

# Review and Update of the World Bank's Safeguards Policies

## Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework

15 March 2016

### Introduction

The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment upon the World Bank's proposed Environmental and Social Framework (ESF). OHCHR recognizes that the Bank's existing safeguards established an important precedent in environmental and social risk management, and have had very positive impacts globally. The Bank's revised safeguards will likewise be expected to strongly influence social and environmental safeguards and sustainability policies of bilateral and multilateral lenders, export credit agencies<sup>1</sup> and others, as well as legislative and policy frameworks governing social and environmental risk management at country level.

OHCHR has engaged actively with Bank Management in relation to the draft ESF over the last three years, including informal written submissions in relation to the first and second drafts, a two-day retreat in Washington DC in early 2015 co-led by the Principals of the two organisations, working level sessions in Washington DC and Geneva, and through OHCHR's participation in national consultations on the ESF in Berlin (November 2015), Brussels (for European countries) (January 2016), Washington DC (February 2016) and the consultation meeting on ESS 7 in Addis Ababa (February 2016). OHCHR recognizes the very significant effort that the Bank has undertaken to consult with stakeholders from all over the globe, and is grateful for the opportunities that it has had to take part. The comments in this document are offered in the spirit of a continuing commitment to constructive collaboration.

Consistent with its mandate, OHCHR's comments focus on the content of the draft ESF from the perspective of international human rights law and their foreseeable impacts upon individuals and groups in practice, particularly those most marginalized. Human rights considerations arise not only in relation to the substantive content of the ESF but also in relation to the institutional architecture designed to implement this framework. OHCHR's comments are consistent with those that it has submitted in relation to the

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<sup>1</sup> See OECD/DAC, Working Party on Export Credits and Credit Guarantees, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ("Common Approaches"), TAD/ECG(2012)5, June 28, 2012, paras. 20, 22 and 25, at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/ecg%282012%295&doclanguage=en>.

safeguard policy consultation processes of other multilateral development banks, including most recently the Asian Infrastructure Investment Bank (AIIB).<sup>2</sup> A Frequently Asked Questions (FAQ) document on Human Rights and Multilateral Development Banks is attached as part of this submission, cross-referenced as needed to particular recommendations (**Annex I**).

OHCHR's inputs are also consistent with member States' commitments last year at the 2030 Summit for Sustainable Development and the 3<sup>rd</sup> International Conference on Financing for Development, and are intended to support the implementation of those commitments. The 2030 Agenda underscores the centrality of human rights for sustainable development and the need to implement the Agenda consistently with existing international law. The Addis Ababa Action Agenda (para. 75) calls upon "all development banks to establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women's empowerment, that are transparent, effective, efficient and time-sensitive" (see **Annex III**).

## **A. Positive Features**

OHCHR notes that the ESF is said to embody as a "risk and outcomes based approach," designed to reduce up-front safeguard requirements which may not be necessary and to allocate safeguard resources more strategically to risk. OHCHR welcomes the fact that, in line with the 2010 report of the Independent Evaluation Group, the ESF seeks to encourage the management of risk throughout the project cycle, which implies a stronger focus on supervision. The proposed framework is intended to simplify due diligence due diligence and risk management requirements, harmonize safeguard standards with those of other lenders, and clarify the division of responsibilities between the Bank and Borrower.

OHCHR very much welcomes the broad range of social risks sought to be addressed by ESF as well as its explicit focus on eliminating discrimination. The Bank's global leadership role is particularly important in these respects. OHCHR is also pleased to note that the second draft ESF has been strengthened in a number of respects compared with the first draft. OHCHR particularly welcomes the strengthening of the labour standard (Environmental and Social Standard, ESS 2) in certain important respects, the deletion of the "alternative approach" in ESS 7, and the expansion of the scope of the resettlement standard (ESS 5) to include land titling projects in particular circumstances. The proposed framework for stakeholder engagement was also strengthened in a number of important respects. OHCHR also notes that the Bank has taken a number of steps to define clearer up-front procedural requirements in the ESP and ESS 1 and clarify the requirements governing common approaches, sub-projects, financial intermediary lending, and using Borrowers' Frameworks.

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<sup>2</sup> OHCHR, Consultation on the Asian Infrastructure Investment Bank Draft Environmental and Social Framework, Comments of the Office of the United Nations High Commissioner for Human Rights, Oct. 22, 2015.

## B. Recommended Areas for Further Strengthening

Notwithstanding the positive features such as those outlined above, in OHCHR's view there appear to be several weaknesses or ambiguities in the draft ESF, particularly in relation to the risk management framework (ESS 1) and the Bank's due diligence and supervision obligations set out in the ESP. The main areas of concern from OHCHR's perspective are:

1. Insufficient recognition of the obligations of Borrowers under international human rights, labour and environmental law, and lack of any recognition of the relevance of these sources of law in relation to the Bank's due diligence responsibilities;
2. The need to clarify and strengthen the Bank's due diligence responsibilities which appear to rely disproportionately on information provided by the Borrower;
3. The need to further clarify and strengthen the frameworks for delegating safeguard responsibility to other safeguard systems including Borrower Frameworks, Financial Intermediaries, and co-financers ("common approaches");
4. The need to avoid deferring the appraisal of assessable risks as far as possible: under the ESF, compliance with the ESS's need only be achieved "in a manner and within a timeframe acceptable to the Bank," rather than in accordance with a more objective standard; and
5. The need to clarify and strengthen monitoring and reporting requirements, commensurate with the ESF's focus on adaptive management during project implementation.

### 1. The role of international human rights law

The draft ESF fails to reference the international treaty obligations of Borrowers and does not recognise the World Bank's procedural duty to ensure, as far as possible, that the projects that it supports are not associated with potential human rights violations. In OHCHR's view the human rights provision in the Vision statement (para 3) is confusing and potentially damaging in that it seems to imply that international human rights law, as applicable to Bank-supported projects, is merely aspirational rather than the subject of binding legal obligations for Borrowers.

OHCHR does not agree with the arguments against the explicit integration of human rights put forward in the 1 July 2015 Consultation Paper to the second draft (paras 20, 73). OHCHR's responses to these and related objections are set out in detail in **Annex I**. In OHCHR's view, the self-standing nature of the ESF is a secondary virtue compared with the importance of aligning and keeping current with applicable international law (see FAQ, **Annex I**, Qu. 6). The suggestion that the Bank may infringe borrowers' sovereignty or find itself acting as an arbiter or enforcer of human rights mis-states the role that international human rights standards should, and in some Bank-supported

projects do, play in connection with investment project due diligence and risk management (**Annex I**, Qu's 3-7).

The purpose in integrating human rights is not to set the Bank up as an enforcer or tribunal or require it to make binding determinations on Borrowers' compliance with their treaty obligations. (Even specifically mandated UN human rights bodies tend to operate more on the principle of constructive dialogue than by way of formal adjudication or declarations of non-compliance). Rather, the purpose is to ensure that all information relevant to social and environmental risk assessment is taken into account, and that all potentially useful mitigation options are considered, in order to help minimize adverse impacts and promote sustainable development outcomes (**Annex I**, Qu's 3-7).

The reference to international agreements in paragraph 24 of ESS 1 is relevant but not sufficient for present purposes given the additional specific due diligence responsibilities of the Bank under the ESP, beginning with risk screening and categorisation. **Annex II** sets out, illustratively, a number of key entry points where the timely integration of human rights risk information, as defined in Annex II, could strengthen the Bank's due diligence in practice.

**Recommendation 1:** OHCHR recommends that the aspirational reference to human rights in para 3 of the Vision statement be replaced with the following: *"The Bank recognizes the importance of human rights for development effectiveness. In this regard the Bank's operations will encourage respect for human rights and will seek to avoid adverse human rights impacts."*

**Recommendation 2:** In line with OP 4.01 and 4.36,<sup>3</sup> OHCHR recommends that the ESP retain an explicit commitment to respect international agreements relevant to the projects it supports. OHCHR suggests: *"The Bank will respect internationally recognized human rights standards and take all necessary measures to avoid supporting projects that may put a borrower in breach of its obligations under international agreements in the social and environmental fields, including international human rights agreements."* Where national law and international law set different standards, it should be clarified that the Bank will respect the higher standard.

## 2. The Bank's due diligence responsibilities

In OHCHR's view, the Bank's own due diligence obligations still do not seem to be clearly specified and appear to rely disproportionately on information provided by the Borrower. Paragraph 30(a) of the ESP says that the Bank's due diligence responsibilities will include "reviewing information provided by the Borrower" and requesting

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<sup>3</sup> OP 4.01, para 3 and OP 4.36, para. 6.

additional information when there are gaps. Paragraph 30 also refers to the duty of the Borrower to provide “all relevant information so that the Bank can fulfill” its due diligence responsibilities. In OHCHR’s view, these provisions do not adequately reflect the Bank’s own responsibilities to seek information from a wide range of sources and verify information provided by the Borrower.

The ESP contains relatively little detail on the Bank’s supervision responsibilities compared with its existing safeguards, notwithstanding the shortcomings in supervision documented and analysed in recent years by the Independent Evaluation Group (IEG), the Inspection Panel, the 2014 Advisory Review of the Bank’s Safeguards Risk Management,<sup>4</sup> the 2014 Involuntary Resettlement Portfolio Review,<sup>5</sup> and the importance of strengthened supervision as part of the *quid pro quo* for adaptive risk management. The Inspection Panel, the IEG’s recent learning review “Managing Environmental and Social Risks in Development Policy Financing” (25 July 2015) and the recent Safeguards Operational Review of the Asian Development Bank (ADB) have all underscored the importance of defining due diligence responsibilities as clearly and precisely as possible in safeguard policy text.

The due diligence framework governing sub-projects has been strengthened between the first and second drafts to some degree, however in OHCHR’s view further strengthening would be merited. Paragraph 35 of the ESP requires that high risk projects comply with the ESS’s, but that substantial risk projects need only meet the requirements of national law “and any requirement of the ESS’s that the Bank deems relevant to the subproject.” However paragraph 25 of the Environmental and Social Procedure defines “substantial risk” as including impacts that may not always be reversible or able to be mitigated and may “give rise to significant social conflict or harm or significant risks to human security.” OHCHR has reviewed national laws in a wide sampling of countries on discrimination against women and girls, HIV-related human rights issues, child labour, freedom of association, and legal frameworks governing consultation with indigenous peoples, and has noted significant gaps vis-à-vis the ESS’s and international human rights law. For these reasons, OHCHR would recommend that substantial risk sub-projects should meet ESS requirements, in addition to high risk sub-projects.

**Recommendation 3:** OHCHR recommends that the ESP, paragraph 30, be amended to make it clear that the Bank’s due diligence includes seeking information from all relevant sources and independently verifying information provided by the Borrower.

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<sup>4</sup> World Bank, Internal Audit Vice-Presidency, *Advisory Review of the Bank’s Safeguards Risk Management*, June 16, 2014, available at <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/317401425505124162/iad-draft-report-advisory-review-safeguards-risk-management.pdf>.

<sup>5</sup> World Bank, *Involuntary Resettlement Portfolio Review Phase I and II* (2015).

**Recommendation 4:** OHCHR recommends that paragraph 35 of the ESP be amended to require that both high risk and substantial risk sub-projects meet the requirements of the ESSs.

Other recommendations pertaining to the Bank’s due diligence and supervision responsibilities are included in Section 5 below on “Disclosure, monitoring and reporting”, together with recommendations pertaining to the Borrowers’ responsibilities under ESS 1.

### **3. Delegation of safeguard responsibility to potentially weaker safeguard systems**

In OHCHR’s view, the most significant risks to the successful implementation of the ESF seem to arise from the continuing broad discretions governing the use of Borrower Frameworks, Financial Intermediaries (FIs), common approaches for co-financing multi-donor or advanced stage projects, and associated facilities (Vision, para 8; ESP paras 9-13, 23-27; ESS 1, paras 8, 11b-12, fn 14). These provisions effectively allow delegation of safeguard responsibility to a third party based only on the requirement that the project would thereby be enabled “to achieve objectives materially consistent with the ESS’s.”<sup>6</sup> OHCHR notes moreover that greater discretion and flexibility seem to have been introduced from the first draft ESF to the second draft.<sup>7</sup>

OHCHR is not advocating for a strict equivalence test between World Bank and other safeguard frameworks in this regard. In OHCHR’s view, “material consistency” is an appropriate test. However it is recommended that “material consistency” be determined by a direct comparison between the substantive requirements of the Bank’s and other parties’ safeguard systems, together with an assessment of commitment, implementation capacity and track record. In OHCHR’s view, unless a more direct comparison between different safeguard frameworks’ requirements is undertaken, and unless there are clear definitions of key terms such as “commitment” and “track record,” it is difficult to see how the ESF’s objectives will be achieved in practice.

As to Borrower Frameworks specifically, OHCHR strongly supports the objective of country ownership and the need to use and strengthen Borrower environmental and social systems as far as possible. However, in OHCHR’s view, greater clarity seems to be needed to ensure that the objectives of country ownership and strengthening Borrower Frameworks do not inadvertently override the ESF’s social and environmental risk management objectives. The second draft takes a number of steps in a positive direction, in OHCHR’s view, starting from the position that the use of Borrower

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<sup>6</sup> Paragraph 8 of the Vision refers to outcomes “materially consistent with the objectives of the ESF”, which on an ordinary reading seems even weaker than the formulation in the ESP and ESS 1.

<sup>7</sup> This is apparent in the ESS1 Objectives, bullet points 2 b (“to acceptable levels”), 2d (“where technically and financially feasible”), and 3 (“whenever appropriate”).

Frameworks will not be the default option.<sup>8</sup> However, in OHCHR’s view, these improvements do not yet constitute a sufficiently robust equivalence test.<sup>9</sup> The IEG’s learning review “Managing Environmental and Social Risks in Development Policy Financing” (25 July 2015) suggests that policy ambiguity has led to inconsistent practice and policy compliance, including in relation to country capacity assessment and gap analysis. It therefore seems important to clarify these particular aspects of policy, in OHCHR’s view.

**Recommendation 5:** OHCHR recommends that the Bank ensure that all World Bank-supported activities including those implemented through Borrower Frameworks, common approaches and sub-projects are *materially consistent with the requirements of the ESSs*.

**Recommendation 6:** OHCHR recommends that all high risk activities should be excluded from any delegation, either through the use of Borrower Frameworks, common approaches, Financial Intermediaries or associated facilities, for a five year period of initial ESF implementation.

**Recommendation 7:** OHCHR recommends that the ESF provide more specific requirements for the assessment of the Borrower’s track record including with respect to past project-related community grievances and any findings or recommendations of international human rights bodies relevant for this purpose (*see Annex II*).

**Recommendation 8:** OHCHR recommends that the Bank should be required to provide to the Board the information necessary to assess the potential risks and benefits of using Borrower Frameworks or common approach agreements. The Board should provide and disclose an explanation of any decisions to use Borrowers’ Frameworks or common approach agreements.

#### 4. Deferred appraisal and open-ended compliance

The flexibility to assess, determine, disclose relevant information about or ensure compliance “in a manner and within a timeframe acceptable to the Bank” (ESP paras 7,

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<sup>8</sup> An assessment of a Borrower Framework will only be initiated after express interest by Borrower and after the Bank validates the merit in devoting time and resources: “The use of Borrower’s ES Framework will be determined at the discretion of the Bank.” (ESP para 24). Certain indications are given of substantive benchmarks against which the Borrower Framework should be assessed. Specifically, ESS1 states that the gaps relating to the Borrower’s ES Framework “will be assessed in reference to what would be required in the relevant ESS” (fn 27). The Environmental and Social Procedure states that “depending on the nature of risks and impacts of the project, the review of the Borrower’s ES Framework may include an assessment of the consistency of specific aspects of the Borrower ES framework against specific requirements of the ESSs” (para 40).

<sup>9</sup> OHCHR notes that the Environmental and Social Procedure indicates that the Bank *may* recommend not using the Borrower’s Framework in cases where the project is complex, high risk, etc (para 45), but this is not the same as a clear high risk exclusion. The Borrower Framework track record is mentioned five times in the Procedure (paras 23c, 24g, 42d, 47), however it is not clear how this concept will be assessed.

16, 18; ESS1 para 13, fn 12) remains, in OHCHR's view, a significant potential weakness in the ESF, and may increase the incentives to defer the assessment of risks beyond the point of maximum Bank leverage. OHCHR appreciates that full appraisal of risks may not always be practicable, such as in the case of a major rural roads project where siting is not clear at the outset. However the ESF presently seems to legislate to the exception rather than the rule.

OHCHR notes, positively, the requirement in the ESF that "the Borrower commit to not carrying out any activities or taking any actions in relation to the project that may cause material or significant adverse environmental or social risks or impacts until the relevant plans, measures or actions have been completed" (ESP para 17).<sup>10</sup> However the phrase "within a manner and timeframe acceptable to the Bank" remains unchanged from the first draft ESF to the second, and the deletion of the adjective "minor" from the second draft (draft ESP para 47, ESS1, para 39; *cf*: first draft ESS 1, para 37), broadening the scope of proposed project changes subject to adaptive management, seems to increase flexibility further. In OHCHR's view, ESS 1 should clarify that deferral after appraisal should be the exception to the rule, and that exceptions to this general rule should be defined or at least described. Other MDBs' safeguards, including those of the ADB and AIIB, appear to have more rigorous provisions in this regard.

**Recommendation 9:** OHCHR recommends that the ESF clearly specify a general rule that all high and substantial risks be fully appraised and reflected in the project documents before Board approval, and should be excluded from any deferral through an ESCP.

**Recommendation 10:** OHCHR recommends that any exceptions to the general rule that high and substantial risks be appraised prior to Board approval should meet the following requirements:

- third party monitoring;
- public disclosure of the ESCP, including common approach agreement, before approval;
- public disclosure of ESCP monitoring reports;
- routine audit of deferred appraisal activities and ex-post impact evaluation of a representative sample of activities over the first 5 years of ESF implementation;
- provision of information to the Board that fully explains why certain risks could not be appraised prior to Board approval.

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<sup>10</sup> *Cf.* ESS1 para 15; Annex 2, para 12.



## 5. Disclosure, monitoring (including independent/third party monitoring), and reporting

The ESF's stated intention is to move safeguards away from a prescriptive approach to an implementation outcome oriented one. Given this objective, it is vital that potentially affected stakeholders have full information about ongoing monitoring and implementation efforts. As such the lack of specification of Borrower reporting and disclosure to *stakeholders* (ESS1, paras 51-52) is a matter of concern. Timely disclosure is a fundamental accountability safeguard that appears to be weaker in the ESF compared with OP/BP 4.01 and OP/BP 4.12<sup>11</sup>.

OHCHR notes that disclosure to stakeholders is to be as early as possible<sup>12</sup> and that the Environmental and Social Commitment Plan (ESCP) "will be disclosed" (ESS 1, para 36). However, monitoring and reporting responsibilities are defined only in general terms (ESS1, paras 45-50; ESS 10, paras 23-25).<sup>13</sup> The ESP continues not to require procedural minimum thresholds for disclosure throughout the project cycle, thus potentially leaving the timing and content of disclosure for affected groups and the Board too vague to be consistent and effective in practice. Moreover there does not appear to be any explicit requirement to disclose monitoring reports to the public (only to the Bank). Under ESS 1, paragraph 51, disclosure to stakeholders should be undertaken "in a manner appropriate to the nature of their interests and the potential environmental and social risks and impacts of the project," an unclear formulation that potentially overlooks potential entitlements to that information as a matter of right.<sup>14</sup> There also appears to be a gap concerning the absence of any explicit disclosure procedure for the main compliance mechanism – the ESCP – as part of borrower-prepared monitoring reports.

In OHCHR's view, the ESF also does not describe sufficiently clearly the circumstances in which the Borrower should retain independent third party specialists. ESP paragraph 55 requires third party or independent monitoring "where appropriate." ESS1 (para. 33) states: "For projects that are High Risk or contentious, or that involve serious multidimensional environmental or social risks or impacts, the Borrower *may be required* to engage one or more internationally recognized independent experts. Such experts *may, depending on the project*, form part of an advisory panel or be otherwise employed by the Borrower, and will provide independent advice and oversight to the project." Similarly, ESS1 states: "where appropriate, the Borrower will engage stakeholders and third parties, such as independent experts, local communities or NGOs, to complement or verify its own monitoring activities" (ESS1, para 45). In OHCHR's view, these provisions would seem to be flexible and non-committal in even

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<sup>11</sup> Cf. OP/BP 4.01, paras. 9, 11-15; OP 4.12, paras. 22, 28-29, and BP 4.12, para. 8.

<sup>12</sup> ESP, para. 49, and ESS 10, para. 22(d).

<sup>13</sup> For example, ESS1 and the E/S Procedure refer to the ESCP implementation report and Annual Monitoring report which should include, among other things, a report on stakeholder engagement during implementation (ESP, paras 46, 54; ESS1, paras 40, 45, 47).

<sup>14</sup> Human Rights Committee, *Article 19: Freedoms of Expression and Opinion*, General Comment No. 34 (Sept. 12, 2011), CCPR/C/GC/34, paras. 18-19.

the most high risk circumstances. The safeguard policies of the European Bank for Reconstruction and Development, AIIB, ADB and African Development Bank appear to contain clearer and more predictable requirements for third party monitoring and independent advisory panels, as does OP 4.01 (para. 4).

**Recommendation 11:** OHCHR recommends that minimum disclosure requirements for high risk and substantial risk projects prior to the appraisal mission should include a draft Environmental and Social Impact Assessment (ESIA) and Environmental and Social Management Plan (ESMP), draft stakeholder engagement plan, preliminary environmental and social framework assessment/gap analysis, ESCPs and resettlement plans and indigenous peoples' plans. Documentation should include broad siting information and generic assessment and risk management parameters for subprojects for which the location is not identified prior to Board approval.

**Recommendation 12:** Detailed ESCP reporting, as part of annual monitoring reports, should include environmental and social safeguard implementation indicators, particularly on issues related to resettlement, indigenous peoples, critical natural habitat protection, protection of vulnerable and disadvantaged people, non-discrimination in accessing project benefits, and stakeholder engagement. OHCHR recommends that the monitoring reports be made public, subject to redaction of any commercially sensitive information, and that the Bank verify the accuracy and completeness of the information provided and include the results in the track record of the Borrower's performance.

**Recommendation 13:** OHCHR recommends that the ESF specify further the circumstances in which expert panels should be required, which should include projects likely to cause large-scale displacement. Furthermore OHCHR recommends that an independent and/or community monitoring mechanism should be required in the following circumstances:

- where human rights risks or impacts are considered high;
- for any use of Borrower Frameworks during the first five years of ESF implementation;
- for any deferred appraisal of any high or substantial risk activity;
- where Borrower capacity, commitment and/or track record are weak.

## 6. Recommendations relating to particular ESS's

As indicated at the outset, OHCHR recognizes that a number of the ESS's have been strengthened from the first to the second draft ESF. OHCHR would recommend that consideration be given to further strengthening in the following respects.

## ESS 1: Environmental and Social Assessment

OHCHR welcomes the broad definition of “social risks and impacts” in draft ESS 1, paragraph 26, and notes that the open-ended list of grounds on which groups of people may be disadvantaged or vulnerable corresponds to a significant extent with the grounds of discrimination that are prohibited under international human rights law. OHCHR would strongly encourage the Bank to retain this definition in the final version of the ESF, but would also urge the explicit inclusion of “political or other opinion” and “language” as additional categories of discrimination prohibited by international human rights law<sup>15</sup> which, in practice, limit the access of particular population groups to the benefits of investment projects. Discrimination on these grounds will not always be captured by other proxy measures such as ethnicity. An amendment of this kind would help to ensure broad-based participation and equitable access to project benefits, consistent with international human rights law, the 2030 Agenda for Sustainable Development,<sup>16</sup> and the Bank’s Articles of Agreement (see **Annex I**, Qu’s 1 and 2).

OHCHR notes with concern the significant number of documented cases where individuals opposing MDB-supported projects have suffered serious reprisals or have lost their lives as a result. The killing earlier this month of Berta Cáceres, who had led community opposition to the construction of the Agua Zarca dam in Honduras, is the latest illustration of the risks that many communities face.<sup>17</sup> OHCHR notes that ESS 10 requires that “meaningful consultation” be free of coercion or intimidation, however OHCHR would recommend that the definition of “social risks and impacts” in ESS 1 be expanded to include risks of reprisals against individuals or communities in relation to Bank-supported projects, given the alarming extent to which this specific risk occurs in practice.

ESS 1 (para 24) states that the obligations of countries “*directly applicable* to the project under relevant international agreements” should be part of the environmental and social assessment (ESA), while the relevance of national law is defined by a broader standard (i.e. national laws need only be “*applicable*” to environmental and social issues in order to be deemed relevant to the ESA). In OHCHR’s view a common standard of applicability should apply to all sources of law relevant to particular social or environmental issues. A common standard would ensure that all relevant sources of law are given equal consideration, and that any material inconsistencies between the requirements of national and international law may be brought to the surface and reconciled.

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<sup>15</sup> These grounds are included in the Universal Declaration on Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, one or more of which bind all World Bank shareholders (see Annex IV). The relevance of discrimination on these grounds to sustainable development is highlighted in paragraph 19 of the 2030 Sustainable Development Agenda.

<sup>16</sup> *Id.*

<sup>17</sup> Indigenous peoples: UN expert condemns killing of rights defender Berta Cáceres in Honduras, Geneva, Mar. 4, 2016, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17153&LangID=E>.

**Recommendation 14:** OHCHR recommends that the definition of social risks and impacts in paragraph 26 of ESS 1, and the list of prohibited grounds of discrimination in footnote 22 of ESS 1, be amended to include discrimination on the grounds of “political or other opinion” and “language.”

**Recommendation 15:** OHCHR recommends that the definition of “social risks and impacts” be expanded to include risks of reprisals against individuals or communities in relation to Bank-supported projects.

**Recommendation 16:** OHCHR recommends that national law and international law, as relevant to social and environmental assessment (ESS 1, para. 24), be governed by a common standard of “applicable” law. This would entail two minor edits to ESS 1, para. 24(a): the deletion of the word “directly”, and the addition of the bracketed phrase “(including implementation)” after the phrase “international treaties and agreements.”

## **ESS 2: Labor and Working Conditions**

OHCHR welcomes the incorporation of separate standard covering labour and working conditions, and acknowledges the substantial improvements introduced in relation to the first draft ESS 2, including the broadening of the protection to workers other than direct project workers, including contracted and sub-contracted workers, primary supply workers, workers in community labour, and to a lesser extent, government officials (ESS 2, paras 3-8). The limitation in the scope of occupational health and safety (OHS) measures (paras 24- 30) to a limited category of workers, however, seems unwarranted.

OHCHR also notes the efforts to further align ESS 2 requirements with the ILO 1998 Declaration of Fundamental Principles and Rights at Work and core labour conventions. In OHCHR’s view, however, there is still significant room to further align ESS 2 with those and other relevant international standards, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, in relation to child labour, minimum age, and the freedom of association and collective bargaining. Explicit referencing to the relevant international instruments would help to ensure closer alignment and clarify the content of ESS 5 requirements.

**Recommendation 17:** OHCHR recommends that the same protection afforded to project workers under ESS 2 be extended to public sectors workers, and that OHS measures apply to all workers associated with projects irrespective of their employment relationship.

**Recommendation 18:** OHCHR recommends that the Bank reference the core international labour standards and other relevant international instruments in ESS 2 and further align its provisions with those standards.

## ESS 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

OHCHR recognizes certain important improvements in ESS 5 from the first draft to the second, including the expansion of the scope of ESS 5 to address land titling projects. However in OHCHR's view there is still a need to clarify and strengthen the ESF insofar as the downstream impacts from projects causing physical or economic displacement outside the scope of ESS 5 are concerned, for example, in relation to livelihood losses and economic displacement downstream from dam projects. Given the well-documented limits of compensation in redressing displacement impacts in practice, and consistent with the safeguard policies of the ADB and AIIB.<sup>18</sup> OHCHR would also recommend that remediation of downstream impacts be governed by a "livelihood improvement" objective, with a livelihood restoration standard as a minimum requirement.

**Recommendation 19:** OHCHR recommends that the scope of ESS 5 be widened to include physical and economic displacement caused by projects other than projects specifically involving land acquisitions and land use restrictions, and that remediation of displacement impacts be governed by a requirement to improve, or at least, restore, the livelihoods of those adversely impacted.

## ESS 7: Indigenous Peoples

OHCHR welcomes the removal of the "alternative approach" in the first draft of the ESS 7 (para 9), which would have allowed Governments to opt-out of using the indigenous standard in certain circumstances. At the same time OHCHR acknowledges the concerns expressed by various States regarding the need for flexibility in the definition of the scope of ESS 7, and takes note of the proposals to broaden this scope to cover other social groups in situation of vulnerability and to include additional terminology to reflect regional and national specificities. However in OHCHR's view, any broadening of this kind should not result in any dilution of the current level of protection afforded to indigenous peoples' rights under international law. Moreover the term "indigenous peoples" should be maintained in the title and text of the standard even if additional terminology is introduced.

The recognition of the principle of Free Prior and Informed Consent (FPIC) is also a welcome development. However, the draft ESS 7 seems to approach consultation and FPIC as separate concepts associated with different procedures. In this connection, and in line with international standards, it should be clarified that securing indigenous peoples' consent or agreement should be the objective of all consultation processes (UNDRIP, arts 19, 32; ILO C169, art 6.1.a). Moreover, given that the ultimate aim of consultation with indigenous peoples should be to effectively inform the Borrowers'

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<sup>18</sup> ADB, Safeguard Policy Statement 2009, Appendix 2, para. 6; AIIB Environmental and Social Framework, p.34 under "Social Coverage."

decision-making through negotiation and agreement, the Borrower should be required to document all reasonable efforts to accommodate indigenous peoples' expressed concerns in the project definition and, when applicable, in the identification of project alternatives. From this perspective, OHCHR would recommend that the procedural requirements now applying to FPIC (para 18.c) be extended to all consultation processes with indigenous peoples in relation *all* projects potentially affecting them.

In addition, in line with the Bank's existing policy and international standards, OHCHR would recommend that ESS 7 affirm the Bank's explicit commitment not to finance any project involving the physical relocation of indigenous peoples (or else having substantive impacts on lands and natural resources occupied or otherwise used by indigenous peoples) without having obtained "broad support" from the affected communities (OP 4.10, para. 20; *cf.* UNDRIP, art. 10; ILO C169, art. 16.1; ILO C107, art. 12.1). Finally, it is recommended that ESS 7 reflects the possibility that regional standards and national laws could include more stringent requirements regarding indigenous peoples' FPIC (*see e.g.* AIIB, ESP, para. 61; ESS 3, para 3).

**Recommendation 20:** OHCHR recommends that FPIC should be the objective of all consultations with indigenous peoples under ESS 7. Borrowers should be required to document all efforts aimed at reaching a negotiated agreement with indigenous peoples in relation to all projects potentially affecting them.

**Recommendation 21:** OHCHR recommends that ESS7 should incorporate a commitment by the Bank not to finance any project involving the physical relocation of indigenous peoples (or else having substantive impacts on lands and natural resources occupied or otherwise used by indigenous peoples) without having obtained indigenous peoples' "broad support." Where regional standards or national laws establish more stringent criteria in relation to FPIC, the Borrower should be required to abide by the higher standards.