

Analysis of the Second Draft of the Proposed World Bank Environmental and Social Framework

Briefing Paper

THE NETHERLANDS



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Advisory Report by the Dutch Sustainability Unit

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Environmental and Social Framework: Briefing Paper

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GLOSSARY AND ACRONYMS

CSO	Civil Society Organization
CODE	Committee on Development Effectiveness
DPL	Development Policy Lending
DSU	Dutch Sustainability Unit
EHSGs	World Bank Group Environmental, Health and Safety Guidelines
ESCP	Environmental and Social Commitment Plan
ESMP	Environmental and Social Management Plan
ESF	Environmental and Social Framework
ESIA	Environmental and Social Impact Assessment
ESP	Environmental and Social Policy
ESS	Environmental and Social Standard
NCEA	Netherlands Commission for Environmental Assessment
P4R	Program for Results
WB	World Bank

SUMMARY

On 12 August 2015 the Dutch Ministry of Foreign Affairs requested the Dutch Sustainability Unit (DSU) of the Netherlands Commission for Environmental Assessment (NCEA) to:

- 1) make an analysis of the Second Draft of the World Bank’s Environmental and Social Framework (ESF) against the recommendations made in DSU’s advice on the First Draft of the ESF (dated 7 January 2015); and, on the basis of this analysis, recommend issues to raise in the Phase 3 consultations;
- 2) compare these recommended issues against the issues suggested for the phase 3 Consultations by the Bank’s Committee on Development Effectiveness (CODE) in a paper titled “Issues for Phase 3 Consultations: CODE Introduction” (3 August 2015).

The results of the analysis under 1) are given in the below table. The comparison under 2) leads to the conclusion that all issues recommended by the DSU to include in the Phase 3 consultation are also recommended by the CODE, with the exception of broadening the scope of the ESF to DPLs and P4R.

Strengthen operationalisation of the new ESF (see chapter 4 for full explanation)

Summary of January 2015 DSU recommendation on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Accelerate production of ESS annexes and Information Notes, with initial focus on ESS5 , ESS 7 and Information Disclosure (ESP F). It would be best if these procedural guides were to be finalized prior to Bank Board approval of the ESF.	No new Information Notes have been produced as part of the ESF revision. However, detailed Annexes now exist for ESS 1 and ESS 5.	<i>Maintain recommendation:</i> Even though some annexes have now been added, other annexes and information notes still need to be completed. Our understanding is that Annexes will be “mandatory” and Information Notes will be non-mandatory guidance.
Further specify conditionality requirements, for example through inclusion of requirements within Section C of the ESP.	No new conditionality requirements have been added to Section C of the ESP. However, new language throughout the ESF does provide more evidence that the Bank is committed to oversight.	<i>Maintain recommendation:</i> Conditionality clearly has been strengthened, but probably not sufficiently to create trust with CSOs and/or others that the Bank will and can act if, for example, the borrower does not stick to the conditions in the ESCP. It is recommended that the Bank explicitly specifies what the procedure will be if conditions are not adhered to, including the financial consequences for the borrower.

Summary of January 2015 DSU recommendation on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
<p>Refrain from using borrower systems before it has been independently verified that these systems are equivalent to the Bank's safeguards. If they are considered to be equivalent, performance of borrower systems should be monitored during loan implementation, and corrective action should be taken where necessary to ensure standards are met.</p>	<p>There is no reference to "independent verification". However, a new paragraph (24) of the ESP makes it clear that use of a Borrower's ES framework will be determined at the discretion of the Bank.</p> <p>In addition, new wording and additions in ESS 1 clarify the issue of use of Borrower safeguard systems. This amendment goes some way towards addressing CSO and/or others concerns about use of Borrower systems.</p>	<p>Maintain recommendation:</p> <p>The new text in the Second Draft deals with some of the CSO and/or others criticism, but will probably not be sufficient to build trust that borrower systems will only be used if these are of sufficient quality. For this it will be necessary that a trustworthy and independent entity verifies where this would be the case. In addition, implementation of the system will need to be monitored and the Bank should make clear its actions where implementation may not be of sufficient quality.</p>
<p>Further specify requirements for disclosure either within ESS1 Annex 2, or in a separate Information Note.</p>	<p>A new sentence added to the old ESP paragraph 34, makes it clear that the ESCP will be disclosed.</p>	<p>Delete recommendation:</p> <p>Requirements for disclosure are now sufficiently clear.</p>
<p>Make it specifically clear that Inspection Panel redress applies if borrowers violate national laws.</p>	<p>The second draft still does not specifically indicate that IP redress applies if borrowers violate national laws. IP redress where 'harm has occurred as a result of WB non-compliance with its policies and procedures'. However, it could be argued that this includes violation of national laws, since at several points in the ESF it is stated that part of these policies and procedures is that projects should comply with national laws. This implies that violation of national laws could mean non-compliance with WB policies and procedures, in which case IP redress would apply.</p>	<p>Maintain recommendation:</p> <p>There is clear indication in the second draft ESF that inspection panel redress applies, however, this is not stated explicitly. Recommendation is to state explicitly that inspection panel redress applies in the case of violation of national laws (comparable to the text that states explicitly that IP redress applies in the in the case of 'World Bank non-compliance with its policies and procedures'.)</p>

Develop capacity for implementation

Summary of January 2015 DSU recommendation on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Accelerate the Bank's plan for implementation of the new ESF into its own practices, including specification of the resource commitments entailed.	The Second Draft does not deal with Bank resource commitments for implementing the ESF, and nor would it be expected to.	Maintain recommendation: This recommendation is crucial for the new ESF to function in practice. However, this does not translate into text for the ESF, but should be dealt with in parallel to the drafting of the new framework.
Accelerate the plans for addressing the issue of national system strengthening, including specification of the resource commitments that will be reserved for this purpose.	New wording in paragraph 26 indicates that where the Bank has agreed to use the Borrower's ES Framework, the Bank will work with the Borrower to strengthen the Borrower's ES Framework. Commitment to system strengthening also appears in the new ESS1 Annex 1.	Maintain recommendation: This recommendation is crucial for the new ESF to function in practice. However, this does not translate into text for the ESF, but should be dealt with in parallel to the drafting of the new framework.

Complete and improve standards

Summary of January 2015 DSU recommendation on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Establish one or more specialist "expert groups" to enable considered revision of the ESF with respect to emerging issues (e.g. including human rights, gender), resettlement and biodiversity. Rectify many of the uncertainties around ESS 5 and ESS6 by rapidly developing Annexes or Information Notes for these ESS.	There is no indication that specialist expert groups have been involved in the development of the Second Draft. However, some of the "emerging issue" concerns discussed in the DSU advice have been acted on to some extent.	Maintain recommendation: The second draft has improved significantly as compared to the first draft on the issues mentioned. However, it is not yet complete. Also in light of the significant and detailed criticism of CSOs and/or others there would be great advantage for building trust and credibility to complete the ESF on the basis of the judgment of specialist expert groups
Consider removing the opt-out clause from ESS 7; from ESS 1 and from the ESP (Section D).	The opt-out clause has now been removed.	Delete recommendation: The opt out clauses have been removed.
Consider inserting specific reference to freedom of association and right to collective bargaining into ESS 2.	A new Objective statement in ESS 2 now explicitly supports the principles of free association and the collective bargaining of workers.	Delete recommendation: Specific reference has been made.

Broaden the scope of the ESF

Summary of January 2015 DSU recommendation on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
<p>Institute a mandatory requirement for environmental and social assessment of DPLs and P4R, and include these modalities within the purview of the ESF. This should entail more detailed treatment of SEA/SESA in ESS1.</p>	<p>The Bank still does not wish to incorporate DPLs or P4R modalities within the purview of the ESF. However, the new Annex 1 to ESS 1 presents a full range of possible environmental and social assessment approaches that may be applied by Borrowers, including SEA/SESA.</p>	<p><i>Maintain recommendation:</i> The second draft ESF still does not include a mandatory requirement for environmental and social assessment of DPLs and P4Rs. This is not justified in light of the major environmental and social consequences these may have.</p>

1. Introduction

In July 2014 the World Bank (“the Bank”) released a draft of its new Environmental and Social Framework (ESF) for consultation. Subsequently the Ministry of Foreign Affairs requested the Dutch Sustainability Unit (DSU) of the Netherlands Commission for Environmental Assessment (NCEA) to analyse this draft and recommend issues and suggestions that the ministry could include in its discussion with the Bank on the proposed ESF. The DSU published its report on 7 January 2015.

On 1 July 2015, the Bank produced a Second Draft of the ESF, endorsed by its Committee on Development Effectiveness (CODE), so that it could proceed with a third round of consultations. On 3 August 2015, CODE produced a brief paper listing a series of issues that should be dealt with in the third round of consultations.

On 12 August 2015 the Ministry requested the DSU to:

- make an analysis of the Second Draft of the World Bank’s Environmental and Social Framework (ESF) against the recommendations made in DSU’s advice on the First Draft of the ESF (dated 7 January 2015); and, on the basis of this analysis, recommend issues to raise in the Phase 3 consultations;
- analyse these recommended issues against the issues suggested for the phase 3 Consultations by the Bank’s Committee on Development Effectiveness (CODE) in a paper titled “Issues for Phase 3 Consultations: CODE Introduction” (3 August 2015).

Following the introduction, this briefing paper consists of four sections. First, some general comments are made about the extent of changes made to the First Draft of the ESF. Secondly, a summary is made of the main changes presented in the Second Draft, organized according to the section order of the ESF. Then the Second Draft of the ESF is analysed against the recommendations made in the DSU advice of 7 January 2015, and finally the recommendations made in the CODE paper of 3 August 2015 are examined.

2. General comments on the extent of changes to the first draft

The Second Draft contains a significant number of amendments and additions. Many hundreds of changes have been made. Having said this, the amendments do not change the overall structure or thrust of the proposed ESF. Changes are of language and emphasis, rather than overall structure, although some significant concessions have been made as a result of CSO and others criticisms and the Bank's own revisions.

The Second Draft still flags the following three new directions for the Bank's approach to safeguards:

- a shift from a predominant focus on pre-approval ex ante assessment, to a greater concentration of effort in project implementation, monitoring and compliance;
- a greater reliance where possible on borrowing country "ownership" of environmental and social safeguard procedures;
- a new stress on "flexibility", which would enable changes to be made to safeguard application as projects develop over time.

While the overall structure remains the same, it is clear that serious attempts have been made to address CSO and/or others concerns. Possibly the most significant changes or additions made include the following:

- Completion of Annex 1 and Annex 2 to ESS 1 ("Assessment and Management of Environmental and Social Risks and Impacts" and "Environmental and Social Commitment Plan"). These annexes were missing from the First Draft, and they provide substantial detail on how environmental and social impact assessments and Environmental and Social Commitment Plans should be structured by Borrowers.
- Completion of an Annex to ESS 5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement) outlining Involuntary Resettlement Instruments. This did not exist in the First Draft, and includes eight pages outlining minimum elements of a resettlement plan.
- The dropping of the contentious so-called "opt out" clause in ESS 7 (Indigenous Peoples). This clause would have allowed governments to opt out of compliance with this standard if it was deemed that nominating specific groups as "indigenous" would possibly lead to conflict.
- Subtle change in language from "expecting" projects to meet the Environmental and Social Standards, to "requiring" that they do so (see paragraph 5).
- A new paragraph (24) in the Environmental and Social Policy section now makes it clear that the use of a Borrower's ES Framework will be determined at the discretion of the Bank.
- One of the main criticisms of ESS 2 in the First Draft is that it did not support the principles of free association and the collective bargaining of workers. This problem has been rectified with the addition of a new Objective. It should be noted, however, that this new text does not reference ILO standards.
- It should also be noted that the Second Draft did not amend or add any Information Notes. The ones that exist presumably still stand.

3. Summary of main changes made to the first draft of the ESF

Overview Section

Significant changes in the Overview section include the following:

- an indication that Environmental and Social Procedures, along with Guidance Notes, are not to be considered as part of the ESF itself, but will be developed later. The First Draft was confusing in this respect;
- a change of focus from “stakeholders” and “communities and individuals” to “project-affected parties”. This could be considered to be a positive change, because it makes the focus of participation and engagement clearer, but possibly restricts access to grievance mechanisms due to potentially reduced “standing”.

Vision Statement

The redrafted Vision Statement includes “up-front” recognition of some of the “emerging issues” that were arguably not dealt with clearly enough in the First Draft. For example, the new draft recognizes the importance of climate change, with the addition of the following as a new part of paragraph 2:

It recognizes that climate change is affecting the nature and location of projects, and that World Bank-financed projects should reduce their impact on the climate by choosing alternatives with lower carbon emissions. The World Bank works on climate change because it is a fundamental threat to development in our lifetime. The World Bank is committed to supporting its client countries to manage their economies, to decarbonize and invest in resilience, while ending poverty and boosting shared prosperity.

WB management has taken a positive step in referring in the new vision statement to the Universal Declaration by including the following text:

In this regard, the World Bank shares the aspirations of the Universal Declaration of Human Rights and helps its clients fulfill those aspirations. To help ensure development effectiveness, the World intends to maintain, in a manner consistent with its Articles of Agreement, the promotion of such approach in the design and implementation of the development projects that it supports.

Other significant changes in the Vision Statement section include the following:

- paragraph 7 includes a new sentence to the effect that the Bank’s vision goes beyond ‘do no harm’ to maximizing development gains;
- paragraph 9 includes a new sentence that strengthens the Bank’s commitment to the use of “borrower systems”:

The Bank is committed to the use and development of borrower’s frameworks to avoid unnecessary duplication, build national capacity and achieve development outcomes that are materially consistent with the objectives of the Environmental and Social Framework.

Environmental and Social Policy for Investment Project Financing

Objectives and Principles

Subtle changes in language imply that the Bank is perhaps more actively involved in oversight than was indicated in the First Draft. An example can be seen in paragraph 3, sub-section b, where the Bank now “supports” the Borrower, rather than “assists”:

As and where required, support the Borrower to carry out early and continuing engagement and meaningful consultation with stakeholders, in particular affected communities, and in providing project-based grievance mechanisms¹.

Other notable changes and additions include:

- additions to various paragraphs, indicating that “disadvantage” or “vulnerability” relates to individuals, as well as groups (e.g. paragraph 4, sub-section b);
- subtle change in language from “expecting” projects to meet the Environmental and Social Standards, to “requiring” that they do so (see paragraph 5).

Scope of Application

The ESP’s scope is expanded to better define what is meant by “associated facilities”.

Bank Requirements

Bank Requirements have been clarified by a new paragraph (15) that *requires* Borrowers to conduct environmental and social assessment of projects proposed for Bank support in accordance with ESS1. In addition, the old paragraph 13 has been folded in to the new paragraph 15, and the language changes to require Borrowers to “prepare and implement” projects so that they meet the requirements of the ESSs rather than to merely “structure” them.

The Bank had been criticized for requiring Borrowers to structure projects so that they meet the requirements of the ESSs in a manner and a “timetable acceptable to the Bank”. CSO critics had implied that “timetable acceptability” implied a safeguards process that would be entirely open-ended. In the First Draft, the definition of “manner” and “acceptable timetable” were relegated to a footnote. The definitions are now part of the formal text (new paragraph 16).

Finally, a new paragraph (19) *requires* Borrowers to apply the relevant requirements of the World Bank Group Environmental Health and Safety Guidelines. This is an additional due diligence commitment that did not exist in the First Draft.

When host country requirements differ from the levels and measures presented in the EHSs, the Bank will require the Borrower to achieve or implement whichever is more stringent.

Environmental and Social Risk Classification

The addition of new words in paragraph 21 indicates stronger due diligence:

The Bank will review the risk classification assigned to the project on a regular basis, including during implementation, [and will change the classification where necessary](#), to ensure that it continues to be appropriate.

Use and Strengthening of the Borrower’s Environmental and Social Framework

A new paragraph (24) makes it clear that use of a Borrower’s ES framework will be determined at the discretion of the Bank. A clear statement such as this was not included in the

¹ In the first draft this text was: ‘As and where required, assist the Borrower to carry out early and continuing engagement and meaningful consultation with stakeholders, in particular affected communities, and assist the Borrower in providing project-based grievance mechanisms.’

First Draft, and so significantly clarifies this situation and would appear to go some way towards addressing CSO and/or others criticisms.

The Bank will consider the use of all, or part, of the Borrower's existing environmental and social framework relevant to the development and implementation of the project (the Borrower's ES Framework). The use of Borrower's ES Framework will be determined at the discretion of the Bank. Where the Bank has agreed to consider such use, the Bank will review the Borrower's ES Framework to assess whether such use would enable the project to achieve objectives materially consistent with the ESSs.

Special Project Types

The Second Draft adds new Bank commitments with regard to sub-projects. The old paragraph 33 used to make the Borrower responsible for classifying sub-projects and carrying out environmental and social assessment. A new paragraph 34 makes it clear that the Bank is now responsible for classifying each sub-project, and conducting due diligence. Further, if a sub-project is classified as "high risk", then the Borrower must carry out environmental and social assessment in accordance with the Bank's ESSs. A new paragraph 36 goes further, as follows:

The Bank will review the adequacy of national environmental and social requirements relevant to the subprojects, and assess the capacity of the Borrower to conduct environmental and social assessment of subprojects as required by paragraph 35. If the Bank is not satisfied that adequate capacity exists on the part of the Borrower, all High Risk and, as appropriate, Substantial Risk subprojects will be subject to prior review and approval by the Bank.

Similar, tighter, due diligence requirements have been developed where the Borrower is a Financial Intermediary (FI). These requirements are now laid out in paragraphs 39 to 44.

ESS1: Assessment and Management of Environmental and Social Risks and Impacts

As mentioned earlier, possibly the most significant addition to ESS 1 is the presentation of two new annexes. Annex 1 to ESS1 was left blank in the First Draft. The Second Draft includes a completed Annex that provides 14 pages of extensive advice to Borrowers on the different methods and tools that should be applied during environmental and social assessment. This includes a detailed indicative outline for ESIA's and ESMPs. Annex 2 provides 2 pages of guidance on the content, implementation, and timing of Environmental and Social Commitment Plans. This Annex was left blank in the First Draft.

New wording and additions clarify the issue of use of Borrower safeguard systems. The new paragraph 18 (amendment to old paragraph 17) changes the emphasis on how Borrower safeguard systems will be applied. In the new paragraph 18, the Borrower *may request* the Bank to consider use of its ES Framework, provided that it (the Borrower) *is likely to be able to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs*. This amendment goes some way towards addressing CSO and/or others concerns about use of Borrower systems, especially when it is clear that the *Borrower will provide information to the Bank in connection with the Bank's review of the Borrower's existing environmental and social framework relevant for the proposed project (the ES Framework)*.

In addition, new wording in the Objectives section of ESS1 qualifies the use of borrower

safeguard systems by adding the words “whenever appropriate” to the following sentence (text in blue is new):

To utilize national environmental and social institutions, systems, laws, regulations and procedures in the assessment, development and implementation of projects, [whenever appropriate](#).

The Second Draft includes a number of new requirements for stakeholder engagement during the environmental and social assessment process. Examples include the following new paragraphs:

51. The Borrower will continue to engage with, and provide information to stakeholders throughout the life-cycle of the project, in a manner appropriate to the nature of their interests and the potential environmental and social risks and impacts of the project.

52. If there are significant changes to the project that result in additional risks and impacts, particularly where these will impact project-affected parties, the Borrower will provide information on such risks and impacts and consult with project-affected parties as to how these risks and impacts will be mitigated. The Borrower will disclose an updated ESCP, setting out the mitigation measures.

A new “emerging issue” that was not considered in the First Draft is the impact of projects on ecosystem services. This concept appears at a number of points throughout the Second Draft, and is included in ESS 1 in paragraph 26, sub-section a, and in paragraph 28 (the latter as follows):

The environmental and social assessment will identify ecosystem services that may be adversely affected by the project. Where communities are likely to be impacted, they will participate in the identification of such ecosystem services and appropriate mitigation measures.

Finally, a number of CSO and/or others concerns focused on the proposed Environmental and Social Commitment Plan (ESCP), and supposed lack of certainty about its formality and disclosure. A new paragraph 15 clarifies the relationship between actions required by the ESCP, and the implementation of specific projects:

Where the ESCP requires the Borrower to plan or take specific measures and actions over a specified timeframe to avoid, minimize, reduce or mitigate specific risks and impacts of the project, the Borrower will not carry out any activities in relation to the project that may cause material adverse environmental or social risks or impacts until the relevant plans, measures or actions have been completed in accordance with the ESCP.

In addition, it is now clear that the ESCP will be disclosed (paragraph 36).

ESS 2: Labor and Working Conditions

One of the main criticisms of ESS 2 in the First Draft is that it did not support the principles of free association and the collective bargaining of workers. This problem has been rectified with the addition of a new Objective. In addition, new wording in paragraph 16 requires projects to not restrict workers from developing alternative mechanisms to express their grievances and protect their rights, where national law restricts workers’ organizations. It should be noted, however, that the new text does not reference ILO standards.

The redraft of the Objectives section of ESS 2 also expands the definition of “vulnerable categories” of workers, to include people with disabilities, contracted workers, and primary supply workers (additions to Objectives section).

ESS 3: Resource Efficiency and Pollution Prevention and Management

Changes to ESS 3 introduce the required use of the Bank's Environmental Health and Safety Guidelines, and also include new sections dealing with greenhouse gases (for example, paragraph 16):

For projects that are expected to produce GHG emissions in excess of the threshold established by the Bank of CO₂-equivalent annually, the Borrower will, where technically and financially feasible, estimate (a) direct emissions from the facilities owned or controlled within the physical project boundary; and (b) indirect emissions associated with off-site production of energy used by the project. Estimation of GHG emissions will be conducted by the Borrower annually in accordance with internationally recognized methodologies and good practice.

ESS 4: Community Health and Safety

Additions to ESS 4 introduce additional provisions dealing with emergency events and emergency response plans.

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

This ESS received considerable criticism from CSOs in the First Draft. This was mostly focused on the involuntary resettlement aspects of the Standard. The Second Draft includes new justification for avoiding involuntary resettlement (paragraph 2):

Experience indicates that physical and economic displacement, if unmitigated, may give rise to severe economic, social and environmental risks: production systems may be dismantled; people face impoverishment if their productive resources or other income sources are lost; people may be relocated to environments where their productive skills are less applicable and the competition for resources greater; community institutions and social networks may be weakened; kin groups may be dispersed; and cultural identity, traditional authority, and the potential for mutual help may be diminished or lost.

In addition, there is a clearer definition of what is meant by "restoring livelihoods" (in the Objectives section). An amended Objective states that projects should "improve or restore" livelihoods and living standards to *pre-displacement levels*. This is an improvement over the First Draft.

The ESS includes two new Objective points that strengthen resettlement planning and stress that resettlement should be conceived of as a development opportunity:

To conceive and execute resettlement as a development opportunity, including measures enabling displaced persons to benefit directly from the project as the nature of the project may warrant.

To ensure that resettlement activities are planned and implemented with appropriate disclosure of information, meaningful consultation, and the informed participation of those affected.

Another positive addition is a new paragraph (18) that specifies the importance of women's perspectives in the consultation processes around resettlement planning:

The consultation process should ensure that women's perspectives are obtained and their interests factored into all aspects of resettlement planning and implementation. Addressing livelihood impacts may require intra-household analysis in cases where women's and men's

livelihoods are affected differently. Women's and men's preferences in terms of compensation mechanisms, such as compensation in kind rather than in cash, should be explored.

This goes at least part of the way towards addressing CSO and/or others criticisms that the First Draft did not deal extensively enough with gender equality issues.

Finally, the Second Draft includes a whole new Annex dealing with Involuntary Resettlement Instruments, including eight pages outlining the minimum elements of a resettlement plan. This did not exist in the First Draft.

ESS 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources

Perhaps the most significant change to ESS 6 is the introduction of new sections dealing with ecosystems services. The new paragraph 5 defines four types of ecosystem service, and a new Objective states that one of the purposes of the Standard is to "maintain the benefits from ecosystem services derived from the sustainable management of biodiversity and living natural resources".

Other significant additions include:

- an important addition to paragraph 18, indicating that biodiversity offsets will only be considered as a "last resort";
- a new paragraph (36) that requires land-based agriculture projects to be located on land that is already converted or highly degraded;
- an expanded definition of "habitat" in paragraph 17, as follows:
This ESS addresses all habitats, including 'modified habitat', 'natural habitat', and 'critical habitat', along with 'legally protected and internationally and regionally recognized areas of biodiversity value'.

ESS 7: Indigenous Peoples

As mentioned earlier, one of the most contentious aspects of the ESF First Draft, the so-called "opt out" clause (previously paragraph 9), has been dropped from the Second Draft. This will undoubtedly assuage the concerns of many stakeholders. Another important addition (to paragraph 21) requires Borrowers to prepare plans for the legal recognition of customary ownership rights.

ESS 8: Cultural Heritage

Additions to paragraph 4 now recognize that cultural heritage consists of both tangible and intangible aspects. Another new section deals with legally protected cultural heritage areas (paragraph 17).

ESS 9: Financial Intermediaries

A significant concession to CSO and/or others critics is a change of wording in paragraph 7 of ESS 9. Here it is now made clear that financial intermediaries must apply the ESSs to any FI sub-project that involves resettlement, adverse risks or impacts on indigenous peoples, or significant risks or impacts on the environment, community health, biodiversity, or cultural heritage.

ESS 10: Stakeholder Engagement and Information Disclosure

Perhaps the most noteworthy change to ESS 10 is the strengthened focus on stakeholder engagement. The changed title of the ESS puts the term “stakeholder engagement” before “information disclosure”. A new paragraph 2 specifies the importance of stakeholder engagement:

Stakeholder engagement is an inclusive process conducted throughout the project life-cycle. Where properly designed and implemented, it supports the development of strong, constructive and responsive relationships that are important for successful management of a project’s environmental and social risks. Stakeholder engagement is most effective when initiated at an early stage of the project process, and is an integral part of early project decisions and the assessment, management and monitoring of the project’s environmental and social risks and impacts.

A new addition to paragraph 9 indicates how Borrowers should deal with the outcomes of stakeholder engagement:

The Borrower will maintain a documented record of stakeholder engagement, including a description of the stakeholders consulted, a summary of the feedback received, and a brief explanation of how the feedback was taken into account, or the reasons why it was not.

Finally, new paragraphs (19 and 20) outline the type of information that Borrowers are required to provide to stakeholders.

4. Analysis of the second draft of the ESF against recommendations made in the DSU advice on the first draft

In a 7 January 2015 document, DSU provided advice on the First Draft of the ESF. This advice included a series of recommendations. This section assess the extent to which these recommendations have been acted upon in the Second Draft.

The DSU recommendations were grouped within four categories: (i) strengthen operationalisation of the new ESF; (ii) develop capacity for implementation; (iii) complete and improve standards; and, (iv) broaden the scope of the ESF.

Strengthen operationalisation of the new ESF

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Accelerate production of ESS annexes and Information Notes, with initial focus on ESS5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement), ESS 7 (Indigenous Peoples) and Information Disclosure (ESP F). It would be best if these procedural guides were to be finalised prior to Bank Board approval of the ESF.	No new Information Notes have been produced as part of the ESF revision. However, detailed Annexes now exist for ESS 1 (Environmental and Social Assessment and Environmental and Social Commitment Plan); ESS 5 (Involuntary Resettlement Instruments).	Maintain recommendation: even though some annexes have now been added, other annexes and information notes still need to be completed.
Further specify conditionality requirements, for example through inclusion of requirements within Section C of the ESP.	No new conditionality requirements have been added to Section C of the ESP. However, new language throughout the ESF does provide more evidence that the Bank is committed to oversight. For example, paragraph 5 of the ESP now “requires” projects to meet the Environmental and Social Standards, rather than merely “expecting” them to. Another example can be found in the new paragraph 34 of the ESP. The old version (paragraph 33) used to make the Borrower responsible for classifying sub-projects and carrying out environmental and social assessment.	Maintain recommendation: conditionality clearly has been strengthened, but probably not sufficiently to create sufficient trust with CSOs and/or others that the Bank will and can act if for example the borrower does not stick to the conditions in the ESCP. It is recommended that Bank explicitly specifies what the procedure will be if conditions are not adhered to, including the financial consequences for the borrower.

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
	<p>The new paragraph makes it clear that the Bank is now responsible for classifying each sub-project, and conducting due diligence. Further, if a sub-project is classified as “high risk”, then the Borrower must carry out environmental and social assessment in accordance with the Bank’s ESSs.</p>	
<p>Refrain from using borrower systems before it has been independently verified that these systems are equivalent to the Bank’s safeguards. If they are considered to be equivalent, performance of borrower systems should be monitored during loan implementation, and corrective action should be taken where necessary to ensure standards are met.</p>	<p>There is no reference to “independent verification”. However, a new paragraph (24) of the ESP makes it clear that use of a Borrower’s ES framework will be determined at the discretion of the Bank. A clear statement such as this was not included in the First Draft, and so significantly clarifies this situation and would appear to go some way towards addressing CSO and/or others criticisms.</p> <p>In addition, new wording and additions in ESS 1 clarify the issue of use of Borrower safeguard systems. The new paragraph 18 (amendment to old paragraph 17) changes the emphasis on how Borrower safeguard systems will be applied. In the new paragraph 18, the Borrower may request the Bank to consider use of its ES Framework, provided that it (the Borrower) is likely to be able to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs. This amendment goes some way towards addressing CSO concerns about use of Borrower systems, especially when it is clear that the Borrower will provide information to the Bank in connection with the Bank’s review of the Borrower’s existing environmental and social framework relevant for the proposed project (the ES Framework).</p>	<p><i>Maintain recommendation:</i></p> <p>The new text in the second draft takes away some of the CSO and/or others criticism, but will not be sufficient to build sufficient trust that borrower systems will only be used if these are of sufficient quality. For this it will be necessary that a trustworthy and independent entity verifies where this would be the case, implementation of the system will be monitored and that the Bank specifies its actions where implementation would not be of sufficient quality.</p>

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Further specify requirements for disclosure either within ESS1 Annex 2, or in a separate Information Note. (This recommendation relates to the Environmental and Social Commitment Plan).	A new sentence added to ESP paragraph 34, makes it clear that the ESCP will now be disclosed. The new sentence does not specify that disclosure of the ESCP will be to the public, but this is implied. This commitment did not exist in the First Draft.	Delete recommendation: Requirements for disclosure are now sufficiently clear.
Make it specifically clear that Inspection Panel redress applies if borrowers violate national laws. This could be achieved through amending paragraph 51 of Bank Requirement I, or through an amendment to each ESS.	The second draft still does not specifically indicate that IP redress applies if borrowers violate national laws. IP redress applies (e.g. art. 11 of the overview section) where ‘harm has occurred as a result of WB non-compliance with its policies and procedures’. However, it could be argued that this includes violation of national laws, since at several points in the ESF it is stated that part of these policies and procedures is that projects should comply with national laws. For example, ESS2 states that ‘in countries where national law recognizes workers right to form and to join workers’ organizations (...) the project will comply with national law’. Or, ESS 3 art.12 states that ‘any remediation of the site will be undertaken in accordance with national law’. This implies that violation of national laws could mean non-compliance with WB policies and procedures, in which case IP redress would apply.	Maintain recommendation: There is clear indication in the second draft ESF that inspection panel redress applies, however, this is not stated explicitly. Recommendation is to state explicitly that inspection panel redress applies in the case of violation of national laws (comparable to the text that states explicitly that IP redress applies in the in the case of ‘World Bank non-compliance with its policies and procedures’).

Develop capacity for implementation

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Accelerate the Bank's plan for implementation of the new ESF into its own practices, including specification of the resource commitments entailed.	The Second Draft does not deal with Bank resource commitments for implementing the ESF, and nor would it be expected to.	<i>Maintain recommendation:</i> This recommendation is crucial for the new ESF to function in practice. However, this does translate into text for the ESF, but should be dealt with in parallel to the drafting of the new framework.
Accelerate the plans for addressing – where possible with others – the issue of national system strengthening, including specification of the resource commitments that will be reserved.	New wording in the old paragraph 25 (new paragraph 26) indicates that where the Bank has agreed to use the Borrower's ES Framework, the Bank will work with the Borrower to identify and agree on measures and actions to address gaps in, and strengthen, the Borrower's ES Framework. Commitment to system strengthening now also appears in the new Annex 1 to ESS1.	<i>Maintain recommendation:</i> This recommendation is crucial for the new ESF to function in practice. However, this does translate into text for the ESF, but should be dealt with in parallel to the drafting of the new framework.

Complete and improve standards

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3 rd consultation round
Establish one or more specialist "expert groups" to enable considered revision of the ESF with respect to emerging issues (e.g. including human rights, gender), resettlement and biodiversity. Rectify many of the uncertainties around ESS 5 and ESS6 by rapidly developing Annexes or Information Notes for these ESS.	There is no indication that specialist expert groups have been involved in the development of the Second Draft. However, some of the "emerging issue" concerns discussed in the DSU advice have been acted on to some extent. For example, there is an amended commitment to the Universal Declaration on Human Rights; a new Annex to ESS 5 dealing with Involuntary Resettlement Instruments; an indication that biodiversity offsets will only be applied as a "last resort"; and, new text at various points that signifies greater attention to climate change issues.	<i>Maintain recommendation:</i> The second draft has improved significantly as compared to the first draft on the issues mentioned, however, is not yet complete. Also in light of the significant and detailed criticism of CSOs and/or others there would be great advantage for building trust and credibility to complete the ESF on the basis of the judgment of specialist expert groups

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3rd consultation round
Consider removing the opt-out clause from ESS 7; from ESS 1 (para 28); and, from the ESP (Section D: Special Considerations).	The opt-out clause has now been removed.	<i>Delete recommendation:</i> the opt out clauses have been removed.
Consider inserting specific reference to freedom of association and right to collective bargaining into ESS 2.	A new Objective statement in ESS 2 now explicitly supports the principles of free association and the collective bargaining of workers.	<i>Delete recommendation:</i> Specific reference has been made.

Broaden the scope of the ESF

Recommendation in DSU Advice on First Draft	Extent to which recommendation has been acted upon in Second Draft	Suggestions for the 3rd consultation round
Institute a mandatory requirement for environmental and social assessment of DPLs and P4R, and include these modalities within the purview of the ESF. This should entail more detailed treatment of the instrument of Strategic Environmental and Social Assessment (SEA/SESA) in ESS1.	The Bank still does not wish to incorporate DPLs or P4R modalities within the purview of the ESF. Footnote 12 remains unchanged in this regard. However, it is worth mentioning that the new Annex 1 to ESS 1 presents a full range of possible environmental and social assessment approaches that may be applied by Borrowers, including strategic environmental assessment.	<i>Maintain recommendation:</i> The second draft ESF still does not include a mandatory requirement for environmental and social assessment of DPLs and P4Rs. This is not justified in light of the major environmental and social consequences these may have.

5. Analysis of recommendations made in the Committee on Development Effectiveness Paper (3 August 2015)

It can be concluded that all the issues recommended by the DSU to be raised in the Phase 3 consultation (see previous chapter) are included in the series of issues recommended by the CODE. This with the exception of the recommendation to broaden the scope of the ESF to include Development Policy Lending and Programming for Results.