

Public comment by the International Trade Union Confederation/Global Unions¹ regarding the draft Guidance Note for ESS2: Labour and Working Conditions

15 December 2017

The draft Guidance Note (GN) for Environmental and Social Standard 2 (ESS2) moves forward in the crucial area of coherence with the universal standards of the International Labour Organization. However, further clarification is needed in this area and throughout the Guidance Note to provide Borrowers with an effective understanding of the World Bank's expectations. A greater focus on managing private contractors will make ESS2 more useful and relevant for Borrowers. More specific guidance for Borrowers will help ensure that project employment creates decent work and formal jobs, thereby contributing to poverty alleviation and shared prosperity. Together, Borrowers, the World Bank and workers can ensure that inclusive development is not only the end goal of a project, but takes place during the project itself. A brief discussion of the guidance notes for ESS1 and ESS10 is at the end of this document. This seeks clarification that workers and their organizations can be stakeholders in some circumstances.

Most urgently, changes are needed in several places where the guidance weakens the requirements of ESS2, and steps should be taken to ensure that all project workers are aware of their protections under the safeguards.

Communicating ESS2 to workers

Informing project workers of the content of ESS2 will greatly benefit the implementation of the standard. ESS2 paragraph 10 states that information provided to project workers “will set out their rights and under national labor and employment law...as well as those arising from the requirements of this ESS”. Guidance should help Borrowers communicate not only the specific conditions resulting from ESS2, such as particular working hours or a grievance mechanism, but advise workers of the existence of ESS2 and its core protections. This can include appending a copy of ESS2 to employment contracts in GN10.2. In this way, workers can become active participants in jointly upholding ESS2. Violations will be less likely to occur when all parties understand their rights and responsibilities. Currently, GN25.4 mandates the communication of specific information regarding ESS2 requirements on occupational health and safety. This guidance can be expanded to cover other topics, similar to GN21.3 concerning methods of communicating grievance mechanisms to workers.

¹ The Global Unions group is made up of the International Trade Union Confederation (ITUC), which has 202 million members in 163 countries; the Global Union Federations (GUFs), which represent their respective sectors at the international trade union level (BWI, EI, IAEA, IFJ, IndustriALL, ITF, IUF, PSI and UNI); and the Trade Union Advisory Committee (TUAC) to the OECD. The main contributors to this comment are the ITUC and Building and Woodworkers International (BWI).

Core Labour Standards

The Guidance Note appropriately begins in 2.2 with a specific list of International Labour Organization (ILO) Conventions that inform ESS2. This is crucial to carry out the vision of the Environmental and Social Framework to “(a) support Borrowers in achieving good international practice relating to environmental and social sustainability; (b) assist Borrowers in fulfilling their national and international environmental and social obligations; (c) enhance non-discrimination, transparency, participation, accountability and governance”. GN2.2 should be preserved with vital context added.

It is no coincidence that the eight listed conventions were chosen from among the 189 adopted by the ILO, the recognized standard-setting institution in the international system. These eight fundamental conventions define the four core labour standards, namely freedom of association and collective bargaining, freedom from forced labour, freedom from child labour and freedom from discrimination at work. The core labour standards are the foundation of efforts to end poverty and achieve sustainable development through the world of work. The content of the eight conventions provides essential information for Borrowers about implementing the basic norms of labour rights.

Referring to the eight fundamental conventions, the 1998 ILO Declaration on Fundamental Principles and Rights at Work declared that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”² This information concerning the 187 member countries of the ILO is important to add to the existing sentence in GN2.2 concerning the incorporation of ratified conventions into national law.

Explanatory context would aid Borrowers, and particularly any individuals with a limited background in labour, in understanding ESS2 and fulfilling international obligations.

Upholding the integrity of ESS2

Global Unions urge the final draft to correct instances where the Guidance Note introduces unnecessary conditions and loopholes to ESS2. The Guidance Note should be based in the principle of equal rights at work for all categories of workers, regardless of the type of project.

GN10.1 guides Borrowers toward providing some workers, such as seasonal employees, with less documentation and inferior detail based on “the length and nature of the employment”. This arrangement requires workers to take the extra step of requesting copies if desired, creating unequal access to basic information about the terms and conditions of employment. The distinction is without basis in ESS2 paragraph 10, which focuses on the provision of information that is “clear and understandable”, “sets out [worker] rights” under national law and ESS2, and “provided at the beginning of the working relationship and when any material changes” occur.

² <http://www.ilo.org/declaration/lang--en/index.htm>

The content of GN10.1 is particularly dangerous because seasonal, temporary and non-standard workers are already the most precarious and vulnerable to mistreatment. Providing less documentation and less accessibility would worsen these existing vulnerabilities and undermine ESS2 implementation. The Guidance Note should provide guidance consistent with ESS2, ensuring that all workers receive clear and comprehensive information.

A similar distinction is introduced in GN11.1 on leave, rest and pay. ESS2 paragraph 11 requires that project workers be “provided with adequate” rest and leave under national law and projects procedures, while GN11.1 only concerns itself with ‘considering’ leave and rest when national law is silent on the subject. In contrast, GN9.6 notes that “ESS2 does not preclude higher levels of protection” than what is mandated by law. GN11.1 suggests that the amount of leave and rest can be decided based on the “scope, risks and impacts” of the project. This is an open door to determining working conditions based on extraneous factors. It is also stated that rest and leave can be decided by the Borrower based on “type and duration of employment”, without further elaboration. This guidance fails to help the Borrower ensure adequate leave and rest for all project workers. Instead, it provides unclear direction and potential loopholes. The guidance should help Borrowers determine and implement adequate rest and leave based on the work and working conditions – for example, greater rest for particularly demanding tasks or in cases of extreme heat or cold – as well as industry conditions and local practice.

No guidance is given concerning the ESS2 requirement that workers are paid regularly and any deductions are made in a transparent manner. In practice, wage and hour violations including non-payment are frequent in the developing world and represent a risk when projects utilize private contractors. Greater guidance is needed on how Borrowers can manage this risk, and the GN11.1 should be rewritten to be consistent with the intent of ESS2.

ESS2 paragraph 22 states that projects “*may* utilize existing grievance mechanisms, providing that they are properly designed and implemented, address concerns promptly, and are readily accessible to project workers” (emphasis added). While this subjects existing procedures to a close examination of their suitability and the need for any “project-specific arrangements”, GN22.1 counsels Borrowers to use existing mechanisms “to the extent possible” and describes the requirements of paragraph 22 as “important.” Little guidance is given on evaluating existing mechanisms and designing additional measures, which is the primary task of the Borrower.

In the Occupational Health and Safety section, GN24.1 changes the emphasis and scope of ESS2 paragraph 24 and footnote 18. The standard states “The OHS measures *will include* the requirements of this Section, and *will take into account* the General EHSGs and, as appropriate, the industry-specific EHSGs and other GIIP” (emphasis added). GN24.1 states that “measures *take into account* national law requirements on OHS and workplace conditions as they apply to the project, together with the requirements of ESS2” (emphasis added). In paragraph 24, ‘take into account’ is meant as a signifier to distinguish between what is required and what can serve as a valuable resource. GN24.1 takes the phrase and uses it differently, i.e. in combination with the word ‘requirements’. Although the intent may be clear to some, the phrasing could lead to confusion among Borrowers, the omission of key ESS2 requirements, and the overall watering-down of OHS measures. The addition of national law in GN24.1 and its foregrounding ahead of

ESS2 is also puzzling, as the focus of paragraph 24 and footnote 18 is ESS2 itself, the EHSs and Good International Industry Practice.

Private contractors

GN3.4 perceptively gives the example of multiple contractors and subcontractors on an infrastructure project. A high volume of World Bank lending is toward projects of this exact type, and other types of projects frequently involve some form of private procurement. Guidance is specifically provided for managing contractors and procurement with relation to ESS2 paragraphs 31-33. Overall, the Guidance Note can go further in providing advice to Borrowers about managing third parties and procedures for prevention, monitoring and remediation. This is relevant in many parts of ESS2 beyond the section on contracted workers. Addressing potential risks with private actors throughout the document would strengthen implementation. The issue of labour brokers is also crucial. Because of a high level of risk for abuse, use of labour brokers should be avoided in favour of direct hiring. If utilized, brokers should be tightly monitored.

In cases where prevailing industry practices, including wages and working conditions, are higher than the requirements of national law, contractors should not subvert normal practice in the name of meeting the standards set by the Borrower. Conversely, in many countries it is prevailing practice for firms to violate laws and international standards with impunity. In such cases, the Borrower needs to take effective steps to avoid violations and provide remedy if abuses occur. At minimum, wages and conditions of work should meet the law *and* local industry practices. This is a floor upon which international standards and the requirements of ESS2 can be added.

Scope of Application

GN2.3 can advise Borrowers to consult with tripartite bodies, should such mechanisms exist.

In GN3.2 and 3.3, important information is provided regarding the determination of worker categories under ESS2 and the existence of an employment relationship. The guidance here is vague and indirect. It should be clearly explained to Borrowers how to use the bullet points in GN3.3 (a) and (b) to make a determination of employment, with a presumption that employment exists when one or more indicators is met. If a worker can provide evidence of one of the indicators, it should be incumbent on the employer to disprove the employment relationship. Borrowers should be counselled to thoroughly map their employment relationships.

The guidance should counsel Borrowers to establish procedures barring any form of disguised employment, misclassification, informality or casual labour. All project workers should have a direct employment relationship with their employer. The information in GN3.3 and oversight of contractors, such as a requirement to regularly provide employment records, can prevent this from occurring. Disguised employment and other forms of non-standard work deny workers their basic rights, contribute to poverty and would constitute evasion of ESS2. Misclassification, informality and casual labour are particularly prevalent in the construction industry, where webs of contracting can obscure employment relationships. Further, the lack of a permanent worksite enables employers to engage in improper or evasive practices. Disguised employment is any setup that obscures the legal status of a worker. This can include misclassification, wherein a

worker is labelled an independent contractor or other title despite meeting the definition of an employee. Informal work includes jobs that are not properly registered, such as hiring a worker without a required employment contract or failing to make social payments. Casual labour is the hiring of workers without any job security, for example the use of day labourers who are chosen each morning or are intermittently employed.

We recommend a rephrasing of the first sentence of GN3.5, specifically “source or provide labor for a project”. Footnote 3 includes a range of third parties including contractors that provide works or functions on the project, as well as labour brokers and others. ‘Source or provide labor’ could be interpreted as meaning only brokering. It would also be useful to connect this guidance with ESS2 provisions on the protection of migrants and prohibition of forced labour, as labour brokering is connected with abuse of migrants and involuntary labour. Reference could also be made to the risk management of contractors in ESS2 paragraphs 31 and 32, which is closely related to the discussion in GN3.5.

GN4.1 only provides professionals as an example of direct workers, employed as part of the project implementation unit with duties that are supervisory and typically provided by consultants. Direct workers on a project could include a far wider range of duties in the event that labour-intensive activities are not contracted.

GN8.2 could be more useful to Borrowers by defining the legal transfer of employment for civil servants to a project and providing an example of how this differs from the situation described in GN8.1

Working Conditions and Management of Worker Relationships

Guidance for ESS2 paragraph 9 could address prevailing national conditions and practices. Around the world, workers are impacted by two major gaps: first, between international standards and national law; and second, between national law and regular practice even where national law aligns with international norms. Particularly in developing countries with low capacity for inspection and enforcement, non-compliance with the law is widespread and systematic. Especially when dealing with contractors, Borrowers will need to understand gaps between law and reality, and use due diligence, contracts and monitoring to address subsequent risks. To achieve the effective implementation of ESS2, this will need to a major part of Borrower *labour management procedures*.

GN9.5 can suggest that Borrowers delineate methods of preserving privacy when records are kept.

Terms and Conditions of Employment

GN10.2 includes “disciplinary procedures that are applicable to the worker”. Guidance can be provided on appropriate and fair procedures, and avoidance of measures that damage the dignity of workers. This includes physical punishment and verbal abuse.

GN12.1 is an example of the Guidance Note opting to rephrase the content of ESS2 instead of providing additional explanation, and it is limited to cases “where national law mandates” benefits payments.

In paragraph 12, ESS2 states that *labour management procedures* can mandate written notice of termination. Guidance should be provided on designing appropriate mechanism for mass layoffs, particularly when a project or project phase come to an end. The conditions of dismissal and benefit payments to third parties can also be subject to a collective agreement, and Borrowers can be advised to abide by agreements. Consultations with workers’ organizations should occur when major changes or dismissals are under consideration.

Non-Discrimination and Equal Opportunity

It would be useful for GN13.2 to refer to fairness in the creation of job classifications, and in the assignment of workers to those classifications. This addresses issues of occupational gender segregation and the marginalizing of migrants to certain job classes, sometimes aided by discriminatory definitions or management decisions. The general principle of equal pay for work of equal value can also be described, which will guide Borrowers in designing fair systems.

Borrowers can be provided with guidance regarding non-discrimination and the managing of private contractors. If multiple contractors are used and each conducts a different activity on the project, overall conditions of occupational segregation, unequal opportunity and pay gaps can arise among the project workforce. Borrowers can be guided to focus in the contracting process on ensuring that certain contractors, particularly if their service is associated with a higher percentage of women workers, do not provide terms and conditions of employment that unduly fall below other contractors.

GN13.5 recommends that the Borrower identify measures to support equal opportunity and prevent harassment or mistreatment of migrant workers. Guidance can be provided on implementing those measures, including training of managers and notification of workers. Vocational training that enables workers to access higher-paid jobs is an important part of avoiding discrimination and ensuring equal opportunity. Borrowers can ensure that marginalized groups are made aware of project job opportunities, and connected to training that will allow them to take full advantage.

For marginalized groups or in cases of sexual harassment, there are particularly high barriers and levels of fear regarding grievance mechanisms. Borrowers can be counselled to facilitate the ability of affected parties to come forward. Extra steps may be necessary to ensure that no retaliation takes place or pressure is not exercised to withdraw complaints. Borrowers can also track disaggregated information on pay, hiring and other areas where discrimination can occur, gauging the impact of the measures and identifying when additional measures are needed.

GN15.1 raises the vital subject of discrimination against pregnant women and mothers, which our comment discusses in the Occupational Health and Safety section. GN15.1 should also address the subject of discrimination on the basis of HIV/AIDS or other medical conditions. Core principals include preserving the confidentiality of status and protection from dismissal.

This can be done in conjunction with efforts to educate the overall workforce about prevention, wellbeing and dignity for those with stigmatized medical conditions.

Workers' Organizations

GN16.1 does not provide specific guidance, explain the purpose of ESS2 paragraph 16, or shed light on the distinction between countries where freedom of association is recognized and countries where it is restricted. This introductory section could note the role of workers' organizations and dialogue in ensuring fair working conditions, positive social and economic impacts, project health and safety, and productivity. Reference to the role of workers' organizations, collective bargaining and freedom of association in creating "sound worker management relationships", per ESS2 paragraph 1, would also be helpful in explaining the relevance of the section to project design and execution. GN16.1 could describe how freedom of association and collective bargaining are enabling rights, providing workers with the tools to monitor and address discrimination, grievances and other key elements of ESS2. It is worth enumerating that the basis of international standards on workers' organizations is the principle of non-interference with organizational activities; Borrowers and employers should remain neutral in cases of worker activity and take an open stance when approached to engage in collective bargaining or discuss fair access to the workplace.

This section does not provide guidance on providing "information needed for meaningful negotiation" per ESS2 paragraph 16. This could be added to GN16.3 on collective bargaining, providing examples of relevant information that provides an accurate overall view of the project and employer, such as financial documents and records related to the project workforce. Borrowers should be counselled by the Guidance Note to provide necessary information to contractors and the bargaining partners of contractors that will enable meaningful negotiations to occur. If information is sensitive, conditions of confidentiality should be agreed between the bargaining partners. Guidance can also be added on the definition of meaningful negotiation, which constitutes constructive, good faith talks on all topics related to the terms and conditions of employment.

GN16.3 introduces the obligation of workers' organizations to be representative and act according to certain principles. However, the obligations of the Borrower and its contractors under ESS2 are untouched. It should be noted that excessive representativity requirements are one method by which countries legally restrict freedom of association and collective bargaining. In the interest of balance and preventing the guidance from providing Borrowers with tools to attack workers' organizations, GN16.3 should discuss actions by the Borrower to allow fair representation, the implementation of collective agreements, and the handling of grievances. This includes access for workers' organizations to the project site, worksites, the workforce, management and the ability to hold meetings during non-work times. This is also an opportunity to provide detail on the principle of non-interference in the formation and functioning of workers' organizations, a cornerstone of international norms alluded to in paragraph 16 by "workers' rights to form and to join workers' organizations of their choosing and bargain collectively without interference".

Interference includes the pressure and coercion described in GN16.4, in addition to favouring certain workers' organizations or restricting reasonable access. This should be added to GN16.4 or GN16.5; such guidance would correspond to ESS2 paragraph 16: "the role of legally established workers' organizations and legitimate workers representatives will be respected."

Whether the vehicle of worker representation is a trade union or an alternate mechanism, access and the ability to conduct representative activities are fundamental. In addition to structured negotiations on the terms and conditions of employment, representative activities include the selection of representatives to deal with day-to-day implementation and engagement with management. Worksite-level representatives are sometimes called shop stewards and/or health and safety representatives. Stewards and representatives should have the right to speak with management, be present during disciplinary or other meetings regarding the employment of a worker, engage with management on the practical application of agreements, inspect working conditions and health and safety in a reasonable manner, and conduct organizational activities. This information would supplement GN16.4 on alternate mechanisms and GN16.2 on trade unions, providing a complete picture of the protected activities of workers' organizations and the obligations of the Borrower.

With regards to GN16.4 and engagement with workers through alternative means, it is key to describe the ability to provide higher levels of protection for workers than what is set out in national law. This should not only include recognizing alternative mechanisms where rights are seriously restricted by law, but also engaging with bona fide workers' organizations even if the law or normal practice allows an employer to avoid recognition and negotiation. For example, a country's law may not provide a type of worker with the right to organize and bargain, but also not prohibit them from doing so. These categories can include, for example, agricultural and migrant workers. Where multinational companies are present as contractors on a project and workers' organizations represent company employees in other countries where the company operates, collaboration can be sought with these organizations on developing alternative mechanisms and upholding basic rights. Similar advice can also be sought from international trade union organizations, particularly those related to the project's sector of activity or area of operation.

GN16.5 importantly addresses the "outsourcing or modifying the delivery of work," which signals to Borrowers that they should not change contractors if a contractor's workforce unionizes, nor allow outsourcing of work if direct workers on a project exercise their rights. This paragraph also addresses the problems of intimidation and retaliation that plague worker activities in many parts of the world. It should be supplemented by advising Borrowers to take timely remedial action if such retaliation or coercion occurs, which will prevent individual cases from discouraging organizational activities among the larger project workforce. Remedial action can include reintegration of dismissed workers, disciplining of managers or a public announcement of non-interference and respect moving forward. GN30.3 can be drawn upon for methods of correcting problems and identifying causes. GN20.1 states "If national law is inadequate to effectively regulate and implement prohibitions against forced labor, the *labor management procedures* set out measures to address incidents of forced labor and remedy the

situation”. Similar guidance should be given for situations where national law or prevailing national practice is inadequate to stop violations of freedom of association and collective bargaining rights.

Protecting the Work Force

GN17.3 indicates that terminating of a child under the minimum working age should be conducted in a “responsible manner.” Greater detail can be provided here, such as connecting the child with education, training and rehabilitation services. Financial compensation can be recommended, to ease the transition of the child and remedy the damage caused by engaging in child labour. GN19.1 can supplement ESS2 with guidance on studying and identifying hazardous conditions, work processes and dangerous substances, per international standards.

Guidance on forced labour can address the high risks areas of migrant workers, labour brokering and how to manage these risks through due diligence and monitoring. This is also an opportunity to address trafficking in persons, providing guidance to ESS2 footnote 15.

GN20.2 provides an instructive list of abuses related to forced labour. Coercive activities to force or extract work should be expanded to include not only security personnel but also managers. Supervisors and management should be explicitly prohibited from engaging in physical or psychological pressure, including threats or practices of physical punishment.

Grievance Mechanisms

GN21.4 should address remediation should any form of retaliation occur, and specific steps to prevent retaliation. For example, training of project managers.

The guidance focuses mostly on the existence of grievance mechanisms, neglecting how these mechanisms should properly handle complaints. The last sentence of GN22.1 goes in this direction by alluding to key features, including defined timeframes, independence, and communication with the participants. This should also include the right to appeal, which helps create a fair process.

The guidance mentions procedures for anonymous complaints, but does not discuss confidentiality. The two are distinct processes, with confidentiality referring more to the strict protection of information and limits on the number of people who are aware of the complainant’s identity. Anonymity implies a process in which no one may be aware of their identity. Confidentiality is often preferable because it allows for better follow-up and involvement of the grievant in the process, while reducing fear and exposure to retaliation. Borrowers can be counselled to create procedures that allow the grievant to request confidentiality from the outset, triggering steps such as referring to the grievant with a generic title in documents.

GN22.1 would benefit from a recommendation for grievances to be handled by a committee with the necessary composition to ensure trust among the workforce and the balanced consideration of grievances. Such a committee should include workers’ representatives, thereby promoting accountability and a range of viewpoints beyond that of a single manager assigned as a contact point for grievances. The latter setup seems to be implied under the current language of the

Guidance Note. Complainants should also have the right to have a representative or colleague accompany them to meetings. Such measures help to ensure fairness and non-retaliation in grievance mechanisms that are implemented in the absence of collectively bargained procedures. Per ESS2 paragraph 23, and collectively bargained procedures are not to be displaced.

Occupational Health and Safety

GN25.3 mentions that “Some OHS risk may be specific to women workers” and advises the balanced representation of women on OHS committees. Balanced representation is an important method to help ensure that specific risks are addressed, but guidance could be given on best practices in responding to specific risks.

Specific risks can include the need to protect women during pregnancy and breastfeeding, which falls under the “appropriate measures of protection and assistance” mentioned in ESS2 paragraph 15 and GN15.1. In the context of non-discrimination, GN15.1 provides guidance against prejudice or discriminatory dismissal in such cases. GN25.3 can add international standards and good practices, including conducting an assessment of the risks and making the results available to the woman concerned, and the elimination or adaption of risk. If a temporary transfer to another job duty is necessary, it should provide equal remuneration and timely reinstatement to the original position (or an equivalent one) once pregnancy or breastfeeding has ended. This is only partially covered in GN15.1.

GN26.1 makes a valuable contribution by discussing health and safety committees and worker representatives as methods of collaboration and consultation with project workers, per ESS2 paragraph 26. Further guidance can be given on the committees, which are ideally comprised of at least 50% worker representatives who are freely chosen by democratic means. In cases where workers’ organizations are present, joint OHS committees can be formed for ongoing collaboration. The final sentence of GN26.1 could be clarified to ensure that workers are not excluded in any way from collaboration on OHS in the name of perceived deficits in understanding or language gaps.

GN28.1 can provide guidance regarding worker accommodations, particularly to ensure that workers’ freedom of association and movement is not restricted. Movement and association are an important part of the “well-being of project workers”. Borrowers should also provide adequate transportation in cases where accommodation is provided.

GN29.1 can make reference to OHS committees as methods of collaboration, and to the engagement between committees in the case that multiple parties are operating on the same project site.

Corrective action plans are most effective when implementation is timebound, which can be advised in GN30.3

The Guidance Note needs to provide information on ESS2 paragraph 25(f) and footnote 20 concerning remedy for injury and other adverse impacts. This guidance should ensure that the all injured workers receive benefits and that the Borrower or contractor does not impede access to benefits, for example by contesting claims in court. The Borrower should ensure access to

medical care that restores or maintains the health of the injured worker and their ability to work or care for themselves. In the case of death or permanent loss of ability, appropriate periodical payments should be ensured to the worker or their family.

Contracted Workers

Trade unions are an invaluable source of information on the business practices and record of companies. Consultation with relevant workers' organizations can be advised in GN 31.1 as part of the due diligence process. This provides an independent point of view with in-depth information about contractors and sectors, including risks that are specific to an economic activity or local area.

In tying together information for the Borrower, guidance in this section should reference ESS1 footnote 1 (to paragraph 3), which states:

It is recognized that the Borrower may not be the entity directly implementing the project. Nevertheless, the Borrower is responsible for ensuring that the project is prepared and implemented so that it meets all applicable requirements of the ESSs in a manner and timeframe agreed with the Bank. The Borrower will ensure that any entity involved in implementing the project supports all obligations and commitments of the Borrower in accordance with the requirements of the ESSs and the specific conditions of the legal agreement, including the ESCP. Contractors retained by or acting on behalf of the Borrower or an implementing agency are considered to be under the direct control of the Borrower.

The specific examples of procedures to monitor contractors, including audits and spot checks, in GN32.1 is appreciated. Oversight should also include procedures whereby the contractor will promptly notify the Borrower of problems or potential problems related to ESS2 requirements. GN32.1 would benefit from concrete guidance on remedying cases of non-compliance, in addition to the monitoring procedures. Detailed guidance would also be helpful regarding the ESS2 statement that “the Borrower will incorporate the requirements of this ESS into contractual agreements”, and the requirement that contractors do the same with their subcontractors. Particularly once the level of subcontractor is reached, or if labour brokers are utilized by a contractor, the multiple layers of responsibility can allow abuses to occur and limit the willingness of the top party (the Borrower) to take effective action. Guidance should clearly enumerate the responsibilities of the Borrower and the contractor in monitoring subcontractors. It is particularly important that contractors do not engage in subcontracting with the intent to avoid responsibility for working conditions.

For grievance mechanisms to be effective, workers must be aware of their existence. GN33.2 describes how a project grievance mechanism should be made available to contracted workers if the contractor is unable to provide a mechanism. In such cases, the layers of employment and supervision make it more likely that workers will not be informed of their rights to access redress, or will encounter difficulties in accessing the proper channel. Guidance can be provided on raising the awareness of third party workers and designing accessible mechanisms, consistent with ESS2 paragraph 21.

In practice, placing obligations for contractors in an agreement is only a first step and can be largely symbolic. Contractors are frequently doomed to failure because the financial and completion requirements do not allow them to provide decent and safe working conditions. First, contractors need adequate financial resources in order to provide contracted workers with reasonable terms and conditions of employment, including wages, leave and benefits. If Borrowers force rock-bottom financial conditions but nominally include ESS2 in contracts, the rights of project workers are unlikely to be realized. Similarly, contractual and informal pressure on speed can seriously compromise occupational health and safety. Guidance should address these crucial issues that allow contractors to meet obligations, and ensure that the Borrower is a responsible actor.

Community Workers

Guidance should help ensure that ESS2 paragraph 34 does not become a loophole to avoid responsibility. Direct workers hired by a Borrower or agency to carry out works or infrastructure projects should not be classified as community workers, even if targeted efforts are made to promote local hiring. Not all, or even most, public works projects or public employment programmes include the community contribution of labour. Section F of ESS2 is rife with dangers of disguised employment and misclassification. Guidance to Borrowers must dissuade any attempts to evade ESS2 requirements or disguised employment.

GN34.3 can be tightened to be consistent with ESS2 paragraph 35, which makes it mandatory to assess community labour projects with regards to ESS2 paragraphs 9-15. GN34.3 appropriately points out that terms and conditions of employment and wages are most important in long-term projects and employment-support programmes. However, guidance should be given on how to assess wages, terms and conditions of employment, working conditions and other elements of paragraphs 9-15 on all projects with community labour. GN35.1 focuses on OHS and specific vulnerabilities, bypassing crucial subjects. Similarly, ESS2 paragraph 36 requires the *labour management procedures* to enumerate terms and conditions of employment, including wage and hour aspects, but this is not taken up in GN36.1 or GN36.2, which address grievance mechanisms and restate paragraph 36. Overall, this provides little guidance to Borrowers on ensuring that community workers are provided with fair remuneration and decent terms and conditions of employment.

One of the eight fundamental conventions of the ILO is Convention 29 on forced and compulsory labour, adopted in 1930. Recognizing actually existing conditions in some countries, the convention allowed compulsory mobilization to continue during a short transitional period before being eliminated. The convention sets out basic protections and requirements for transitional compulsory workers that should also, at the very minimum, be the floor for voluntary community workers. These protections include working hours consistent with prevailing practice for regular workers, overtime pay, rest consistent with local practice, remuneration at prevailing rates for the type of work conducted, payment directly to the worker and not an intermediary, and the application of worker compensation laws. The transitional allowance of compulsory labour was abolished by the 2014 Protocol to the Convention, but voluntary community labourers should receive at least the basic rights afforded to compulsory workers some 87 years

ago. Guidance should be much stronger on the considerations made in assessing the terms of ESS2 in relation to community workers.

Primary Supply Workers

GN39.1 suggests a mapping exercise of possible suppliers if a sector is identified as having serious child labour, forced labour or OHS risks. However, mapping of possible suppliers is also useful in identifying risk and conducting due diligence and is described in ESS1 paragraph 13 (c).

No guidance is provided on ESS2 paragraph 40, which states that “The labor management procedures will set out roles and responsibilities for monitoring primary suppliers”. Monitoring is central to avoiding negative impacts on primary supply workers, and guidance can be given on how Borrowers can be effective in designing and implementing it. The Guidance Note is also silent on requiring ESS2 paragraph 41: “where there is a significant risk of serious safety issues related to primary supply workers, the Borrower will require the relevant primary supplier to introduce procedures and mitigation measures”. This part of ESS2 risks being a symbolic measure unless effective requirements are demanded by Borrowers of suppliers. Finally, no guidance is given on what constitutes “appropriate steps” in cases of child or forced labour per ESS2 paragraph 40. Here again, Borrowers need specifics in order to uphold ESS2 with regards to primary supply workers.

Additional resources

There are numerous ILO conventions and recommendations, in addition to the eight fundamental conventions, that are helpful in designing well-functioning labour relations and procedures. Other resources include materials developed by the IFC. Because the ESS2 Guidance Note is relatively brief and is meant to address Borrowers in a wider range of country situations, further resources should be listed at the end or referenced throughout. A suggested list of items:

[ILO Convention 94, Labour Clauses \(Public Contracts\)](#)

[ILO Convention 121, Employment Injury Benefits](#)

[ILO Convention 135 – Workers’ Representatives](#) (See also: [Recommendation 143](#))

[ILO Recommendation No. 146 , Minimum Age of Work](#)

[ILO Convention 154, Collective Bargaining](#) (See also: [Recommendation 163](#))

[ILO Convention 155, Occupational Health and Safety](#) (See also: [Protocol on the Convention](#))

[ILO Convention 167, Safety and Health in Construction](#) (See also: [Recommendation 175](#))

[ILO Convention 181, Private Employment Agencies](#) (See also: [Recommendation 188](#))

[ILO Convention 183, Maternity Protection](#)

[ILO Recommendation No. 190, Child Labour](#)

[ILO Recommendation No. 198, Employment Relationship](#)

[ILO Recommendation 203, Forced Labour](#) (See also [Protocol 29 to the Forced Labour Convention](#))

[Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”](#)

[The UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively](#)

[Survey of violations of Trade Union Rights](#)

[World Bank Core Labor Standards Toolkit](#)

[IFC Good Practice Note: Non-Discrimination and Equal Opportunity](#)

[IFC Good Practice Note: HIV/AIDS in the Workplace](#)

[IFC and EBRD: Guidance Note on Workers’ Accommodations](#)

[IFC Good Practice Note: Managing Retrenchment](#)

[IFC Good Practice Note: Addressing Child Labor in the Workforce and Supply Chain](#)

[IFC Good Practice Note: Managing Contractors’ Environmental and Social Performance](#)

General comment on workers and employment in ESS1 and ESS10

ESS10 paragraph 3 states that “Requirements regarding engagement with workers are found in ESS2”, which could limit the identification of key stakeholders in ESS10 paragraphs 10-11. ESS2 is limited to project workers and oversight of employment created on the project or in the project’s supply chain. Together, this misses the issue of how projects will impact employment and livelihoods, and the need for consultation of affected workers and their organizations. Some of this may be identified during consultations stemming from ESS2 paragraph 2 and footnote 2, although these statements seems to refer to consultation of workers’ organizations in the scoping a project site for potential labour and working condition risks. Meanwhile, ESS1 briefly mentions the consideration of “impacts on the health, safety and well-being of workers and project-affected communities” (paragraph 28(c), vi). This could potentially identify large-scale or structural impacts on employment, but seems limited to the issue of safety and may not capture cases where a project will change a local labour market, eliminate livelihoods or compel a transition to new types of jobs. This is related to the central purpose of the project, such as a new logistics network that could displace existing workers, rather than its shorter-term construction or creation by project workers.

For example, a Bank project could fund the construction of new transit infrastructure and support a Borrower in designing a formal public transport system that will replace an informal network. Other examples include the expansion of intensive commercial agriculture in areas dominated by casual labourers, tenant farmers and smallholders. In such cases, there may be workers' organizations which are stakeholders and stand to be affected by the project, but will not be involved as representatives of project workers. For example, trade unions of informal workers (e.g. drivers) or rural workers' organizations. Such workers' organizations and their members will be directly impacted, potentially adversely, and should be consulted separately from community or social organizations.

The Guidance Note for ESS10 should add guidance for paragraph 3 regarding ESS2. This guidance can explain to Borrower that ESS2 covers project workers, not groups of workers whose livelihoods may be impacted by the project. In such cases, these groups of workers should be treated as stakeholders. Similar content could be added to guidance for ESS1 paragraph 28.