



Human Rights Watch Submission
The World Bank's Second Draft Environmental and Social Framework
October 2015

Thank you for the opportunity to comment on the second draft of the World Bank's Environmental and Social Framework.

Human Rights Watch welcomes a number of improvements over the initial draft of the framework, including regarding labor standards and protections for indigenous people. For example, the new draft broadens the scope of Environmental and Social Standard (ESS) 2 to include contracted and other workers, correcting a serious gap.

Another positive step is the removal of the "alternative approach" provision, which under EES 1 would have allowed borrowers to opt out of applying requirements related to indigenous peoples under certain circumstances. We appreciate that the standards in ESS 10 on stakeholder engagement and information have been strengthened in some respects, including the incorporation of non-discrimination provisions, to better ensure effective and inclusive consultation with affected communities and project stakeholders.

Nevertheless, we remain concerned that the second draft does not remedy a number of overarching problems that Human Rights Watch and others identified during the previous consultation period and does not position the bank to respond appropriately to the complex human rights challenges that arise with many of its projects. We will not restate all of the concerns we described in detail in our previous [submission](#). Rather, we focus on issues we believe are of the highest priority and are particularly critical to ensuring that the proposed framework can effectively identify and address potential harmful social and environmental impacts of bank projects.

Human Rights Watch recognizes that this safeguard review requires the bank to strike a difficult balance between effectively addressing environmental and social risks of bank projects and minimizing unnecessary burdens or costs for borrower governments. We share concerns raised by a number of governments that the framework requires a lot from borrowers without providing the necessary resources to support implementation and to increase a borrower's capacity to meet its obligations under bank requirements. We strongly believe the correct response is for the bank to

clarify and strengthen its own responsibilities for carrying out and supervising the safeguards, rather than to dilute them. The bank has a responsibility separate from that of governments to ensure that communities and individuals, particularly the poor and marginalized, are not harmed by bank projects and have access to project benefits.

1. Require Respect for Human Rights

The World Bank should:

- **Recommendation 1:** Include in the Environmental and Social Policy a requirement for bank-funded projects to respect human rights and for staff to assess and address the human rights risks of all bank-financed activities to ensure that it does not fund rights violations, directly or indirectly. At a minimum, the policy should require the bank to respect a borrower's international treaty obligations and require staff to assess and address impacts that run contrary to these obligations.
- **Recommendation 2:** Amend the vision language to remove all suggestion that respect for human rights is merely aspirational. A return to the language in the first draft would be preferable, though still inadequate.
- **Recommendation 3:** Amend the vision language to remove the suggestion that consideration of human rights may violate the bank's Articles of Agreement.
- **Recommendation 4:** Prohibit discrimination based on political or other opinion, in line with international law. Not only would prohibiting discrimination on the basis of political opinion not run afoul of the bank's mandate, it is essential for the World Bank to live up to its status as an apolitical institution. Otherwise, it remains possible that governments will be able to use bank funds to discriminate against people who did not vote for or are perceived not to support the ruling party or a local government official.
- **Recommendation 5:** Require both the bank and the borrower to identify any existing restrictions in the country where the project is being carried out on freedom of expression, assembly, and association that would create a risk to meaningful consultation, effective grievance mechanisms, and the use of the borrowing country's systems.
- **Recommendation 6:** Amend ESS 1 to require the environmental and social assessment to take into account applicable international treaties and agreements.

The World Bank has a responsibility to ensure that it does not violate human rights through the projects it funds. Yet, the second draft of the framework, like the initial draft, does not require

borrowers to respect human rights in carrying out bank-funded projects. The primary reference to human rights remains in the non-binding vision statement, and as amended is even more problematic than the first draft.

The bank has [touted](#) the added reference to the Universal Declaration of Human Rights (UDHR) in the vision statement as an improvement from the first draft. To the contrary, the explicit reference to the UDHR as setting out only “aspirations” runs contrary to the declaration’s standing as one of three documents constituting the Bill of Rights, and misrepresents the status of the substantive rights contained in the UDHR under international law.

Further, by limiting the bank to promoting such “aspirations ... in a manner consistent with its Articles of Agreement,” the vision statement reinforces the bank’s dangerous position that basic respect of human rights is outside its mandate. This qualification appears to suggest that respect for human rights could be inconsistent with the bank’s Articles of Agreement, lending support to the entrenched yet misguided notion that the bank’s economic and non-political mandate precludes it from addressing human rights.

The bank’s general counsel, Roberto Dañino, clearly rejected such a notion in 2006 in a legal opinion concluding, according to the World Bank’s [website](#), that “human rights may constitute legitimate considerations for the Bank where they have economic ramifications or impacts.” Elsewhere Dañino [wrote](#) that in his view, “human rights are at the very core of the World Bank’s mandate.”

In a similar vein, the bank has defended its decision not to require respect for human rights in carrying out its projects in its consultation paper and elsewhere by claiming that it is not a “competent authority” to enforce governments’ human rights obligations. This position distorts what is being asked of the bank. The expectation is not for the bank to monitor a government’s general compliance with human rights, but to undertake due diligence to make certain that bank finances are not being utilized for activities that violate human rights. To achieve this, at a minimum, the Environmental and Social Policy should require bank staff to identify any potentially adverse human rights impact of proposed investments and work with borrowers to address them.

Over the past decades, numerous development scholars and practitioners, including in the World Bank’s research department, have shown that respect for human rights is critical for achieving inclusive development. Recognizing this link, other multilateral development banks and international agencies have incorporated human rights commitments and standards into their safeguard policies.

The World Bank has [claimed](#) that the draft safeguards “[go] as far or further than any other multilateral development bank in protecting the vulnerable and the marginalized.” But, with the

proposed framework, it appears headed in the opposite direction. In contrast to the bank's existing operational policies, the framework does not require projects to comply with any international agreements. ESS 1 requires the environmental and social assessment to "take into account in an appropriate manner ... obligations of the country directly applicable to the project under relevant international treaties and agreement."

But this is a lower standard than existing safeguard policies, which say that the bank "does not fund project activities that would contravene" country obligations including under relevant international environmental treaties and agreements. The bank should not backtrack on this commitment and instead strengthen it to ensure that the bank does not fund activities that would contravene international law and treaties.

ESS 1 also sets a stricter standard for national laws than it does for international law. It requires the environmental and social assessment to take into account national laws if applicable, while only requiring international law be taken into account if *directly* applicable. The bank should delete the word "directly" to maintain consistency between the provisions on international and national law.

The bank's resistance to human rights has two major practical consequences that undermine the framework's ability to achieve its goals. First, it makes it possible for the bank's policies to fall short of human rights standards. For example, the safeguards identify discrimination as a social risk or impact, but they do not include a list of prohibited grounds. Rather, they emphasize the risk of discrimination against "disadvantaged or vulnerable groups," a category that has no meaning under international law. In addition, the draft policies define this category without reference to political or other opinion or language, even though those are prohibited grounds for discrimination in the two core human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

The list is not all-inclusive and discrimination on these grounds is arguably nevertheless prohibited under the general discrimination provision. But it is a matter of concern that the bank appears to be deliberately avoiding explicit reference to the internationally accepted grounds for which discrimination is prohibited. The lack of a clear prohibition on discrimination on the basis of political opinion would make it more difficult, for example, to challenge denials of benefits of bank-funded projects due to political opinion, a problem that Human Rights Watch has documented.

Second, the bank's position on human rights contributes to the framework's overly narrow approach to risks related to bank projects that does not sufficiently take into account the broader operating environment, such as restrictions on freedom of expression, assembly, and association. The draft

safeguards do not address reprisals against project critics and restrictions on civil society organizations, both of which undermine the effective implementation of safeguards requirements, including for meaningful consultation and access to accountability mechanisms.

In a positive step, the provisions guiding the bank's classification of a project's risk level and the borrower's environmental and social assessment have been amended to broaden the factors that may be taken under consideration. The risk classification provisions now states that "other areas of risk" may be relevant beyond the immediate project, including governance structures and legislation and considerations of stability, conflict, or security. The environmental and social assessment now similarly includes a section on "social and conflict analysis."

These additions, however, do not explicitly include human rights, or obstacles to participation related to freedom of expression, assembly, and association that may pose risks to meaningful engagement or to providing effective grievance mechanisms. Moreover, identifying these risks does not translate into specific measures to identify, prevent, and remedy them.

The bank's continued resistance to incorporating human rights into its safeguards and other policies is of special concern in light of the framework's emphasis on borrower systems, which, as further discussed below, places the bulk of the responsibility for meeting these requirements on borrower governments. If the bank is to transfer such responsibility to governments, it is all the more critical for it to reverse its position on human rights.

2. Ensure Meaningful, Effective Consultation

The World Bank should:

- **Recommendation 7:** Specify that in situations in which there is a high risk of reprisals against people or communities critical of a bank-funded project, the bank will require the involvement of independent specialists who report directly to the bank. The framework should explicitly require the bank to use independent consultants in any situation in which there are concerns about whether the environment is conducive to free participation without risk of reprisal of civil society and community members potentially affected by the project, including those from marginalized groups.
- **Recommendation 8:** Include a provision explicitly prohibiting borrowers from punishing, retaliating, or otherwise acting against a stakeholder who has made their views heard, however critical they may be, and obligating borrowers to take all necessary measures to prevent others from similarly acting against a stakeholder.

- **Recommendation 9:** Require borrowers to investigate any credible allegation of intimidation, harassment, or retaliation linked to criticism of a World Bank-funded project, and to provide a remedy for any abuse identified, including criminal sanctions if appropriate.

Human Rights Watch welcomes a number of improvements to Environmental and Social Standard 10 on stakeholder engagement and information disclosure. The language has been clarified and strengthened to stress the importance of effective and inclusive consultation. The second draft would require borrowers to engage with all project stakeholders, including all of those who may have an interest in the project in addition to communities affected by the project, not only “where appropriate.”

Borrowers are also required to maintain a documented record of stakeholder engagement that includes a summary of the feedback received, a brief explanation of how it was taken into account, or the reasons why it was not. They would also be required to document and disclose consultation with stakeholders, although it is not clear if this is the same “documented record” of stakeholder engagement – a point that should be clarified.

In our previous submission, Human Rights Watch highlighted two areas in which the framework fell short of ensuring meaningful, effective consultation. The first was the need for attention to overcoming legacies of discrimination that would prevent some individuals or groups from enjoying the full benefits of requirements for disclosing information, meaningful consultation, and stakeholder engagement. The second was to address environments in which freedom of expression, assembly, and association are not respected or in which project critics face significant risks of reprisals.

In a positive change, the second draft requires borrowers to carry out meaningful consultation free from discrimination and encourages stakeholder feedback. However, it does not include specific measures to ensure that this will be achieved in practice.

In one respect, in fact, it may even be a step backward. The previous draft provided that the bank would have a right to carry out independent consultation activities in high risk or complex projects with potentially significant environmental or social risks. This has been changed to: “Depending on the potential significance of environmental and social risks and impacts, the Borrower may be required to retain third-party specialists to assist in the stakeholder identification and analysis to support a comprehensive analysis and the design of an inclusive engagement process.” The new language makes it even less clear when the bank will require third-party specialists to assist with the consultations. This is in contrast to the requirements for the environmental and social assessment,

which must be carried out by independent specialists for all high and substantial risk projects, as well as when the borrower has limited capacity.

3. Require Prevention, Investigation, and Remedy for Security Incidents

The World Bank should:

- **Recommendation 10:** Clarify that the provisions apply to all borrower security arrangements.
- **Recommendation 11:** Restore the deleted references to United Nation’s Code of Conduct for Law Enforcement Officials, and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- **Recommendation 12:** Restore the deleted requirement to provide a grievance mechanism for acts of security personnel.

In our previous submission, Human Rights Watch noted that it appears the provisions for security personnel were taken from standards drafted for the private sector. Human Rights Watch recommended changing the first sentence, which applies the provisions in cases in which borrowers “retain direct or contracted workers to provide security,” since governments typically use their existing security forces.

The second draft not only retains this inappropriate language, but the provision prohibiting borrowers from sanctioning the use of force except for preventative or defensive purposes was amended to apply only to “direct or contracted workers.” It also removes the requirement to provide a grievance mechanism for acts by security personnel and a footnote requiring borrowers’ security arrangements be guided by the United Nation’s Code of Conduct for Law Enforcement Officials, and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

4. Require Adequate Bank Due Diligence

The World Bank should:

- **Recommendation 13:** Publish the mandatory procedures for implementing the framework and the supporting budget prior to approving the Environmental and Social Framework.
- **Recommendation 14:** Amend the standard on borrower frameworks and the common approach so they may only be used when the borrower or institutional framework is materially consistent with the ESS requirements.

- **Recommendation 15:** Where borrower systems are utilized, ensure sufficient resources and adequate implementation for support and capacity building.
- **Recommendation 16:** Amend due diligence requirements in the Environmental and Social Policy to require research and investigation rather than solely relying on material provided by the borrower. In addition to research conducted by bank staff and/or independent specialists, the bank should allow civil society organizations to submit relevant information.
- **Recommendation 17:** Clarify that it remains the bank’s responsibility to ensure that the borrower complies with the requirements of the safeguards, even in cases in which the borrower’s framework or another institution’s policies are applied.
- **Recommendation 18:** Require borrowers to include a resettlement plan and budget prior to board approval of a project.
- **Recommendation 19:** Remove the provision allowing the borrower to determine which labor standards in ESS 2 are relevant to the project.

Human Rights Watch shares the concerns raised by other organizations, a number of governments and the Inspection Panel that the draft framework does not include sufficient bank due diligence in light of the borrowers’ enhanced responsibilities under the proposed safeguards.

A major feature of the framework is to allow borrowers to use their existing frameworks – e.g. national laws and institutions – in place of all or part of the bank’s safeguard policies. It also allows for a “common approach” that would allow borrowers to apply other institutions’ safeguards systems in projects jointly funded by other multilateral or bilateral funding agencies as well those involving financial intermediaries.

The bank’s intention to build borrowers’ capacity by giving them greater ownership over carrying out safeguards and to simplify carrying out jointly financed projects is understandable and a positive approach. But the bank’s borrowers have varied levels of institutional capacity. The success of using borrower systems and the common approach depend on two points: (1) a clear standard and careful assessment to determine whether the relevant national or institutional system (both the legal framework and enforcement) is at least as protective as the bank’s standards; and (2) a commitment by the bank of sufficient resources and adequate due diligence to actively support and independently monitor implementation.

The draft framework, however, lacks clear and robust due diligence procedures for the bank, creating undue risk for communities affected by bank projects and possibly leaving them worse off than under the existing policies. It also unfairly leaves borrowers, many of whom face significant development challenges, to carry the weight of implementing a complex set of requirements.

The standard for assessing national and institutional systems is whether it will “enable the project to achieve objectives materially consistent with the ESSs.” Basing the assessment on the objectives rather than substantive standards suggests that the lower standards may be used so long as the bank is satisfied that its objectives will be achieved. The bank instead should apply a standard that assesses whether the national or institutional requirements are materially consistent with the bank’s requirements.

The proposed framework also lacks adequate due diligence measures to assess, support, and monitor borrower implementation of ESS requirements, particularly for projects that are not high risk. Under the Environmental and Social Policy, the bank’s required due diligence rests almost entirely on reviewing documents provided by the borrower, without requiring the bank to verify the information the borrower provides.

The Environmental and Social Procedures require some additional due diligence measures, but these should be strengthened and included in the policy. For example, the procedures require the bank to conduct site visits for high-risk projects, but the borrower facilitates such visits, potentially interfering with staff members’ ability to independently assess risks and monitor implementation. And the visits are not required for substantial, moderate, or low risk projects.

The draft also does not resolve how the use of borrower systems impacts the bank’s responsibilities, nor does it clearly provide that the bank ultimately retains responsibility to ensure compliance. The policy should include clear standards on how the bank will supervise a borrower’s compliance with its own national laws. For example, the bank should determine the relationship between the country-level grievance mechanism the borrower establishes – which could well be the borrower’s national courts – and the bank’s Inspection Panel.

Compounding this ambiguity, as the Inspection Panel has written, the framework consistently uses language obligating the bank to “require” the borrower comply with the safeguards – rather than “ensure” that it does, as in the existing policies. This change can imply that the bank is only responsible for requiring the borrower to formally apply the safeguards, but not to ensure compliance.

Two final examples of deficiencies in bank due diligence are in the framework’s standard on resettlement (ESS 5) and on labor (ESS 2). The framework does not require borrowers to submit a resettlement plan and budgets as part of the board’s appraisal and approval process. The lack of board oversight, combined with the overreliance on borrower systems for implementing and monitoring resettlement, creates a risk that such plans will be flawed or poorly implemented.

An internal World Bank [audit released](#) earlier this year found that poor bank oversight over projects involving resettlement has led to major problems and found that using country systems is “not feasible in this area.” In a similar vein, the labor standards leave the borrower to “identify the relevant requirements of ESS 2 and how they will be addressed in the project.” This provision gives borrowers undue discretion to determine which standards are applicable to projects.

In addition to correcting the above gaps and ambiguities, it is critical for the bank to commit sufficient resources to support borrowers in carrying out their environmental and social obligations. The bank’s decision not to publish the implementation plan and budget makes it difficult to comprehensively assess the extent to which the bank intends to support borrowers’ enhanced responsibilities. A lack of robust technical and financial support will limit the bank’s ability to ensure that communities affected by bank projects and the environment are adequately protected and will undermine the capacity-building objective of using borrower systems.

Some borrower governments have argued strongly in favor of borrower systems while maintaining that the new requirements are overly burdensome and should be scaled back. A number have even suggested that not doing so may threaten the bank’s competitiveness. Human Rights Watch strongly believes that the better approach to drawing the benefits from borrower systems while alleviating the burden on borrower governments is for the bank to actively and effectively support and monitor borrowers’ implementation. Indeed, investing in borrowers’ capacity and maintaining strong due diligence procedures would enhance the bank’s competitiveness, since it capitalizes on the bank’s most important assets: the knowledge it holds and quality projects it delivers.