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To: Committee on Development Effectiveness
World Bank Group
Cc: Hartwig Schafer
World Bank Vice President, Operations Policy and Country Services

June 22, 2015

Questions that require answers during the June 24th CODE meeting

We write to bring to your attention some critical issues that we would like you to raise as representatives of our countries at the upcoming CODE meeting on June 24th, 2015. We, the undersigned organizations, greatly appreciate President Kim's commitment to ensure that the Bank's new Safeguards Framework does not represent a dilution of existing social and environmental protections. **Any draft which proposes dilutions of existing safeguards should not be presented for consultation.**

The World Bank's first safeguards draft represented a dangerous weakening of protections for the project-affected communities and environment. We urge CODE to be vigilant in ensuring that the 2nd draft does not propose any dilutions to existing policy.

By gutting the Bank's due diligence requirements, removing mandatory timing and procedural obligations for Borrower compliance, and significantly limiting the power of the Inspection Panel, the first draft effectively dismantled thirty years of environmental and social protections. For example, the Bank's current safeguards require that the environmental impact assessment of a project with significant environmental and social impacts be released for public comment prior to appraisal and approximately 120 days prior to Board vote, to allow for full public input prior to the Board's vote. This requirement was removed in the first draft, which represented a significant dilution of existing safeguards and threatened the democratic nature of Board decision-making. We urge CODE to examine whether this mandatory, time-bound requirement has been reinstated in the second draft.

In addition, the first draft failed to achieve upward harmonization with the strongest environmental and social standards of other multilateral and bilateral institutions. The first draft also failed to require specific World Bank due diligence measures to ensure that Bank-funded activities do not contribute to or exacerbate human rights violations.

During the first phase of consultations, much of the input from civil society was neither properly recorded by the Bank, nor did it make much of an impact on the structure of the draft, with some exceptions. Civil society has attempted to engage constructively with the Bank during Phase 2 consultations of the safeguards review since the first draft ESF was released last July. We remain very concerned that the next draft will continue to embody a significant dilution of existing protections, will fail to achieve upward harmonization with the highest safeguards found at other MDBs or bilateral institutions, and will fail to address the serious flaws that have been identified by civil society and safeguards experts over the past year. Our concerns arise from meetings we have had with many of your offices, with Bank Management and with government officials during and following the official Phase 2 consultation process.

We have attached here a 'checklist' of questions we encourage you to utilize in your analysis of the revised ESF and to pose to Bank Management prior to or during the CODE meetings in order to assess whether the present draft represents dilutions of existing safeguards, in violation of President Kim's commitment. **If the draft contains policy dilutions, we urge CODE to send it back to Management for redrafting prior to release for public comment.**

We thank you for your time and consideration, and do look forward to hearing from you on the responses you receive from Management.

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ANNEX I - Questions

Overall:

1. Do the environmental and social protections of this draft represent a dilution of existing Bank safeguards?
2. Does the draft still contain highly flexible language linked to substantial policy dilutions and open ended compliance? Is the term “financially feasible” used throughout the document? Is it still defined as per Draft 1 to signify “if the Borrower believes they can afford it”? Do phrases like “in a manner deemed appropriate by the Bank” replace current mandatory procedures or timing requirements?
3. Is the “avoid” portion of the mitigation hierarchy given full weight in each ESS, compared to the “mitigate, reduce or compensate” portions?
4. Are projects and subprojects classified as “high risk” if they are complex, or likely to include substantial environmental and social harm? **Are all projects and subprojects, regardless of risk classification, required to comply with all of the requirements of the ESSs?**
5. Has a detailed budget and a detailed implementation plan for the new safeguards been provided with this draft?
6. What are the repercussions for Borrowers if they fail to comply with the ESSs?
7. Do the ESSs require compliance with international law, including relevant human rights instruments?

Environmental and Social Policy (ESP)

1. Is there an explicit requirement for the Bank to carry out due diligence to ensure that the activities it supports do not lead to, contribute to, or exacerbate human rights violations?
2. Does the draft require the Bank to carry out independent consultation activities where concerns for reprisal or coercion exist, when the environment is not conducive to participation by civil society and all potentially impacted community members, including those from marginalized groups?
3. Does the World Bank’s due diligence process spell out what it will be based on (*i.e.* does it go beyond depending largely, if not exclusively on Borrower information?)
4. Will certain types of projects be categorized by default as high risk (e.g. large-scale infrastructure development, extractive industries, complex projects)?
5. Will the use of borrower frameworks be excluded from consideration by the Bank in regard to high-risk or otherwise complex projects? If not, how will an assessment of borrower capacity be different for high-risk and substantial-risk projects versus lower-risk projects?
6. What are the Bank’s minimum due diligence requirements for each project prior to appraisal and Board approval?

ESS1

Objectives:

1. The first draft merely specified that the objective was to “adopt a mitigation hierarchy”, not to “avoid impacts”; it appears that this objective can be fulfilled simply by having a “mitigation hierarchy” to plan to avoid impacts, a far lower standard than “avoid impacts”; Has this weak language been removed and replaced with a requirement to, first, avoid harm, and does this apply to all of the ESSs?
2. The first draft objectives required compensation for harm “as appropriate”; does this or other vague language still remain in the section on residual impacts?
3. Is the Bank responsible for determining equivalency between Bank safeguards and borrower systems according to the existing robust CSS equivalency safeguard requirements or is the determination based on self-reporting/self-assessment by the Borrower?
4. Do the objectives specify when and how the use of borrower frameworks will be determined satisfactory by the Bank?

Borrower Systems:

1. The first draft had as an Objective the default use of “national... systems, laws, procedures in assessment, development and implementation” while also eliminating mandatory CSS equivalency assessment requirements, a massive dilution of protections. Does the new draft make the same dilutions?

2. Have any of the mandatory rules for determining CSS equivalency of Borrower safeguards with Bank safeguards been deleted? If Borrower frameworks do not provide safeguards and a track record of implementation equivalent to Bank safeguards, will the use of such frameworks be excluded?
3. Is there an easily accessible, mandatory, and transparent mechanism for civil society input into the assessment of Borrower systems? Does the Bank require assessment of the Borrower's track record, including by civil society as central to the determination of equivalency and the viability of using Borrower systems?
4. If when using the Borrower's system, it falls out of compliance with Bank safeguards during a Bank project, does the Bank require cessation of the Borrower System approach?

Consultation

1. Does the 2nd draft reinstate the Bank's current prior-to-appraisal requirement for consultation, normally resulting in approximately 120 days of public comment on projects with significant impacts prior to Board vote?
2. Does the draft require the Bank to carry out independent consultation activities where there are concerns where the environment is conducive to civil society and all potentially impacted community members, including those from marginalized groups, freely participating without risk of reprisal?

Compliance

1. Has the 2nd draft reinstated the existing mandatory compliance milestones (including timing of consultation prior to appraisal etc.) or has it continued to introduce the substantial dilution of open-ended compliance?
2. Does ESS1 require compliance with ESSs, or merely "consistency", a dilution of existing safeguards?
3. If a Borrower fails to comply with the safeguards, does the 2nd draft provide a detailed, time-bound and mandatory procedure, or remedies, to be taken by the Bank, which include project cancellation, withdrawal/retrieval of funds, reparations for harm, etc.? Or does the lack of detail imply few drawbacks to violating the ESCP?
4. Must all of the ESS requirements be included in legally binding contracts, or only some of the ESS requirements?
5. Does this draft propose allowing the Bank to replace its safeguards with those of other MDBs, co-financiers or financial intermediaries? How does the Bank determine equivalence with other safeguard systems? Is it required to examine the mandatory implementation measures or simply compare (vague) general objectives? Does it require "upward harmonization" with the strongest co-financer safeguards?

Environmental and Social Assessment

1. Are there mandatory rules for what constitutes an environmental or social assessment?
2. Can Borrowers avoid complying with mandatory levels of pollution control in Bank-financed projects?

Vulnerable/Disadvantaged

1. Does ESS1 require the social assessment to differentiate between groups it considers disadvantaged and vulnerable when examining potential negative impacts of projects?
2. Has the concept of "universal access" been applied to standards beyond Community Health and Safety so that all new construction will be accessible for all people?
3. Does the term "inclusion" incorporate persons with disabilities?
4. Does the new draft include the assessment of sexual orientation, gender identity and/or expression issues consistently throughout the policy? Including the commitment to specific and measurable gender and SOGIE baseline indicators for each project?
5. Does the new draft prohibit discrimination on the basis of all grounds outlined at international law, including discrimination on the basis of political opinion and language, and require inclusion of all who are marginalized?

ESS2

1. Are workers' rights to freedom of association and collective bargaining protected in the revised ESF, regardless of national law?
2. Is mandatory implementation of the ILO core labor standards included in the body of the policy, or in one of its footnotes?
3. Does ESS 2 set a minimum age for child labor that is in line with ILO Convention 138?

ESS3

1. Is there a mandatory threshold for Greenhouse Gas emissions accounting as there was in the first draft?
2. Has the new draft included the assessment of community and ecosystems resilience when it comes to climate change impacts?
3. Is there a clear requirement for compliance with the highest industry standards, and prohibition to use any funding for the release and use of materials that are hazardous to human and environmental health?

ESS4

1. Does the new draft still propose allowing the “preventative” use of force in Bank-supported projects?
2. The first draft cited the United Nation’s (UN) Code of Conduct for Law Enforcement Officials, and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Does the 2nd draft continue to cite these important international standards?
3. Does the new draft clearly outline the responsibilities of public sector borrowers when using their security forces, as well as, the contracting of private security? Including the need for public disclosure and consultation of proposed and existing security arrangements? Does it require use of the steps listed in the Voluntary Principles on Security and Human Rights?¹
4. Does the 2nd draft require borrowers to prevent, investigate, report to legal authorities, prosecute and remedy attacks by public and private security forces on affected communities, including the establishment of protections for victims and witnesses to ensure confidentiality and appropriate treatment?

ESS5

1. Is the Borrower, with the Bank’s assistance, required to prepare resettlement plans and budgets prior to project approval and make them available in a manner accessible to affected persons, allowing them the opportunity to provide comments to the Board, as required under the current policy?
2. Are the Bank and the Borrower required to explore, early on during project preparation and in consultation with potentially affected people, all viable alternative project designs to avoid or minimize displacement, as required under the current policy?
3. Does the scope of ESS5 include all physical and economic displacement that is caused, in whole or in part, by all project-related activities, including land titling, land use regulation and natural resource management as well as activities that reduce access to productive resources?
4. Is the Borrower required to offer people who will be resettled a choice of economically viable resettlement site options and to ensure that livelihood programs are tailored to the economic activity in the area and the skill-base of those who are resettled?
5. Does ESS 5 require the Borrower to address the unique needs of disadvantaged or vulnerable groups including minorities, persons with disabilities, women-headed households, children and the elderly affected by resettlement, to ensure the maximum accessibility and inclusion for all affected people within the project area of influence? For example, does ESS 5 require the Borrower to address the unique needs of children in the resettlement plan, including by ensuring continued access to education, health care, safe spaces to play and adequate standard of living?
6. Is an independent panel of resettlement experts (POE) required for all high risk projects that cause large-scale displacement and require complex and long-term mitigation measures?
7. Does ESS5 explicitly commit to alignment with the Voluntary Guidelines on land tenure?

¹ For example, the Voluntary Principles require assessment and identification of security risks; the risk of the potential for violence; the human rights records of public and private security forces; Risk assessments should consider the available human rights records of public security forces.; an assessment of the rule of law (including a risk assessment of the local prosecuting authority and judiciary’s capacity to hold accountable those responsible for human rights abuses in a manner that respects the rights of the accused); conflict analysis and an assessment of the risk of equipment transfers – i.e. if a Bank-supported company provides equipment to public or private security forces. The fact that the principles are voluntary is a weakness and there have been substantial weaknesses in their implementation, detailed by EarthRights and others. However, the language in these principles is far stronger than that found in the Bank’s first draft, which appears to leave the door wide open for violent abuses by security forces associated with Bank-funded projects.

ESS6

1. Have the dilutions of protections for biodiversity, forests and forest peoples in the 1st draft been eliminated? For example, does the ESF adopt a definition of critical habitat that covers a broad range of ecological and social values, including areas traditionally important to indigenous peoples and local communities?²
2. Do the scope and objectives of the revised ESS6 specifically address all projects which impact local and indigenous communities, and the natural resources upon which they depend? The 1st draft had no requirement for the active participation of affected communities and Indigenous Peoples, and “consideration” of their use of natural resources only occurs “where applicable.” Has this been corrected in the new draft?
3. Does the 2nd draft maintain the dilutions in the first draft and allow for the conversion and degradation of critical habitats, protected areas, and national parks, including through the use of offsets, or have these new loopholes been eliminated?
4. Does the new draft achieve upward harmonization with the ADB’s definition of critical habitat, which includes: “areas having biodiversity of significant social, economic, or cultural importance to local communities”? Did the WB’s comparative assessment of ADB, IFC, AfDB, etc. safeguards include the ADB’s critical habitat definition?
5. Does the ESF include stringent provisions specifically to protect forests, incorporating content from the Bank’s existing OP 4.36, e.g. sustainable forest management criteria, and independent verification of sustainable forest management practices?
6. Do ESS6 provisions on supply chains have a mandatory requirement for (independently) verifying the traceability and sustainable sourcing of all primary materials?

ESS7

1. Has the 2nd draft removed reference to the ‘alternative approach’ proposed in the first draft?
2. Have ESS7 and ESS1 been amended to ensure that the ESF could not allow an ‘opt out’ of ESS7 or other ESSs through a reliance on borrower systems or the use of waivers?
3. Is there a reference to the UN Declaration on the Rights of Indigenous Peoples and international human rights standards regarding the proper implementation of the principle of free, prior and informed consent (FPIC)?
4. Does the requirement for FPIC include a requirement for a time-bound, budgeted and monitored agreement with the affected indigenous peoples against which complaints can be raised with project and institutional-level grievance mechanisms for non-compliance?
5. Can we expect to see timing and substantive requirements for an Indigenous Peoples Plan?

ESS8

1. Are Borrowers clearly prohibited from carrying out projects that are “located in, or in the vicinity of, a recognized cultural heritage site” or a protected area?

ESS9

1. Has the new draft removed the dilutions pertaining to Financial Intermediaries that were introduced in the first draft? Are any FI subprojects exempt from Bank ESSs? Does ESS10 apply to all subprojects?³
2. Are Financial Intermediaries required to “screen, appraise and monitor all subprojects in accordance with the environmental and social risk profile of the individual subprojects” as per the first draft? Or, as we have been hearing from staff and ED offices, has this requirement been diluted in the 2nd draft?

² i.e. Forest Policy OP 4.36 applies to projects that affect the rights and welfare of people and their level of dependence upon or interaction with forests. The first draft eliminated this language. OP 4.04 expects the borrower to take into account the views of local communities and NGOs affected by Bank-financed projects involving natural habitats and for involving such people in the planning, designing, implementing, monitoring and evaluating of such projects. OP 4.36 calls for the recognition of and respect for any legally documented or customary land tenure and use rights as well as the rights of indigenous peoples and workers (10b). The 1st draft ESS 6 diluted these requirements and merely stated: “Where applicable, the assessment will consider the use of and dependence on natural resources by Indigenous Peoples and affected communities who live in or around the project areas and whose use of biodiversity resources may be affected by the project, as well as their potential role in the conservation and sustainable use of such biodiversity resources (#13).

³ The Bank’s current Natural Habitat policy “applies to subprojects under sectoral loans or loans to financial intermediaries.” Current safeguards require all subprojects to carry out appropriate EA, following OP 4.01 and the FI is required to verify that subprojects meet OP 4.01 requirements as well as those of other applicable environmental policies. The first draft eliminated these requirements and only required “high risk” subprojects and not those of “substantial risk” or less, to comply with ESSs, a remarkable dilution. Have these dilutions been removed in their entirety – i.e. do ESSs still apply to all subprojects?

3. Are environmental assessments for all FI projects made public?
4. Are detailed steps and remedies provided in case of non-compliance at the sub-project or project level for FIs?

ESS10

1. Are there minimum requirements for what and when project information should be disclosed to affected communities?
2. Is the Borrower required to provide all information, equally, to all stakeholders? Are there different types of stakeholders with different types of access or privileges?
3. Does ESS10 clearly describe how the Inspection Panel will be applied to projects and subprojects using “borrower systems”? And are borrowers required, as part of stakeholder engagement, to disclose the existence of the Inspection Panel and its procedures?
4. Where stakeholder engagement is conducted under “borrower systems”, are the existing robust CSS safeguards for ensuring equivalency of systems mandatory?
5. Is there sufficient due diligence and transparency to ensure independent, inclusive and accurate identification of stakeholders and adequate consultations in Bank projects, especially in high and substantial risk projects? In high risk situations, is the Borrower required to work with independent intermediaries to consult with stakeholders and ensure confidentiality of participants?
6. Are there minimum requirements for the design of a grievance mechanism that ensures accessibility, transparency, independence, and provides access to remedy? Do the requirements for grievance mechanisms provide meaningful opportunities for affected communities to inform the design of a project-level grievance mechanism as part of a robust participatory consultative process?
7. Does the Bank plan to produce further guidance notes on how to consult with women and vulnerable groups such as children, persons with disabilities, or sexual minorities to operationalize the commitments in ESS10?
8. Does the new draft prohibit the Borrower from punishing, retaliating, or otherwise acting against a stakeholder who has used peaceful and legitimate means to make his or her views heard, however critical they may be, and require the Borrower to take all necessary measures to prevent others from similarly acting against a stakeholder?

3rd Phase Consultations

1. Will there be face-to-face general stakeholder consultations on the content of the 2nd draft of the ESF, including the proposed budget, procedures and guidance notes?
2. Will these meetings be held in all World Bank operating regions?
3. Will verbatim transcripts be provided for each consultation?
4. Will translations of all materials, including budget, procedures and guidance notes be provided at least 60 days in advance?
5. Will there be expert group meetings on issues of specific interests, such as indigenous peoples, climate change, land and resettlement, labor, disadvantaged and vulnerable groups, gender, biodiversity, etc.?
6. Have ways been identified to elicit feedback from the most isolated and affected communities, disadvantaged or vulnerable groups including minorities, persons with disabilities, women, children and the elderly, and those who fear reprisal from their governments for participating (like SOGIE)?

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