Minority Rights Group International (MRG), an international non-governmental organization working to secure the rights of minorities and indigenous peoples, and Lex Justi, a law practice with a business and human rights specialty, would like to follow up the recent consultation meeting hosted by the World Bank in Brussels, Belgium. We take this opportunity to present our most salient comments in written form. We hope that this may facilitate you in preparing the notes of the meeting.

We wish to begin by expressing our appreciation for the very transparent nature of the whole consultation process. In particular, we were greatly helped by the fact that the Second Draft for Consultation of the Environmental and Social Framework (1 July 2015, hereafter Second Draft) was made available online in ‘track changes’ form. This constitutes very good practice, as it greatly facilitated preparation for the Brussels meeting. We also appreciated the way that Day 2 of the Brussels session included civil society-presented case-studies, which proved to be a welcome way of engendering an open and constructive dialogue.

We should also emphasise that there is much in the Second Draft that is very positive. The following is a summary\(^1\) of our main points and recommendations:

**General tenor of the Second Draft**

- In general we can feel that the text has become overly complicated and difficult to understand. We would recommend a thorough edit, which would also ensure that all terms defined in the document are listed in the Glossary, before the final version is approved. We also recommend the formulation of a guide or summary to the standards that could usefully include a chart visualising their interconnections given the numerous cross-references within them. This document would assist in helping to ensure accessibility and understanding of the standards. We also note that the previous version was entitled ‘Setting

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\(^1\) In preparing these comments, we have found that our page numbers have varied depending on our printer settings. We apologise in advance and include paragraph and ESS numbers as additional ways to reference the Second Draft.
Standards for Sustainable Development’ as opposed to the currently proposed ‘Setting Environmental and Social Standards for Investment Project Financing’.

- More specifically, the insertion of the word ‘corporate’ before the reference to the Bank’s ‘twin goals of ending extreme poverty and promoting shared prosperity’, in para. 1 of the Vision section, strikes us as both unnecessary and inconsistent with the World Bank’s status as an international organisation.

  Recommendation: We recommend reverting to the original ‘Sustainable Development’ phrase for the title, as it encourages the reader to consider the Framework holistically – as we believe is the intention of the drafters. Moreover, this is in line with the Vision contained in the text.

  Recommendation: Delete the reference to ‘corporate’ in para. 1 of the Vision.

Human rights

- The language in the Second Draft on human rights remains weak. It is essentially limited to para. 3 p. 5 in the Vision – i.e. ‘shares the aspirations’ of the Universal Declaration of Human Rights’ (UDHR). The wording represents a fundamental misreading of the UDHR’s authoritative status in international law. The UDHR, together with the two International Covenants, constitutes the International Bill of Human Rights, which is considered the cornerstone for States’ international human rights obligations.

  In the same paragraph, it is worrying that the World Bank would subordinate the UDHR to its Articles of Agreement: ‘in a manner consistent with...’ In fact, as a specialized agency of the United Nations, we believe that this wording runs counter to the repeatedly renewed commitment of the United Nations to promote respect for human rights as a core purpose. Secretary-General Ban Ki-moon’s November 2013 ‘Human Rights Up Front’ initiative is a clear reiteration of this commitment.

  Moreover, given the UN Guiding Principles on Business and Human Rights (UNGPs) and other related developments, the World Bank may well face being left outside mainstream UN human rights policy development if it does not take the necessary steps now to catch up with the rest of the UN family. Specifically, we would reference Principle 4 of the UNGPs concerning the State-Business nexus and Principle 9 addressing States’ promotion of respect for human rights by business enterprises with which they conduct commercial transactions. Finally, we might note that under the UNGPs, States, as Board Members of the World Bank, should ‘Encourage [the World Bank], within their respective mandates and capacities, to promote business respect for human rights’ (Principle 10b). We might hope that this Principle could be used with the Bank’s Board Members to garner their support for greater acknowledgement of international human rights in the Framework as well as a reference to the UNGPs.

  Recommendation: The Environmental and Social Policy (ESP) should contain an affirmation that World Bank-funded projects will respect human rights. Moreover, the World Bank should commit itself expressly to assessing and addressing the substantial human rights risks of all its financed activities. The ESP could also reference the UNGPs.
Marginalised groups

- On the one hand, we can express appreciation that the lists of marginalised groups are relatively comprehensive and have been strengthened with inclusion in fn 11 para. 4 (b) p. 10 (ESP) as well as fn 22 para. 26 (b) p. 29 (ESS1) of ‘other’ disability and also ‘health’ status.
- On the other hand, the list still lacks other widely accepted protected characteristics, such as: language, belief (as in religion or belief), descent (as in caste), political or other opinion, and migration status.
- Moreover, lists of marginalised groups are not consistent across the whole of the Second Draft. In fact, sub-para. 7 (g) p. 37 (ESS1 Annex 1) does include ‘migrant or internally displaced status’, which is not included in the list in the ESP and earlier in ESS1. It is not clear why these categories appear here but not earlier.
- We also urge the World Bank to move away from the terminology ‘disadvantaged or vulnerable’ and replace it with ‘marginalised’. Many representatives of marginalised communities feel that especially the word ‘vulnerable’ is in itself reductive and marginalising, depicting affected persons as passive in the face of human rights abuses as opposed to characterising them as active rights-owning individuals.
- In para. 30 on p. 13 (on ‘Non-discrimination’) of the Consultation Paper, the World Bank makes it clear that its intention is to act ‘in a broad and inclusive manner’, in particular through maintaining non-exhaustive lists of marginalised groups (here referring specifically to the list in ESS1). While the lists on p. 10 and p. 29 do have ‘for example’ to suggest such open-endedness, we would recommend the addition of ‘and other social groups’ at the end of every list. This is similar to the language found in e.g. the 1951 UN Convention relating to the status of refugees (where it is ‘particular social group’) which has given asylum countries as well as UNHCR the necessary flexibility to adapt the Convention refugee definition to evolving circumstances. Given that the proposed Framework is intended to be used for many years, this flexibility would be very useful to the World Bank and Borrowers as well.
- **Recommendation:** The World Bank should replace ‘disadvantaged or vulnerable’ with ‘marginalised’, and ensure that the list of protected characteristics is uniform throughout as well as totally inclusive of widely accepted categories. Finally, we would recommend the addition of ‘and other social groups’ at the end of every list.

Proportionality relevant to Borrower and Bank obligations

- Throughout the document, most actions safeguarding affected communities will be ‘proportionate to the potential environmental and social risks and impacts.’ This qualification applies to consultation, monitoring, impact assessments and grievance mechanisms, among other topics in the Second Draft. While we acknowledge that the Interpretive Guide to the UNGPs of the Office of the High Commissioner for Human Rights utilises the concept of ‘proportionality’, it does so primarily in connection with due diligence processes (see pp. 19 - 20 of the Interpretive Guide). However, ‘proportionality’ is not as relevant to the substantive aspects of consultation and grievance mechanisms. In addition, we would note that Borrowers from the IDA and IBRD are States and have international human rights obligations to ensure respect for the rights of communities that may be impacted by the planned project.
A particularly sensitive example can be found in para. 50 on p. 19 of the ESP regarding engagement and meaningful consultation. Community consultation may not be adequate and meaningful if, for instance, it is not sufficiently inclusive or if insufficient information is provided to the participants. Not only would the rights of such persons be infringed but also the Borrower would not be in compliance with its human rights treaty obligations.

Thus, while we can understand that monitoring by the Bank (para. 53 on p. 20 of the ESP) and the Borrower (para. 45 on p. 32 of ESS1) requires proportionality, for consultation with affected persons and other areas, for example, but not exclusively:

- the applicability of OHS measures to community labor (para. 34 p. 56 in ESS2);
- grievance mechanisms (para. 57 p. 20 in the ESP; para 27 p. 128 in ESS10; para. 1 p. 129 in Annex 1 to ESS10); and
- the inclusion of baseline conditions relevant to habitats and the biodiversity that they support (paras. 12-13 pp. 95-96 in ESS6),

the proportionality language could, as with the example of consultation mentioned above, affect the rights of persons and result in the Borrower’s violation of its international human rights treaty obligations.

Recommendation: The ‘proportionate to...’ language should be reviewed throughout the document and removed where it would result in diminishing the substantive rights of affected persons and where it would result in an inconsistency with the Borrower’s international human rights obligations, such as with respect to consultation, stakeholder engagement, and grievance mechanisms, among others.

One key opt-out remains

- We strongly welcome the removal of the ‘alternative approach’ to ESS7.
- We also appreciate the amended language in fn 14 para. 23 p. 110 (ESS7), removing what could have been a further opt-out clause concerning indigenous persons with individual legal title who would have been at risk of falling outside the protections under ESS7. Given that individual land titling has often been a first step towards the removal of customary land rights for indigenous communities, the amended language is particularly welcome.
- However, one fundamental opt-out remains with regard, more broadly, to the application of the mitigation hierarchy, namely in para. 5 (d) on p. 24 (ESS1): ‘Where residual risks or impacts remain, compensate for or offset them, where technically and financially feasible.’ Given that this would apply throughout wherever the mitigation hierarchy is mentioned, this is very troubling.

Recommendation: The phrase ‘where technically and financially feasible’ should be removed from the mitigation hierarchy in para. 5 p. 24 (ESS1).

Moreover, the paper ‘Issues for Phase 3 Consultations’ raises the possibility that a waiver could be reintroduced with regard to application of ESS7 (in the table under ESS7 p. 3). We find this deeply worrying, as it would represent a major step backwards for the drafting process.

Recommendation: We urge that such a waiver or ‘alternative approach’ concerning application of ESS7 must not be reintroduced into the final text.

World Bank dependency on Borrower information
• According to para. 30 p. 16 in the ESP, most of the responsibility for information-gathering and accountability rests with the Borrower: ‘The Borrower is responsible for ensuring that all relevant information is provided to the Bank so that the Bank can fulfill its responsibility to undertake environmental and social due diligence...’

• It is good that, ‘The Bank will have the right to participate in consultation activities to understand the concerns of affected people and how such concerns will be addressed...’ (para. 50 p. 19 also in the ESP). However, we note with concern the key removal from the same paragraph of ‘For High Risk or complex projects with potentially significant adverse environmental and social impacts, the Bank will have the right to carry out independent consultation activities’ (emphasis added).

• While we understand that resource and staffing constraints may well make it difficult for the World Bank to carry out independent consultation activities in all projects, we would urge the World Bank at least to retain the right to carry out such activities.

• The language on grievance mechanisms in ESS10 remains relatively undeveloped. For instance, it is unclear how the World Bank complaints procedures, including the Grievance Redress Service, mentioned in para. 58 pp. 20-21 (ESP) would fit into the grievance procedures outlined in ESS10.

• **Recommendation:** The sentence, ‘The Bank will have the right to carry out independent consultation activities’, should be reinstated in para. 50 p. 19 of the ESP and should apply to all projects.

• **Recommendation:** We would highly recommend the establishment of a civil society ‘shadow reporting’ mechanism to the World Bank, to allow the World Bank to receive information independently of the Borrower on project implementation.

• **Recommendation:** The language on grievance mechanisms contained in Section C and the Annex of ESS10 should be strengthened and brought into line with paras. 57 and 58 pp. 20–21 of the ESP. In particular, the World Bank should be mentioned as a last instance in a new sub-para. (f) in para. 2 on p. 129 of the Annex to ESS10.

**Consultation**

• Para. 17 pp. 78-79 of ESS5 states that ‘Additional provisions apply to consultations with displaced Indigenous Peoples, in accordance with ESS7’.

• Para. 11 p. 88 of the Annex to ESS5 outlines the circumstances and procedures for community participation. However, throughout the paragraph, its scope is limited to ‘displaced persons’.

• In neither case should the modifier ‘displaced’ be used. In the first instance, the word contradicts and undermines the provisions in ESS7. And in the second instance, community participation should surely commence prior to any displacement.

• **Recommendation:** In both paragraphs, the word ‘displaced’ should be removed and alternative language such as “affected” be used instead.

**Inadequate attention to the risk of total loss of culture**

• While paras. 26 and 27 on p. 81 of ESS5 provide for various forms of compensation, including replacement housing, relocation assistance etc., all of these remedies are couched
in purely economic terms and do not recognise that for certain cultures removal from specific locations intrinsically linked to their traditional livelihoods would essentially mean the end of their cultures within a couple of generations (e.g. pastoralists, fisherpeoples, forest-dwellers). Some of these livelihood-characterised communities (e.g. some fisher communities which may be marginalised but not indigenous) may also fall outside the scope of ESS7, rendering them even more vulnerable.

- This is compounded by para. 7 p. 114 of ESS8: ‘The requirements of ESS8 apply to intangible heritage only in so far as it relates to a physical component of the project.’ This sentence quite simply does not make sense: intangible heritage is surely that which does not necessarily have a physical component. And indeed even if there are ‘physical components’, there may well be a need for other actions to be taken, such as the documentation of oral histories, knowledge about the use of traditional medicines, etc.

- **Recommendation:** After Section B on p. 84 in ESS5, we recommend that a new section on ‘Cultural impacts of displacement’ be inserted. It should contain a clause stating that, ‘If a project will lead to the eradication of a culture, it must be suspended at least until the necessary safeguards are taken to ensure its survival.’

- **Recommendation:** Para. 7 p. 114 of ESS8 should be removed.

**Indigenous peoples and free, prior and informed consent (FPIC)**

- Footnote 4 para. 7 on p. 105 (ESS7) differentiates between indigenous persons and/or communities having lost collective attachment involuntarily or through migration into urban areas: ‘Generally, [ESS7] does not apply to individuals or small groups migrating to urban areas in search of economic opportunity.’ This sentence establishes an unwarranted and unhelpful distinction. Given the widespread dislocation and marginalisation of many indigenous communities, it is often very difficult to determine whether indigenous economic migrants are moving voluntarily or involuntarily. Often such movements are caused by a variety of factors; even migration ‘in search of economic opportunity’ may well be due to the effects of marginalisation and discrimination.

- According to para. 18 (c) p. 108 of ESS7, FPIC applies to ‘significant impacts... cultural heritage’. The wording ‘significant’ is vague and may result in differing interpretations and a lowering of standards. Most importantly, it is not clear who would get to judge the significance of the impact – the Borrower or indigenous communities themselves? Indeed, in the next sentence, the Borrower is tasked with engaging ‘independent specialists’, but should that happen only after the significance of the cultural impact has been determined? We also note that the modifier ‘significant’ is only applied to ‘cultural heritage’ and not to ‘impacts on land and natural resources’ or ‘relocation’. We wonder why the higher and vague threshold is applied to ‘cultural heritage’ and would recommend removing the modifier.

- Finally, ESS7 (and particularly FPIC) does not appear to apply to indigenous communities adjacent to project areas or downstream, despite the fact that they could be equally or even more seriously affected.

- **Recommendation:** We suggest that the sentence beginning ‘Generally...’ in footnote 4 para. 7 p. 105 (ESS7) be removed (and also the word ‘however’ in the following sentence).
• **Recommendation:** We recommend the removal of the word ‘significant’, with regard to the application of FPIC to cultural heritage in para. 18 (c) p. 108 of ESS7.

• **Recommendation:** We recommend that a sentence be added to paras. 9 and 10 p. 105 concerning application of ESS7 also to those indigenous communities which are affected by projects even while being outside the project area.

• We note that according to para. 5 on p. 104 in ESS7, ‘the Borrower may agree with the Bank on an alternative terminology for the Indigenous Peoples as appropriate to the circumstances of the Borrower’. We also note that the paper ‘Issues for Phase 3 Consultations’ raises the possibility that alternative terminologies used in different countries be used to describe Indigenous Peoples. Although we understand that the Borrower may wish to apply alternative terminology depending on locally accepted usage, the Bank’s support for this approach could create a contradiction with the use of the term under the ESSs, as set forth in para. 6 of ESS7. In addition, the alternative terminology could potentially contravene international human rights law standards and specifically the self-identification of indigenous peoples.

• **Recommendation:** Add the following phrase to the end of the last sentence of para. 5 on p. 104 in ESS7: ‘as long as the alternative terminology is in line with the self-identification of the community concerned’.

### Design of grievance mechanisms

- We note that ESS10 provides that the ‘Borrower will propose and implement a grievance mechanism...’ (para. 26 p. 128) and that the Borrower’s process of engagement with stakeholders is to include ‘addressing and responding to grievances’ (para. 8 on p. 124 in ESS10). However, the wording is ambiguous as to whether stakeholders will be consulted with respect to the design of the grievance mechanism.

- In the case of indigenous peoples, where a grievance mechanism is designed without their input, this may result in the means for accessing and employing the mechanism as well as the procedures and available outcomes of the procedure not respecting their culture, practices and rights.

- Similarly, where grievance mechanisms for workers (para. 22 on p. 54 in ESS2) and for other affected communities (para. 26 on p. 128 in ESS10) are designed without their appropriate input, then the mechanisms risk undermining the trust of such persons and violating their rights.

- As provided in Principle 31 of the UNGPs, non-judicial grievance mechanisms at the operational level should be ‘[b]ased on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance....’ In order to be effective, any grievance mechanism created by the Borrower in consultation with such groups should be designed to meet the criteria set forth in Principle 31 of the UNGPs.

- **Recommendation:** We recommend inserting a new sentence at the end of para. 26 on p. 128 in ESS10 that provides that ‘The grievance mechanism will be designed in consultation with the stakeholder group for whose use it is intended and such consultation shall include both the mechanism’s design and performance.’
- **Recommendation:** We suggest that Annex 1 to ESS10 makes reference to Principle 31 of the UNGPs or alternatively mentions the concepts contained in the principle.

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