



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Review and Update of the World Bank Safeguard Policies - Phase 2

Comments from the Columbia Center on Sustainable Investment

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The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice, and discussion of sustainable international investment. CCSI values the opportunity to comment on the current draft of the World Bank’s Environmental and Social Framework.

General comments

Requiring compliance with the Environmental and Social Standards

The current draft, at page 10, para. 7, sets out that “[t]he Bank will only support projects that are consistent with, and within the boundaries of, its Articles of Agreement and are expected to meet the requirements of the Environmental and Social Standards (“ESSs”) in a manner and within a timeframe acceptable to the Bank.” This clause introduces the possibility that Bank-funded projects could continue for a significant part of their lifecycle while not being compliant with the Bank’s standards. The longer the non-compliant project continues, however, the more difficult it may be for the Bank to contemplate withdrawing funding for non-compliant practices, and the more difficult it may be for a borrower to achieve compliance. For instance, a borrower must undertake processes like engagement, consultation, and free, prior and informed consent at the earliest stages of a project; otherwise, the borrower may never be able to fully meet their obligations with regards to such processes. While the Bank will require the borrower to meet ESS requirements “in a manner and a timeframe acceptable to the Bank” (page 11, para. 13), delayed compliance with engagement, consultation and consent obligations should not be permissible. The Bank should therefore amend para. 7, to carve out these and other relevant obligations from this flexible approach, and to strictly require that the borrower is in compliance with such obligations before agreeing to provide funding and support to the project.

The need to incorporate human rights standards

The draft Environmental and Social Framework currently has very few references to human rights. The framework should be amended to regularly refer to, and incorporate the standards of, international human rights law.

The draft Vision for Sustainable Development sets out the twin goals of ending extreme poverty and promoting shared prosperity in all its partner countries (page 5, para. 1). One likely effect of such goals is to support the realization of human rights, including the rights to food, education, health and water, among many others. However, the Bank's large development projects and programs also hold the potential to have significant negative human rights impacts on vulnerable peoples, communities, and individuals. While the Bank is not mandated with the principal function of fulfilling human rights, it should adapt its regulatory framework – including its environmental and social framework – to ensuring that all Bank activities and Bank-funded projects and programs are compliant with human rights and with international human rights law. This is in keeping with the Bank's own acknowledgement that “[w]hile the World Bank is not an enforcer of human rights, it may play a facilitative role in helping its members realize their human rights obligations.”¹

The Bank has explained that the ESSs' lack of emphasis on human rights relates in part to the prohibition of the Bank and its officers from engaging in political activities. However, such a prohibition should not stop the Bank from ensuring that Bank-funded projects comply with human rights. International human rights law comprises legal norms and standards that are already binding on nation states. To require that Bank funds be spent on projects that are human rights compliant should be regarded as encouraging legal compliance, rather than engaging in political activity.

Applicability of ESSs

The current draft of the World Bank Environmental and Social Policy states that the ESSs do not apply to Development Policy lending or Program-for-Results Financing (page 10, footnote 10). A recent Inspection Panel decision also excluded the possibility of the ESSs applying to technical assistance financed through a Bank-Executed Trust Fund.² While other policies may apply to those types of lending, such policies are usually less comprehensive and do not always, for instance, place the same emphasis on community engagement, consultation, and, for indigenous peoples, the right to free, prior and informed consent. This discrepancy means that communities that may be affected by Bank projects have significantly varying degrees of protections, depending on the source or structure of funding received from the Bank. This is counter-productive for the Bank's efforts to foster “social development and inclusion,” which it has identified as “critical for all of the World

¹ World Bank, FAQs: Human Rights, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20749693~pagePK:98400~piPK:98424~theSitePK:95474,00.html>

² Inspection Panel, Notice of Non-Registration and Observations Regarding the Policy Framework Applicable to Technical Assistance, JPN REQUEST RQ 15/01 (Feb 6, 2015), para. 24.

Bank's development interventions" (page 5, para. 3). Having significant variability in the standards and community protections applicable to its different activities will also interfere with the ability of the Bank and its borrowers to achieve social license for, and avoid community conflict regarding, Bank-funded projects. The preferable approach would be to ensure that a more consistent regime of social and environmental protections applies to all types of Bank-funded projects or activities.

Consultation and participation

The current draft of the World Bank Environmental and Social Policy notes that "[t]he Bank will require the Borrower to engage with communities, groups, or individuals affected by proposed projects, and with civil society, through information disclosure, consultation, and informed participation in a manner commensurate with the risks to and impacts on affected communities" (pages 16-17, para. 44). The current phrasing implies that communities, groups and individuals would only be entitled to be consulted if they are already affected by a project. Rewording this to read "communities, groups, or individuals **that are, or will likely be,** affected by proposed projects..." would foster a more meaningful form of information disclosure, consultation and participation, and a more risk-conscious program design for Bank-funded projects.

The Bank also has the right to carry out independent consultation activities for "High Risk or complex projects with potentially significant adverse environmental and social impacts" (page 17, para. 44). Given the Vision for Sustainable Development's emphasis on inclusion, which "means empowering all citizens to participate in, and benefit from, the development process" and "ensur[ing] that the voice of all citizens can be heard" (page 5, para. 3), those standards must ensure that consultation with, and the participation of, communities, groups and individuals always occurs. The draft ESSs thus should be amended so that the Bank also has the right to independently consult when it reasonably determines that the borrower either has not fulfilled, or is incapable of fulfilling, the borrower's obligations with respect to consultation and participation under the ESSs.

Environmental and Social Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

Ensuring appropriate coordination between government agencies

The current draft of ESS1 requires borrowers to carry out environmental and social impact assessments (page 25, para. 21) and to monitor and measure the environmental and social performance of the project (page 31, para. 49), but does not require that these tasks be done in coordination with all relevant government agencies, ministries and departments. This differs from the International Finance Corporation's Performance Standard 1, which requires corporate borrowers to carry out environmental and social assessments "in coordination with other

responsible government agencies and third parties as appropriate”.³ Encouraging greater coordination between relevant government agencies, ministries and departments will ensure that environmental and social impact assessments and the monitoring and measuring of the environmental and social performance of the project is optimized. ESS1 should be amended to create such an obligation in addition to the current requirements to engage adequately qualified, trained and experienced persons (page 26, para. 23; page 30, para. 44) and to employ measures that have been agreed upon with the Bank (page 31, para. 49).

Environmental and Social Standard 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

Forced evictions, and characterization of affected persons

The draft ESSs are commendable to the extent that they align with, or provide more extensive protections than, relevant standards such as the Basic Principles and Guidelines on Development-Based Evictions and Displacement⁴ and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (“VGGT”).⁵ The current draft ESS5’s stated objective (“[t]o avoid forced eviction”, page 56) should be realized through an Environmental and Social Framework which complies with the Committee on Economic, Social and Cultural Rights’ authoritative interpretation that forced evictions are *prima facie* incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights.⁶ The framework should thus be amended to only allow for forced eviction in the very few instances permitted under the Committee’s General Comment 7, such as “in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause”.⁷

The Basic Principles and Guidelines on Development-Based Evictions and Displacement set out that in the narrow circumstances in which forced evictions may legally take place, minimum procedural requirements apply:

“At a minimum, regardless of the circumstances and without discrimination, competent authorities shall ensure that evicted persons or groups, especially those who are unable to

³ International Finance Corporation, Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts (January 1, 2012), para. 5.

⁴ Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, U.N. Doc. A/HRC/4/18 (June 11, 2007) (hereinafter “Basic Principles and Guidelines on Development-Based Evictions and Displacement”).

⁵ Food and Agriculture Organization of the United Nations, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

⁶ United Nations Committee on Economic, Social and Cultural Rights, General Comment 7, The right to adequate housing (Art.11.1): forced evictions U.N. Doc. E/1998/22, para. 1 (May 20, 1997).

⁷ Id, para. 11

provide for themselves, have safe and secure access to: (a) essential food, potable water and sanitation; (b) basic shelter and housing; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; and (g) education for children and childcare facilities. States should also ensure that members of the same extended family or community are not separated as a result of evictions.”⁸

These procedural requirements apply “to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law.”⁹ The Bank therefore should amend ESS5 to ensure that any person being evicted receive protections that at the very least comply with these minimum requirements. Thus, the obligation on the borrower to provide assistance to displaced persons with “no recognizable legal right or claim to the land or land assets they occupy or use” with only “an *opportunity* to reestablish livelihoods elsewhere” (para. 30(c)) should be amended to oblige the borrower to ensure that all evicted persons or groups have safe and secure access to livelihood sources.

More fundamentally, the classification of affected persons into the categories of those with (a) legal rights; (b) a claim that is recognized or recognizable under national law; and (c) no recognizable right or claim (page. 58, para. 6) does not align with best practices such as the VGGT, which recognize that many communities or individuals may have claims to tenure rights that are legitimate but not recognized under national law. Thus, the references to persons or communities with or without recognizable legal rights should be amended as follows:

Clause	Current wording	Recommended amendment
ESS5, para. 6(b)	Who do not have formal legal rights to land or assets, but have a claim to land or assets that is recognized or recognizable under national law; or	Who do not have formal legal rights to land or assets, but have a claim to land or assets that is recognized or recognizable under national law <u>or have other legitimate tenure rights not currently protected by national law, as contemplated in Art. 4.4 of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security;</u> or
ESS5, para. 6(c)	Who have no recognizable legal right or claim to the land or assets they occupy or use.	Who have no recognizable legal right or claim to, <u>or other legitimate tenure right over,</u> the land or assets they occupy or use.

⁸ Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 51.

⁹, Id, Para. 21.

ESS5, para. 30(b)	In cases affecting persons with legal rights or claims to land that are recognized or recognizable under national law (see paragraph 6(a) and (b)), ...	In cases affecting persons with legal rights or claims to land that are recognized or recognizable under national law <u>or persons with other legitimate tenure rights</u> (see paragraph 6(a) and (b)), ...
ESS5, para. 30(c)	Economically displaced persons who are without legally recognizable claims to land (see paragraph 6(c)) will be compensated for lost assets other than land (such as crops, irrigation infrastructure and other improvements made to the land), at replacement cost. ...	Economically displaced persons who are without legally recognizable claims to <u>or other legitimate tenure rights over</u> , land (see paragraph 6(c)) will be compensated for lost assets other than land (such as crops, irrigation infrastructure and other improvements made to the land), at replacement cost. ...

Environmental and Social Standard 7: Indigenous Peoples

Excluding the application of ESS7 through an “alternative approach” to avoid “serious risk of exacerbating ethnic tension or civil strife”

The contemplation of an “alternative approach” to applying ESS7 where the borrower is concerned that identifying cultural groups and applying ESS7 would cause “a serious risk of exacerbating ethnic tension or civil strife” (page 76, para. 9) creates wide scope for denying protections, like the right to free, prior and informed consent, to which indigenous peoples are entitled under international law.

Although past Bank-financed projects may have witnessed instances of “ethnic tension or civil strife,” withdrawing protections for communities and individuals vulnerable to the adverse effects of Bank-funded projects is not the only way of avoiding such occurrences.

Rather than an “alternative approach” that would afford lesser protections to indigenous peoples, the Bank should amend this clause in accordance with either of the two following options:

1. Accord the relevant protections in ESS7 to all, including non-indigenous, communities that are, or are likely to be, affected wherever applying ESS7 to indigenous peoples would create a serious risk of exacerbating ethnic tension or civil strife.
2. Remove the “alternative approach” concept entirely from the ESSs, so that no exceptions to the application of ESS7 exist.