

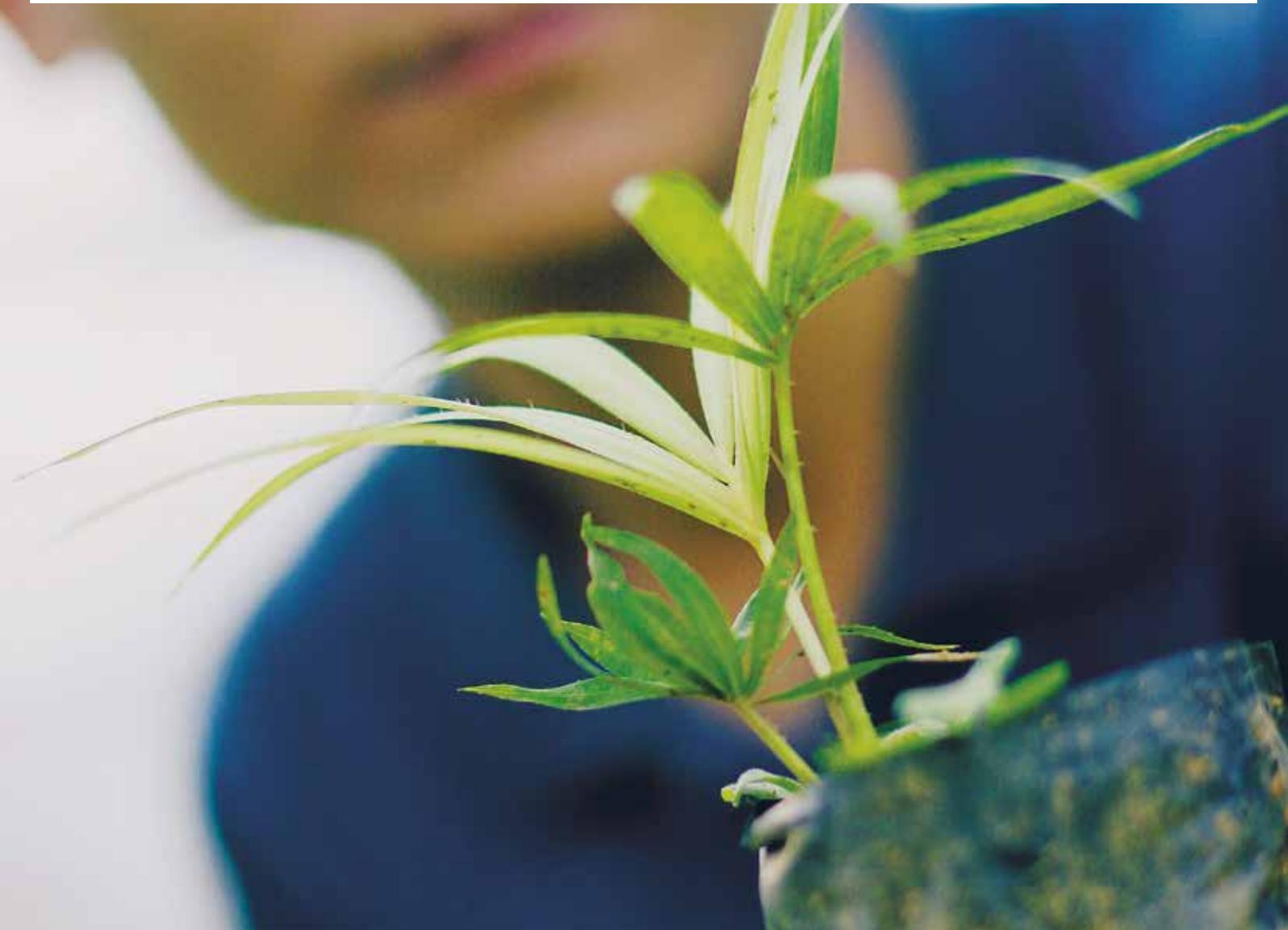
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Reforming the World Bank's Safeguards

A comparative legal analysis

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Reforming the World Bank's Safeguards

A comparative legal analysis

Jochen von Bernstorff/Philipp Dann

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Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
BP	Bank Procedure (World Bank)
CAO	Compliance Advisor/Ombudsman (IFC)
DOTS	Development Outcome Tracking System (IFC)
EA	Environmental assessment
EBRD	European Bank for Reconstruction and Development
GPA	General policy on assessment
IFC	International Finance Cooperation
IEG	Independent Evaluation Group
MDB	Multilateral development bank
NGO	Non-governmental organizations
OECD	Organization for Economic Co-operation and Development
OP	Operational Policy (World Bank)
TTL	Task Team Leader (World Bank)
UCS	Use of country systems

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Executive Summary

The World Bank has for the first time started a process to update and review its environmental and social safeguard policies in their entirety. According to the World Bank approach paper “*there are many reasons to carry out this review and update of the safeguard policies, among them: changing borrower profiles; increased awareness of the value and vulnerability of the global commons; changing Bank operations; the growing role of the private sector; and the 2010 evaluation¹ of the safeguard policies*”²

One additional key factor influencing the reform process is the emergence of alternative safeguard frameworks in the broader development finance community. This process, which started with the adoption of the Performance Standards by the International Finance Corporation (IFC) in 2006, had far-reaching implications for the Multilateral Development Banks’ (MDBs) approach to preventing environmental and social risks. Today, almost all regional MDBs have reformed their safeguard systems. By comparing the safeguard frameworks of other MDBs and IFC with the World Bank’s approach, the study ‘*Reforming the World Bank’s Safeguards. A Comparative Legal Analysis*’ by Jochen von Bernstorff and Philipp Dann draws a differentiated picture of the reform needs and potentials in the World Bank’s safeguard system. The study, which was commissioned by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ), analyzes the safeguard frameworks of the African Development Bank (AfDB), Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD) and IFC in order to assess whether individual elements could and should be emulated by the World Bank.³ At the same time, the study explains some key legal notions (like ‘policies’, ‘non-policies’, ‘principles’, etc.) in order to benefit easier and more transparent communication about these notions.

The following elements of any MDB sustainability framework are analyzed in more detail: its **normative architecture**, its approach to **screening and appraising**

bank-financed projects, its approach to **monitoring and supervising** projects, including the question to what extent **country systems** can be used for safeguarding people and the environment, as well as **cross-cutting issues**, such as the budgetary framework of the safeguard system.

The study concludes that while the adoption of some elements from the safeguard frameworks of other MDBs and IFC would enhance the effectiveness of the World Bank’s safeguard system, the adoption of other elements would risk diluting the achievements of the existing safeguards system, especially if reforms were not sequenced carefully.

Normative architecture

The comparison between the various approaches to structuring and organizing environmental and social policies shows a clear trend towards an ‘integrated framework’-architecture. The integrated framework provides an easily understandable and well-structured pyramid of rules, consisting of three layers: An umbrella policy (first layer), a set of issue-specific policies (second layer) and guidance notes on each issue-specific policy (third layer).

The World Bank lacks a comparably transparent pyramid structure. Instead, its safeguards are contained in a variety of unconnected policies on the second layer (OPs/BPs) without a unifying overall structure. In order to ensure comprehensive coverage and better accessibility, this study proposes several options to design an integrated framework along the lines of the IFC-model and the structural approach taken by other MDBs. The study in particular explains why the World Bank should follow the approach taken by other MDBs to introduce an umbrella policy for social and environmental safeguards.

Based on a comparative review of thematic coverage of MDB safeguard systems, the study also makes the case for introducing new policies on emerging issues of community health, labor conditions, land tenure, climate change and natural resources already covered by most of the analyzed MDBs.

Linkages between appraisal and supervision

A central element of any safeguard system is the question of how upstream (i.e. the early phase of project identification, appraisal and approval) and downstream (i.e. implementation and supervision) phases are designed – and how they

1 IEG, Safeguards and Sustainability Policies in a Changing World, 2010 [hereafter IEG, Report, 2010].

2 World Bank, The World Bank’s Safeguard Policies – Proposed Review and Update. Approach Paper, 2012.

3 Although the Inter-American Development Bank also substantially revised its safeguard policies, it is not covered in this study due to capacity constraints.

are linked and integrated into a coherent system. In this respect, the analyzed safeguard systems show a considerable degree of variance. While IFC and some regional MDBs focus on shifting responsibility to the client and continuously supervise environmental and social outcomes in co-operation with the client, the World Bank puts its main emphasis on early and clear prescriptions and intensive up-front risk-screening through its own staff.

The World Bank has so far not managed to integrate upstream appraisal and downstream supervision and evaluation of environmental and social outcomes into a well-balanced safeguard system. An approach that systematically links the upstream assessment of risks with the downstream supervision of mitigation plans should therefore lie at the heart of the Bank's safeguard reform. It is imperative for the Bank to step up on-going efforts to make the monitoring and supervision of projects more effective.⁴ IFC and regional MDBs can provide important lessons for supervision of environmental and social outcomes – but also warnings. IFC for instance is the institution with the strongest reliance on client-reporting in the monitoring phase. However, these reports are not always candid and sometimes of limited quality. Other MDBs have tried to broaden information channels in the supervision phase to overcome these difficulties. The World Bank should also make more use of third party monitoring and information generated by affected populations and their representatives.

Borrower ownership and the use of country systems

The comparison with other MDBs shows a mixed record of fostering borrower ownership through the use of country systems. Other MDBs are generally not more advanced in the practical use of country systems than the World Bank. Two regional MDBs (ADB and AfDB) put a stronger conceptual focus on borrower capacity-building as a precondition for the use of country systems than the World Bank. In general, experiences in these MDBs and the World Bank demonstrate that borrower capacity-building should be regarded as the central precondition and tool to create and implement borrower ownership in the field of safeguards. At the same time, the level of ownership and partner capacity must also influence the sequencing of the safeguard reforms. The World Bank should refrain from loosening its up-front screening of environmental and social risks (e.g. through using country systems) before having an effective

monitoring system for environmental and social outcomes in place. For using country systems for safeguarding people and the environment not only requires that the partner systems work efficiently, but that the World Bank also continuously monitors their reliability. More borrower ownership in the area of safeguards is advisable, but it requires enhanced long-term investments in both borrower capacity and the Bank's own supervision system.

Agents for ensuring better environmental and social outcomes

The World Bank, as well as some of the analyzed MDBs and IFC, is very cautious when it comes to integrating third party information through community participation, expert analysis and grievance mechanisms. Experiences on the national level however show that adverse effects of projects are resolved faster, more efficiently and more effectively when external agents and affected individuals can contribute information on impacts throughout the whole project cycle. The World Bank therefore needs to open up its monitoring system and intensify its efforts to involve independent experts, as well as create effective community participation and third party-agency on environmental and social issues throughout the project cycle. This must include enhanced investment in centralized and decentralized grievance mechanisms.

⁴ On the respective efforts concerning the grievance mechanisms and the Dispute Resolution & Prevention (DRP) Facility, see below, II.3a.dd).

I. Introduction: The World Bank's safeguard system in need of reform

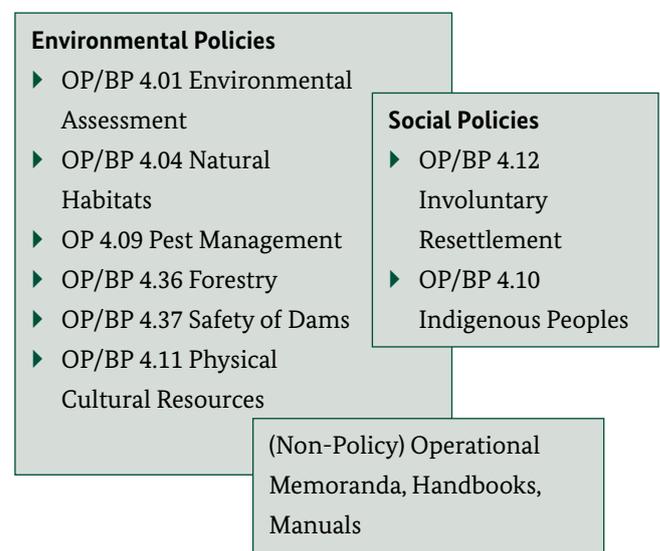
1. Context

The World Bank's environmental and social safeguard policies have been developed since the 1980s for the instrument of investment lending.⁵ The central idea of the safeguard policies is to protect people and the environment from adverse impacts of projects financed by the Bank. Since the late 1980s, eight environmental and social safeguard policies (see Figure 1) as well as two legal safeguard policies⁶ have been adopted, each of which deals with a particular environmental, social or legal risk through specific procedural and substantive norms. Due to the incremental development of the safeguard system, the individual policies lack a common policy-framework as well as a unified internal structure. Despite its pioneering-role in the 1980s and 90s and the achievements of the World Bank safeguard system in preventing harm to people and the environment, the Bank has come under increasing pressure to reform it.

Critique of the current World Bank safeguard system has been voiced from various perspectives, internal and external. The 2010 Report by the Independent Evaluation Group (IEG) 'Safeguards and Sustainability Policies in a Changing World'⁷ came to the conclusion that the current World Bank safeguard system is only partially effective and should be reformed. It criticized the Bank's focus on ex-ante assessments as being too "frontloaded" and inflexible. At the same time, it found the World Bank safeguard policies to neglect systematic supervision of environmental and social risks in

the implementation phase.⁸ Civil society organizations have also pointed to the fact that the six environmental and two social safeguard policies cover some important social and environmental risks, but leave other issues (e.g. climate change and labor conditions) aside.⁹ Another recurring issue that is voiced from inside the Bank is the safeguard policies' lack of coherence, both in terms of their overall architecture as well as their internal structure, which makes them difficult to work with.

Figure 1. World Bank core environmental and social safeguard policies



Pressure on the Bank to reform the safeguard policies is also related to changes in the economic and political environment: Growing wealth in many developing countries has diversified the group of borrowers and produced more and more capable and self-confident counterparts and borrowers for lending institutions like the Bank. The new emphasis on effectiveness and results, closely connected to the Paris Declaration (2005) and the Accra Agenda for Action (2008), has created higher expectations with regard to enhanced client-ownership and improved accounting of development

5 Investment Lending is the central lending instrument of the World Bank, covering 75 to 80 percent of World Bank lending in the past two decades. Next to it, the Bank has two other major lending instruments, Development Policy Lending, which accounts for roughly 20 percent of lending volume, and Program-for-Results financing, which was newly introduced as a lending instrument in 2012 and is capped at no more than 5 percent of Bank lending. (<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120732~menuPK:268725~pagePK:41367~piPK:51533~theSitePK:40941,00.html>). While investment lending is governed most directly in OP/BP 10.00, development policy lending is regulated in OP/BP 8.60 and Program-for-Results financing in OP/BP 9.00. Safeguard policies do not apply to Development Policy Lending and only in principle to Program-for-Results lending. In more detail, Dann, Law of Development Cooperation, 2013, Chap. 7 and 8.

6 As the Safeguard Review does not include the two legal safeguard policies, they are not discussed in this study.

7 Hereafter cited as 'IEG, Report, 2010'.

8 IEG, Report, 2010, Executive Summary, pp. xx-xxiii.

9 On the challenge of internalizing human rights standards into the operations of international organizations von Bernstorff, *Procedures of Decision-Making and the Role of Law in International Organizations*, 9 German Law Journal 1939–1964 (2008), 1961–1963, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1049>.

outcomes, including the management of environmental and social risks.¹⁰

Moreover, serious competition to the World Bank's safeguard model emerged from within the World Bank Group as well as from regional multilateral development banks (MDBs). In 2006, the International Finance Corporation (IFC), the private lending arm of the World Bank Group, created its own safeguard policies for investment lending, attempting to adapt the content of the World Bank's safeguard policies to the needs and capabilities of private sector clients.¹¹ Building on the World Bank's experience, IFC's Policy on Environmental and Social Sustainability and the accompanying Performance Standards adopted in 2006 and revised in 2012 established an integrated safeguard system which was intended to be more encompassing, more flexible and outcome oriented, and more conducive to client-capacity building. This model proved to be very attractive for private sector lenders and today is the dominant approach used by private banks (referenced in the leading global standard for private sector lending, the so called 'Equator Principles') and public banks alike. IFC's Performance Standards are also being referred to in the OECD standard for export credit guarantees.¹²

Regional MDBs¹³, inspired by IFC's move towards an integrated framework, followed suit and reformed their respective safeguard systems in the subsequent years. The European Bank for Reconstruction and Development (EBRD)¹⁴ implemented an integrated framework in 2008, followed by the Asian Development Bank (ADB), which introduced a similar structure in 2009.¹⁵ The African Development Bank (AfDB) released a comparable reform proposal in December

2012.¹⁶ Although the regional development banks deal to a substantial degree with public borrowers, they have adopted specific elements of the IFC model as part of their reform efforts.

2. Aim and Methodology

Against this background, the World Bank recently started a far-reaching review process of its safeguard policies.¹⁷ This study will compare the World Bank's safeguard system with the respective systems of IFC, AfDB, ADB and EBRD in order to derive policy-options for the reform-process. The guiding questions in the reform debate and this study are:

- ▶ how can the World Bank's safeguard system become better aligned with the changing needs and aspirations of borrowers, the external context, and the business of the Bank;¹⁸ and
- ▶ whether and, if so, to what extent can and should the World Bank's safeguard framework be aligned with the safeguard systems used by IFC and regional MDBs.

In this regard, IFC's safeguard approach plays a particularly important role. Building on the experiences of the World Bank's safeguard system, IFC was the first institution to introduce a conceptually new approach to safeguarding people and the environment, which subsequently influenced all the other MDBs' reform efforts. It therefore makes sense to view IFC's safeguards approach as an alternative safeguard paradigm that can be contrasted to the World Bank's framework. Juxtaposing these two paradigms helps to compare the analyzed MDBs safeguard systems by locating particular features on a spectrum between the World Bank and the IFC model. To support this effort, the study explains and clarifies a number of notions that are used in the current discussion but are seldom explained in concrete terms. For this purpose too, the comparison with other banks and their terminologies and concepts is helpful.¹⁹

10 On the fundamentally changing landscape, see for example Greenhill/Prizzon/Rogerson, *The Age of Choice: Developing countries in the new aid landscape*, ODI Working Paper 364, 2013; Severino/Ray, *The End of ODA*, Center of Global Development Working Paper 167, 2009; Dann, *The Law of Development Cooperation*, 2013, Chapter 2.C.

11 IFC, *Policy on Environmental and Social Sustainability*, January 2012.

12 Organisation for Economic Co-operation and Development, Trade and Agriculture Directorate Trade Committee, Working Party on Export Credits and Credit Guarantees, Recommendation of the Council on Common Approaches for officially supported Export Credits and Environmental and Social Due Diligence, 28.06.2012, TAD/ECG(2012)5, V. 20.

13 Although the Inter-American Development Bank also substantially revised its safeguard policies, it is not covered in this study due to capacity constraints.

14 EBRD, *Environmental and Social Policy*, 2008.

15 ADB, *Safeguard Policy Statement*, 2009.

16 AfDB, *African Development Bank's Integrated Safeguards System*, 2012.

17 World Bank, *The World Bank's Safeguard Policies – Proposed Review and Update. Approach Paper*, 2012 [hereafter World Bank Approach Paper, 2012].

18 World Bank, *Approach Paper*, 2012, pg. 1.

19 On terminology, see section I.3 below. – Note also that this study as well as the current reform only deal with safeguards in investment lending. Nevertheless, the other two lending instruments of the Bank, development policy lending and program-for-results lending as well as BETFs, also pose important questions with regard to social and environmental safeguards.

This comparative study is primarily a legal analysis. The basis and main object of the analysis are legal texts (policies) of World Bank, IFC and other MDBs, which contain the relevant norms on environmental and social safeguards as well as scientific and non-scientific texts on these policies. Additionally, interviews were conducted with safeguard practitioners in the analyzed institutions. These interviews were kindly facilitated by the German Ministry for Economic Cooperation and Development and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH Sector Project 'International positioning of German development cooperation in development economics'. Whenever empirical questions were raised, the study relies on empirical data that is publicly available. However, as most of the institutions analyzed in this study have only recently reformed their safeguard policies, empirical data on the effectiveness of these new policies is often not yet available.²⁰ Despite of interviews with safeguard experts in the analyzed institutions, the study can only to a very limited extent assess how the compared safeguard norms are being applied in practice.

When comparing various policies and making recommendations the authors of this study applied the normative *telos* common to all analyzed safeguard systems, which is the prevention and mitigation of adverse environmental and social impacts. The recommendations thus attempt to outline policy options in the safeguard review-process with the potential to enhance prevention and mitigation of adverse environmental and social impacts of World Bank investment lending projects in light of changed context of bank engagement (see above).

3. Terminology

This study deals with internal norms of various MDBs, in particular those of the World Bank, EBRD, AfDB, ADB and IFC. There are several notions which are not easily understood and distinguished for non-lawyers (and even among lawyers) when analyzing norms on environmental and social safeguards of these institutions.

In this study, the term 'norms' will be used as the overall term encompassing mandatory and non-mandatory internal organizational prescriptions. It is a heuristic term,

which is not identical with the terminology applied in the internal practice of MDBs. It should be noted in this context that there is no uniform practice of MDBs in terms of terminology. However, some general patterns in terms of internal terminology can be discerned. Mandatory safeguard norms are often called 'policies' or 'rules'. Both terms are used interchangeably in this study. The notion of 'policies' normally refers to a set of mandatory norms (e.g. policy on indigenous people), while the word 'rule' more often means the concrete norm (e.g. para. 10 or Art. 5).

Whenever the term 'principles' occurs in this study, it is being used to differentiate between a concrete prescription ('rule') and more abstract rules or policies ('principles'). 'Do no harm', for instance, is a principle, which can be concretized by a mandatory rule or policy with more concrete prescriptive meaning.

Non-mandatory internal norms of MDBs are in practice often being called 'non-policies', 'guidance-notes', 'operational memoranda', or 'manuals'. These norms regularly are being drafted in very concrete terms to allow the staff of the organization to handle and process mandatory policies. They guide the application of safeguard policies by staff members without being mandatory norms themselves.

²⁰ It would be worthwhile to bring in the experiences that national administrations have collected with regard to these issues, as they have struggled with similar problems since about 25 years and have developed interesting approaches, especially in the context of 'New Public Management'. See generally, Schedler/Proeller, *New Public Management*, 2000.

II. Analysis and comparison of safeguard systems

The current reform debate focuses on four aspects of the existing World Bank-safeguards approach, which have either been put forth in the approach paper²¹ or stated in the influential IEG-evaluation²²: (1.) the lack of a transparent normative architecture and a hierarchically integrated and thematically comprehensive framework consolidating existing safeguard policies; (2.) the prescriptive and rather inflexible focus of the Bank's safeguard system on ex-ante screening; (3.) deficits in the systematic monitoring and evaluation of environmental and social outcomes in the downstream phase; and (4.) the lack of adequate institutional and budgetary incentives with regard to safeguards. The study analyzes more closely whether and to what extent these alleged structural weaknesses of the World Bank's safeguard system can be traced back to the respective policies. Moreover, the study tries to verify whether individual elements of safeguard approaches used in other MDBs, including IFC, actually constitute improvements with regard to the World Bank's system and, if this is the case, to what extent it would be advisable to use them as a yardstick for the World Bank reform process. The study approaches all of these aspects by describing the underlying problems as well as the respective solutions of IFC and the regional development banks, in order to then compare these solutions with the approach currently taken by the World Bank. By way of conclusion, the study attempts to answer the question whether and, if so, to what extent certain elements of the new paradigm developed by IFC and at least partially adopted by other MDBs can and should be used by the World Bank to improve its existing safeguard system.

1. Normative Architecture: Integrated Framework vs. Fragmented Policies

a) What does 'integrated framework' mean?

aa) Integrated framework

When IFC developed its safeguard approach, it aimed at an easily accessible and comprehensive standard, which would allow private enterprises to manage environmental and social risks effectively. In terms of the overall normative architecture, IFC therefore opted for an *integrated framework*,

which systematically connects and includes substantial and procedural rules as well as specific guidance notes in a hierarchically structured normative architecture. Such an integrated framework provides an easily understandable and well-structured pyramid of norms, consisting of three layers (see figure 2): An umbrella policy at the top formulates general principles. These apply to a set of issue-specific policies on the second layer, which spell out more concrete substantive aims and procedural rules, for example for the treatment of indigenous people or biodiversity conservation. Each of these issue-specific policies is complemented by an accompanying guidance note. These guidance notes are non-policies providing almost a running commentary on the policy-rules.

This feature of the IFC model has proven to be a very attractive architectural approach not only for private sector lending (Equator Principles), but also for other MDBs (EBRD, AfDB, ADB) as well as the OECD in the field export credit guarantees²³, the majority of which subsequently espoused it as will be shown below. The integrated framework-approach has quickly become the new standard approach to formulating and structuring safeguard policies in investment lending to both private and public entities.

The key characteristic of an integrated framework is the existence of an encompassing policy (called umbrella policy) that defines basic roles and responsibilities as well as general commitments and objectives with regard to environmental and social risks. In case of the IFC-Performance standard, this general policy is called 'Policy on Environmental and Social Sustainability'. In other MDBs this umbrella policy is termed 'Safeguard Policy Statement' (ADB)²⁴, 'Integrated Safeguard Policy Statement' (AfDB)²⁵ or 'Environmental and Social Policy' (EBRD)²⁶. This umbrella policy is complemented by a second normative layer that consists of focused policy statements that establish operational parameters for specific issues, e.g. climate change,

21 World Bank, Approach Paper, 2012.

22 IEG, Report, 2010.

23 On the safeguards-system prescribed by the OECD for its member states in the field of export credits, which refers to IFC-standards in more detail see von Bernstorff, Jochen/Jacob, Marc/Baetens, F. Freya: Steuerung und Kontrolle der Außenwirtschaftsförderung in Deutschland, USA und den Niederlanden im Rechtsvergleich, 2013 (forthcoming with INEF).

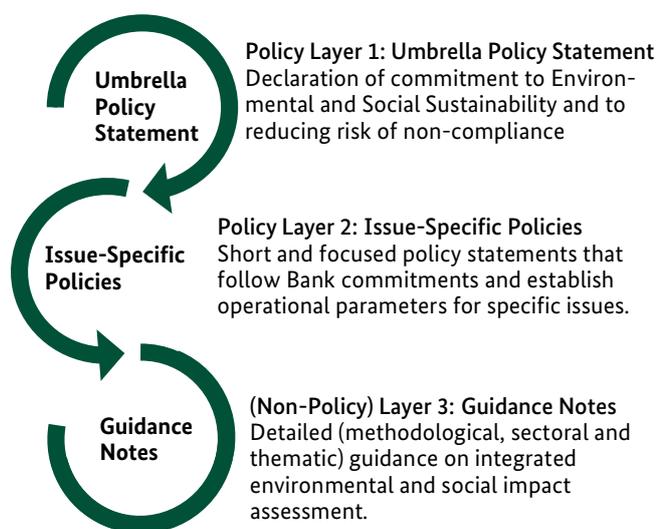
24 ADB, Safeguard Policy Statement, 2009.

25 AfDB, African Development Bank's Integrated Safeguards System, 2012. The policy is still a proposal.

26 EBRD, Environmental and Social Policy, 2008.

labor conditions, involuntary resettlement, etc. These issue-specific policies are called ‘Performance Standards’ (IFC)²⁷, ‘Safeguards Requirements’ (ADB)²⁸, ‘Operational Safeguards’ (AfDB)²⁹ or ‘Performance Requirements’ (EBRD)³⁰. Whereas the umbrella policy applies to every project in the lending portfolio, the issue-specific policies focus on specific risk areas and therefore only apply under certain circumstances. The third layer provides practical guidance on how to implement procedures and processes established by the two higher-ranking layers of norms.

Figure 2. Characteristics of the integrated framework approach



The World Bank lacks a comparably transparent pyramid structure. Although Operational Policy (OP) 10.00 (and the accompanying Bank Procedure, BP 10.00) defines objectives and procedural responsibilities for investment lending in general, it contains no details on roles, responsibilities and commitments with respect to safeguards and should therefore not be understood as an umbrella policy as defined above. On what would be the second normative layer, the Bank has a number of structurally non-standardized issue-specific policies which each consist of two components, the rather short substantive policy (the OP) and the more extensive procedural rules (the BP). Even less systematized is the third level of the Bank’s legal structure, which consists

27 IFC, Performance Standards on Environmental and Social Sustainability, 2012 [hereafter: IFC, Performance Standard No].
 28 The Safeguard Requirements are annexed to the ADB Safeguard Policy Statement, see above [FN 27].
 29 These are integrated in the proposal, see above [FN 28].
 30 These requirements are integrated in the same document as the umbrella policy, see above [FN 29].

of some explanatory rule books, such as Operational Memoranda or Manuals, which lack the systematic stringency that for example the IFC Guidance Notes have.

In what follows, the content of the three layers of norms in the IFC-model and other MDBs will be described in more detail.

ab) Umbrella policy

In the integrated framework approach, the umbrella policy (layer 1) provides a common *substantial and procedural* framework that guides the issue-specific policies (layer 2). The umbrella policy represents the highest layer of the safeguard framework and therefore is mandatory in all analyzed institutions. While the specific content of the umbrella policy differs between MDBs, a number of common elements can be distinguished.

Figure 3. Layer 1 umbrella policy content of MDBs³¹

	Content	WB	IFC	EBRD	ADB	AfDB
General commitments	Poverty reduction	In OP 10.00	+	+	+	+
	Environmental sustainability	In OP 10.00	+	+	+	+
	Social sustainability	In OP 10.00	+	+	+	+
	Human rights		+	+		+
	Gender		+	+	+	
General roles and responsibilities	Due diligence	In OP/ BP 10.00	+	+	+	+
	Project categorization	In OP/ BP 10.00	+	+	+	+
	Supervision/ monitoring	In OP/ BP 10.00	+	+	+	+
	Grievance		+	+	+	+

First, all umbrella policy statements analyzed in this study start out in defining the *general commitments* as well as *roles and responsibilities* of the safeguard system (see figure 3 for a detailed overview of umbrella policy content). All analyzed umbrella policies contain a general commitment

31 See Appendix for examples of language on social sustainability, human rights and gender.

to environmental and social sustainability. Some add language on human rights, gender or other general principles. IFC's umbrella policy, for instance, contains a commitment to the 'do no harm' principle, to gender-sensitivity and to human rights as well as to participation of affected communities.³² EBRD commits itself to environmental and social sustainability and adds language on human rights and gender.³³ The new umbrella policy of AfDB also contains references to environmental and social sustainability and human rights³⁴ but does not include a clear commitment to gender issues. ADB only commits itself in its umbrella policy to "avoid adverse impacts of projects on the environment and affected people, where possible" without stating a commitment to human rights.³⁵

Box 1. Umbrella references to Human Rights

As to concrete references to human rights standards, regional banks use carefully drafted language in order not to recognize direct obligations of the respective institutions. When references to binding human rights law appear in the umbrella policy, they concede that financed projects should not interfere with obligations of countries under these treaties. This amounts to an indirect commitment relating to binding constitutional or treaty obligations of the borrower only.

The AfDB umbrella policy can serve as an example: "*The Bank is committed to **respecting and promoting Human Rights on the African continent as well as to protecting vulnerable groups, particularly Indigenous Peoples, within the context of national systems and regulations.***" (AfDB, 2012, para. 11)

and

"*The Bank will **encourage countries to apply the international norms and standards and best practices, enshrined in the United Nations' and African Union's Human Rights declarations***"; (AfDB, 2012, para. 11)

32 IFC, Policy on Environmental and Social Sustainability, 2012, paras. 9, 12, 13, 30; here the IFC references language on business and human rights from the so called Ruggie-Principles of the UN Human Rights Council, see von Bernstorff, Die UN Guiding Principles on Business and Human Rights – Ein Kommentar aus völkerrechtlicher Sicht, available at: <http://www.humanrights-business.org/files/vortragguidingprinciplesjvb.pdf>; on business and human rights in general von Bernstorff, Business and Human Rights: On the Expansion of International Human Rights Obligations to Abusive Corporate Practices, in: K. Lachmeyer (Hrsg.), *Corporate Social Responsibility and International Law*, Wien 2010, S. 35–52.

33 EBRD, Environmental and Social Policy, 2008, paras. 2, 3, 5, 9, 46, 47.

34 AfDB, Integrated Safeguards System, 2012, p. iv and paras. 2, 9, 12, 16, 38.

35 ADB, Safeguard Policy Statement, June 2009, Chapter V.A., and paras 12, 31, 32, 42, 54, 59.

or in the case of EBRD: "*The EBRD will not **knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental protection, human rights and sustainable development, as identified during project appraisal***"; (EBRD, 2008, para. 9)

or in the case of the IFC: "*IFC recognizes the responsibility **of business to respect human rights, (...) IFC's Performance Standards support this responsibility of the private sector***". (IFC, 2012, para. 12) Only exceptionally do banks commit themselves directly to human rights. In these cases they prefer to use weak and tentative language in order to avoid taking on concrete obligations. The EBRD formulation is a telling example:

"*The Bank will **seek to ensure that the projects it finances respect the rights of affected workers and communities***" (EBRD, 2008, para. 3).

The formulation "seek to ensure" instead of "ensures" weakens this EBRD commitment considerably. Furthermore the verb "respect" is not related to the bank but to the 'project' as such, again avoiding a direct commitment of EBRD. Furthermore EBRD here only refers to "rights" instead of "human rights", deliberately rendering the reference more ambiguous.

Nonetheless, all reviewed umbrella policies form part of an integrated safeguard policy, which is considered a mandatory policy. Their mandatory albeit abstract nature can also explain why the references to external human rights standards are drafted in cautious language. The aim is to avoid MDB commitment to binding obligations under human rights treaty law, which is traditionally attributed only to states. The thin red line of recognizing direct human rights obligations of the relevant banks is not crossed. That does not mean that these abstract and careful references to rights and gender or other social issues are rendered meaningless if formulated along the lines described above. They still function as an – albeit indirect – commitment to these issues by the respective MDB which can serve as a discursive reference point for both staff implementing specific policies and for affected populations confronted with projects of these institutions. In other words: even if not directly enforceable in judicial or quasi-judicial proceedings, such references can change the way these issues are being dealt with.

In general, the umbrella policies of regional MDBs and IFC allow for a comprehensive thematic coverage of their safeguard systems. For, even if a specific risk is not covered by an existing issue-specific policy, the umbrella policy makes clear that occurring environmental and social risks should be prevented and mitigated through available general procedures. Umbrella policies can potentially be used to ensure a comprehensive thematic coverage of the safeguard system in the face of social and environmental risks.

Within the World Bank, so far no umbrella policy for environmental and social risks exists. Even though OP/BP 4.01 on environmental assessment provides a gateway into the safeguards system in terms of procedural chronology, it only serves as a general policy for environmental assessments in procedural terms. Social aspects mentioned in this policy, such as “*health and safety*”, are either addressed only in connection with environmental impacts and treated as a consequence thereof; or they refer to indigenous people and resettlement issues on which two specific social safeguard policies already exist (OP/BP 4.10 and OP/BP 4.12). OP/BP 4.01 therefore hardly qualifies as an umbrella policy, which would cover all adverse social impacts of a given project.

Other World Bank policies and documents, however, do contain elements which in regional MDBs form part of the umbrella policy. OP 10.00 for instance contains a general commitment to poverty reduction as well as environmental and social sustainability for Bank investment lending activities.

Box 2. ‘Do no harm’ and ‘do good’

On its website the Bank in a (non-mandatory) explanation of its safeguards policies for the general public mentions the ‘do no harm’ principle in the following way:

“The World Bank’s environmental and social safeguard policies are a cornerstone of its support to sustainable poverty reduction. The objective of these policies is to prevent and mitigate undue harm to people and their environment in the development process”.

So far the ‘do no harm’ principle is thus only being mentioned in World Bank public relations and information documents. Even though it might be interpreted as an (unwritten) underlying philosophy of all existing issue-specific safeguard policies, it is not contained as a general principle in a mandatory World Bank policy. In the reform process, the Bank itself has suggested to complement the existing ‘do no harm’ approach by a ‘do good’ approach: In the words of the approach paper of the Bank:

“The Bank expects this review and update process to result in the next generation of safeguard policies that can help the Bank support measurable development outcomes or ‘doing good’, in addition to maintaining the ‘do no harm’ principles of the current safeguard policies.”³⁶

This statement shows the general willingness to broaden the responsibilities of the Bank with regard to environmental and social sustainability issues. As to the concrete meaning of the new ‘do good’ approach, concrete definitions are so far lacking. Linguistically it implies a more

active role of the bank in this area compared to the passive ‘do no harm’ principle. Bank projects are not only supposed to avoid harm but should also generate positive effects for those affected by them. IFC’s umbrella policy adds this positive dimension to the ‘do no harm’ commitment in the following words:

“Central to IFC’s development mission are its efforts to carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes.”³⁷

Interestingly, the shift from previously only negative to (also) positive commitments can also be seen in international human rights doctrine. According to the so called obligations-triad (‘respect, protect, fulfill and promote’), three dimensions of obligations under human rights norms can be differentiated.³⁸ Whereas the classic obligation to *respect* is only a negative obligation not to violate the specific right by one’s actions (doing no harm), both the obligations to *protect* and to *fulfill and promote* constitute so called positive obligations requiring positive action (doing good) on the side of the duty bearer.

If the World Bank introduced an umbrella policy on environmental and social safeguards, this umbrella would be the right place for also hosting policy-commitments to the ‘do no harm’ and the ‘do good’ principle.

ac) Issue-specific policies

The second layer of norms generally starts with a general assessment policy (GPA), which is applicable to all projects with environmental and social risks.³⁹ Technically, this policy integrates all following safeguard policies into one common *assessment regime*. The GPA also contains the *general requirements* for handling environmental and social risks.

In the case of IFC’s ‘Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts’, basic procedural and information-related rules are defined with a focus on client ownership and continuous

37 IFC, Policy on Environmental and Social Sustainability, 2012, para 9 (emphasis added).

38 The first *General Comment* of a UN-treaty body using the today generally recognized obligations triad to specify human rights obligations was the United Nations Committee on Economic, Social and Cultural Rights, in General Comment No. 12 – The right to adequate food (art. 11), UN Doc. E/C.12/1999/5 vom 12.05.1999, para. 15.

39 IFC Performance Standard 1; EBRD Performance Requirement 1; AfDB, African Development Bank’s Integrated Safeguards System, Policy Statement and Operational Safeguards, Tunis Dec. 2012, Operational Safeguard on Environmental and Social Assessment, B; ADB, Safeguard Policy Statement, June 2009, Chapter V.B.1.

36 World Bank, Approach Paper, 2012, para. 8.

management of environmental and social risks.⁴⁰ Exigencies of process are laid out in a principle-oriented fashion. Among those are provisions on the risk-assessment-process,⁴¹ on project categorization, on client capacity building for continuous risk-management,⁴² on monitoring and review,⁴³ as well as on stakeholder engagement, grievance mechanisms and disclosure policies.⁴⁴

EBRD and AfDB's first general assessment policy (GPA) very much resemble the IFC model in scope and content. EBRD's 'Performance Requirement on Environmental and Social Appraisal and Management' regulates the processes of project assessment, categorization, and risk-management,⁴⁵ and further requires clients to establish and maintain the organizational structure necessary for implementation.⁴⁶ Similarly, AfDB's first general assessment policy ('Operational Safeguard on Environmental and Social Assessment') provides an overarching framework governing project categorization and the general requirements of borrowers to identify, assess and manage the potential environmental and social risks of projects. It regulates in detail the process of project assessment (C.1) and categorization (C.2), as well as the precise scope of assessments (C.3).⁴⁷ Like IFC's first performance standard, it sets out requirements concerning the consultation and participation of communities,⁴⁸ disclosure and access to information,⁴⁹ and the establishment of grievance and redress mechanisms.⁵⁰ However, the emphasis on building client capacities for continuous risk management appears weaker at AfDB compared to IFC's first performance standard. Generally, analyzed MDBs seem more reluctant than IFC to prescribe detailed institutional requirements to their borrowers, which can be explained by differences in their customer base (public vs. private clients).

40 IFC Performance Standard 1, paras. 7–36.

41 IFC Performance Standard 1, paras. 7–12.

42 IFC Performance Standard 1, paras. 13–21.

43 IFC Performance Standard 1, paras. 22–23.

44 IFC Performance Standard 1, paras. 25–36.

45 EBRD Performance Requirement 1, paras. 5–16.

46 EBRD Performance Requirement 1, paras. 17–18. In addition, and more explicitly than in the IFC's first Performance Standard, clients are responsible for ensuring standards are met in projects executed by (sub)contractors (para. 19).

47 AfDB Operational Safeguard 1 on Environmental and Social Assessment. Assessments shall pay special attention to risks for cultural heritage (C.3, paras 34–37) and impacts on local communities, particularly vulnerable groups (C.3, paras 38–44).

48 AfDB, Operational Safeguard 1, C.3, paras 45–48.

49 AfDB, Operational Safeguard 1, C.3, paras 49–59.

50 AfDB, Operational Safeguard 1, C.3, para. 30.

In addition to the general assessment policy, IFC's safeguard framework consists of seven issue-specific policies ('Performance Standards') on the second layer of norms. Five deal with specific social issues (labor conditions, community health, resettlement, indigenous peoples, and cultural heritage) and two with environmental standards (resource efficiency and pollution prevention, and biodiversity and natural resources). All issue-specific Performance Standards have been structured in a similar fashion, setting out general 'objectives' first, followed by the 'scope of application' and the individual 'requirements' for projects. The issue-specific Performance Standards are relatively short documents with up to 30 substantive paragraphs each. EBRD has developed its issue-specific policies ('Performance Requirements') based on the structure and coverage of the IFC performance standards. Both AfDB and ADB also use the tripartite IFC-structure (objectives/scope of application/requirements) to define applicable rules under their issue-specific policies.

The World Bank's issue-specific safeguard policies consist of a special set of OPs and BPs, which are however not published in one separate document – in contrast to IFC's Performance Standards. In terms of thematic coverage, the World Bank has six environmental policies, including a general policy on environmental assessment (OP/BP 4.01 Environmental Assessment, OP/BP 4.04 Natural Habitats, OP 4.09 Pest Management, OP/BP 4.11 Physical Cultural Resources, OP/BP 4.36 Forestry, OP/BP 4.37 Safety of Dams), but only two stand-alone social safeguard policies (OP/BP 4.12 Involuntary Resettlement, OP/BP 4.10 Indigenous Peoples). If one compares the range of topics covered by IFC and other MDBs with those covered by the World Bank, the World Bank's safeguard policies appear to be deficient with regard to social issues (see figure 5). In particular, labor and community health standards are not regulated in a mandatory policy.

At the World Bank, each OP takes an individual approach to define objectives and requirements, and almost⁵¹ every OP is complemented by a corresponding BP, which contains the respective procedural rules. In terms of accessibility the separation of OPs from BPs and the lack of a common structure for all issue-specific policies make the World Bank safeguard framework more difficult to comprehend and apply. This stands in stark contrast to the fully integrated performance standards or requirements used by IFC, EBRD, AfDB and ADB.

51 'OP 4.09 – Pest Management' is the only exception to this rule.

Figure 4. Layer 2 Environmental Safeguard Policies/Performance Standards thematic coverage

Content	WB	IFC	EBRD	ADB	AfDB
General Policy on Assessment (GPA)	H	H	H	H	H
Pollution (PO)	(only in guidance note)	H	H	S (in GPA)	H
Pest Management (PM)	H	S (in PO)	S (in PO)	S (in GPA)	S (in PO)
Biodiversity and Natural Habitats (BH)	H	H	H	S (in GPA)	H
Forestry (F)	H	C (in BH, PO, NR)	S (in BH)		S (in BH)
Natural Resources (NR)		H	H	S (in GPA)	H
Safety of Dams (SD)	H	I (in CH)	I (in CH)	I (in GPA)	I (in BH)
Climate Change, Greenhouse Gases (CC)		S (in PO)	S (in PO)	S (in GPA)	H

Figure 5. Layer 2 Social Safeguard Policies/Performance Standards thematic coverage

Content	WB	IFC	EBRD	ADB	AfDB
General Policy on Assessment (GPA)	C (in Env. GPA)	H	H	S (numerous social issues as subheadings in Env. GPA)	H
Community Health (CH)	I (in Env. GPA)	H	H	S (in GPA)	I (in GPA)
Indigenous Peoples (IP)	H	H	H	H	S (in GPA, R)
Resettlement (R)	H	H	H	H	H
Cultural Heritage (C)	H	H	H	S (in GPA)	S (in GPA)
Labour and Working Conditions (L)		H	H	S (in R, IP)	H
Land Tenure (LT)	C (in R, IP)	C (in R)	I (in IP)	C (in R, IP)	I (in R)

H – Heading of an individual or shared policy or safeguard

S – Subheading under a policy or safeguard heading

C – Consistent use of term under relevant headings or subheadings

I – Isolated use of term within paragraphs

ad) Guidance notes

The third and most implementation-oriented layer of the integrated safeguard systems under review consists of non-mandatory norms called 'non-policies', 'guidance notes', 'manuals', 'hand books' or 'operational memoranda'. All MDBs operate with these concrete (though often not publicized) guidance-documents for staff. While some guidance notes are issue-specific, others have a cross-cutting function, applying to multiple or all issue-specific policies.⁵² These guidance documents describe and specify internal processes through which environmental and social impacts of projects are to be assessed, mitigated and monitored by staff-members as well as clients throughout the project cycle.⁵³

In particular IFC has a transparent, easy to access and fully integrated guidance-note structure. Each Performance Standard is accompanied by one guidance note commenting on each paragraph of the Performance standard. Like the Performance Standards, these guidance notes have been integrated into a single document. Moreover, one cross-cutting guidance note for IFC Performance Standard 1 (GPA) describes how to internally organize all environmental and social reviews.⁵⁴

In the World Bank, however, guidance documents ('operational memoranda') have been developed individually when needed. They therefore do not follow a coherent structure, nor have they been integrated into one comprehensive document. In general, documents belonging to this most concrete layer of norms (layer 3) have a purely internal function. Hence, cases of non-compliance with such documents ('operational memoranda') cannot be invoked by affected populations before the World Bank Inspection Panel, whereas a breach of OP/BP norms can.

b) Lessons to be learned for the World Bank safeguard reform?

In terms of normative architecture, the World Bank should follow the integrated framework approach used by all analyzed banks. If the Bank wished to introduce such an

52 IFC-CESI Environmental and Social Review Procedures Manual [hereafter: IFC, ESRP Manual].

53 See as an example the compiled individual IFC-Guidance Notes for each Performance Standard: 'International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability', http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709fffd1a5d13d27/GN_English_2012_Full-Doc-ument.pdf?MOD=AJPERES.

54 IFC-CESI Environmental and Social Review Procedures Manual.

integrated safeguard framework, there are no structural or legal impediments that would hinder it to do so.⁵⁵

In terms of overall effectiveness of safeguards, the three-layered integrated architecture has two main advantages: accessibility and comprehensiveness of coverage.

The clear, coherent and transparent normative structure makes it much easier for staff, clients and affected populations to understand and handle requirements set out in safeguard policies. An integrated framework therefore improves the chances of effective outreach activities of the World Bank vis-à-vis third parties and civil society. It also facilitates the impact of staff training activities on safeguard planning and implementation.

As to coverage, the umbrella policy should contain a general commitment to environmental and social sustainability as well as references to human rights and gender equality, as most of the umbrella policies of regional MDBs and IFC do. Even if some specific risks might not be covered by issue-specific policies, the umbrella policy – through the commitment to environmental and social sustainability – would ensure that these risks are prevented and mitigated.

Recommendations for layer 1 (umbrella policy):

With regard to layer 1, the World Bank should introduce an umbrella policy on environmental and social safeguards in form of a new OP. This umbrella policy should contain general substantive commitments with regard to the environment *and* society as well as a definition of general roles and responsibilities for handling and implementing safeguard policies (community participation etc.). The umbrella policies of other regional banks can serve as an example in this context.

Recommendations for layers 2 and 3 (issue-specific policies and guidance notes):

In terms of the substantive content of the World Bank policies on layer 2, the adoption of an integrated architecture could be carried out without weakening existing standards. The above mentioned recommendations for layer 1 are thus largely independent of what will happen with existing safeguard policies on layer 2. As to layer 2, the World Bank should reformulate OP 4.01 as a general assessment policy

55 This might be different if the study were to look also at the other two lending instruments (development policy and programming-for-results lending). There, the concrete procedural roles might be different but not the normative expectation.

for environmental *and* social issues (GPA) along the lines of all other analyzed institutions (except ADB).

The World Bank should strive towards a unified and easy to grasp structure of issue-specific policies (layer 2) and corresponding guidance notes (layer 3). For this purpose, existing safeguards should be carefully streamlined without diluting the substantive requirements contained in them. Moreover, the comparison with other MDBs suggests that the World Bank should introduce new issue-specific policies on social impacts (i.e. labor, occupational health and safety, and land tenure) as well as on environmental impacts (i.e. climate change and natural resources) (layer 2). This could be done 1) through the introduction of new separate issue-specific policies with respective headings and 2) through inserting substantial new content under new subheadings into already existing (related) policies. The first option seems recommendable if the issue at hand needs to be addressed in more detail and should be given particular weight and visibility within the safeguards system. The second option is advisable if the issue has strong substantive links to an existing policy.

2. Appraisal phase: Principled and outcome-based approach vs. frontloaded prescription

In the upstream or early phase of the project cycle⁵⁶, the World Bank puts a strong emphasis on clear prescriptions. The underlying assumption is that a project that starts with a deficient risk assessment or an inadequate mitigation plan will never achieve satisfactory results.⁵⁷ The Bank justifies this approach by referring to its client structure and to political economy considerations: The Bank, which mainly deals with governments and public borrowers, requires more analytical work upfront because governments, unlike private firms, need to know the exact costs of projects well in advance.⁵⁸ Governments are also less flexible in accommodating affected people as they need to be careful not to set unwanted precedents. Furthermore, the World Bank, as well as other regional development banks that primarily work with public borrowers, regularly gets involved much

earlier in the project cycle than for instance IFC, which sometimes gets involved when the private borrower has already prepared a project and possibly acquired land and permits.

While these reasons might explain why the Bank developed this approach, it is nevertheless seen to have major disadvantages. The central critique aims at the wrong balance between upstream and downstream elements of the project cycle: the World Bank puts too much emphasis on the planning and not enough on the implementation phase. The second part of this criticism – the World Bank’s insufficient focus of the implementation phase – will be addressed later.⁵⁹ This chapter will analyze the upstream phase, which is, in spite of the invested resources and time, not without faults. In particular, the procedural requirements have been criticized as cumbersome, giving clients not enough leeway and ownership and ultimately promoting a “*compliance culture*” instead of client ownership and responsibility.⁶⁰

The model introduced by IFC and adopted in relevant aspects by regional MDBs aims for an upstream approach that is more focused on the formulation of expected outcomes, procedural flexibility, community participation, and also more conducive to client-capacity building. Ideally, the client is responsible for, and indeed the owner of, investment projects – not least by having more discretion and leeway. The balance between upstream and downstream is shifted towards the latter: IFC’s approach puts less emphasis on frontloaded prescriptions upstream and more emphasis on the client’s or borrower’s responsibility for effective implementation and supervision downstream. It should be emphasized that this approach is not at all incompatible with the World Bank’s early involvement in projects.

a) What does “focus on principles and outcomes” in the upstream phase mean?

To understand both IFC’s/MDBs’ as well as the World Bank’s approach to the upstream phase and in order to develop reform options, the study analyzes four components of these approaches in depth: aa) formulation and tracking of expected outcomes, ab) procedural flexibility, ac) community participation, and ad) the use of country systems. Differences between the World Bank and the other analyzed institutions are indeed stark with regard to the first point. With regard to the other elements, however,

56 The project cycle has ‘upstream’ and ‘downstream’ elements, i.e. the early phase of project identification, appraisal and approval (‘upstream’) and its latter implementation and supervision (‘downstream’). On the different stages, see Dann, *Entwicklungsverwaltungsrecht*, 2012, pp. 336.

57 See especially World Bank, *Making Sustainable Commitments. An Environment Strategy for the World Bank*, 2001.

58 E.g. in the case of OP/BP 4.12, compensation payments needs to be budgeted before resettlement can begin.

59 See section II.3.

60 IEG, Report, 2010, p. xlvi.

differences are much smaller than rhetoric suggests. This in turn means that pressure for reform might be less strong.

aa) Formulation and tracking of expected outcomes

The new approach to screening projects that was pioneered by IFC and adopted by the regional MDBs transparently defines guiding principles and general as well as project-specific expected outcomes. In IFC's case, principles and objectives are articulated in the umbrella policy (layer 1) as well as in the Performance Standards (layer 2). The umbrella policy (i.e. the 'Policy on Environmental and Social Sustainability') defines 'commitments', i.e. basic values and rationales of IFC's work.⁶¹ Each Performance Standard then lists 5–10 concrete objectives to be reached with respect to the specific issue.⁶² Clients and projects that are not in compliance with the Standards are not supported.⁶³

For each IFC investment project, expected outcomes are to be defined at the beginning of the project cycle and tracked through *performance indicators*.⁶⁴ During appraisal, an 'Environmental and Social Review Document' is to be compiled that includes environmental and social ratings of the Performance Standards and tracking of project attributes.⁶⁵ A central part of this is the so-called 'Development Outcome Tracking System' (DOTS).⁶⁶ This system aims to achieve real-time tracking of development results throughout the project cycle. To this end, IFC's lead economic or social specialist (LESS) formulates performance indicators with baselines and targets for supervision at the outset of

each project.⁶⁷ It should be noted, though, that, although clients have more responsibility, it is primarily IFC and not the client who develops and tracks the indicators.

IFC's focus on principles and outcomes has also been adopted by regional development banks.⁶⁸ ADB articulates its objectives in the umbrella policy ('Safeguard Policy Statement')⁶⁹ and under point B of the 'Safeguard Requirements', i.e. the second layer issue-specific policies.⁷⁰ While the objectives are very short and focused, they are complemented by extensive policy principles⁷¹ and concrete requirements under point D of the 'Safeguard Requirements'.⁷² The rationale behind this is to differentiate more clearly between objectives ADB aims to accomplish and concrete requirements staff needs to comply with.⁷³ ADB also prescribes the use of performance indicators to track progress and outcomes of its projects.⁷⁴ Similarly, AfDB clearly articulates its commitments/principles and expected outcomes in its umbrella policy ('Integrated Safeguard Policy Statement') and in the 'Operational Safeguards'.⁷⁵ In these issue-specific policies, AfDB lays down its commitments more extensively than in the umbrella policy. Performance indicators are also used as a regular tool to track progress and outcomes of projects.⁷⁶

In the World Bank, there is much less clarity on applicable principles and expected outcomes. There is a short reference to poverty reduction in OP 1.00. The IDA Articles of Agreement mention the promotion of economic development, increase of productivity and thus the improvement of living standards in less-developed areas. However, the recently revised 'OP 10.00 – Investment Project Finance' is more explicit and states several objectives: "*Bank financing*

61 IFC, Policy on Environmental and Social Sustainability, para. 8–18; on the notion of principles, see above I.3.

62 E.g. IFC, Performance Standard 1, after para. 3 – "*To identify and evaluate environmental and social risks and impacts of the project; to adopt a mitigation hierarchy to anticipate and avoid, or where avoidance is not possible, minimize...*".

63 IFC, Policy on Environmental and Social Sustainability, 2012, para. 22.

64 Their importance is less evident from the text of the binding Policy and Performance Standards, but from the non-binding Guidance Note (see IFC, ESRP-Manual,). Only Performance Standard 1 mentions indicators, but not as mandatory elements. On the importance of indicators, see also IEG-Study, p. xix.

65 IFC, ESRP Manual 1, Key terms, p. 8.

66 DOTS is an indicator-based monitoring system that is supposed to document the "*overall development outcome*" of IFC projects by assessing the following components throughout the project life cycle: (i) financial performance; (ii) economic performance; (iii) environmental and social performance; and (iv) broader private-sector development impacts. See http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IDG_Home/Monitoring_Tracking_Results/Tracking_System.

67 IFC, ESRP Manual 1, Chap 3, point 4; same goes for FI-lending (IFC, ESRP Manual 1, Chap 7, point 2.22).

68 The outcome focus regularly comes 'on top off' and not instead of the process focus. More on this in the next section below.

69 ADB Safeguard Policy Statement para. 43, 44.

70 See ADB, Safeguard Policy Statement, 2009, Appendixes 1–3 (App.1, para. 2; App. 2, para. 3; App. 3, para. 3).

71 See ADB, Safeguard Policy Statement, 2009, between para. 48 and 49.

72 See the examples below, ab).

73 ADB, Safeguard Policy Statement, 2009, para. 27.

74 ADB, Safeguard Policy Statement, 2009, App. 1, para. 12/14 and App.2, para. 31.

75 See AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 5–20 and point B in the Operational Safeguards.

76 AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 16 and e.g. Operational Safeguard 3 (Biodiversity), para. 150.

of investment projects (“Investment Project Financing”) aims to promote poverty reduction and sustainable development of member countries by providing financial and related operational support to specific projects that promote broad-based economic growth, contribute to social and environmental sustainability, enhance the effectiveness of the public or private sectors, or otherwise contribute to the overall development of member states.”

The term and concept of ‘outcomes’ does not feature in World Bank policies with regard to investment lending. This omission might be due to the fact that the emphasis on outcomes is a product of the Paris Declaration and its accompanying debate, which took place around 2005, i.e. the time that IFC was reforming its rules but after the World Bank safeguards were already in place. Furthermore, in the World Bank’s system there is much less insistence on indicators during the project cycle and no system comparable to DOTS.⁷⁷ It should be noted, however, that the World Bank’s new Program-for-Results financing instrument heavily relies on indicators and could be a useful role model for the investment lending reform.⁷⁸

For consequences and recommendations following from this analysis, see II.2b.

ab) Reduction of procedural responsibilities?

According to the IEG study as well as interviews with World Bank staff, another problem of the World Bank’s safeguard model is the overly prescriptive and detailed procedural approach in the upstream phase.⁷⁹ World Bank rules are considered to be cumbersome, overwhelming World Bank staff as well as borrowers – ultimately putting the borrower in a straitjacket that prevents ownership. On the other hand, the approach applied by IFC and – to a lesser extent – by other MDBs is supposed to reduce procedural obligations for the lender, while giving more leeway and responsibility to the (private) client, freeing it as well as bank staff from cumbersome rules and hurdles. There is however little evidence for strong differences between World Bank, IFC and regional MDBs: procedural requirements are comparably detailed in all analyzed frameworks.

77 See also below, Section II.3.b (on the downstream phase implications of this).

78 See OP 9.00, paras. 2b), 4. On this new instrument see Dann, *Law of Development Cooperation*, 2013, Ch. 8, Section 2. The review of the Program-for-Results instrument, expected to be conducted in 2014, could hence also be insightful for the safeguard reform (if this not completed by then).

79 IEG, Report, 2010, pp. 87–89.

According to IFC’s Policy and its Performance Standards, the client is responsible for the assessment and management of risks, while IFC only has to supervise and monitor.⁸⁰ IFC has to ensure ‘due diligence’ in supervising the clients’ assessment and system.⁸¹ Such due diligence, however, includes reviewing all information, conducting site inspections, analyzing the businesses activities in relation to Standards, and to identify gaps – which amounts to significant IFC involvement and corresponding regulations. Analyzing the concrete procedural rules and duties of IFC as laid down in the Guidance Notes, IFC’s due diligence-obligations appear to be as intense as the World Bank’s full project appraisal.⁸²

The World Bank starts from a different basis: after a borrower request⁸³, the Bank conducts the important early screening itself,⁸⁴ assessing the risks involved and correspondingly categorizing the project. Regarding the assessment, the borrower comes in only in the second stage and is responsible for conducting the ‘Environmental Assessment’ (EA),⁸⁵ the ‘Social Assessment’ and the formulation of various management and mitigation plans⁸⁶. The World Bank closely monitors the client and retains a prominent role during the process, e.g. by helping to prepare and conduct the EA⁸⁷ and conducting an extensive appraisal of the project in its entirety.⁸⁸ In sum, the difference in terms of how closely World Bank and IFC get involved in the process and prescribe procedural steps for clients or borrowers are found to be negligible, at least with regard to the appraisal stage.

There is also no clear shift towards less procedural rules in the reformed, integrated frameworks of the regional MDBs. Indeed, too much leeway for clients is considered too risky and incompatible with the overall responsibility of the MDBs for their projects. Accordingly, procedural rules are also quite extensive.

80 IFC, Policy on Environmental and Social Sustainability, 2012, para. 7.

81 IFC, Policy on Environmental and Social Sustainability, 2012, para. 28.

82 See IFC, ESRP Manual 3 (including a planning stage, a site visit, the completion of a ERSD and a Peer Review Meeting); on the respective process for World Bank projects, see e.g. BP 10.0, BP 4.01, para. 15–18.

83 OP 10.00, para. 2.

84 OP 4.01, para. 8; OP 4.10, para. 8.

85 OP 4.01, para. 4.

86 OP 4.10, para. 9, 12.

87 BP 4.01, para. 6, 10.

88 BP 4.01, para. 15–17.

ADB defines general as well as specialized requirements for policy implementation in the umbrella policy⁸⁹ and in point D. of each of the issue-specific 'Safeguard Requirements'.⁹⁰ ADB's 'Safeguard Requirements' set out specific actions to be taken by the borrower/client in much detail and with regard to specific scenarios. For instance, the Safeguard Requirement for indigenous peoples spells out expected actions during the assessment and risk management processes, including the development of consultation strategies,⁹¹ the conduct of field-based social impact assessments,⁹² and the use of independent advisory panels in the preparation of risk mitigation strategies.⁹³ Like IFC, ADB retains the responsibility to ensure that borrowers/clients comply with its Safeguard Requirements „*through their due diligence, review, and supervision*“.⁹⁴

EBRD's first policy requirement ('Performance Requirement 1') includes some general procedural requirements for clients with regard to the conduct of environmental and social assessments, risk management and implementation,⁹⁵ to which the issue-specific policies add more detailed requirements, for instance to provide a grievance mechanism for workers,⁹⁶ or to monitor and report emissions, effluents, and wastes.⁹⁷ The bank's own role generally consists of reviewing the clients' assessment, assisting clients to develop risk mitigation measures, and monitoring project compliance with environmental and social standards.⁹⁸ Whereas it is the responsibility of clients to ensure compliance with the 'Performance Requirements', including through information disclosure and stakeholder engagement, all deliverables are submitted to the EBRD, which reviews them as part of its own environmental and social appraisal.⁹⁹

AfDB's umbrella policy does not specify procedural requirements for borrowers in a separate section, but it

89 ADB, Safeguard Policy Statement, 2009, para. 49–73.

90 ADB, Safeguard Requirement 3 on Indigenous Peoples is particularly detailed and contains both General Requirements (D.) and Special Requirements (E.).

91 ADB, Safeguard Requirement 3 on Indigenous Peoples 1, para. 11.

92 ADB, Safeguard Requirement 3, para. 14.

93 ADB, Safeguard Requirement 3, para. 19.

94 ADB, Safeguard Policy Statement, para. 5 and the Safeguard Review Procedures in its Operational Manual, detailing the procedural requirements for ADB staff.

95 EBRD, Performance Requirement 1, paras. 4–24.

96 EBRD, Performance Requirement 2, para. 18.

97 EBRD, Performance Requirement 3, para. 15.

98 EBRD, Environmental and Social Policy, para. 3.

99 EBRD, Environmental and Social Policy, para. 14.

nevertheless contains procedural aspects.¹⁰⁰ Also, similar to IFC's 'Performance Standards' and ADB's 'Safeguard Requirements', its second layer 'Operational Safeguards' spell out procedural obligations in much more detail.¹⁰¹ While procedural requirements on borrowers are thus similarly detailed, AfDB explicitly acknowledges the capacity constraints of its member countries and commits to providing implementation assistance and practical support.¹⁰² Compared with other MDBs, AfDB also appears to be more involved in the appraisal of projects by the borrower.¹⁰³

One aspect that should be noted is the beginning of the banks' involvement in the project cycle. This aspect is important in order to understand one of the central differences between IFC and the World Bank or other MDBs and has relevance for their procedural involvement.¹⁰⁴ The World Bank, as well as other regional development banks that primarily work with public borrowers, regularly gets involved much earlier in the project cycle than for instance IFC, which sometimes gets involved when the private borrower has already prepared a project and possibly acquired land and permits. Even when one accounts for the differences between the banks' customers (public/private sector), the World Bank and regional MDBs normally participate more actively in early identification and development of a project – and hence also its appraisal.

To sum up, one important difference between the two approaches should be noted: especially IFC relies more heavily on self-assessments of its clients than the World Bank

100 E.g. AfDB, African Development Bank's Integrated Safeguards System, 2012, paras. 5, 8, 9, 15.

101 For example, AfDB's 'Operational Safeguard 1', which is the general policy statement, contains detailed procedural requirements for the borrower, in particular concerning the conduct of environmental and social assessments (C.1), project screening and categorization (C.2). The Bank thereby retains some responsibilities in reviewing or validating borrower's assessments or project categorizations (e.g. para. 18). Operational Safeguard 2 includes demanding procedural obligations in particular in relation to resettlement planning (D.3), but also compensation procedures (D.5), and monitoring and evaluation (D.8). See also Operational Safeguard 2, paras. 74–130; Operational Safeguard 3, paras. 137–177 (including procedural obligations with regards to specific habitats, species, renewable resources, ecosystems); Operational Safeguard 4, paras. 182–203; Operational Safeguard 5, paras. 207–229.

102 AfDB Integrated Safeguard Policy Statement, para. 7. Like other MDBs, the AfDB also maintains responsibility for compliance monitoring and supervision of safeguards, a task carried out by its Compliance and Safeguards Division in consultation with borrowers (paras 15–16).

103 AfDB Operational Safeguard 1, para. 18.

104 This was pointed out in several interviews and is acknowledged in IFC, Policy on Environmental and Social Sustainability, 2012, para. 27.

does.¹⁰⁵ IFC has to check the client's plans and systems, but is not conducting its own screening and hence assumes the workability and capacity of the client and its plans. In other words, the division of responsibilities between lender and borrower and in particular the question of how much responsibility the borrower is allowed to carry is crucial.

For consequences and recommendations following from this analysis, see II.2b.

ac) Greater participation of affected communities and external experts

Another problem of the World Bank's safeguard approach is the participation of affected communities and external experts in the very early stages of the project cycle. Three aspects are of particular importance: first, participation of the public sets in too late. Especially the early screening phase, in which the all-important categorization¹⁰⁶ of projects (as A, B, C or FI) is undertaken, takes place without public involvement. Second, the scope of who has the right to participate is decided without participation of communities or an early possibility to challenge it. This criticism refers to the term "*project-affected*", which in the World Bank indicates particular participation rights.¹⁰⁷ Third, studies of external experts are given too little weight. While the important environmental and social plans are based on studies by external experts, these studies are only "*reference points*" with which borrowers or the Bank can disagree and from which they can deviate. Also, there is also little participation in the process of conducting these studies.¹⁰⁸

IFC and other MDBs do not serve as helpful examples. All of them acknowledge the basic idea: to integrate affected communities and stakeholders early and effectively into the

planning of projects in order to tap into local knowledge and to secure broader support, improve projects and ultimately achieve more sustainable results.¹⁰⁹ But they are not generally more open or have evidently more participatory approaches than the World Bank.

However, minor differences between the analyzed banks exist, which are insightful nonetheless:

The IFC model is recommendable, for example, where it prescribes a more detailed system for dealing with *external communications* (i.e. from third parties, not affected) and hence provides a more convincing approach to integrate the general public.¹¹⁰

The disclosure obligations of IFC and IFC's clients, on the other hand, are less intense. Here, the World Bank rules provide for more transparency and access to information. Also, IFC has a much narrower concept of who should be consulted and participate. While the World Bank and regional MDBs have broadened their respective scope in this regard ("*potentially affected*"), IFC only grants far-reaching rights to those that suffer "*significant adverse effects*".¹¹¹ Finally and most importantly, IFC is depending on compliant and capable clients to create effective participation systems. The World Bank with its more diverse borrowers would be ill-advised to adopt IFC's approach without precautions. To enhance participatory transparency, the Bank could adopt a rule which is inspired by national transparency laws according to which any binding decision taken by the World Bank and the project partner will only enter into force after having been publicized vis-à-vis the affected communities and the public at large *and which grants the public four weeks of reaction time*. Within these four weeks all entities involved in the decision (Bank and borrower) can withdraw their consent to the decision without any legal consequences.

For consequences and recommendations following from this analysis, see II.2b.

105 IEG, Report, 2010, p. xvi.

106 At the beginning of the World Bank's project cycle, each project is categorized into one of four different risk categories according to the "*type, location, sensitivity, and scale of the project and the nature and magnitude of its potential environmental impacts*" (OP 4.01). 'A' is the highest ("*likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented*") and 'C' the lowest ("*minimal or no adverse environmental impacts*") risk category, with 'B' in between. The fourth category 'FI' applies only to "*investment of Bank funds through a financial intermediary*".

107 World Bank, OP 4.01, paras. 14–17. See also Naude Fourie, The World Bank Inspection Panel and Quasi-Judicial Oversight, 2009, pp. 238–240; Hunter, International Law and Public Participation in Policy-Making at the International Financial Institutions, in: Bradlow/Hunter (eds.), International Financial Institutions and International Law, 2010, pp. 199.

108 For a current example, where consultations have taken place, see <http://www.nature.com/news/environmental-concerns-reach-fever-pitch-over-plan-to-link-red-sea-to-dead-sea-1.12515>

109 On the approaches of Bank and IFC, see Annes. See also: ADB, Safeguard Policy Statement, 2009, p. 10 (key policy considerations, para. 32–33), p. 19–20, para. 53–56; AfDB, African Development Bank's Integrated Safeguard System, 2012, p. 7 (key policy considerations, para. 31–32), Policy Statement, p. 16 (para. 9).

110 See IFC, Performance Standard 1, para. 26, 34.

111 EBRD has a 'Performance Requirement' specifically on 'Information Disclosure and Stakeholder Engagement', wherein meaningful consultation shall similarly involve "*potentially affected parties*" (para. 3). At the ADB, Bank staff assesses completed projects *inter alia* with regards to "*the degree and quality of the participation of project-affected people in the project cycle*." ADB, Operational Procedures (OP), para. 35.

ad) Use of country systems and capacity support

A final element of the upstream phase that is to be reviewed in this study is the use of country systems, i.e. the use of a borrower's environmental and social safeguard systems instead of those of donors, which is a central demand of the Paris Declaration of 2005.¹¹² The Bank's OP/BP 4.00 on the use of country systems, introduced in 2005, allows the Bank to use a country's system in case that *equivalence* between the standards of the Bank and the country is assured, and that the *acceptability* of the borrower's implementation practices, track record and capacity is satisfactory. This policy, however, has so far not been an overall success.¹¹³

Here, IFC is not a relevant point of comparison. Due to the private nature of its clients IFC has not introduced this idea as a general policy.

The comparison with other MDBs shows a mixed record of fostering borrower ownership through the use of country systems. While EBRD has not committed itself to the use of country systems in its 'Environmental and Social Policy', ADB and AfDB have introduced policies to strengthen and eventually use country systems.

Of special importance for this study is the ADB, which introduced the use of country systems in its reformed 'Safeguard Policy Statement' of 2009.¹¹⁴ A comparison of its policy with OP/BP 4.00 yields the following results:

First of all, a comparison of the *text* of the policies shows that they are very similar in their wording. The ADB in principle replicated content and structure of the World Bank's policy.¹¹⁵

In particular, the rules regarding the respective bank's duties to supervise and monitor projects when using country systems are the same for the World Bank and ADB. Both institutions do not relinquish their responsibility for supervision, but have to adhere to the same rules that apply when

their own systems are used.¹¹⁶ ADB's rules are more explicit in this respect and are therefore more easily understood and applied. In particular, they explicitly state that ADB's regular accountability mechanism apply even when the bank uses country systems.¹¹⁷

Three particular differences with regard to the text nevertheless exist: (1) ADB assesses not just equivalence and acceptability but also the commitment of a borrower.¹¹⁸ (2) ADB strengthens the role of external consultations. It obliges itself not just to publish its findings (as the World Bank does¹¹⁹), but also to solicit external input into the draft assessment of a country's system.¹²⁰ (3) ADB allows for closer cooperation with development partners in the assessment of country systems.¹²¹ All of these differences indicate an approach that is slightly more sensitive to the particular context (partners, experts, borrower's commitment) but not a general shift away from the World Bank's approach.¹²²

According to our interviews, there are also differences in the way the World Bank and ADB interpret and implement the 'use of country systems'-approach: while the World Bank is more focused on *using* country systems, ADB (and also AfDB) focuses on *strengthening* country system before using them. ADB's umbrella policy calls this a "*phased approach*".¹²³ In practice, ADB's focus so far is on helping to create client capacity to implement and manage the relevant standards. ADB, according to our interviews, has so far

112 Paris Declaration, para. 16–30.

113 J.D. Quintero, A. Ninio, P.J. Posas, Use of Country Systems for Environmental Safeguards, Analytical Background Paper for the World Bank's 2010 Environment Strategy, February 22, 2011; for practical problems with the policy see IEG, Report, 2010, p. 100; see also Inspection Panel, Investigation Report No. 64977-ZA (South Africa Eskom), 21. Nov 2011, pp. 33. On the parallel policy with regard to the use of a borrower's procurement rules see the critical analysis of Pallas/Wood, The World Bank's Use of Country Systems Policy, Development Policy Review 27 (2009), pp. 215–230.

114 See the umbrella policy ADB, Safeguard Policy Statement, 2009, para. 37, 68–69 and Appendix 6.

115 Overall, ADB's rules seem to be formulated in more clarity, perhaps profiting already from experiences with the World Bank's rules.

116 ADB, Safeguard Policy Statement, 2009, para. 68 (vii) and Appendix 6, para. 19–20; and World Bank, BP 4.00, para. 6 (FN4).

117 ADB, Safeguard Policy Statement, 2009, para. 68 (ix) and Appendix 6, para. 20.

118 ADB, Statement, para. 68 (ii). It should be noted, however, that the Bank also holds its borrowers accountable to its commitment to implement its own system's requirements. It does so by making such compliance a contractual condition and by providing the Bank with recourse in the event that the borrower changes its system or fails to comply with it.

119 OP 4.00, para. 7.

120 ADB, Safeguard Policy Statement, para. 68 (vi).

121 ADB, Safeguard Policy Statement, para. 68 (vii); In line with this, it advocates a continued convergence to a common set of safeguard principles among MDBs and bilateral donors, in order to facilitate the alignment of country systems. See the Proceedings of ADB's Country Safeguard Systems Regional Workshop held in April 2012 in Manila, Synthesis. Available online: <http://www.adb.org/sites/default/files/pub/2012/country-safeguard-systems-workshop.pdf>.

122 It should be noted, for example, that many of the Bank's Safeguard Diagnostic Review have been undertaken with active participation by co-financing institutions, such as ADB or bilateral donors, so that in practice the Bank also seeks close cooperation with these partners.

123 ADB Safeguard Policy Statement, para 68 (x). The phased approach was foreseen for a period of three years after the adoption of the policy in June 2009.

never actually fully applied its policy and used a country's system. Instead, ADB has an extensive program to support and develop country systems in order to allow their future use by the ADB, e.g. by conducting diagnostic studies, reforming environmental laws and regulations, or helping to build up administrative structures and capacities. Since 2009, ADB has provided borrowers with technical assistance amounting to USD 17.4 million to foster their legal and institutional framework for the effective implementation of standards – not just ADB standards, but international good practices more broadly.¹²⁴

A preoccupation with strengthening country systems also characterizes AfDB's approach. AfDB stresses the importance of using country systems as a general principle,¹²⁵ but puts more emphasis on training and upgrading country systems than on their use.¹²⁶ To achieve the objective of strengthening country systems, assessments conducted by the borrower under AfDB's 'Operational Safeguard 1' (GPA) shall not only meet AfDB's requirements, but in addition (not instead) comply "*with existing country systems for assessing and managing environmental risk*".¹²⁷ At the same time, AfDB remains committed to making the use of country systems a default option, as long as national capacity is considered sufficiently strong.¹²⁸

Another aspect with regard to the practice of UCS that was mentioned in the interviews but is not apparent in the text of the respective policies concerns the scope of country

system assessments. The World Bank's pilot program on the use of country systems deploys what one might call a project-based approach, where the Bank assesses the equivalence and acceptability of a country system *for each individual project*. This approach is considered too small-scale, cost-intensive and ultimately ineffective.¹²⁹ Instead, ADB's approach that assesses the national system as a whole, and not just with regard to a specific project, is considered more manageable and ultimately more sustainable to build borrower capacities. If gaps in equivalence and acceptability remain too wide (as the IEG Report of 2010 suggests),¹³⁰ the World Bank may need to invest more heavily in strengthening country systems prior to their use. At the same time, the question is whether the World Bank should assess the equivalence and acceptability of country systems on the basis of its own safeguard standards currently in place, or rather refer to international principles, standards, and good practices.¹³¹ If the medium to long term objective is a common set of safeguard standards for multilateral and bilateral donors alike, the latter approach appears to be more promising.

b) Lessons to be learned for the World Bank safeguards reform?

The safeguard system in the upstream phase has clear deficits to which IFC and other regional MDBs offer both interesting reform options and cautionary tales.

Surely, the central weakness of the World Bank system is its deficit in setting out clear and comprehensive *guiding principles*, formulating *expected outcomes* and using *performance indicator*-based tracking systems. Here, IFC provides a helpful contrast and the Bank should aim to be equally

124 See the ADB website, which also contains information on particular technical assistance projects: <http://www.adb.org/site/safeguards/country-safeguard-systems>. Examples include a project on strengthening involuntary resettlement safeguard systems in Nepal, or on improving the legal and regulatory framework for environmental impact assessment in Mongolia.

125 It is mentioned in the fundamental objectives of the reformed system, AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 15 (p. 17).

126 Interviews as well as AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 7; also AfDB, Operational Safeguard 1 (E+S-Assessment), para. 15: "*The Bank recognizes the importance of working in close cooperation with its borrowers and clients in implementing the operational safeguards with the aim of strengthening the capacity of Country Systems to manage the environmental and social assessment process.*" However, it is a problem that AfDB itself currently lacks sufficient institutional capacity to assist member states in strengthening their own systems. AfDB Integrated Safeguards System Memorandum ADB/BD/WP/2912/184 (28 December 2012), III. Institutional Capacity for Implementation.

127 AfDB, Operational Safeguard 1, para. 15. The experience in the simultaneous use of country systems while still following AfDB requirements shall be taken into account in the Bank's efforts to assist countries in assessing and strengthening their own systems (para 16).

128 AfDB, A Roadmap for Improving Performance on Aid Effectiveness and Promoting Effective Development, para. 3.6.

129 IEG, Report, 2010, p. 99: "*The piecemeal approach currently being pursued focused on individual projects and policies appears unworkable and needs a major redesign for it to be successfully scaled up.*" Prior to this, the evaluation of a two-year pilot program on the use of borrower systems in addressing environmental and social safeguards at the World Bank found in 2008 that the project-based approach tested in the pilot proved too detailed, and not effective in building borrower capacity in a more sustainable way. OPCS, Evaluation of the initial phase of the pilot program for use of country systems for environmental and social safeguards: Lessons learned and management proposal for an incremental scale up of the program, 2008, p. 34. See also J.D. Quintero, A. Ninio, P.J. Posas: Use of Country Systems for Environmental Safeguards, Analytical Background Paper for the World Bank's 2010 Environment Strategy, February 22, 2011 and ADB, Safeguard Policy Statement, 2009, Attachment 1, para. 6.

130 IEG, Report, 2010, p. 100.

131 J.D. Quintero, A. Ninio, P.J. Posas: Use of Country Systems for Environmental Safeguards, Analytical Background Paper for the World Bank's 2010 Environment Strategy, February 22, 2011, paras. 24–26.

clear and transparent about its principles, objectives and precise criteria for assessing project results. It is necessary, however, to sound a note of caution here. Indicators per se are no cure-all. It is hotly debated to what extent it is possible to formulate adequate indicators, who should have the power to do so, and how to use them objectively.¹³² Also, a far-reaching shift from the Bank's present focus on upstream compliance with procedures towards a downstream focus on the achievement of outcomes seems only advisable if at the same time the supervision capacity of the Bank is strengthened and community participation, transparency, and disclosure become more important. Outcome-oriented and indicator-based systems have proven to be successful only where the general public as well as affected persons a) had access to information and b) could use this information to react, i.e. where information was "actionable".¹³³

With respect to the problem of overly detailed and prescriptive *procedural rules*, the idea of simply relaxing procedural rules is not convincing. In fact, neither IFC nor regional MDBs actually grant more procedural leeway or flexibility. More flexibility is only advisable if the borrower has the capacities to fulfill objectives independently and effective supervision systems are in place.

For the Bank, concrete procedural rules are not problematic per se; they can be helpful in guiding staff. The problem is rather how rules are drafted. It should be made sure that rules are not so detailed that they become non-transparent, difficult to navigate and ultimately to comply with. This refers back to the question of a normative architecture. An umbrella policy (layer 1) that covers basic procedural rules is helpful; guidance notes (layer 3) that provide a transparent running commentary on the policies (layer 2) are advisable too. The policies themselves (OPs/BPs, layer 2) should be reviewed with regard to the clarity and coherence of their internal structure and terminology.

Participation of affected and other third parties is a central element of upstream assessments and needs further reform, even though IFC's approach provides less of a good example in this case, and other MDBs are largely in line with the World Bank's current approach. Nonetheless, five elements should help to make the system more effective: First, the Bank should allow effective participation already during the screening phase in order to improve categorization. It should also provide grievance mechanisms for definition of project-affected in order to ensure that relevant groups are actually participating. Furthermore, it should ensure greater weight of external expert studies in the environmental and social plans in order to have a more neutral basis for them. A fourth element would be to install a better response system for comments of the general public, i.e. strengthen rules on how it (and the borrower) has to react to input and justify their measures in order to ensure responsiveness. This could be achieved by introducing a clause in the respective OP/BP (layer 2) that the Bank has to respond to inputs.

With regard to the use of *country systems*, the comparison with regional MDBs proved fruitful. Four recommendations follow from our comparative analysis: First, the World Bank should be more open to cooperation and collaboration with others in assessing country systems. This implies using already existing country system-assessments – often, the required information is already available from other sources, e.g. in Eastern Europe from European Commission reports, or from other regional bodies. Also, more external input from experts should be solicited. Second, the World Bank should give clear priority to *strengthening* country systems before using them. To this end, the existing 'address gaps'-clause¹³⁴ should be reformulated to include a preference for capacity-building to improve the respective system before using it. Third, the World Bank should focus on *country-wide* system assessment, not on individual projects. Fourth, the World Bank should differentiate more clearly between environmental safeguards (where harmonization-efforts are already well-advanced) and social safeguards (which are much less harmonized).

3. Implementation phase: Downstream focus vs. downstream laissez-faire

According to the IEG-report, the most fundamental problem of the World Bank's safeguard system is its weak supervision during implementation. The current safeguard system puts sufficient emphasis on the upstream assessment

132 Davis/Kingsbury/Engle Merry, Indicators as Technology of Global Governance, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583431; Riegner, Entwicklungsmessung und Recht, in: Dann/Kadelbach/Kaltenborn (eds.), Entwicklung und Recht, 2013 (on file with the authors).

133 National administrative management and its law have been experimenting with similar systems since the late 1980s. See Kuhlmann, Messung und Vergleich von Verwaltungsleistungen, Die Verwaltung 2011, pp. 155; Kuhlmann/Fedele, New Public Management in Continental Europe, in: Wollmann/Marcou (eds.), The Provision of Public Services in Europe, 2010, pp. 49.

134 OP 4.00, para. 3.

of risks, but too little on tracking outcomes, monitoring implementation, and providing grievance mechanisms. Even if the current framework provides a good screening up-front, the Bank takes a more lenient approach in the downstream phase, in particular for category-B projects. Here, even good plans are not monitored precisely enough, performance indicators are not used systemically, external expertise and feedback is not given enough weight, and grievances are not addressed quickly enough. Good efforts upstream are not linked to and supported by strong efforts downstream.

In comparison, the practice of other MDBs and in particular IFC's Performance Standard model provides an instructive example for a more systemic focus on the implementation phase. As will be elaborated in more detail below, IFC has for instance developed a sophisticated monitoring system regarding environmental and social project-outcomes in the downstream phase as well as grievance mechanisms. It hence provides a much closer link between the upstream focus on outcomes and the downstream phase. Regional MDBs have also adopted a more systematic approach to supervision during the implementation of projects, with a clear division of tasks between the borrower and the respective Bank.

Four elements are important that characterize the implementation phase and IFC's approach in particular: (aa) monitoring through client, (ab) monitoring through third parties, (ac) disclosure of information, and (ad) grievance mechanisms.

a) What does “downstream focus” mean?

aa) Monitoring through client

The key characteristic of IFC's approach to monitoring is the systematic and continuous follow-up on the up-front agreed environmental and social outcomes of the project during implementation. The most important structural element of this approach is DOTS, which enables IFC staff to rate particular projects based on the environmental and social indicators defined at appraisal.¹³⁵ It analytically links project appraisal, project-monitoring and project evaluation. With a low rating in DOTS, the completed project will not be considered a successful one by IFC-management, even though it may have proven to be economically viable. Tracking and evaluating environmental and social outcomes of projects thus is mandatory and of decisive

importance both for further downstream disbursement decisions and for future dealings with the client.¹³⁶

How does IFC generate the information needed to continuously assess the environmental and social outcomes of a particular project? The most important tools to generate information on outcomes in the implementation-phase are regular reports produced by the client¹³⁷ and regular supervision site visits conducted by IFC-staff¹³⁸ as well as, on an ad-hoc basis, conference calls, stakeholder meetings and other sources of information. Both the regular reports and the site visits lead to an internal IFC report, which compares the situation on the ground with outcomes agreed between client and IFC at the appraisal stage. The results of this internal review of each client report and site visit will be used in two ways. First, in case of non-compliance with defined outcomes, IFC will work with the client to bring it back into compliance through defining corrective measures. Second, the findings will be used for the dynamic and ongoing rating process, which is not without teeth, for disbursements will only be made if environmental and social obligations are being fulfilled or waived.¹³⁹ Moreover, cases of non-compliance will trigger a tighter and more intense supervision regime (portfolio review),¹⁴⁰ including a higher frequency of reports and site visits, based on a specific risk-rating process.¹⁴¹

All analyzed regional MDBs have developed a continuous and integrated supervision system based on client reports and site visits – although none of them follows IFC's strong reliance on the client. General requirements for monitoring are contained in the umbrella policy (layer 1). Specific details on how to organize monitoring for certain issues (resettlement, indigenous people) can also be found in issue-specific policies (layer 2) and in guidance notes (layer 3). ADB's system is based on a separated and parallel responsibility of borrower and bank, which is set out in ADB's 'Safeguard Policy Statement'.¹⁴² The borrower has to

¹³⁵ Above, II.2.a; IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.5.

¹³⁶ IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.2.

¹³⁷ IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.3.

¹³⁸ IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.6.

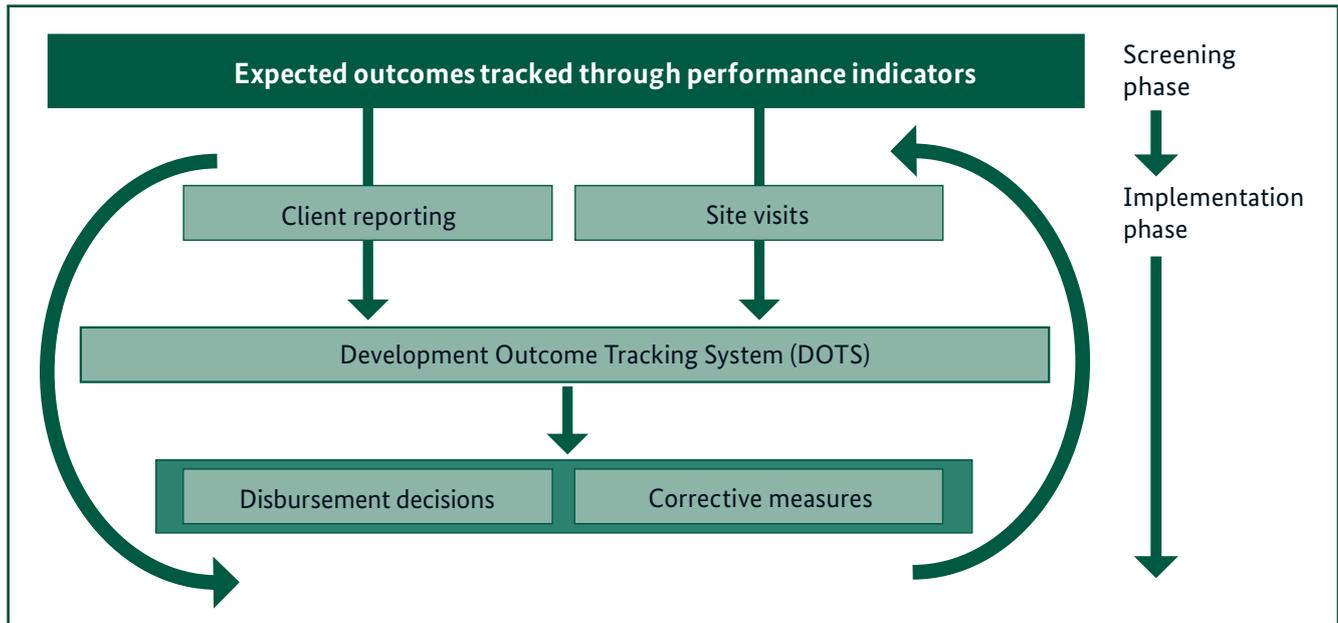
¹³⁹ IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.2.

¹⁴⁰ IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.8.4.

¹⁴¹ IFC-CESI Environmental and Social Review Procedures Manual, 6 (direct investments: supervision), para. 2.4.

¹⁴² ADB, Safeguard Policy Statement, para. 57.

Figure 6. IFC Supervision



maintain procedures to ensure supervision, document and publish monitoring results, submit periodic monitoring reports, and, if necessary, identify and implement corrective measures to ensure that agreed outcomes are achieved.¹⁴³ Clients are asked to work with external experts and non-governmental organizations (NGOs) and use independent advisory panels to guarantee effective monitoring of implementation.¹⁴⁴ ADB staff not only has to review and verify client reports, but to investigate itself through periodic site visits and supervision missions.¹⁴⁵ The extent of monitoring activities required from the borrower and conducted by ADB thereby depends on the project's risks and impacts.¹⁴⁶ Besides the umbrella policy, which outlines the general approach to monitoring and supervision, ADB's issue-specific policies include further provisions on Monitoring and Reporting, which principally reiterate but also concretize the provisions in the umbrella policy.¹⁴⁷ At EBRD, too, responsibility for monitoring is shared between the borrower and Bank, but with an even stronger role for EBRD staff.¹⁴⁸ In contrast to ADB, the scope and periodicity of monitoring

depends not just on “the projects’ issues, impacts and compliance requirements”, but also on “the ability of the client and/or local authorities to adequately monitor”.¹⁴⁹ EBRD works together with clients to develop a monitoring program in accordance with its Performance Requirements, and therein specifies “the appropriate monitoring tools”.¹⁵⁰ Again, whereas the client has to establish procedures to monitor and measure compliance which is further specified in the issue-specific ‘Performance Requirements’, EBRD retains responsibility for reviewing reports submitted by the client and thereby conducts its own monitoring missions and relies on third party monitoring.¹⁵¹ AfDB in its proposed new ‘Safeguard Policy’ also advances a parallel approach to monitoring.¹⁵²

At first sight, the monitoring system of the World Bank seems similar to those used by the other institutions mentioned above: systematic supervision is prescribed by OP/BP 13.05 (which have recently been retired, and their content included in OP/BP 10.00) and in the safeguard

143 ADB, Safeguard Policy Statement, para. 57 (i), (iii), (iv), (vii).

144 ADB, Safeguard Policy Statement, para. 57 (v), (vi).

145 ADB, Safeguard Policy Statement, para. 58, (i), (ii), (iii). Moreover Bank staff are responsible for preparing a project completion report and therein to determine (unilaterally) whether the objective and desired outcomes have been achieved (v).

146 ADB, Safeguard Policy Statement, paras. 57 and 58.

147 E.g. ADB Safeguard Requirements 1, paras. 21–22; or Safeguard Requirements 2, paras. 30–31.

148 EBRD, Environmental and Social Policy, 2008, para. 34–8.

149 EBRD Environmental and Social Policy, para. 35.

150 EBRD Environmental and Social Policy, para. 35. Appropriate monitoring tools depend on „the results of due diligence, the results of any public consultation which has taken place and within the framework of legal agreements concluded with the client.”

151 EBRD Environmental and Social Policy, para. 36.

152 AfDB, African Development Bank’s Integrated Safeguards System, 2012, B.8, para. 15 and the issue-specific Operational Safeguards.

policies.¹⁵³ Supervision should include the use of performance indicators.¹⁵⁴ An ‘Integrated Safeguard Data Sheet’ (ISDS) has to be prepared by the project team before appraisal in order to mark safeguard issues and indicates how to deal with them during implementation. The ‘Project Implementation Plan’¹⁵⁵ is supposed to provide a clear map of the implementation process and includes environmental and safeguard issues. Generating information about the ongoing project and the supervision by the Bank is based on reports by the borrower, measured against the yardstick of a ‘Project Implementation Plan’. The overall responsibility on the side of the Bank rests with the ‘Task Team Leader’ (TTL), who has to ensure regular supervision, including site visits etc.¹⁵⁶ Similar to IFC’s and other MDBs’ rules, the TTL, in case of changes or non-compliance, is to seek dialogue and bring the project back on track but can also use contractual remedies.¹⁵⁷

However, there are four main differences between the approach taken by the World Bank and IFC in particular (beyond the public nature of the borrower), some of which are also differences with regard to the approaches taken by other MDBs with a reformed integrated safeguards system:

(1) In World Bank rules, there is a stronger focus on the role of the Bank and its TTL than on obligations of borrowers. For example, the TTL prepares early reports¹⁵⁸ and is responsible for ascertaining compliance with safeguards throughout the project.¹⁵⁹ Monitoring through the client/borrower itself is hence not the dominant model in the Bank’s safeguard supervision but rather parallel or secondary, as is generally the approach chosen by other MDBs.

(2) There is in practice an irregular use of performance indicators and no equivalent to DOTS, i.e. no systematic tracking system that includes environmental and social issues. The ‘Project Implementation Plan’ could be a basis for this but is not necessarily formulated in indicators.

153 Regarding environmental aspects in World Bank, BP 4.01 (para. 20–23), regarding indigenous people in BP 4.10 (para. 12) and regarding involuntary resettlements in BP 4.12 (para. 14–17).

154 World Bank, BP 13.05, para. 2b.

155 PIP; see World Bank, BP 13.05, para. 2 c and Annex B.

156 World Bank, BP 13.05, paras. 9–11.

157 World Bank, BP 13.05, para. 13. On these remedies in more detail Dann, *Entwicklungsverwaltungsrecht*, pp. 348. See also ADB Safeguard Policy Statement, para. 58; EBRD Environmental and Social Policy, para. 37.

158 World Bank, BP 13.05, para. 6.

159 World Bank, BP 13.05, para. 9d, 11.

(3) In terms of substance, the World Bank’s rules put more emphasis on financial and procurement aspects than on monitoring safeguards. There is hence an imbalance between environmental/social and fiduciary values that should be remedied.

(4) Compared to the IFC model and some of the other MDBs, there is also an imbalance with regard to timing: Bank rules emphasize the planning of supervision rather than doing supervision.¹⁶⁰ Here again, the downstream phase is weaker.

A final point should be made: The problem in the World Bank is much less the rules than the practice and the compliance with the rules. Especially with regard to Category B projects, i.e. those which do not seem to be especially risky, there is much less internal value given to supervision and outcomes. This is not a problem of deficient rules but of the insufficient compliance culture.¹⁶¹

ab) Third party monitoring: expert review and community feedback

As IEG noted, IFC’s supervision system strongly relies on high quality reports produced by the client – but these reports on environmental and social outcomes are often inadequate and not always candid.¹⁶² In only 50 % of the (28) random sample projects evaluated by IEG, clients provided IFC with satisfactory reports.¹⁶³ Moreover, site visits by IFC staff can be waived for low risk-projects.¹⁶⁴ Even if IFC site visits take place, their frequency is being decided by IFC staff on a case by case basis.¹⁶⁵ Given that client reports and site visits are the organization’s two central information-gathering tools on which its supervision system depends, IFC monitoring of environmental and social outcomes might effectively break down for individual projects. This is the Achilles’ heel of a supervision system, which is almost exclusively based on client ownership and client-based information-gathering. IFC’s supervision system in general seems too strongly focused on information-processing between client and IFC. It lacks institutionalized information channels on environmental and social outcomes fed

160 EBRD’s seems similarly preoccupied with the planning of monitoring. EBRD Environmental and Social Policy, para. 35.

161 On this see below II.4.

162 IEG, Report, 2010, p. 32–33.

163 IEG, Report, 2010, p. 33.

164 IFC, ESRP Manual, Chap. 6 (direct investments: supervision), para. 2.6.1–2.6.3.

165 IFC, ESRP, Chap. 6 (direct investments: supervision), para. 2.6.

by third parties and affected communities below the grievance-level. Granted, IFC's 'Guidance Note 1' foresees feedback from affected communities regarding the effectiveness of agreed environmental and social mitigation measures, but this feedback process again is supposed to be managed by the client alone. In the words of the guidance note:

*"When applicable, and throughout the life of the project, clients should build upon the channels of communication and engagement with Affected Communities established during the risks and impacts identification process. In particular, clients should use the appropriate stakeholders engagement practices described in this Performance Standard to disclose information and receive feedback on the effectiveness of the implementation of the mitigation measures in the clients management system as well as the Affected Communities' ongoing interests and concerns about the project."*¹⁶⁶

In sum, existing IFC policies and guidance on downstream community participation, disclosure of information and feedback-loops on environmental and social issues put the responsibility on the client and thus must rely on how the client in practice handles these rather flexible norms.¹⁶⁷

Independent third party monitoring has not been institutionalized.

Regional MDBs generally also adopt a client-based mechanism of monitoring in the implementation phase,¹⁶⁸ even though AfDB and EBRD add a much stronger emphasis on third party monitoring. AfDB in its umbrella policies explicitly foresees the use of third party expertise for monitoring for complex projects or when conflicts with host communities arise.¹⁶⁹ EBRD even lists "*periodic third party monitoring*" under the general monitoring mechanisms to be used for EBRD-projects. AfDB additionally requires that the reports of such independent monitoring exercises shall be publicly available to all parties and result in an implementable action plan.¹⁷⁰ What is interesting though: None of them understands project-affected citizens as regular participants in monitoring (as information providers) below the grievance level.

166 IFC, Guidance Notes to Performance Standards on Environmental and Social Sustainability, January 1, 2012, Guidance Note 1, para. 94.

167 IFC Performance Standard 1, para. 22–33.

168 EBRD, Performance Requirement 10 on Information Disclosure and Community Participation, para. 21–23.

169 AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 16; EBRD, Environmental and Social Policy, para. 35–36.

170 AfDB, African Development Bank's Integrated Safeguards System, 2012, para. 16.

Compared to IFC, the World Bank, like regional MDBs, relies less on the client/borrower. Instead, the World Bank requires the TTL to take a very active role in generating information. It therefore does not have the mentioned Achilles heel. However, the Bank is similarly ineffective in generating third party information and using local knowledge of the project-affected. The central OP/BP 13.05 on supervision (now: OP/BP 10.00) mention neither of them. The safeguard policies themselves integrate project-affected into the preparation of project up to approval, but they have no role when it comes to supervision and monitoring. The Bank is more open when it comes to its disclosure policies. These are much broader and stricter than those of IFC (see below, ac.) – hereby creating opportunities for the general public to engage with the Bank.

ac) Transparency and disclosure of information

Transparency is a central element of any system to avoid or mitigate adverse social or environmental impacts. As mentioned above, it is today beyond doubt that involving project-affected groups as well as the general public in the decision-making and implementation process is of great value. Comparing the 'Access to Information'-policies of World Bank, IFC and regional MDBs reveals that the World Bank has the comparatively most transparent information policy and is more open to the involvement of – and hence also monitoring through – the general public.

IFC's policy record is mixed: General rules are rather restrictive. The umbrella policy makes only a very general commitment to timely information¹⁷¹ and to informed consultation and participation but only where there are adverse impacts.¹⁷² The 'Access to Information Policy' mentions disclosure in direct investments and lays down that an 'Environmental and Social Review Summary' (ESRS) is to be published, including a concrete but also very limited list of seven types of information.¹⁷³ The issue-specific 'Performance Standards' contain more concrete rules. According to 'Performance Standard 1', for example, the client is obliged to engage the relevant stakeholders, to address and involve "*affected communities*"¹⁷⁴, but to engage in more concrete consultation only when things get adverse.¹⁷⁵

171 IFC, Performance Standards 1 para. 14.

172 IFC, Performance Standards 1 para. 30.

173 IFC, Performance Standards 1 para. 31.

174 IFC, Performance Standards 1 para. 29.

175 See above, II.2.c (community participation). This rather restrictive approach could have to do with the fact that these are private clients.

The World Bank enacted a new ‘Access to Information Policy’ in 2010. The new policy is based on the principle that any World Bank document and information shall be made public, unless it falls under a limited number of exceptions.¹⁷⁶ With respect to safeguards, however, it is often not information of the Bank but rather of the borrower that might be relevant for affected or the general public. Here, the Bank lists a number of documents that are prepared by the Bank but have to be disclosed in order to do business with the Bank. This includes ‘Safeguard Assessments’.¹⁷⁷ With regard to other country-specific operational documents prepared by the Bank that are routinely discussed with the borrower (including ‘Project Appraisal Documents’) the Bank requests the borrower concerned to identify whether the document contains any confidential information relating to the borrower, or information whose disclosure may adversely affect relations between the Bank and the country – before finalizing the document. The Bank, as it considers appropriate, then makes adjustments to the document to address the matters of concern to the country/borrower.¹⁷⁸

It should be noted, however, that having progressive rules obviously does not automatically mean that these rules are also complied with. With regard to the World Bank, some Inspection Panel cases have shown that only lip service was paid to the relevant rules. Instead of applying them in a way that does justice to their intention, they were just barely complied with (by the Bank and the borrower).¹⁷⁹

Other MDBs have reacted to the increasing demand for disclosure of documents but only the AfDB has (recently)¹⁸⁰ gone as far as the World Bank.¹⁸¹

ad) Grievance mechanisms

The IFC umbrella policy obliges the client to establish a project-based grievance mechanism for affected communities, which should be “scaled” to the risks and adverse

impacts of the project.¹⁸² Its central function is to “receive and facilitate resolution of Affected Communities’ concerns and grievances about the client’s environmental and social performance”.¹⁸³ The mechanism is tasked to resolve concerns promptly in a transparent and consultative process, which is cost-free and “without retribution” to the party that filed the concern.¹⁸⁴ Through this provision the establishment of a local grievance mechanism becomes a standard requirement for projects which affect local communities. The extent to which IFC staff is informed about voiced concerns and the reactions of the client depends on the quality of client-reporting. The client is supposed to inform IFC annually about “the status of the client’s community engagement” which would theoretically require the client to include information about the use of the grievance mechanism by affected communities.¹⁸⁵ IFC has also installed an independent complaint mechanism for affected communities in the form of the CAO (‘Office of the Compliance Advisor/Ombudsman’). CAO is an independent World Bank Group–institution tasked to review complaints from affected communities triggered by IFC and MIGA-projects. It reports directly to the President of the World Bank and is supposed to act as a mediator between clients and local communities.

The World Bank, too, has rules on grievance mechanisms and is acting on two levels:

- 1 The Bank demands grievance mechanisms from its borrowers in the IFC sense, i.e. providing a project-based, local mechanism to receive and resolve concerns of affected during the process or to provide country-wide grievance systems, in two policies so far, namely OP 4.12 (involuntary resettlement) and OP 4.10 (indigenous peoples, Annex B und C). It is also in the process of developing them, which is certainly a positive development.¹⁸⁶

176 World Bank, Access to Information, 2010, para. 6. On this policy in more detail Dann, Der Zugang zu Dokumenten im Recht der Weltbank, Die Verwaltung 44 (2011), pp. 313.

177 World Bank, Access to Information Policy, 2010, para. 20 c.

178 World Bank, Access to Information, 2010, para. 20 a).

179 Inspection Panel, Mumbai Urban Transport Case, 2005, Investigation Report, pp. 83.

180 AfDB, Disclosure and Access to Information Policy, May 2012.

181 See the respective and separate access to information policies of ADB, Public Communication Policy, 2012, para. 32; EBRD, Public Information Policy, 2008.

182 IFC, Performance Standard 1, para. 35; on various forms of grievance and accountability structures see Dann, The Law of Development Cooperation, 2013, Chap. 9; also Dann, Accountability in Development Aid Law, Archiv des Voelkerrechts 2007, pp. 381; on grievance mechanisms and access to external review in international organizations in general: von Bernstorff, Procedures of Decision-Making and the Role of Law in International Organizations, 9 German Law Journal 1939–1964 (2008), 1959–1960, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1049>.

183 IFC, Performance Standard 1, para. 35.

184 IFC, Performance Standard 1, para. 35.

185 IFC, ESRP, Chap. 6 (direct investments: supervision), para. 2.3.

186 World Bank note: Addressing Grievances in Bank Operations, May 2012.

- 2 Recognizing the importance of providing an early and rapid prevention and response system, it installed the centralized 'Dispute Resolution and Prevention Facility' within its policy-making branch, OPCS.

Concerning an independent complaint mechanism (separate from grievance mechanism) the Bank in 1993 installed the Inspection Panel. This is of central importance for the effectiveness of the whole safeguard system for the following three reasons:

- ▶ The Panel is the only effective and transparent mechanism with which *failures of the Bank* (not the borrower) with regard to safeguards can be addressed, resolved and redress sought. It is central to make the Bank more accountable to those affected by Bank-financed projects.
- ▶ The Panel has a preventive function. Cases before the Inspection Panel receive publicity. The Bank will avoid similar cases and hence invest more resources into avoiding non-compliance with its safeguards and hence environmental and social damage.
- ▶ Norm concretization and explanation: Bank staff, borrowers and grievance mechanisms depend on understanding clearly the meaning of the relevant rules. The Inspection Panel, though not competent to decide authoritatively about their scope and meaning, is in practice very important for exactly this process of interpreting and clarifying the meaning of the safeguard OP/BP.¹⁸⁷

Both tracks (grievance mechanism and independent complaint mechanism) are important and should complement each other to make the Bank's safeguards more effective not least by making the Bank more accountable with regard to its own compliance with the safeguards.¹⁸⁸

¹⁸⁷ On this process with tremendous insights and material Naude Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, 2009. – It is interesting to note in this context that the Panel is providing these functions without actually been run primarily by lawyers. On the contrary, the majority of people serving on the Inspection Panel are not lawyers.

¹⁸⁸ On the World Bank's accountability structures more generally see Dann, *The Law of Development Cooperation*, 2013, Chap. 9; also Dann, *Accountability in Development Aid Law*, *Archiv des Voelkerrechts* 2007, pp. 381 et seq.

b) Lessons to be learned for the World Bank safeguards reform?

An approach that systematically links the upstream assessment of risks with the downstream supervision of plans to their avoidance should lie at the heart of the Bank's safeguard reform. It is imperative for the Bank to make the monitoring and supervision of the implementation more effective. Many rules of the World Bank policies and many risk-avoidance plans of borrowers might already be smartly drafted and in themselves convincing, but the crux is how they are controlled downstream. Here, the World Bank has to reform its rules basically in all layers of regulation – starting by making effective supervision a principal responsibility (Layer 1), describing the Bank's responsibility for supervision more concretely in the policies (Layer 2) and explaining the practical implications in detail through guidance notes (Layer 3).

The model of IFC and regional MDBs provide important lessons – but also warnings.

The IFC model is recommendable with regard to its general emphasis on supervision during implementation. This downstream focus, which necessarily complements the (also in principle recommendable) upstream outcome-based approach by IFC, is so far too weak in the World Bank. The World Bank's several weaknesses can be addressed in the following way:

A central instrument is, as the IFC model demonstrates, an indicator-based tracking system during implementation that allows for a more precise accounting of achievements and deficits. The Bank has similar instruments (PIP, ISDS). However, the Bank should have a unified and general tracking system that is fed by borrower and Bank data and used as the general yardstick. It should also make mandatory the systematic use of indicators or other precise criteria in Category A and B projects.¹⁸⁹ Finally, as to reporting, it should strengthen the weight of environmental and social results in the completion report.

However, any tracking system is only as good as the information that goes into it. Here, IFC is not a good role-model, for it is focused on reports by its clients and has overly flexible rules on site visits. The Bank should rely on a strong track of separate and parallel project supervision to be stipulated in a (to be created) umbrella policy (layer 1). This is also the model to be seen in the regional MDBs. Especially

¹⁸⁹ IEG, Report, 2010, executive summary, p. xxi, and pp. 43 et sequ.

with regard to the very mix of mostly public borrowers and also ones with weak capacities, the IFC approach is not recommendable.

More generally, consultation between the Bank and affected (understood as a two-way system and not just informing them but being open to their feedback) should continue after project approval. If possible and compatible with borrower laws, the Bank should not only encourage direct communication between the client/borrower and affected communities, but also engage third parties directly. Rules should ensure fair access, be sensitive to the variety of groups and their vulnerability,¹⁹⁰ but also ensure their control.

The Bank should also follow the regional MDBs' model and integrate provisions for third party monitoring and supervision into its safeguard system, where third parties can be external experts as well as local communities. This would ensure objective assessments and increase the effectiveness of the Bank's supervision system. Disagreements between external experts and Bank assessments should be made transparent and the Bank should be obliged to justify in writing if it wants to depart from external advice.

Finally, tracking and information gathering systems that monitor *objective* criteria must be complemented by grievance mechanisms, which allow the World Bank to access and react upon the *subjective* information that project-affected people possess. It is important to have a quicker, more direct and easily accessible system to deal with concerns of affected during implementation. The fact that the Bank mostly deals with public borrowers makes the issue more difficult, since grievance mechanisms have to be compatible with the local system of redress (administrative complaints, courts, etc.). Nevertheless, only where the Bank receives undiluted feedback and is accountable for failures, will projects achieve results. The Bank should therefore continue its efforts to press for local, project-based grievance mechanisms as well as strengthen its own Dispute Resolution and Prevention Facility. It should also make sure that the Inspection Panel remains the regular arbiter on how to understand World Bank rules. With regard to grievance mechanisms, it is paramount to make sure that these exist not only on paper but provide fair procedures, e.g. realistic access, use of local languages, without fears of retribution, etc. Compliance with these rules must be controlled by the Inspection Panel.

190 Good example in IFC, Performance Standard 1, paras. 27, 30.

4. Cross-cutting: Institutional system, budgetary aspects, incentive structure

An effective safeguard system is not only built on smart rules but on an institutional system and organizational culture that appreciates environmental and social concerns as central to the World Bank's mission. Such a culture is based on various elements.

Four elements should be taken into account here:

There is, first of all, the question of *who is responsible* for ensuring respect for standards. The problem in the World Bank concerns Category B (and C) projects in particular. For them, safeguard compliance control is delegated from specialists to sector managers, who are not safeguard specialists and overloaded. In IFC, on the other hand, 'Performance Standards' are always monitored and evaluated by staff from the 'Environment and Social Development Department' (CES). CES supports investment departments with the environmental and social review of projects, and is accountable to its vice president. On each project there is also the LESS ('Lead Environmental or Social Specialists') who is responsible for categorizing projects according to risks, formulating indicators and more generally supervising the proper conduct of the appraisal in compliance.¹⁹¹ This results in better allocation of resources as better skilled people pursue the same issue throughout the entire lifecycle of a project.

The World Bank in general pursues a similar approach of separation: On one hand, there is the safeguards unit housed in the 'Sustainable Development Directorate' which exists in each of the 'Regions', complemented by a 'Regional Safeguards Advisor' who oversees the work of safeguard specialists and practically clears all safeguard documents before they are disclosed. On the other hand, projects are run by the 'Sectors'. The concrete project team is led by the 'Task Team Leader' who equally carries responsibility for ensuring compliance with safeguards.¹⁹² He or she is assisted by a 'Regional Safeguards Advisor'. However, for Category B projects this does not apply. The Bank should therefore re-think this aspect. It should also strengthen the role of the 'Quality Assurance and Compliance Group', have more safeguard specialists doing just that and who also work on Category B projects. Finally, the Bank should ensure continuity

191 IFC, ESRP Manual, Chap. 3, para. 2.2 etc.

192 The study by IEG on Safeguard evaluation notes (p. 92) that there is an institutional disconnect between environmental units (doing analytical work and strengthen country systems) and Safeguard people (focusing on concrete projects and mitigating affects).

between the people who are responsible for safeguards during appraisal and during implementation.

This institutional structure can lead to frictions when it comes to the issue of budgeting. In the Bank, the 'Task Team Leader' has to decide about the funding also for safeguard control; often enough, he would invest his scarce resources in employing a 'Financial Risk Officer' rather than in environmental and social safeguards control. There is, hence, a problematic trade-off between securing different risks.

Another budgetary aspect is important. The example of regional MDBs shows that more emphasis on effective safeguard systems also means providing more resources. In the ADB, recent reforms were also accompanied by a great increase of resources for safeguards implementation which meant that there were also simply more people. The same holds true for the AfDB. Here too, the new policies are intended to come with more resources, recruiting more specialists and training the regular staff.¹⁹³

Institutional and budgetary responsibility draws attention to a larger issue that might lie behind them: the general structure of incentives animating Bank staff. It has been argued that the Bank is prone to follow an "*approval culture*" in which more emphasis is given to agreeing on projects than on seeing that these projects achieve the intended outcomes. At the same time, it has been observed that the Bank from its very beginning has developed a rather risk-averse culture in order to gain credibility at the financial markets.¹⁹⁴ This risk-aversion, however, which is still apparent in the cumbersome procedural rules, is aimed more at financial risks than at environmental and social risks. Current incentives at the Bank seem to squeeze out safeguard concerns in the always tight project cycle. At the same time, there are awareness and the goal not so much to avoid any risk but to manage risks responsibly.

How to change this? The budgetary separation (combined with enough resources) is necessary to make sure that one unit perceives safeguard control as their central mission. Clean safeguards records have to be accepted as a necessary element of *any* successful project in the Bank. More broadly, the Bank should not only re-design responsibilities and budgetary structure, but also its system of rewarding or promoting staff. The World Bank should provide more training on safeguards for its general staff.

193 AfDB, African Development Bank's Integrated Safeguards System, 2012, Section III./p. 19.

194 Kapur/Lewis/Webb, The World Bank, 1997, pp. 7.

III. Recommendations

From the many recommendations contained in this study¹⁹⁵, we want to highlight and give special emphasis to the following five points:

I. Create a more transparent normative architecture of the safeguard system

The World Bank should introduce a mandatory umbrella policy on environmental and social safeguards in the form of a new OP setting out general principles, central objectives and basic roles and responsibilities with regard to safeguarding society and the environment. This would help to ensure a potentially seamless coverage of both environmental and social risks for all projects. The Bank should also strive towards a fully integrated three-layer framework with a standardized and easily comprehensible structure of OPs/BPs and complementary non-binding guiding notes. This re-organization would make the safeguard framework more accessible and would be possible without diluting the substantive requirements contained in existing safeguard policies.

II. Provide broader thematic coverage of the safeguard policies

The World Bank should introduce new issue-specific policies on social (labor, community health and safety, land tenure) and environmental impacts (climate change and natural resources) and/or insert substantial new content into existing policies. This would make policies more comprehensive in coverage and more responsive to current environmental and social risks. Other MDBs already cover most of these emerging issues in individual safeguard policies. By adopting a general policy on land tenure, the World Bank could again lead the way in creating new development-related safeguard policies.

III. Link better the appraisal and the implementation phase of projects

The World Bank should make sure that the achievement of expected outcomes agreed upon during appraisal is better controlled during implementation. It can do this by establishing a unified and systematic outcome-tracking system based on performance indicators or equivalently

precise criteria to be used for Category A and Category B projects. Such a system should link the agreed outcomes during appraisal with monitoring during implementation. This would allow for more precise accounting of achievements and deficits throughout the project cycle and thus would ensure greater effectiveness. Disbursement linked to achievement of results, as practiced in the context of program-for-results financing, could also contribute to that aim.

IV. Create multiple agents of oversight

Monitoring implementation is key to an effective safeguards system. The World Bank should therefore strive to turn citizens and experts into agents of oversight, complementing the efforts of the Bank and the borrower in this regard. To that end, the World Bank should enhance effective participation already during the appraisal phase and give third party expertise greater weight in order to improve project categorization and risk management. This includes being more open and responsive to reactions from the affected communities and the general public.

The World Bank should also regularly conduct consultations with project-affected groups after project approval and during implementation. This would allow tapping into local knowledge and information during the implementation phase and to register earlier and better where problems might arise. Such rules should at a minimum ensure fair access and be sensitive to different groups and vulnerabilities. The Bank should integrate provisions for third party (external experts and/or local communities) monitoring into its safeguard system in order to complement the Bank's supervision system and ensure neutral assessments. Finally, the World Bank should continue to demand local, project-based as well as country-wide grievance mechanisms and strengthen its own Dispute Resolution and Prevention Facility. It is paramount to make sure that local grievance mechanisms exist not only on paper but provide fair and accessible procedures. Compliance needs to be controlled by the Inspection Panel.

195 See sections II.1b, 2b and 3b.

V. Refine the Use of Country systems approach

The use of country systems can be a powerful instrument to increase ownership, but it depends on the capacities of the borrowers. Since these are often lacking, the World Bank should invest more into strengthening country systems before using them. To this end, the existing policy on the use of borrower systems should be reformulated to include a preference for capacity-building to improve the respective system before using it.

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Appendix:

Language on social issues in umbrella-policie

Table 1. IFC's Policy on Environmental and Social Sustainability (January 2012)

Social Sustainability	I. Purpose of this Policy <p>IFC strives for positive development outcomes in the activities it supports in developing countries. These activities include (i) investments financed directly by IFC; (ii) investments implemented through financial intermediaries (FIs) or managed by IFC's Asset Management Company or any other IFC subsidiary, as well as investments funded in part or in whole by donors; and (iii) advisory services. IFC believes that an important component of achieving positive development outcomes is the environmental and social sustainability of these activities, which IFC pursues and expects to achieve through the application of this Policy on Environmental and Social Sustainability (the Sustainability Policy or the Policy), and a comprehensive set of environmental and social Performance Standards. (p. 1, para. 1)</p> <p>Through this Policy, IFC puts into practice its commitments to environmental and social sustainability. (p. 1 para 2.)</p>
Human Rights	II. IFC's Commitments <p>IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights. This responsibility means to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to. Meeting this responsibility also means creating access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances. IFC's Performance Standards support this responsibility of the private sector. Each of the Performance Standards has elements related to human rights dimensions that businesses may face in the course of their operations. Consistent with this responsibility, IFC undertakes due diligence of the level and quality of the risks and impacts identification process carried out by its clients against the requirements of the Performance Standards, informed by country, sector, and sponsor knowledge. (p.3, para. 12)</p>
Gender	II. IFC's Commitments <p>IFC believes that women have a crucial role in achieving sound economic growth and poverty reduction. They are an essential part of private sector development. IFC expects its clients to minimize gender-related risks from business activities and unintended gender differentiated impacts. Recognizing that women are often prevented from realizing their economic potential because of gender inequity, IFC is committed to creating opportunities for women through its investment and advisory activities. (p. 3, para 13)</p>

Table 2. EBRD Environmental and Social Policy (May 2008)

Social Sustainability	<p>A. Purpose of this Policy</p> <p>The Policy outlines how the Bank will put into practice its commitment to promote environmental and social sustainability by: (p. 2, para. 2)</p>
Human Rights	<p>B. EBRD's commitment</p> <p>The Bank will seek to ensure that the projects it finances respect the rights of affected workers and communities (p. 2, para. 3)</p> <p>The EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental protection, human rights, and sustainable development, as identified during project appraisal. (p. 4, para. 9)</p> <p>F. Country and sector strategies</p> <p>The strategies will summarise the principal environmental, human rights, gender equality and other social issues in the relevant country/sector and set out the EBRD's proposals for taking these issues into account in its operations, where appropriate. (p. 11, para. 47)</p>
Gender	<p>A. Purpose of this Policy</p> <p>For the purposes of this Policy, the social dimension encompasses (i) labour standards and working conditions including occupational health and safety and (ii) community impacts such as public health, safety and security, gender equality, impacts on Indigenous Peoples and cultural heritage, involuntary resettlement, and affordability of basic services. (p. 2, para. 2)</p> <p>B. EBRD's commitment</p> <p>Particular attention will be given to projects which include elements that focus upon priority environmental and social issues facing the region and which promote implementation of relevant EU strategies, such as climate change mitigation and adaptation, desertification, biodiversity conservation, energy and resource efficiency, poverty alleviation, promotion of decent work, reducing social exclusion, access to basic services, gender equality, transparency, and social development. (p. 3, para. 5)</p> <p>E. Promoting Investments with high environmental and social benefits, including working in partnership with others</p> <p>Other priority areas for promoting projects with significant environmental or social benefits, including gender equality, will be identified in line with paragraph 5 of this Policy. (p. 11, para. 46)</p> <p>F. Country and sector strategies</p> <p>The strategies will summarise the principal environmental, human rights, gender equality and other social issues in the relevant country/sector and set out the EBRD's proposals for taking these issues into account in its operations, where appropriate. (p. 11, para. 47)</p>

Table 3. ADB Safeguard Policy Statement (June 2009)

Social Sustainability	<p>V. SAFEGUARD POLICY STATEMENT</p> <p>A. Overarching Statement on ADB's Commitment and Policy Principles</p> <p>ADB affirms that environmental and social sustainability is a cornerstone of economic growth and poverty reduction in Asia and the Pacific. (p. 14, para 42.)</p>
Human Rights	<p>IV. KEY POLICY ISSUES AND CONSIDERATIONS</p> <p>A. Policy Articulation and Scope</p> <p>Improving the Clarity of Policy Scope and Triggers</p> <p>In its current form, the <i>Policy on Indigenous Peoples</i> does not provide a clear operational definition of Indigenous Peoples. The complexities involved in identifying Indigenous Peoples for the purposes of policy application are exacerbated by the need for situational analysis and by different perceptions among indigenous communities regarding their ancestral domain and communal rights, thus the characteristics used to identify Indigenous Peoples need to be clarified. In addition, the triggers of the policy need to be identified as impacts on Indigenous Peoples' dignity; human rights; livelihood systems; culture; ancestral domains; communal assets; and territorial, natural, and cultural resources. (p. 10, para. 31)</p>
Gender	<p>II. CHANGING CONTEXT</p> <p>ADB's long-term strategic framework 2008–2020 (Strategy 2020) focuses on five drivers of change: (i) private sector development and operations, (ii) good governance and capacity development, (iii) gender equity, (iv) knowledge solutions, and (v) partnerships. (p. 4, para. 12)</p> <p>IV. KEY POLICY ISSUES AND CONSIDERATIONS</p> <p>A. Policy Articulation and Scope</p> <p>Enhancing Consultation and Participation.</p> <p>In addition, ADB needs to clarify what “<i>meaningful consultation</i>” means. For policy application, it would refer to a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues. (p. 10, para. 32)</p> <p>V. SAFEGUARD POLICY STATEMENT</p> <p>B. Policy Delivery Process</p> <p>Consultation and Participation</p> <p>For policy application, meaningful consultation is a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues. (p. 20, para. 54)</p> <p>Local Grievance Redress Mechanism</p> <p>It should address affected people's concerns and complaints promptly, using an understandable and transparent process that is gender responsive, culturally appropriate, and readily accessible to all segments of the affected people. (p. 22, para. 59)</p>

Table 4. AfDB's Integrated Safeguards System (December 2012)

Social Sustainability	<p>EXECUTIVE SUMMARY</p> <p>The Integrated Safeguard Policy Statement</p> <p>Environmental and social sustainability are key to economic growth and poverty reduction in Africa. (p. iv)</p> <p>I. INTRODUCTION</p> <p>A. Background</p> <p>The Bank also has other crosscutting and sector policies that contain commitments to promote environmental and social sustainability in Bank operations. (p.1, para. 2)</p> <p>B. Context</p> <p>Box 1: Contribution of the ISS to the Long-Term Strategy</p> <p>Supporting private-sector development – To foster more inclusive growth, the ISS will seek to enhance the capacities of the private sector to mainstream environmental and social sustainability into their projects to ensure that project-affected populations participate in and derive sustained economic benefits from projects in their communities.</p> <p>Improving governance and accountability – Previously, policy-based loans were not subjected to appropriate environmental and social due diligence; loopholes excluded certain segments of the population from benefiting from the loans. With the ISS, all policy-based loans will be subject to due diligence to build in environmental and social sustainability and strengthen environmental governance. (p. 2, para. 9)</p> <p>C. Current Bank Policies and Safeguards</p> <p>The Bank's commitment to improving environmental and social sustainability in its investments is reflected in the several related policies and tools it has adopted and the changes in institutional setups to ensure effective implementation of these policies and tools (See Figure 1). (p.3, para. 12)</p> <p>In late 2010, the Bank issued a Concept Note entitled, 'Towards an Integrated Safeguard System', signaling its intent to develop a coherent and integrated policy commitment. It also issued a set of safeguard requirements on environmental and social sustainability backed by improved procedures and guidance materials. (p.5, para. 16)</p> <p>F. ISS Structure and Summary</p> <p>The ISS consists of (i) an Integrated Safeguards Policy Statement declaring the Bank's commitment to environmental and social sustainability and the management of risks associated with non-compliance with the Bank's Policies and Procedures; (p. 10, para. 38)</p>
Human Rights	<p>II. INTEGRATED SAFEGUARDS POLICY STATEMENT</p> <p>B. Commitments and Responsibilities</p> <p>B.6 Human rights and vulnerable groups, including Indigenous Peoples</p> <p>The Bank is committed to respecting and promoting Human Rights on the African continent as well as to protecting vulnerable groups, particularly Indigenous Peoples, within the context of national systems and regulations. The Bank will encourage countries to apply the international norms, standards and best practices enshrined in the United Nations' and African Union's Human Rights declarations, including the UN Declaration on the Rights of Indigenous Peoples. (p. 17, para 11)</p>
Gender	<p>N/A</p>

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