach clause in the Environmental Social Standards (ESS 7) on Indigenous Peoples, the broadening of the scope of ESS 5 to cover land titling projects in certain circumstances, and the strengthening of language around gender. However, a number of crucial issues, which were previously identified by Amnesty International (AI)\(^1\), other NGOs\(^2\), governments\(^3\) and the UN\(^4\), remain unaddressed. AI is seriously concerned that the current draft still does not adequately reflect lessons learnt from the human rights challenges that have arisen in a number of development projects supported by the World Bank\(^5\) including those reviewed by the World Bank’s Inspection Panel.

This submission contains detailed language proposals on the use of alternative systems (Appendix 1), and Indigenous Peoples (Appendix 2). In terms of overall concerns, Amnesty International would like to highlight the following priority areas which need to be addressed. As such, this submission is not an exhaustive analysis of all of the human rights gaps in the current draft.

**Scope of application of the ESF**

The application of the ESF is still limited to investment lending rather than all Bank investments. More than 40% of existing World Bank (WB or the Bank) funding is provided through financing activities which will not be covered by the ESF – for example Development Policy Loans (DPL), Program for Results loans (P4R), and plans including country assistance/partnership strategies (CAS). Contrary to the Bank’s assessment, such loans can and do raise significant environmental, social and human rights concerns,\(^6\) and the applicable environmental and social safeguards are weak, both in terms of identifying and mitigating risks, and monitoring, as also a recent study by the Bank’s Independent Evaluation Group (IEG) reported.

**Lack of explicit recognition of the obligations of Member States under international human rights law and other international agreements.**

In particular AI has noted two very worrying trends. Firstly, the draft ESF does not clarify the relationship between international and national law and the Bank’s policies. Furthermore, in specific cases, it sends the message that it will be acceptable – to the Bank – if Borrowers apply a lower standard existing in domestic law than that required by international human rights law. For example, para 13 of ESS2 states that there will be no discrimination in the recruitment, payment, working conditions or treatment of workers involved in Bank-funded projects – but where this requirement conflicts with national law, it will be implemented by Borrowers “to the extent possible”.\(^7\)

---


\(^6\) Philip Alston UN Special Rapporteur on Extreme Poverty [http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx](http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx)


\(^8\) For example a Development Policy Loan approved in 2005 to the DRC government, to improve governance in the forest sector in order to allow for more socially equitable and environmental sustainable use of its forest resources, gave rise to a complaint to the Bank’s Inspection Panel by Indigenous Peoples. The Panel concluded that the safeguard regime applied to the loan was “flawed” (Bank Information Center / Global Witness, [World Bank Safeguards & Development Policy Lending: A Primer on Why DPLs Should be Part of the Safeguard Review. April 2013, p3](http://www.worldbank.org/data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/final_statement_eds18 – vf.pdf))

14 contains a similar caveat.

Secondly, a number of terms of relevance in the ESF have meanings in international human rights law which have been developed and refined by means of interpretation of treaty monitoring bodies and jurisprudence of international courts and quasi-judicial mechanisms. These include concepts such as forced evictions, eminent domain, child and forced labour, free, prior and informed consent and non-discrimination. However, in a number of countries, national legislation does not recognise or define such concepts. It would therefore be very useful to make reference in the ESF, when relevant, in such cases to international standards which lay out the relevant obligations. The 2009 ADB Safeguard Policy Statement provides a useful model where it provides that, in order to help identify whether groups are “indigenous” and therefore entitled to the specific protections of the indigenous safeguard policy, “national legislation, customary law, and any international conventions to which the country is a party will be taken into account.”

The ESF also, in a number of instances, requires the Borrower to inform persons / communities affected by projects of their rights under national law. No mention is made of potentially equally or more important rights under international law.\(^8\) Therefore it is recommended that reference be made to rights under international law where relevant.

**Lack of an over-arching human rights framework in the ESF - human rights due diligence**

The Bank’s refusal to address its own responsibility to respect human rights means that it is lagging behind other International Financial Institutions\(^9\) and risk creating major reputational risks for the institution. At a minimum, to discharge its responsibility to ensure respect for human rights in all activities it supports, Amnesty International urges the Bank to ensure that the ESF allows for adequate human rights due diligence in order to identify, prevent and/or mitigate all potential negative impacts on human rights. The main element of human rights due diligence would include an explicit commitment to respect human rights in all activities and to take all necessary steps to avoid negative impact, whilst ensuring its policies are aligned and that Borrowers comply with international human rights law. In order to do so, the Bank through its Board Members who are part of the working group on human rights should commission a comprehensive human rights gap analysis of the draft ESF with the aim of presenting Member States with an ESF which is fully in line with international human rights law.

**The adaptive risk management approach**

What the Bank refers to as the adaptive risk management approach creates a number of uncertainties and is unhelpful in establishing the Bank’s responsibility to adequately identify potential negative human rights impact. In our view too much is left to the discretion of the Bank’s staff without clear criteria to support decisions on the ground. Much flexibility is accorded, for example, in allowing a loan to be agreed before key environmental and social assessments are submitted. In the ESS5 under Land Acquisition, Restrictions on Land Use and Involuntary Resettlement, the second draft does not require the Bank to disclose draft resettlement plans and budgets before projects are approved. It also does not require that these are made available in a manner accessible to affected persons allowing them the opportunity to provide comments. This is of significant concern given the Bank’s repeated failure to ensure people are protected from forced evictions in a number of different countries.\(^10\)

The draft ESF uses language that creates uncertainty over who takes responsibility for risk identification and mitigation, and as a result raises questions about the ability of oversight mechanisms such as the Inspection Panel to establish failings and responsibility for them. For example, as an over-arching principle, “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”\(^11\). This replaces language existing in the current safeguard policy that requires the Bank to “ensure” the consistency of Borrower actions with applicable safeguards. This language change, while appearing to be very subtle, in fact shifts responsibility for oversight from the Bank to the Borrower in terms of ensuring that carefully designed safeguard requirements are met in practice, and throughout the life of a project. This, together with the phrase “in a manner and timeframe acceptable to the Bank”, raise concerns about the ability of the Inspection Panel to fulfil its mandate to assess the Bank’s compliance with its own policies. If the Bank has

---

\(^8\) For example, ESS7 Paragraph 22 (e) and 25

\(^9\) See environmental and social safeguard policies of AfDB, UNDP, EBRD and EIB which all contain to differing extents a policy commitment to respect human rights in all their activities.

\(^10\) International Consortium of Investigative Journalists, op cit.

\(^11\) ESF (2nd draft, 2015), paragraph 16
judged that risk identification / mitigation is done “in a manner and timeframe acceptable to the Bank”, on what basis can the Panel make a finding of non-compliance with safeguards?

Residual Impacts

The ESF provides for harm avoidance, harm mitigation or compensation in the case of persons directly affected by projects. However, in the case of “residual risks or impacts” - for example persons whose livelihoods are affected downstream of a project (para 25, ESS1), compensation or off-setting will be done “where technically and financially feasible”. However, this approach of citing technical or financial concerns to justify a failure to offer remedies when human rights harms are significant runs contrary to the fundamental principle that victims of human rights violations have a right to an effective remedy.

Recommendations to the Bank:

- Ensure the application of the final version of the ESF – or an equivalent framework – to the entire World Bank investment and loans portfolio;
- Include a clear policy commitment to human rights, spelling out that the Bank will respect human rights and take all necessary and reasonable steps to ensure that its activities will not lead to or exacerbate human rights violations;
- Develop, as a complement to the ESF, a Bank policy on human rights
- Carry out a comprehensive human rights gap analysis of the draft ESF (to be commissioned by the Human Rights Working Group’s Board members) and present Member States with an ESF which is fully in line with international human rights law;
- Refer to and use where relevant applicable language of human rights instruments in order to ensure harmony of understanding with regard to the content of specific rights;
- Require Borrowers to assess impacts on human rights, as well as processes for ongoing monitoring of and accountability for adverse human rights impacts of projects and policies supported by the Bank;
- Require Borrowers to inform affected people/communities of their rights under the ESF and national and international law where applicable; and the existence of the World Bank’s Inspection Panel
- Clarify that where there is a discrepancy between national and international law, the higher standard will apply;
- Ensure that the Strategic Country Diagnostic directly informs assessments and application of policies, and that they are taken into account in Environmental and Social Assessments;
- Prohibit deferred appraisal of risks, in particular in projects where there are clear risks of human rights violations; where discretion is allowed in the ESF, and establish clear criteria to guide staff in taking decisions;
- Ensure meaningful and timely participation of, and adequate disclosure of information to, affected communities; with regard to projects where a clear risk of human rights violations has been identified, ensure that all information is made available before consultations / activities begin;
- In order to ensure that victims of human rights violations right to an effective remedy is not unduly compromised, delete “where technically and financially feasible” in ESS1 para 25.
Appendix 1 - Alternative Systems

Lack of a strong framework able to support Country Systems and other Alternative Systems. Amnesty International respects and commends the Bank’s efforts to ensure ownership of projects by the Borrowers and agrees that, in principle and if effectively regulated and implemented, the use of Borrower’s own environmental, social and human rights frameworks is a sound move to improve development effectiveness. However, the draft ESF currently does not provide the necessary structure and clarity to explain how these alternative systems, including co-financier standards, country systems, and Financial Intermediary (FI) standards, would be utilised and assessed and how their implementation will be supported. Firstly, as mentioned above, the Bank must ensure that it promotes safeguards that are fully consistent with the human rights obligations of its member states; otherwise the Bank risks promoting – and indeed incentivising – adherence to standards which are lower than the human rights obligations to which countries have committed. Secondly, no matter which system the Bank applies, it must be made clear that delegating responsibilities to the recipient countries will not absolve the Bank of its own responsibility to ensure its investments do not negatively impact on human rights. As an institution the Bank remains responsible for decisions regarding what it funds. This responsibility exists regardless of what systems the country, financial intermediaries or any of its co-financiers have in place.

Widely differing interpretations of the standard applicable for assessing alternative systems According to the ESF, projects may be governed by the systems of co-financiers, borrower countries, or FIs, where they are likely to “enable the project to achieve objectives materially consistent with the ESSs”12. This phrase unfortunately lacks clarity. A number of Member States have interpreted it to mean material consistency with the substance/requirements of the ESSs and Bank documents have suggested this interpretation13. At the same time, safeguards staff have stated that the intended meaning of this phrase is materially consistent with the objectives of the ESSs, that is, the three to five general objectives which precede each ESS. Safeguards staff have indicated that additionally, for country systems only, Bank staff may assess against “specific requirements of the ESSs” “depending on the nature of the risks and impacts of the project.”14 However, this provision appears only in the Procedure, and not in the ESF.

Most problematically, the objectives within the ESSs are broad, often lacking any procedural or substantive benchmarks. They are not always outcome-based. The objective of ESS1, for instance, is to “adopt a mitigation hierarchy approach...” to address risk rather than to actually avoid, minimize, mitigate and compensate risks. The fact that the objectives leave such wide room for interpretation, may mean that there will be little opportunity for countries or civil society to challenge a poor determination on whether to utilize an alternative framework. A test of “material consistency with the objectives of the ESSs” places excessive discretion with Bank staff, and would be very hard to assess objectively.

The existing safeguards require Financial Intermediaries (FIs) to comply with the safeguards. For country systems, the existing safeguards set out a clear test of equivalency and acceptability. OP 4.00 defines equivalency as “designed to achieve the objectives and adhere to the applicable operational principles set out in Table A1”, which in essence boil down the safeguards to their most salient and material requirements. Given President Kim’s commitment to no dilution of existing safeguard protections, the use of alternative frameworks must ensure a level of protection no weaker than that currently required by the existing safeguards. A test of “material consistency” would also set a weaker bar than that utilized by, for example, the Asian Development Bank.

Recommendations

1) Alternative systems must be measured against the substantive requirements of the ESSs, not merely their objectives. One way to do this is to maintain the existing equivalency/acceptability test under the current Country Systems policy and revise it, so that its operational principles reflect the material provisions of the ESSs. Ensure both the ESF and all ESSs are in line with international agreements.

2) When country systems are used, require that Borrowers are provided with dedicated resources and capacity building. Promoting country ownership of socially and environmentally sustainable development should be a primary objective of World Bank activities. This should include working with client countries to strengthen social and environmental safeguard systems. This involves empowering

---

12 ESF, paras 9, 13, 23, 24.
13 The “Road-testing” case study on Lebanon utilized a test of “can it deliver outputs consistent with ESSs”. The Bangladesh case study used “material consistency with ESSs.” In several instances, the ESF requires material consistency with the objectives of the ESSs.
14 ES Procedure, para 40.
governments to determine national development priorities, ensuring that citizens and project-affected people are fully consulted and involved in decision-making, supporting full implementation of social and environmental regulatory frameworks, and supporting institutional capacity-building for effective social and environmental management and project implementation. Currently, the Bank only makes an unspecified commitment to provide trust fund resources.

3) **Strengthen the analysis of implementation capacity, commitment and track record** Under the existing policy (OP 4.00), the acceptability of the borrower's implementation practices, track record, and capacity must be demonstrated. The proposed ESF does not expand, however, upon how capacity, commitment and track record will be assessed. The ESF should provide for assessment of implementation practices, track record, capacity and commitment to implement the Bank-financed activities in a manner that prevents harm to communities and the environment, and this should be directly informed by the Systematic Country Diagnostic.\(^{15}\) Capacity and commitment should be defined to include, among other things, good governance and low corruption risk, accessibility of judicial and non-judicial mechanisms for people affected by state and corporate actions, the existence of environmental management institutions, adherence to the rule of law (including capacity to enforce laws and regulations, and the extent to which corporate influence affects both legal frameworks and their enforcement), commitment to and record of compliance with human rights norms relevant to the environmental and social risk factors present in the project, and enabling environment for public participation.

4) **Ensure there will be public consultation and Board review of the use of alternative systems** In each case, the decision to use alternative systems must be subject to meaningful public consultation prior to approval, including full disclosure of assessments and their methodology. The Bank must also play an active supervisory role in any use of alternative systems, regularly monitoring for material changes in alternative systems or implementation practices, and track record, commitment and capacity that could affect implementation. Projects relying on country systems should be required to have community or third-party monitoring, as well as an effective grievance mechanism that communities can access early on in the project if needed.

5) **Bank staff should prepare case studies or model examples demonstrating how alternative systems would work in practice** to ensure the Board will make an informed decision on the adequacy of the alternative systems model.

Appendix 2 - Indigenous Peoples Safeguard (ESS7)

Amnesty International very much welcomes the removal of the opt-out or ‘alternative approach’, which gave borrowers the option of requesting to suspend ESS7 for a given loan. AI welcomes this recognition that there are measures borrowers must take in order to ensure that they do not violate international human rights law.

Similarly, AI welcomes the amendment to footnote 14 on p115, which requires borrowers to comply with ESS7 in addition to ESS5 when carrying out land titling activities. The original version of this footnote was highly problematic in that it failed to recognise the violation of human rights that can occur when domestic laws do not allow for Indigenous Peoples’ collective models of land ownership.

Concerns of governments with regard to ESS7

Concerns have been raised throughout the consultation process that ESS7 foments divisions in society or is discriminatory.\[^{16}\] It should be noted that the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty which the overwhelming majority of World Bank Borrowers are a party to, states that specific measures to counter the marginalisation of Indigenous Peoples and minorities are not discriminatory; in fact, they “may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms”. Furthermore, the concerned governments have presented no evidence that the implementation of Indigenous Peoples’ rights foments division or ethnic tensions. In fact, the academic literature points rather in the other direction – that the failure to recognise and support cultural differences is a source of conflict.\[^{17}\]

Specific concerns and recommendations

Paragraph 5

‘As the applicability of such terminology varies widely from country to country, the Borrower may agree with the Bank on an alternative terminology for the Indigenous Peoples as appropriate to the circumstances of the Borrower.’

Generally, Indigenous Peoples consider it to be of fundamental importance, and in keeping with their rights to self-identification and self-determination, to be referred to as Indigenous Peoples. At a minimum AI finds it essential to state expressly in ESS7 that if another term is being used in project documentation as a replacement for ‘Indigenous Peoples’, all of the substantive requirements of ESS7 will still apply.

Paragraph 7

‘This ESS also applies to communities or groups of Indigenous Peoples who, during the lifetime of members of the community or group, have lost collective attachment to distinct habitats or ancestral territories in the project area, because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area.’

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the right of Indigenous Peoples to restitution of, or if not possible compensation for, lands which have been expropriated from them (Art. 28.1). This right does not expire upon the passing away of those who lived originally on the land. If the Bank sponsors projects on such lands, it risks supporting a further entrenchment of that expropriation, and rendering impossible a full remedy for that continuing human rights violation. **Amnesty International recommends to delete “during the lifetime of members of the community or group”**.

Paragraph 10

‘The Borrower will assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on Indigenous Peoples who are

---


\[^{17}\] See for example David A. Hamburg and Cyrus R. Vance, Preventing Deadly Conflict (New York, Carnegie Corporation of New York, 1997), p. 29: “Time and again in this century, attempts at suppression [of ethnic, cultural or religious differences] have too often led to bloodshed, and in case after case, the accommodation of diversity within appropriate constitutional forms has helped prevent bloodshed”.
present in, or have collective attachment to, the project area.’

In most cases there are specific impacts which only the affected Indigenous People will be able to identify. **It is essential that Borrowers are specifically required to fully and effectively involve affected Indigenous Peoples when carrying out this assessment.**

**Paragraph 16**

‘There may be situations involving the exceptional vulnerability of remote groups with limited external contact, also known as peoples “in voluntary isolation” or “in initial contact.” Projects that may have potential impacts on these peoples require appropriate measures to recognize, respect and protect their land and territories, environment, health and culture, as well as measures to avoid all undesired contact with them as a consequence of the project.’

AI welcomes the recognition of the specific risks relating to peoples in voluntary isolation or initial contact.

While it is very difficult to ascertain the views of a people who may not wish to have contact with the outside world, **the ESS should require that Borrowers, when assessing the impacts and seeking to understand the wishes of the affected communities, should “work with and ensure the contribution of indigenous authorities and organizations whose mission is to protect the rights of indigenous peoples in voluntary isolation or initial contact”, as recommended by the Inter-American Commission on Human Rights.** The ESS should recognise that the requirements of FPIC must apply in such cases.

**When such peoples reject contact or engagement with a project, Borrowers should be required to “consider these peoples’ rejection of contact with persons from outside their people as assertions of their decision to remain isolated and their non-consent to such interventions or projects, and refrain from carrying them out.”**

**Paragraph 18**

AI welcomes the strengthened wording on Free, Prior and Informed Consent. However, rather than the restricted list of situations in which FPIC is required given in this paragraph, **the ESS should state that FPIC is required when any activity is proposed which may impact significantly on the human rights of an Indigenous People.** This may include legislation or policy measures. The former United Nations Special Rapporteur on the Rights of Indigenous Peoples interprets this as meaning that FPIC applies ‘whenever a State decision may affect indigenous peoples in ways not felt by others in society’.

For instance, para 21 states:

‘Where projects involve (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied, or (b) the acquisition of such lands, the Borrower will prepare a plan for the legal recognition of such ownership, occupation, or sage, with due respect to the customs, traditions and land tenure systems of the Indigenous Peoples concerned. The objective of such plans will be the following: (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or (b) conversion of customary usage rights to communal and/or individual ownership rights.’

This is a very good example of a situation where the FPIC of the Indigenous People must be obtained before proceeding. Conversion of customary usage rights to individual ownership rights can result in significant damage to a community’s ability to survive and maintain its collective identity.

In this regard it should be noted that FPIC should not be characterised as a veto right. A properly managed FPIC process involves both sides engaging in good faith, with the intention of reaching a mutually acceptable agreement.

---

18 Inter-American Commission on Human Rights, “Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas”, 30 December 2013, pp 80-81

19 Ibid, p79

In such a situation, confidence is built on both sides, and the likelihood of inflexible positions – on either side - is reduced. If at any point, the Indigenous People says no outright, it implies that the process of consultation is unfinished, or that the harm to their rights is so significant as to endanger their ability to pursue livelihoods, or maintain their integrity and culture – in short, their continued existence as a community. In any case, the former UN Special Rapporteur has stated that the degree to which the requirement of consent will be absolute, will depend on a case-by-case assessment.21

Para 18(d) states “(d) FPIC does not require unanimity and may be achieved even when individuals or groups within or among affected Indigenous Peoples explicitly disagree.” This is overly simplistic. If, for example, all or most people in the community who depend on land for a living, object to a project that will expropriate their land, then the concern cannot be simply ignored. The ESF should require that, if there is no unanimity, the Borrower and the Bank seek to understand the nature of the concerns and the constituency that is voicing them, and determine whether this concern is indicative of the risk of a serious human rights impact, and, if that is the case, not proceed with the project.

An FPIC process is not free if there is inequality of bargaining power. This arises in most cases where a state or private company enters into consultations with an Indigenous People, especially if the latter is economically marginalised. The ESS should require that an independent mechanism be set up to provide the community with necessary legal and technical expertise to fully understand the proposals being made, and their rights within it. The funding for this should be built into the project.

21 “Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.” Ibid, para 47.