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Program on International and Comparative Environmental Law

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Dear Safeguards Team,

Thank you for the opportunity to comment on the future architecture of the World Bank's safeguard policies. We recognize that there is significant uncertainty in the timing and nature of the safeguard policy review and thus limit our comments at this point to some general concerns about the future framework.

The Safeguards Are Important for the Continual Protection of Affected Communities. When they were established, the World Bank's policies served as a global standard for environmental and social protections related to development projects. The safeguard policies provide minimum standards to protect communities and the environment affected by international development projects funded by the World Bank. The Bank describes its policies as "the cornerstone of the Bank's efforts to protect people and the environment, and to ensure sustainable development outcomes."¹

Underlying the safeguard policies is a recognition that achieving sustainable development requires the effective participation of people directly affected by the project and a commitment that short-term development should not come at the expense of the environment or of particularly poor or vulnerable communities. To counter the many pressures to push projects through that build from early in the project cycle, the Bank adopted a rules-based approach in the safeguard policies that ensures certain minimum procedural and substantive standards are met that ensure minimum protection for the environment and vulnerable communities. A rules-based approach to development that guarantees certain minimum protections are in place remains necessary for effective and equitable sustainable development.

In the Approach Paper, the Bank states that the purpose of the review is to "better align the policies with the changing needs and aspirations of borrowers, the external context, and the business of the Bank."² Although all of these factors are important, the Bank should not ignore the fundamental purpose of the safeguards. They do not exist for the benefit of the borrowers,

¹ The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper, para. 8.

² The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper, para. 1.



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the donors, or Bank management. They exist to ensure that the interests and voice of affected communities are present in the design and implementation of projects. As the Bank reviews its safeguard policies, it is the interest of those communities that must remain at the forefront in evaluating proposed changes.

This is particularly true when considering risks associated with projects. Some critics of the safeguard policies believe that they have led to the Bank being too risk averse. We agree that the Bank needs to be willing to take risks in sparking development in many of the countries and sectors in which it operates. The safeguard policies are in fact designed to limit the type of risks the Bank will take—particularly those risks that fall disproportionately on directly affected communities. The Bank should be risk averse when it is taking decisions that increase the risk that vulnerable or poor communities may be made worse off. Indeed, by protecting affected people, strong safeguard policies lower the risk of Bank projects, and if a proposed project cannot meet the minimum safeguard policies then this indicates the project is too risky—not for the Bank or the Borrower, but for the directly affected communities who, as noted above, should not be asked to bear the burden of the Bank’s risk taking.

The IFC Approach is Not Appropriate. The Approach Paper suggests that the Bank is considering following the general approach reflected in the IFC’s Performance Standards. While the IFC Performance Standards helpfully extend to issues and subjects not currently covered by the World Bank safeguards, in general the approach championed by the IFC is not appropriate for the World Bank. Although the Bank should extend its safeguards policies to new areas such as gender, human rights, climate change, and labor (subjects addressed to some extent by the IFC Performance Standards), the Bank should not adopt the IFC’s general approach.

When the IFC shifted from safeguard policies to performance standards, the IFC shifted as well from a system that ensured minimum protection of communities to one that put the focus on working with IFC clients to improve their performance. Thus, the IFC can approve projects that do not meet the Performance Standards (and may never meet the Performance Standards) as long as, in IFC’s view, the client has a system in place to improve its performance over time. In theory, this allows the IFC to build capacity in its clients and improve performance gradually. Regardless of whether the IFC actually has been able to improve development outcomes through this approach, it is clear that the IFC has traded off minimum protections for the environment and vulnerable communities in favor of retaining maximum discretion to work with their private sector clients.



The fundamental problem with this approach is the environment and affected communities bear the risk and absorb the adverse impacts, while IFC is ostensibly working with their clients over time. Such a framework of discretionary engagement with the client is perfectly acceptable as long as it is done in the context of minimum protections for the community that sets a floor below which the project cannot fall.

A number of other factors are important for recognizing the limits of the IFC model for the Bank. First, the Bank's public sector clients have direct obligations and norms under international law that should not be undermined by Bank lending. The IFC's private sector clients are under no such obligations. The international norms and obligations provide an important framework for setting minimum standards for the Bank's public sector lending.

Second, while helping improve borrowers' policies and performance is a valuable goal, there is no evidence at all that the Performance Standards have protected vulnerable communities or contributed to development effectiveness. In fact, looking at the recent review of the IFC's lending through Financial Intermediaries, it is clear that the IFC does not seem to have any indication that the projects it funds do not harm the communities near them nor that it is closely monitoring many of them.

Third, the World Bank operates in a far more developed public policy space than do the Performance Standards. Much of the Performance Standards' appeal is that they have been widely adopted in the Equator Principles and elsewhere, but this is not necessarily a reflection that they are effective standards. The IFC standards filled a large policy vacuum in international affairs, whereas the World Bank safeguards operate in a congested space. The Bank's safeguards have heavily influenced policies at other development banks as well as at the national level. International law and norms also provide standards for international development. For the Bank to meet its avowed goal that the new safeguards should be a 'public good,' then the Bank needs to take current approaches in international law and at other international and national institutions into account. Put simply, a set of policies that followed closely the IFC standards would not likely be accepted as the leading set of standards for other development institutions nor would they be widely followed at the national level as are the current safeguards.

Taking a Balanced Approach to Standards and Managerial Discretion. While we understand the need to update the Environmental and Social Safeguard policies, this should not be accomplished by abandoning the Bank's commitment to clear procedural and substantive standards. The Bank needs to strike a balance between minimum standards that are clear,



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enforceable, and protective of the environment and vulnerable communities on the one hand, and that also allow for the effective engagement and progressive development of capacity among its borrowers on the other hand. Finding this balance is the central challenge for the Bank's review of its safeguard policies.

We have several initial suggestions for guidelines on how to strike this balance. First, there should be no dilution of the core commitments currently found in the safeguard policies. The Bank has committed to this, but as the Approach Paper suggests "language matters" and part of the 'no dilution' approach must be that core standards remain clear, mandatory, and enforceable. This includes, for example, maintaining clear requirements for public consultation in environmental assessment, effective compensation in involuntary resettlement, and the use of indigenous peoples' development plans.

Second, the Bank should look to international law and norms for setting the mandatory standards. As the Bank lends primarily to the public sector clients, it should clarify that it will not support projects that are inconsistent with the international legal obligations of its borrowers.

Third, the Bank should improve its framework in those areas where it lags behind other institutions. In this limited way, reference to the IFC Performance Standards would be appropriate. Like the IFC, the Bank's new policy should embrace free and prior informed consent for indigenous peoples, explicitly promote human rights and labor standards, prevent forced evictions in Bank-financed projects, and expand its explicit approach to counting and reducing greenhouse gas emissions. Like the Asian Development Bank, the Bank's safeguard policies should be applicable to the entire Bank portfolio of projects.

Fourth, relying on the principles above, the Bank should strive in each policy area to have a limited set of clear, mandatory standards that must be met in each project. The Bank should not allow any derogation from these core commitments. An example would be the need for public consultations in project affected areas to review draft impact assessments for projects that significantly affect the environment. Another might be the core labor standards found in international law. These standards can be found in international law or current best practice.

Fifth, once these clear minimum protections are secured, the Bank's approach could be more like the IFC's—to require the borrowers to commit to achieving a broader set of performance outcomes through the life of the project. The Bank can monitor the progress toward these outcomes and work to improve borrower capacity where that is the problem.



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In sum, a balanced approach builds from a floor of clear, enforceable standards that protect the rights and interests of affected communities from disproportionate and unacceptable harm. In this way, the Bank can reaffirm that protecting those rights and interests are as important to development effectiveness as is a good relationship with the government borrowers. Added to this would be a set of more general principles and aspirations to guide the Bank's engagement with its borrowers and its evaluations of the borrowers' country systems. In this way, the Bank's policies having ensured minimum protections could also embrace a more flexible approach that supports its borrowers to improve environmental management over time.

We look forward to providing more detail on this approach as the review of the safeguards proceeds. In the meantime, please do not hesitate to contact us if you would like further clarifications or to discuss any of the issues mentioned above. We can be reached by email or phone.

Sincerely,

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