

**Mandates of the Special Rapporteur on extreme poverty and human rights; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Working Group of experts on people of African descent; Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the situation of human rights in Cambodia; Independent Expert on the situation of human rights in the Central African Republic; Independent Expert on the promotion of a democratic and equitable international order; Working Group on the issue of discrimination against women in law and in practice; Independent Expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right to food; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on freedom of religion or belief; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the rights of indigenous peoples; Independent Expert on Human Rights and International solidarity; Working Group on the use of mercenaries; the Special Rapporteur on minority issues; Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the sale of children, child prostitution and child pornography; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Independent Expert on the situation of human rights in Somalia; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; Special Rapporteur on violence against women, its causes and consequences; and the Special Rapporteur on the human right to safe drinking water and sanitation**

12 December 2014

Dear Mr. Jim Yong Kim,

We have the honor to address you in our capacities as special procedures mandate-holders of the United Nations Human Rights Council. We are writing to you with regard to the World Bank's draft Environmental and Social Framework ("ESF"),<sup>1</sup> which was released for consultation on July 30, 2014. We would like to share with you a number of concerns relating to the approach to 'Safeguards' reflected in the current draft ESF.

At the outset, we wish to underscore the significance of the Bank's first adoption of such standards some thirty years ago. And we commend the Bank for its continued recognition of the central importance of a carefully calibrated framework of standards to ensure that its programs to promote sustainable development, poverty elimination, environmental protection and social standards do not have a negative impact on a diverse range of important values. Most of those values represent important components of international human rights law, to which the Bank's Member States have subscribed within the framework of the United Nations. It is because the Safeguards implicate human rights so directly that we have chosen to write to you as independent human rights experts appointed by United Nations Member States to provide our inputs to the Bank's consultation process.

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<sup>1</sup> We understand that the ESF applies to the International Bank for Reconstruction and Development and the International Development Association, jointly referred to hereafter as the "World Bank" or "Bank".

As the Bank seeks to revise and adapt its Safeguards approach to the challenges of the twenty-first century, we believe that it is imperative that the standards should be premised on a recognition of the central importance of respecting and promoting human rights. But there is no such provision in the current draft. Instead, by contemporary standards, the document seems to go out of its way to avoid any meaningful references to human rights and international human rights law, except for passing references in the Vision statement and Environmental and Social Standard (ESS) 7.<sup>2</sup> The Bank restricts itself to noting that its operations are, in ways that are not explained or elaborated, ‘supportive’ of human rights and that it will ‘encourage respect for them in a manner consistent with the Bank’s Articles of Agreement’.<sup>3</sup> As noted below, however, the convoluted and anachronistic interpretation of the Articles that has so far prevailed ensures that this is a largely empty undertaking.

While the Bank is clearly committed to ending extreme poverty and improving the quality of life of people in developing countries, the pursuit of these worthy goals does not automatically ensure that the resulting programs and projects will promote and respect human rights. We acknowledge that it is not the Bank’s role to act as an enforcer of human rights, but there are a great many other ways in which it can assist governments in meeting their own international obligations, provide support and advice on how programs and projects might be made more human rights compliant, and build knowledge and understanding of human rights into its own work. By opting not to take these steps, the Bank is setting itself apart from other international organizations and agencies which have long since recognized the importance of human rights in the context of carrying out their specialized mandates,<sup>4</sup> and have also rejected the notion that human rights are somehow problematically ‘political’ in ways that the many other accepted goals of development policy are not.

In many contexts, the international community has accepted that development and human rights are interdependent and mutually reinforcing. This has been recognized, for example, in the 1993 Vienna World Conference on Human Rights, the 2000 Millennium Summit and the 2005 and 2010 World Summits.<sup>5</sup> Reference might also be made to a document that is cited on the Bank’s own website which is the 2003 UN Common Understanding adopted by the United Nations Development Group.<sup>6</sup> The Common Understanding requires that human rights guide all development cooperation and that development cooperation “contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights”.<sup>7</sup> It is fair to say that the vast majority of development actors, from the European Investment Bank to the United

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<sup>2</sup> Paragraph 3 of the Bank’s Vision for Sustainable Development and paragraph 3 of ESS7.

<sup>3</sup> Paragraph 3 of the Bank’s Vision for Sustainable Development.

<sup>4</sup> To name a few: UNICEF has proclaimed that the agency is guided by the Convention on the Rights of the Child and strives to establish children’s rights as enduring ethical principles and international standards of behavior towards children. See [http://www.unicef.org/about/who/index\\_mission.html](http://www.unicef.org/about/who/index_mission.html); In 2011 the UN adopted a policy to ensure that its peacekeepers would not be complicit in human rights violations committed by national forces that they were assisting. See “Human rights due diligence policy on United Nations support to non-United Nations security forces”, UN doc. A/67/775-S/2013/110 (5 March 2013); In 2012 the International Labour Organization adopted the Social Protection Floors Recommendation (No. 202), which recognized social security as a human right and, in doing so, invoked both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>5</sup> The World Bank & OECD, *Integrating Human Rights Into Development* (2<sup>nd</sup> ed., 2013), p. xxix.

<sup>6</sup> UNDG, ‘The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies’ (2003).

<sup>7</sup> UNDG, ‘The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies’ (2003).

Nations Development Programme, have expressed a clear commitment to human rights in their policies, thus making the Bank an increasingly isolated outlier in this regard.<sup>8</sup>

The Bank's official reluctance to engage operationally with human rights also stands in marked contrast to the lessons that its formal statements suggest it has drawn from its own experience, including through the work of the Nordic Trust Fund ("NTF").<sup>9</sup> The Bank acknowledges on its website and in many of its non-operational policy analyses that a focus on human rights can improve development outcomes.<sup>10</sup> This is consistent with the seminal insight provided in the work of Amartya Sen, undertaken in his capacity as a Presidential Fellow at the Bank, who argued that freedoms are essential means for achieving development.<sup>11</sup> There are many examples of analyses and reports by the Bank that highlight the potential or actual importance of human rights in promoting the achievement of the Bank's proclaimed goals, such as those relating to gender equality and the role of women in society.

Rather than seeing human rights as a means by which to facilitate the participation and empowerment of the beneficiaries of development, the Bank's proposed new Safeguards seem to view human rights in largely negative terms, as considerations that, if taken seriously, will only drive up the cost of lending rather than contributing to ensuring a positive outcome. While a 2010 report by the Bank's Independent Evaluation Group ("IEG") concluded that the benefits of Safeguards outweigh their costs,<sup>12</sup> the approach in the draft Safeguards seems to be driven by the desire to privilege rapid approval of loans over all else, an orientation which has long been identified as a problem for the Bank.<sup>13</sup> A sense of being increasingly in competition with other lenders to secure the 'business' of developing country borrowers seems to be at the root of this approach.<sup>14</sup> The Bank has defended its increased reluctance to engage with human rights on the basis that alternative sources of development financing are emerging, which do not require meaningful Safeguards, thus providing the latter with a significant advantage over the Bank. In our view, the failure of other lenders to require that projects they fund should respect human rights standards is not a valid reason for the World Bank to follow suit. We believe that the problems that will flow from such a race

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<sup>8</sup> EIB Statement of Environmental and Social Principles and Standards (2009). UNDP Social and Environmental Standards (2014).

<sup>9</sup> NTF's Progress Report January-December 2013 summarizes its activities over 2013 as follows (p.8) : "At the program and activity level, about half on the 27 grants involved human rights methodology and principles in Bank-supported programs with the approval of the respective governments. One quarter of the grants focused on developing human rights-related analytical tools and practices designed to inform work in the client countries. The final quarter of grants formed part of a larger analytical or operational program supporting teams to explore the role of human rights in their respective tasks. The report is available here: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:22312165~pagePK:41367~piPK:51533~theSitePK:40941,00.html>

<sup>10</sup> "In addition, research exists linking economic outcomes to respect for human rights." <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20749693~pagePK:98400~piPK:98424~theSitePK:95474,00.html>

<sup>11</sup> Amartya Sen, *Development as Freedom* (1999).

<sup>12</sup> "Benefit-cost analysis of two stylized models of World Bank and IFC projects illustrates that, on their own, the benefits of safeguards outweigh the costs." IEG, 'Safeguards and Sustainability Policies in a Changing World', (2010), p. xviii-xix.

<sup>13</sup> For an early example, see *Report of Task Force on Portfolio Management* (the "Wapenhans Report") (1992). The IFC Compliance Advisor Ombudsman very recently observed "a primacy of financial considerations in IFC's decision making." CAO Investigation of IFC Environmental and Social Performance in relation to: Investments in Banco Financiera Commercial Hondureña S.A., C-I-R9-Y13-F190, August 6, 2014, p. 39. Also relevant is a recent article in The Guardian based on leaked emails which "show the bank's managers are keen to increase its overall lending and feel that the present standards are too onerous and deter prospective borrowers." The Guardian, 'World Bank email leaks reveal internal row over 'light touch' \$50bn loans', July 5, 2014, available at: <http://www.theguardian.com/business/2014/jul/06/activists-alarm-world-bank-leak-easier-loans>

<sup>14</sup> "The emails show the bank's managers are keen to increase its overall lending and feel that the present standards are too onerous and deter prospective borrowers." The Guardian, 'World Bank email leaks reveal internal row over 'light touch' \$50bn loans', July 5, 2014, available at: <http://www.theguardian.com/business/2014/jul/06/activists-alarm-world-bank-leak-easier-loans>

to the bottom are already becoming apparent, and it will be for us, in different contexts, to make this clear to the relevant lenders.

Human rights are not merely a matter of sound policy, but of legal obligation. As an international organization with international legal personality, and as a UN specialized agency, the Bank is bound by obligations stemming not only from its Articles of Agreement, but also from human rights obligations arising under ‘general rules of international law’<sup>15</sup> and the UN Charter. Moreover, each of the 188 Member States of the World Bank has ratified at least one (and, in almost all cases, several) of the core international human rights treaties.<sup>16</sup> Those States are also bound by human rights obligations stemming from other sources of international law. It is widely recognized that Member States should take their international human rights obligations into account when acting through an international organization such as the World Bank.<sup>17</sup> States that borrow from the Bank also continue to be bound by their own international human rights obligations in the context of Bank-financed development projects and the Bank has a due diligence responsibility not to facilitate the violations of their human rights obligations, or to otherwise become complicit in such violations.

In the past, the Bank has often pointed to its ‘non-political mandate’ to argue that it is prohibited from, or at least restricted in, its ability to deal with human rights more directly. But the Bank’s Articles of Agreement should be interpreted in the context of today’s international legal order, rather than that of the mid-1940s.<sup>18</sup> The Bank and its Member States are bound by both the Articles of Agreement, and by international human rights law. The provisions of the Articles can clearly be interpreted in a way that underlines their consistency with international human rights law. Since all States have long ago accepted human rights as

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<sup>15</sup> ICJ, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, ICJ Reports (1980) 73, at 89-90.

<sup>16</sup> The nine core human rights treaties have the following number of parties: ICERD (177), ICCPR (168), ICESCR (162), CEDAW (188), CAT (155), CRC (194), ICMW (47), CPED (43) and CRPD (84).

<sup>17</sup> “The fact that a State does not per se incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization.” Draft Articles on the Responsibility of International Organizations (2011), Commentary Article 58, para. 4. “Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.” UN Guiding Principles on Business and Human Rights, commentary to principle 10. Other sources which support this proposition include: Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012), principle 15 (“As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.”); Guiding Principles on Extreme Poverty and Human Rights (2012), para. 97 (“Even when a member of an international organization, a State remains responsible for its own conduct in relation to its human rights obligations within and outside its territory.”). See also: the report on the exercise of the rights to freedom of peaceful assembly and of association in the context of multilateral institutions of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, HRC/26/29, para. 16; Antonio Cassese, Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile (E/CN.4/Su/412).

<sup>18</sup> According to the ICJ “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation”. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 31; The World Bank has however often treated the Articles of Agreements as a self-contained regime that is isolated from its surrounding legal environment: “International organizations such as the Bank and other specialized agencies are established by the agreement of member states for the specific purposes set out in their constitutive instruments. As such, their powers and responsibilities must be assessed primarily against the provisions of their respective constitutive instruments, as in the case of the Bank, its Articles of Agreement.” Anne-Marie Leroy, Senior Vice President and Group General Counsel, Response to Joint Allegation Letter of the U.N. Special Rapporteur on the right to food and the Independent Expert on the effects of foreign debt and other related international financial obligations of States, October 9, 2012, p.4, available at: [https://spdb.ohchr.org/hrdb/22nd/OTH\\_09.10.12\\_\(7.2012\).pdf](https://spdb.ohchr.org/hrdb/22nd/OTH_09.10.12_(7.2012).pdf)

a “*legitimate concern of the international community*”<sup>19</sup> the suggestion that these remain little more than political considerations is not sustainable.

Our call for the Bank to include human rights within its overall program objectives does not amount to suggesting that the Bank should ‘sanction’ countries with a poor human rights record. Consistent with international law, with its own obligations and with those of its Member States, the Bank should acknowledge the relevance of human rights in its overall program objectives, as well as incorporate human rights due diligence into its risk management policies.<sup>20</sup> The Bank should also avoid funding projects that would contravene the international human rights obligations of its borrowers.

In the annex, we have highlighted our particular concerns with elements of the proposed ESF. Our aim is to indicate specific means by which a human rights dimension would strengthen the Bank’s new Framework and ensure its compliance with international law. As Bank President, you have repeatedly undertaken that this revision process will not result in a dilution of the human rights components of the Safeguards. We believe that honoring this promise requires a significantly different approach from that which is now being pursued and there are strong legal, policy and instrumental reasons why human rights should be given a central role in the work of the Bank. The current Safeguard Review process provides a critical opportunity for the Bank to fully integrate human rights in its policies and standards. We will be submitting this letter together with its annex to the World Bank’s public consultation process and plan to issue a press release in due course. We stand available to engage further with the Bank in this process and can be reached at [sxextremepoverty@ohchr.org](mailto:sxextremepoverty@ohchr.org) for any comments and views on our letter.

Yours sincerely,

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<sup>19</sup> Vienna Declaration and Programme of Action, UN DOC A/CONF 157/23 (25 June 1993), article 4. The Vienna Declaration was adopted by consensus by 171 States.

<sup>20</sup> The approach presented in the UN Guiding Principles on Business and Human Rights provide a highly pertinent reference point in that respect. See especially Guiding Principle 17-21.

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## ANNEX: Comments on the draft Environmental and Social Framework

### A. Role and Responsibilities of the Bank in the draft ESP

#### The Bank's due diligence responsibilities

The draft Environmental and Social Policy (“ESP”) requires the Bank to undertake its own due diligence assessment of proposed projects.<sup>21</sup> Such due diligence is necessary for it to be able to decide whether or not it should become involved in a project. As they stand, the scope and content of the Bank’s existing due diligence requirements are inadequate.

The draft states that the Bank “*only supports projects that [...] are expected to meet the requirements of the ESSs in a manner and within a timeframe acceptable to the Bank*”.<sup>22</sup> This provision enables the Bank to go ahead with a project even if, at the time of completion of the due diligence assessment, a project does not meet the requirements of the ESSs. The word ‘expected’ and the phrase ‘in a manner and within a timeframe acceptable to the Bank’ indicate that a project can be given the go-ahead even if it does not yet meet the ESSs, as long as there is an expectation that it will meet the ESSs at some point in time in ‘a manner’ acceptable to the Bank. This suggests that the Bank’s proposed ESSs are only aspirations, rather than requirements. Clearly, this move away from a requirements-based Safeguards system to an aspirational one represents a dilution of the existing Safeguards.<sup>23</sup>

The risks and impacts that the Bank has to take into account when deciding how to shape its due diligence are described in the ESP,<sup>24</sup> but they also leave much to be decided by the Bank on a case-by-case basis. For instance, the ESP mentions the risk that “*project impacts fall disproportionately on disadvantaged or vulnerable groups*”,<sup>25</sup> but leaves it to the Bank to decide what ‘disproportionately’ will mean and precisely who the ‘disadvantaged or vulnerable groups’ are in each individual project.

With respect to the Bank’s due diligence requirements, another concern is that the Bank seems to rely almost entirely on information provided by the borrower. The provisions in the ESP, taken together, define the Bank’s responsibility very narrowly as reviewing information provided by the borrower, requesting additional information from the borrower where necessary, and additionally relying on an assessment of the risks inherent to the type of project and the capacity and commitment of the borrower.<sup>26</sup> Experience at the International

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<sup>21</sup> Draft ESP, para. 3 (a).

<sup>22</sup> Draft ESP, para. 7. We note that IFC’s Policy on Environmental and Social Sustainability (effective January 1, 2012, para. 22) contains stricter language: “*IFC will only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time.*”

<sup>23</sup> “*In essence, given the rising social risks and environmental threats, Independent Evaluation advocates the continued use of a requirements-based safeguards system as used by ADB, rather than a switch to an aspirational one of safeguards standards as is being proposed at the World Bank Group.*” Independent Evaluation Asian Development Bank News Release, ‘ADB’s Social and Environmental Safeguards, with Improvements, can be a Benchmark’, 11 November 2014, available at: <http://www.adb.org/news/adb-social-and-environmental-safeguards-improvements-can-be-benchmark>

<sup>24</sup> Draft ESP, para. 4.

<sup>25</sup> Draft ESP, para. 4 (b).

<sup>26</sup> The ESP spells out that the Bank is responsible for “*reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the project and requesting additional and relevant information where there are gaps*”. The ESP also explains that the borrower is responsible for ensuring that “*all relevant information is provided to the Bank*”. The ESP further explains that the “*Bank will assess the risks and impact of the proposed project based on the information that is available to*

Finance Corporation (“IFC”) has shown that overreliance on information from the ‘client’ can lead to the financing of projects with significant environmental or social risks.<sup>27</sup> The Bank cannot evade its responsibility for what happens in a project by deliberately not pursuing other sources of information than those which might be provided by the borrower. The likelihood that the Bank will be responsible for aiding or assisting a borrower in violating its human rights obligations will increase if the Bank relies too heavily on information from that borrower. The Bank is, in that regard, not only responsible for what it knows, but also for what it should have known.

It should therefore be incumbent on the Bank to gather information from sources other than the borrower and this requirement should be clearly reflected in the ESP. It is of particular importance that the Bank also engages in consultations with all affected or potentially affected groups, human rights defenders, and civil society organizations as part of its due diligence assessment in order to ensure that their view on the project is taken into account and that the Bank has access to alternative information about the project. The draft ESP already gives the Bank the ‘right’ to carry out independent consultation activities for ‘high risk’ projects,<sup>28</sup> but rather than only being concerned with this small percentage of projects, the ESP should clearly acknowledge that the Bank has a ‘duty’ to carry out independent consultations with affected groups and civil society organizations as part of its due diligence with regard to all projects.<sup>29</sup> The UN Guiding Principles on Business and Human Rights<sup>30</sup> would be a useful guide for the Bank on how to ensure adequate participation and consultation with affected stakeholders at all stages of a project.

### **The Bank’s supervision and monitoring responsibilities**

As noted above, the draft ESP allows for ‘phased-in’ compliance with the ESSs, so that projects are expected to meet the safeguard standards at some unspecified point in the project cycle. This approach places a heavy burden on the Bank to monitor and supervise projects throughout the implementation phase. But the documented track record of the Bank suggests that monitoring and supervision are not areas in which it has excelled in the past. In 2009, the Inspection Panel concluded that factors such as high staff turnover, budget constraints, inadequate coordination, heavy workloads, lack of Safeguards expertise, and lack of a field presence played a role in the inadequate supervision of projects.<sup>31</sup> A 2010 report by the IEG on the Bank’s safeguard policies also pointed to problems with the monitoring and supervision of Bank projects.<sup>32</sup> IEG noted that more than a third of World Bank projects “*had inadequate environmental and social supervision, manifested mainly in unrealistic Safeguards ratings and poor or absent monitoring and evaluation.*”<sup>33</sup> No organization as complex as the Bank can be perfect, but the problems encountered counsel strongly against placing even more faith in the Bank’s ability to perform meaningful monitoring throughout the project cycle.

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*the Bank, together with an assessment of*’ the risks inherent to the type of project and the capacity and commitment of the borrower. Draft ESP, para. 29 and 30.

<sup>27</sup> CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras, CAO Ref: C-I-R9-Y12-F161, p. 6.

<sup>28</sup> Draft ESP, para. 44.

<sup>29</sup> To be able to classify the applicable risk category it is necessary to consult with the people that are affected by a project.

<sup>30</sup> The Guiding Principles are available here: <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIntroduction.aspx>

<sup>31</sup> Inspection Panel, ‘Accountability at the World Bank: The Inspection Panel at 15 Years’ (2009), p. 65-66.

<sup>32</sup> IEG, ‘Safeguards and Sustainability Policies in a Changing World’, (2010).

<sup>33</sup> IEG, ‘Safeguards and Sustainability Policies in a Changing World’, (2010), p. xvii.

We therefore call on the Bank to put much more emphasis in the ESP on ensuring that a project meets the Bank's safeguard standards from the outset. That does not mean, however, that the Bank should not also invest in improving its ability to track what is happening in projects and intervene effectively when necessary. At a minimum, the Bank should invest in hiring more Safeguards staff to assist in monitoring and supervising projects, and to make sure that safeguard concerns are fully integrated into the decision-making process and are not trumped by financial considerations. The Bank's incentive structure, which rewards staff on the basis of the amount loaned, rather than the overall effectiveness of the project, must be changed, so that the Safeguards work is given more professional recognition and is not merely seen as 'checking a box'. It is furthermore necessary to require that the borrower, in all projects, engages with all stakeholders and relevant third parties to complement or verify project monitoring information, not just 'where appropriate'.<sup>34</sup> These groups can act as an 'early warning mechanism' in projects that do not meet the required safeguard standards.

### **Delegation of Responsibilities by the Bank**

The draft ESF involves a significant delegation of responsibilities from the Bank to the borrower and other entities such as financial intermediaries and multilateral or bilateral funding agencies. Although we are aware of the importance of 'country ownership' as set out in the Paris Declaration and Accra Agenda, we believe a distinction should be made between greater domestic control over the shape and form of development policies and projects, and the responsibility of the Bank not to finance projects that enable, contribute to or exacerbate human rights violations. By financing development projects, the Bank has certain responsibilities of its own that cannot be delegated.

When relying upon the systems put in place by domestic borrowers, the Bank should ensure that they offer at least an equivalent level of protection to that of the ESSs<sup>35</sup> and that they comply with the borrower's international human rights obligations. The criteria for the use of the borrower's ESF, as set out in paragraphs 23-26 of the draft ESP and paragraphs 18-20 of ESS1, are inadequate to achieve these results. The draft lacks a clear standard explaining the circumstances in which the use of a borrower's ESF is acceptable to the Bank.

The only standard in the current draft ESP against which it might be possible to assess borrower systems is whether the borrower's ESF can "*enable the project to achieve objectives materially consistent with the ESSs*".<sup>36</sup> The standard lacks clarity<sup>37</sup> and clearly countenances the use of domestic frameworks that do not offer protection equivalent to the

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<sup>34</sup> Draft ESP, para. 48.

<sup>35</sup> This is a similar standards as used in OP 4.00, Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects.

<sup>36</sup> Draft ESP, para. 23 and 24.

<sup>37</sup> On October 7, 2014, the Bank released an Information Note on the Use and Strengthening of the Borrower's Environmental and Social Framework. Although we appreciate the Bank's effort to clarify its use of borrower systems, this Information Note does not affect our observations here in any significant way. First, the Information Note does not make it much clearer under which exact circumstances a borrower system will be acceptable to the Bank since the Bank only refers to highly abstract objectives of the ESSs. Second, the Bank remains committed to a standard which requires the Bank to assess whether the borrower system 'enables the project to achieve objectives materially consistent with the ESS', instead of demanding borrower systems that are 'equivalent to the ESSs'. Finally, we believe that any clarification of the existing standards should be included in the ESF, instead of in separate Information Notes or other documents, the status of which are unclear and which most likely cannot be used by the Inspection Panel when assessing whether the Bank is compliant with its own standards.

ESSs. The Bank thereby risks financing projects that offer fewer protections than required by its own ESSs and that may contribute to violations of a borrower’s international human rights obligations. The Bank would be legally responsible for such violations when they occur because it has opted to delegate oversight to domestic frameworks that are inadequate.

We draw specific attention to the delegation that takes place in the draft ESF relating to Financial Intermediaries (“FIs”). The Bank is explicit about the intention to delegate responsibilities to FIs in ESS9, which provides that “*FIs will assume delegated responsibility for environmental and social assessment, management and monitoring, as well as overall portfolio management*”.<sup>38</sup> From the different provisions on FIs in the draft ESP, ESS1 and ESS9, we deduce that FIs have to assure that subprojects meet national environmental and social requirements, except when a subproject is classified as High Risk.<sup>39</sup> Since, as we set out above, borrower systems are not required to offer equivalent protection to that of the ESSs, subprojects financed by FIs may therefore be subject to lesser protection than other (parts of) Bank-financed projects. The Bank does not offer a compelling reason for subjecting FIs to less stringent requirements.

The IFC Compliance Advisor Ombudsman (“CAO”) has recently pointed to the risks of dealing with FIs in borrower countries without having proper Safeguards in place. IFC acquired an equity stake in a commercial bank with “*significant exposure to high risk sectors and clients, but which lacked capacity to implement IFC’s environmental and social requirements*”.<sup>40</sup> This was not an isolated incident. The CAO argued that the shortcomings in that case were “*indicative of a system of support to FIs which does not support IFC’s higher level environmental and social commitments*”.<sup>41</sup> Based on this case and a 2012 audit of IFC investments in third party financial intermediaries, the CAO called for “*a reassessment of IFC’s approach to the identification and management of environmental and social risk in its financial institutions business*.”<sup>42</sup> The World Bank’s draft ESF, including its delegation of responsibilities to FIs, is modeled on the IFC’s Sustainability Framework, which makes the CAO’s assessment all the more relevant for the Bank to take into account in its review process.

### **Accountability of the Bank via the Inspection Panel**

The Inspection Panel serves as “*an independent forum to provide accountability and recourse for people affected by IBRD and IDA-financed projects*”.<sup>43</sup> For a request for inspection to be eligible, requesters have to describe the harm or potential harm that, according to them, is the result of a serious violation by the Bank of its policies and procedures.<sup>44</sup> While the existence of the Inspection Panel has made a positive difference in the last decades, the call by various stakeholders has been towards strengthening rather than weakening its procedures, independence and capacity to act to prevent or mitigate impacts. In

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<sup>38</sup> Draft ESS9, para. 1.

<sup>39</sup> Draft ESP, para 37, Draft ESS9, para. 6-7.

<sup>40</sup> CAO Investigation of IFC Environmental and Social Performance in relation to: Investments in Banco Financiera Comercial Hondureña S.A., CAO Ref: C-I-R9-Y13-F190, p. 2.

<sup>41</sup> CAO Investigation of IFC Environmental and Social Performance in relation to: Investments in Banco Financiera Comercial Hondureña S.A., CAO Ref: C-I-R9-Y13-F190, p. 39.

<sup>42</sup> CAO Investigation of IFC Environmental and Social Performance in relation to: Investments in Banco Financiera Comercial Hondureña S.A., CAO Ref: C-I-R9-Y13-F190, p. 39-40.

<sup>43</sup> The Inspection Panel at the World Bank, Operating Procedures, April 2014, p. 6.

<sup>44</sup> The Inspection Panel at the World Bank, Operating Procedures, April 2014, p. 15.

this sense, it is particularly troubling that the structure and language of the draft ESF will make it much harder, however, for requesters to be able to comply with this eligibility requirement, effectively creating a barrier for complainants.

First, the increased delegation of responsibilities from the Bank to other actors (borrower, FIs, multilateral or bilateral funding agencies) will make it less likely that the Bank can be held to account for projects that fail to abide by Bank policies and procedures, as it is more difficult to point to actions or omissions of the Bank in projects that are executed by other entities.<sup>45</sup> When, for instance, the draft ESP requires the Bank to require FIs to verify that a subproject is in accordance with domestic law,<sup>46</sup> actions which are the responsibility of the FI in question are likely to fall outside the purview of the Panel's inspection powers, because it most likely does not involve Bank actions or omissions.

Second, even when the Bank is responsible for certain actions or omissions in relation to a project, the draft ESF also makes it much harder for requesters to define the precise violation by the Bank. As we have set out above, the draft ESF contains imprecise language that fails to explain in clear terms what the exact requirements of the Bank and leaves the Bank with a large degree of discretion. For example, the Bank is required to only support projects that are "*expected to meet the requirements of the ESSs in a manner and within a timeframe acceptable to the Bank*".<sup>47</sup> Due to the imprecise nature of the language used, it will be exceedingly difficult for requesters to argue that the Bank has committed a serious violation of this requirement.

Third, even if requesters meet the eligibility criteria, the Panel itself still has to assess whether "*the alleged harm and possible non-compliance by the Bank with its operational policies and procedures may be of a serious character*".<sup>48</sup> The Inspection Panel has to judge whether the Bank has fulfilled its responsibilities explained in the ESF, but will run into similar problems as the requesters when assessing what the ESF requires from the Bank. The requirements on the Bank in the draft ESF are unclear and leave much discretion to the Bank, while clearly delineated obligations of the Bank are crucial for the Inspection Panel to be able to hold the Bank to account. As the Panel wrote in May 2013, when it submitted comments to the Safeguards Review: "*The Panel's experience shows the importance of clarity of requirements, both for project-affected communities as well as for Bank staff.*"<sup>49</sup>

We recognize the role of domestic accountability mechanisms and the requirement in the draft ESP that borrowers provide for a grievance mechanism.<sup>50</sup> While such mechanisms are clearly important, the fact that a borrower may be held to account domestically does not make it any less necessary for the Bank to be held to account by the Inspection Panel for *its* actions or omissions. The Bank has its own obligations and responsibilities and has significant influence on the shape and form of the development projects that it finances and it

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<sup>45</sup> Paragraph 14 (a) of the 1993 Resolution establishing the Inspection Panel explains that the Panel will not hear complaints "*with respect to actions which are the responsibility of other parties, such as a borrower, or potential borrower, and which do not involve any action or omission on the part of the Bank*".

<sup>46</sup> Draft ESP, para. 37.

<sup>47</sup> Draft ESP, para. 7.

<sup>48</sup> The Inspection Panel at the World Bank, Operating Procedures, April 2014, p. 17.

<sup>49</sup> Inspection Panel, 'Lessons from Panel Cases: Inspection Panel Perspectives', May 2013, available at: <https://consultations.worldbank.org/Data/hub/files/meetings/IPNSubSafRevwithPPPs.pdf>

<sup>50</sup> Draft ESP, para. 50.

is therefore necessary that there be in place separate accountability mechanism for the Bank to account.<sup>51</sup>

## **B. Content and coverage of the draft ESSs**

### **Draft ESSs not in Compliance with International Human Rights law**

As noted above, the draft ESF allows for a significant delegation of responsibilities from the Bank to the borrower and other entities in assessing and managing environmental and social risks and impacts of Bank-financed projects. In this framework, the ESSs play a crucial role in setting mandatory requirements with which the borrower and projects must comply. If the Bank is to commit itself to respect human rights and refrain from contravening a borrower's human rights obligations, it must ensure that its ESSs reflect the full spectrum of relevant human rights protections and that individual ESSs fully comply with international human rights standards in their respective area. The draft ESSs suffer from critical flaws, however, which prevent the Bank and its Member States from meaningfully fulfilling their obligations.

First, the draft ESSs fail to adequately protect all the civil, political, economic, social and cultural rights that international human rights laws and standards guarantee for all individuals. While the draft ESSs include new standards on labour and working conditions and community health and safety in addition to existing standards on involuntary resettlement and the rights of indigenous peoples, these standards have been added in a rather piecemeal manner. This incremental approach leaves other distinct groups of individuals who may be disproportionately impacted by the Bank's operations unprotected in the context of Bank-projects, including, but not limited to: women, children, persons with disabilities, lesbian, gay, bisexual and transgender people, migrants, and racial, ethnic and religious minorities.

In this regard, we welcome the fact that the draft ESF acknowledges that Bank projects may result in a disproportionately adverse impact on "*disadvantaged or vulnerable groups*" and takes into account such factors as "*age, gender, ethnicity, religion, physical or mental disability, social or civic status, sexual orientation, gender identity, economic disadvantages or indigenous status, and/or dependence on unique natural resources*" in identifying such groups. However, the draft ESSs seem to disregard the uniqueness and diverse needs of these groups by bundling them together in the same basket and failing to specify how their rights and interests would be adequately taken into account in the project design, monitoring and implementation. In particular, the draft ESSs fail to specifically recognize gender as a factor which may increase vulnerability to adverse effects of the Bank's operations. This stands in stark contrast with the Bank's express policy and commitment to achieving gender equality,<sup>52</sup> as well as evidence that women and girls are often disproportionately and adversely affected development projects. In order to ensure that

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<sup>51</sup> In this regard, the UN Guiding Principles on Business and Human Rights offer a useful analogy on how to ensure a successful outcome on the basis of non-judicial grievance mechanisms. Specifically, Guiding Principle 31 outlines 'effectiveness criteria' that, when properly implemented, provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to ensure that the people whom it is intended to serve know about it, trust it and are able to use it. We would urge the Bank to include these eight criteria in its updated Framework.

<sup>52</sup> See World Bank Group Gender Equality Highlights (October 2013), available at : <http://www.worldbank.org/content/dam/Worldbank/document/Gender/Gender%20Board%20Update%202013%20Glossy%20summary.pdf>

the needs and interests of each affected group are adequately considered and reflected in the Bank's operations, we recommend that, as a minimum, stakeholder engagement processes set out in ESS 10 be amended, so that it spells out more clearly how such affected groups would be identified, what "stakeholder engagement" entails, and how the borrower will reflect their views and concerns in the project design, monitoring and implementation. ESS 10, as it currently stands, is laden with open-ended terms, such as "as appropriate", "where applicable" and "where appropriate", which render the purpose of stakeholder engagement uncertain.

Second, select human rights norms that the draft ESSs seek to integrate do not adequately reflect existing international human rights laws and standards, which may lead to confused and incomplete implementation of human rights. For example, *ESS2 on Labor and Working Conditions*, while a positive addition to the existing Safeguards, only partially recognizes the ILO's core labour standards and makes no explicit reference to the ILO's eight fundamental conventions, which affirm: the freedom of association and the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Among these core standards, ESS2 selectively prohibits forced labour, child labour and discrimination, and omits reference to the freedom of association and the right to collective bargaining, except where national law recognizes such rights.<sup>53</sup> Furthermore, the "Non-Discrimination and Equal Opportunity" clauses under ESS2 merely provide that decisions relating to employment "will not be made on the basis of personal characteristics unrelated to inherent job requirements", which is entirely inadequate in comparison with international human rights laws and standards that specifically prohibit "discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>54</sup>

Another example is *ESS5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*. The existing Safeguards, while imperfect, have provided specific guidance to allow for prevention and protection measures to be applied in this context. It is deeply worrisome that the progress achieved appears diluted in the ESS5 as currently drafted. While ESS5, para. 2 formally recognises that involuntary resettlement should be avoided, consistent with the mitigation hierarchy in ESS 1, the current draft does not prohibit projects that will cause forced evictions, nor does it recognize that involuntary resettlement and forced eviction violate international human rights law, and that strict conditions and criteria must be met at all times in situations where resettlement is considered inevitable<sup>55</sup>. There is no reference to the need to inform potentially displaced persons about their rights; weaker requirements are put in place concerning the need to offer alternatives of similar or better quality than existing conditions; no references are made to the need to consult with affected people about options prior to resettlement; compensation and proper management are presented as the sole instruments to address the multiple human dimensions of resettlement, without any concrete references to other issues related, for instance, to security of tenure, access to public services and facilities, or access to effective remedies. There is also no prohibition on the use of bank funds for land-grabbing and the consequent displacement of

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<sup>53</sup> Para. 11, ESS2.

<sup>54</sup> Art 2, ICESCR ; Art 2, ICCPR. Article 2 of the Universal Declaration of Human Rights similarly prohibits discrimination "of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

<sup>55</sup> CESCR, General comment No. 7, 1997 Forced evictions and the right to adequate housing

people. The exclusion of land titling, regularization and land use planning directly impacts security of tenure<sup>56</sup>, an essential component of the right to adequate housing, as well as the right to food and freedom from hunger.

A final illustration of the ESSs' incompatibility with international human rights standards is *ESS7 on Indigenous Peoples*. ESS7 now incorporates a requirement to obtain the "free, prior and informed consent" of affected indigenous peoples in line with the language used in international human rights instruments, most notably the United Nations Declaration on the Rights of Indigenous Peoples. However, it is not clear whether the processes prescribed in ESS7 to obtain such consent meet the standards required by international human rights laws and standards, including meaningful consultation with, and participation of, affected indigenous peoples. As raised above, ESS10 does not provide clear indications or guidance to the borrower as to how the views of indigenous peoples should be taken into account. Furthermore, the "opt-out" clause in paragraph 9 undermines the fundamental premise on which the Declaration is framed. That provision allows borrower countries to "opt-out" from the requirements under ESS7. This provision was ostensibly designed to facilitate projects in countries where the existence or the notion of indigenous peoples is contested. However, the ability of borrower countries to effectively choose whether or not to recognize indigenous peoples appears incompatible with the fundamental purpose of the Declaration, which seeks to redress the wrongful denial of the existence of indigenous peoples and their right to self-determination. The "opt-out" clause may also undermine progress achieved in recognizing and implementing the collective rights of indigenous peoples in certain regions of the world. While borrower countries seeking to "opt-out" from the requirements under ESS7 must apply to the Board for approval, the ESSs do not stipulate adequate Safeguards against arbitrary denial of the human rights of indigenous peoples by the borrowers. In case of an opt-out, the remaining ESSs simply cannot give equivalent protection to indigenous peoples since these other ESSs do not take into account the specific protections accorded to indigenous groups under international law.

### **Insufficient coverage of the ESSs**

The draft ESSs are insufficient in terms of coverage of Bank-financed projects and activities, as they only apply to Investment Project Financing ("IPF") and do not include other forms of Bank-lending, such as Development Policy Loans ("DPL") and Program for Results financing ("P4R"). Over the past decades, the nature of Bank lending has evolved from traditional investment lending toward a growing portfolio of DPLs, which are designed to support institutional and policy reforms, and P4R for social sector, financial sector, and governance operations, which is becoming an increasingly important form of financing.<sup>57</sup> Forms of financing other than IPF exceeded 40% of the Bank's total lending in 2002 and 2010,<sup>58</sup> which means that the ESSs do not apply to a substantial portion of the Bank's operations in practice. The inapplicability of the ESSs to DPLs is a particular concern, since these loans support policy and institutional reforms in areas that significantly affect the

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<sup>56</sup> See Guiding Principles on Security of Tenure for the urban poor, in particular Principle 8 "Strengthening security of tenure in development cooperation" at A/HRC/25/54 (2014) Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context.

<sup>57</sup> IEG report, at 3.

<sup>58</sup> Vince McElhinny, Trends in World Bank lending forecast further decline in safeguard coverage and signs of a return to higher risk and higher reward lending, available at: <http://www.bicusa.org/wp-content/uploads/2013/10/Trends-in-WB-Lending-SG-decline-info-brief.pdf>, at 5.

enjoyment of human rights, such as housing, water and sanitation, land governance, education, public administration, agriculture, natural resource management, urban management and infrastructure.<sup>59</sup> Past experience has shown that the use of DPLs has resulted in critical gaps in environmental and social risk assessment and mitigation at the expense of the local communities and the environment.<sup>60</sup> The carving out of policy loans from the Bank's ESSs contrasts with more inclusive approaches taken by other multilateral investment banks, such as the Asian Development Bank ("ADB") and the African Development Bank ("AfDB").

## **Recommendations**

- 1) The Bank should: Commit to respect and promote international human rights in its own activities, not to support projects that would contravene the international human rights obligations of borrowers, and to undertake human rights due diligence in all projects.
- 2) Only finance projects that, at the time of completion of the due diligence assessment, meet the requirements of the ESSs; When the Bank undertakes a due diligence assessment it should not only rely on information from the borrower, but also engage in consultations with affected or potentially affected groups, human rights defenders, and civil society organizations.
- 3) When relying on domestic systems, ensure that they offer at least an equivalent level of protection to that of the ESSs and that they comply with the borrower's international human rights obligations.
- 4) Ensure that the ESF contains language that sets out clearly and precisely the Bank's obligations and minimizes its discretion in this regard; This is essential if the Inspection Panel and project-affected communities are to be able to hold the Bank to account for its actions and omissions.
- 5) Ensure that the ESSs adequately protect all civil, political, economic, social and cultural rights that international human rights law and standards guarantee and that each ESS adequately reflects existing international human rights law and standards. The ESSs should apply to all forms of Bank lending.

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<sup>59</sup> Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Rachel Rolnik, Mission to the World Bank (A/HRC/22/46/Add.3), at para 60.

<sup>60</sup> See, e.g. the Forest and Environment Development Program in Cameroon and the Transitional Support for Economic Recovery Credit in the Democratic Republic of Congo. Bank Information Centre and Global Witness, A Primer on Why DPLs Should be Part of the Safeguard Review (April 2013), available at: <http://www.bicusa.org/wp-content/uploads/2013/05/7-DPL-Primer.pdf>