



Empowering the Inspection Panel

The Impact of the World Bank's Safeguards Review



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Terminology and Abbreviations

Bank	World Bank
Borrower	borrower country
BP	Bank Procedures
CSO	Civil Society Organization
EA	Environmental Assessment
ES	Environmental and Social
ESCP	Environmental and Social Commitment Plan
ESP	Environmental and Social Policy for Investment Project Financing (Second Draft for Consultation, July 2015)
ESPP	Draft Environmental and Social Procedure (July 2015)
ESS	Environmental and Social Standards (Second Draft for Consultation, July 2015)
FI	Financial Intermediary
FPIC	Free prior and informed consent
IBRD	International Bank for Reconstruction and Development
IDA	International Development Agency
ILO	International Labor Organization
IPP	Indigenous Peoples Plan
OP	Operational Policies
PAD	Project Appraisal Document
Panel	World Bank Inspection Panel
Proposed Safeguards or ESF*	Environmental and Social Framework (Second Draft for Consultation, 2015)
Safeguards	Operational Policies and Procedures outlining environmental and social safeguards for Bank-financed projects
TT	Task Team
TTL	Task Team Leader

*ESF comprises ESS and ESP

Executive Summary

In 2012, the World Bank announced a review and update of its Environmental and Social Safeguards, a set of operational policies governing the conduct of the Bank and the borrower country ("Borrower") in order to ensure that Bank operations do not harm people and the environment. The decision to review the Safeguards reflects both an increase in competition from other lenders as well as an ideological shift of the international community in favor of greater Borrower ownership.

The first draft of the World Bank's Environmental and Social framework was published in July 2014 ("first draft"). In response to comments received in the process of consultation, in July 2015, the Bank issued the Second Draft Framework for Consultation ("Proposed Safeguards"), which is the subject of this report. The Proposed Safeguards have received widespread attention from civil society organizations, many of which have emphasized the tensions between greater Borrower ownership and the capacity of the new Proposed Safeguards to protect affected communities. Despite extensive discussion surrounding these Proposed Safeguards, little attention has so far been given to their relevance for the World Bank body that is tasked with holding the Bank accountable for compliance with the Safeguards—the World Bank Inspection Panel. In this paper, we explore the potential impact of the Proposed Safeguards on the Panel, whose role is essential to the accountability of the Bank. Based on our analysis of the changes embodied in the Proposed Safeguards and the Panel's previous approach to assessing Bank compliance with the existing safeguards, we conclude that adoption of the Proposed Safeguards should not impede the Panel from continuing to function as an accountability mechanism.

However, given the shift to greater Borrower ownership in the Proposed Safeguards and the apparent decrease of Bank control over projects, it is possible that the Panel may face resistance from Bank Management and the Board of Executive Directors who might argue that, given the qualitative changes contemplated by Borrower ownership of the project, Bank Management should not have the same level of responsibility as it did in relation to the current Safeguards. Further, if the Bank does not explicitly recommit itself to high environmental and social standards and does not reaffirm the saliency and importance of the Panel, there is a serious risk that states, particularly those with more autocratic regimes, might be emboldened to refuse the Panel access or to intimidate witnesses from cooperating with the Panel.

To ensure its continued effectiveness, we recommend that the Panel should both continue to engage with Bank Management and the Board of Executive Directors to clarify its role under the Proposed Standards, and continue to assert its unchanged role and power in the first set of cases it investigates after the adoption of the new Safeguards.

I. Introduction

The World Bank Inspection Panel ("Panel") was established by the Resolutions of the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), which together form the World Bank. The Panel receives and investigate claims from affected people whose

rights or interests have been or are likely to be directly affected by an action or omission of the [Bank] as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.[1]

The Panel is precluded from hearing, among other claims, "[c]omplaints with respect to actions which are the responsibility of other parties, such as a borrower, or potential borrower, and which do not involve any action or omission on the part of the Bank." [2] The Panel reports its findings to the World Bank's ("Bank") Board of Executive Directors. The Bank Management prepares a response with recommendations and actions to address the Panel's findings of noncompliance. Upon considering both the Panel's report and Management's response, the Board of Executive Directors decides future action.[3]

Though groundbreaking as the first institutional mechanism to allow non-state actors to directly hold an international organization responsible for its actions,[4] the Panel is limited in that it can only serve a fact-finding, investigative role. It cannot monitor affairs once it has submitted its findings to the Board of Executive Directors, nor can it oversee any implementation of its findings.

The operational policies and procedures, compliance with which is subject to the Panel's review - often referred to as "Safeguards" - "require borrowing governments to address certain environmental and social risks in order to receive Bank financing for development projects." [5] The Safeguards include requirements to conduct an environmental and social impact assessment, to consult with affected communities about potential project impacts, and to restore the livelihoods of displaced people.

In 2012, the Bank initiated a review of the Safeguards with the stated goals of:

- Enhancing protections for the poor and the environment through modernized standards;
- Providing inclusive access to development benefits through the introduction of a non-discrimination principle;
- Strengthening partnerships with borrowing countries through closer cooperation and increased use of Borrower frameworks; and
- Strengthening the World Bank's leadership through a modernized safeguards framework.[6]

The review has been subject to public consultations and has resulted in two drafts of a revised framework for the Safeguards. This report focuses on the second and most recent draft for consultation the "Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing" ("Proposed Safeguards"), published in July 2015.

The Proposed Safeguards have been criticized by numerous national and international civil society organizations ("CSOs"). [7] Their main concern is that the shift towards Borrower ownership of Bank-financed projects will result in the dilution of the Safeguards' standards to the detriment of the affected communities.[8] This Report does not consider the impact of the Proposed Safeguards on the rights and interests of communities affected by Bank-financed projects. Instead,

it focuses on whether the Proposed Safeguards impact the Panel's ability to hold the Bank accountable for damage caused to individuals and communities.

Part II of the Report provides an overview of the structural changes embodied in the Proposed Safeguards and situates them within the broader shift in the approach to development financing. Part III describes the impact of the Proposed Safeguards on the work of the Panel. Part IV concludes.

II. Paradigm Shift in the Environmental and Social Framework

This Part of the Report focuses on three main changes in the Proposed Safeguards in the context of the following trends: (1) the paradigmatic shift towards Borrower ownership of projects financed by international development banks; (2) the change in nature of the Bank's obligations; and (3) the expanded thematic coverage.

A. Movement towards Broader Standards and Borrower Ownership

The Proposed Safeguards are presented as a Framework - "Environmental and Social Framework" ("ESF"). The ESF comprises:

- A ***Vision for Sustainable Development***, which sets out the Bank's aspirations regarding environmental and social sustainability;
- The ***World Bank Environmental and Social Policy for Investment Project Financing*** ("ESP"), which sets out the mandatory requirements that apply to the Bank; and
- The ***Environmental and Social Standards*** ("ESS"), together with their Annexes, which set out the mandatory requirements that apply to the Borrower and projects.^[9]

In a significant departure from the current Safeguards, the ESF separates the obligations of the Borrower and the Bank and, rather than specifying responsibilities of the Bank for each Safeguard, provides for general obligations of the Bank applicable to the entire project. Thus, while the Borrower is responsible for complying with the Environmental and Social Standards (ESS),^[10] the Bank "will assist Borrowers in their application of the ESSs to projects supported through Investment Project Financing...".^[11] This movement towards Borrower ownership over the project is part of the broader shift in the financing development arena, as exemplified by the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action^[12]. The shift is premised on the idea that greater Borrower ownership renders international aid more effective by allowing Borrower countries to exercise effective leadership over the project's design and implementation.^[13] The International Finance Corporation ("IFC") and some multinational regional banks have similarly adopted a Borrower-centric approach in which the client is responsible for and the owner of the investment projects.

In tandem with the emphasis on Borrower ownership, the ESF replaces the current, prescriptive Safeguards^[14] with broader obligations for the Bank.^[15] The prescriptive nature of the current Safeguards has been criticized as being interventionist, granting Borrowers little discretion and barring case-specific solutions that are often necessary given the variety of projects, populations, and environments with which the Bank works.^[16] Prescriptive rules have also been characterized as the equivalent of "nit-picking bureaucracy in which compliance with detailed provisions is more important than the attainment of an overall outcome."^[17] In contrast, the principle-based approach is often seen as more flexible because it emphasizes outcome over procedure.^[18] Moreover, it grants Borrowers enough flexibility in their response and greater ownership of the resolution, in turn generating greater efficiency, effectiveness, and political acceptability.^[19] On the other hand, concerns have been expressed that the shift to Borrower ownership coupled with principle-based standards will dilute the concepts embodied in the current Safeguards and will minimize protection for affected populations. As one commentator observes, "[t]he bank proposes replacing its own mandatory safeguards and accountability mechanisms with vaguely worded aspirational standards and an over-reliance on borrowers' national systems, and even those of opaque 'financial intermediaries.'"^[20] Members of the Bank's Board of Executive Directors have expressed concern that the Bank has not adequately explained how the transfer of responsibility will work in practice, underscoring that "it is fundamentally the Bank's responsibility to ensure that it is able to deliver on the requirements of its own policies."^[21]

B. Change in the Nature of the Bank's Obligations: Broad Due Diligence Obligations, Decreased Control over the Project and Fewer Constraints on Bank Discretion

As described above, the ESP "sets out the mandatory requirements of the Bank in relation to the projects it supports through Investment Project Financing"[22] and specifies that the Bank "will assist Borrowers in their application of the ESSs to projects ... in accordance with this Environmental and Social Policy for Investment Project Financing Policy." [23] The ESP further provides that the Bank will:

- a. Undertake its own due diligence of proposed projects, proportionate to the nature and potential significance of the environmental and social risks and impacts related to the project;
- b. As and where required, support the Borrower to carry out early and continuing engagement and meaningful consultation with stakeholders, in particular affected communities, and in providing project-based grievance mechanisms;
- c. Assist the Borrower in identifying appropriate methods and tools to assess and manage the potential environmental and social risks and impacts of the project;
- d. Agree with the Borrower on the conditions under which the Bank is prepared to provide support to a project, as set out in the Environmental and Social Commitment Plan (ESCP); and
- e. Monitor the environmental and social performance of a project in accordance with the ESCP and the ESSs. (internal citations omitted).[24]

One immediately observable change is that the Bank's obligations in the ESP are not tied to any sector-specific context, as is the case in the current Safeguards. Rather than being subject to specified obligations in a particular setting, the Bank now has a general "due diligence" responsibility over proposed projects. The Draft Environmental and Social Procedure ("ESPP") provides additional content to the Bank's responsibilities under the ESP. For example, the Bank's Task Team has an obligation to review "the capacity and commitment of the Borrower to develop and implement the project in accordance with the ESS" and "the need, if any, for enhancement of the Borrower's capacity to meet the requirements of the ESSs, particularly in respect of relevant baseline data and information, on-site training, institutional strengthening, and inter-institutional collaboration." [25] During the initial screening of the project, the Task Team has an obligation to gather sufficient information about the project in order to enable it to:

- a. identify key [environmental and social (ES)] risks and impacts, and their nature and magnitude;
- b. propose a project risk classification;
- c. consider the most appropriate type of ES assessment to be conducted by the Borrower and the methods and tools to be used;
- d. identify and assess details of the Borrower's ES Framework and possible gaps;
- e. propose a preliminary schedule for consultation with stakeholders; and
- f. consider the type of ES due diligence that will be required of the Bank, and propose a preliminary ES due diligence schedule.[26]

Moreover, the ESPP provides guidance on what "due diligence" of the Bank might entail. For example, the Bank has an obligation to carry out environmental and social due diligence that "is appropriate to the nature and scale of the project, and proportionate to the level of ES risks and impacts." [27] The environmental and social due diligence must assess "whether the project is capable of being developed and implemented in accordance with the ESSs or, where the Bank is relying on the Borrower's ES Framework for all or part of the project, whether the project is able to achieve objectives materially consistent with the ESSs." [28] In conducting its due diligence, the Bank not only reviews documents and information provided by the Borrower but, if it has "insufficient information to conduct its due diligence," it must also

request additional information from the Borrower.[29] If a project is classified by the Bank as having a high or substantial risk, the Bank's due diligence "includes site visits by an environmental and/or social specialist, as appropriate." [30] The Bank also has an obligation to ensure that the ESCP, which the Borrower must prepare and which must "set out the material measures and actions required for the project to meet the ESSs over a specified timeframe," is attached to the legal agreement and that "the legal agreement takes into account the findings of the ES assessment, the Bank's ES due diligence, and the results of engagement with stakeholders." [31] The Bank itself must prepare an Environmental and Social Review Summary document, which "sets out an accurate and comprehensive record of the Bank's due diligence of the project," including "the sources of information on which the Bank's due diligence and the Environmental and Social Review Summary has been based; a discussion of the key ES risks and impacts by reference to the relevant ESS, and the proposed mitigation measures; and a summary of the key measures and actions agreed to in the legal agreement, including the ESCP, together with timeframes for implementation." [32]

In addition to the introduction of a broad due diligence obligation in lieu of sector-specific duties, other changes to the Bank's obligations are noteworthy.[33] The first change relates to the level of control the Bank has over the project. Under the current Safeguards, the Bank has responsibilities that relate to the Borrower's fulfilment of its own obligations. For instance, in Operational Policy (OP) 4.10, "*the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples,*" [34] (emphasis added) and in OP 4.37, "*the Bank requires that the borrower arrange one more independent dam specialists to inspect and evaluate the safety status of the existing dam . . .*" (emphasis added).[35] In other instances, the current Safeguards place on the Bank the obligation *to ensure* that the Borrower does (or does not do) something. [36] In contrast, the Proposed Safeguards largely replace the words "ensure" with "require." [37] For example, while OP 4.10 demands that the Bank *ensures* that the Borrower conducts certain assessments, ESP 15 demands that the Bank *require* the Borrower to conduct another set of assessments.[38] The use of different words ("to require" vs. "to ensure") may reflect a subtle yet qualitative difference in the standards underlying the Bank's obligations vis-à-vis the Borrower.[39] "To ensure" generally means to "make certain" that something will occur.[40] In contrast, "to require" is to "demand," "ask," or "impose." [41] One could argue that the obligation "to ensure" requires the Bank to undertake necessary efforts to make *certain* that the Borrower accomplishes a task, whereas the Bank's obligation "to require" could arguably be discharged when a Bank simply makes a request. Under this interpretation, the change from "ensure" to "require" might evidence a weakening of the standard underlying the Bank's obligation. Indeed, in its comments on the Second Draft of the Proposed ESF, the Panel flagged this transition from "ensure" to "require" as disconcerting, noting that such a change may undermine accountability efforts.[42] On the other hand, an argument can be made that the switch from "ensure" to "require" is not an unprecedented departure from the current Safeguards, but merely an attempt to standardize the language for functionally equivalent obligations. The current Safeguards utilize several terms synonymous with "require" and "ensure" and in a number of instances appears to use them interchangeably.[43] Such extensive variation in the terms of the Bank's obligations could arguably render it difficult for both the Bank and the Panel to properly assess the extent of the Bank's responsibility vis-à-vis the Borrower. Accordingly, it is possible that the change from "ensure" to "require" in the Proposed Safeguards is aimed at achieving consistency in the use of terminology.

The second noteworthy change in the Proposed Safeguards is the reduction of constraints on the Bank's discretion in its interaction with the Borrower. The current Safeguards contain temporal qualifications that provide the Bank with a certain amount of discretion in discharging its obligations. For instance, BP 4.10 specifies, "*Early in the project cycle, the task team leader (TTL) initiates a process to determine whether Indigenous Peoples (see OP 4.10, paragraph 4) are present in, or have collective attachment to, the project area*" (emphasis added).[44] The lack of specificity as to when the process must be initiated leaves the Bank with some flexibility in deciding on the right time frame; however, because frameworks for respecting indigenous peoples must be included in the environmental assessment and other initial documents, the Bank cannot avoid or prolong its duties significantly. Another example is the use of "in a timely manner" in the current Safeguards: "In addition, the Bank ensures that relevant project-related environmental and social safeguard documents (see Table A1), including the procedures prepared for projects involving subprojects, are disclosed *in a timely manner before*

project appraisal formally begins, in an accessible place and understandable form and language to key stakeholders" (emphasis added).[45] Here, too, the Bank's discretion as to when disclosure takes place is bounded by the fact that it must occur before the project appraisal begins. In contrast to the current Safeguards, the amount of discretion afforded to the Bank by the Proposed Safeguards appears to be less bound. For instance, ESP 16 mentions that projects must "meet the requirements of the ESSs *in a manner and a timeframe acceptable to the Bank...*" (emphasis added).[46] Similarly, ESP 18 provides that:

If the project comprises or includes existing facilities or existing activities that do not meet the requirements of the ESSs at the time of approval by the Bank, the Bank will require the Borrower, as part of the ESCP, to adopt and implement measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of the ESSs *within a timeframe acceptable to the Bank*. In determining satisfactory measures and an acceptable timeframe, the Bank will take into account the nature and scope of the project and the technical and financial feasibility of the proposed measures.[47]

Thus, the Proposed Safeguards appear to contain fewer boundaries or limitations on the Bank's exercise of its discretion.

C. Expanded Thematic Coverage

The thematic coverage of the Proposed Safeguards has expanded to cover "emerging areas," consistent with other multilateral development banks' safeguard systems.[48] The Bank has introduced new substantive standards on labor and working conditions, resource efficiency and pollution, and community health and safety. In addition, it has addressed several new issues, including climate change, sustainable resource management, labor and working conditions, community health and safety, land tenure, free prior and informed consent (FPIC), biodiversity conservation, gender, disability, and human rights.[49]

The Bank's new standard on labor and working conditions (ESS 2) was introduced after consultation with the International Labor Organization (ILO) and guided by the Declaration on the Fundamental Principles and Rights at Work and the core conventions of the ILO.[50] The standard introduces detailed provisions addressing child and forced labor, freedom of association, collective bargaining, occupational health and safety, and the requirement for the provision of a grievance mechanism for project workers.[51] Furthermore, the Bank's new standard on resource efficiency and pollution prevention management (ESS 3) incorporates the current standard on Pest Management (OP/BP 4.09)[52] while also embracing a more holistic approach by addressing new areas, such as efficient management of energy, water, raw materials, and other resources. It also requires Borrowers to estimate project-related greenhouse gas emissions and to consider options to reduce project-related pollutants.[53] The new standard on Community Health and Safety (ESS 4) expands the scope of the Proposed Safeguards by moving beyond the key provisions in the current safeguards on Safety of Dams (OP/BP 4.37) to address the design and safety aspects of infrastructure, equipment, products, services, traffic, and hazardous materials.[54] In addition, the standard requires Borrowers to develop and implement measures to address possible community exposure to disease,[55] and includes new requirements on security personnel.[56]

Other changes to the Proposed Safeguards that would greatly expand the number of complaints made to the Panel, include the introduction of the requirement of FPIC in certain circumstances and requirements to document consent;[57] a broadening of the definition of cultural heritage is broadened to include both tangible and intangible cultural heritage;[58] and new requirements for the increased and ongoing engagement of stakeholders, including project-affected parties, throughout the project cycle.[59]

One of the changes that has received considerable attention from civil society groups is the new principles of non-discrimination, which provides new standards for communities that were underrepresented or never before included in the

Bank's safeguards. During the second round consultations, many groups who considered themselves particularly vulnerable to discrimination demanded standalone standards and dedicated assessments of their status.^[60] Although the latest draft does not go this far, communities that were underrepresented or never before included in the Bank's safeguards, such as persons with disabilities, are now protected by the Proposed Safeguards. ESS 1 on Environmental Assessment provides that the Bank will take into account environmental and social risks in its due diligence, defining social risks to include project impacts that fall disproportionately on "disadvantaged or vulnerable groups."^[61] This term is further defined in a footnote to refer to those who, "by virtue of, for example, their age, gender, ethnicity, religion, physical or mental disability, social or civic status, sexual orientation, gender identity, economic disadvantages or indigenous status, and/or dependence on unique natural resources may be more likely to be adversely affected by the project impacts and/or more limited than others in their ability to take advantage of a project's benefits."^[62] Significantly, the Proposed Safeguards clarify that assessments must examine differentiated impacts of projects on specific groups rather than on disadvantaged or vulnerable groups as a whole.^[63]

III. Impact of the Proposed Safeguards on the Panel's Work

The structural and philosophical shifts in the Proposed Safeguards outlined above raise some concerns regarding the Panel's ability to continue to hold the Bank accountable and to provide recourse to affected communities. The following sections identify and analyze these concerns vis-à-vis their impact on the work of the Panel.

A. The Bank's decreased control over the projects may lead to the decreased visibility of the Bank for affected communities

The Bank's decreased control over its projects may translate to the Bank being less visible to affected communities. As a result, when the project harms the interests and rights of communities, those communities may not be aware of the Bank's involvement in the project. To address this concern, the Bank should take explicit steps to ensure that Bank visibility (or lack thereof) does not hinder the ability of affected communities to bring a claim before the Panel. These steps could include placing signs or otherwise identifying the Bank's role in the project at the project site. For example, European Union Council Regulation (EC) No 1083/2006 of 11 July 2006 (laying down general provisions on the European Regional Development Fund, the European Social Fund, and the Cohesion Fund, as well as repealing Regulation (EC) No 1260/1999) requires "the Member State and the managing authority for the operational programme [to] provide information on and publicise operations and co-financed programmes... to European Union citizens and beneficiaries with the aim of highlighting the role of the Community and ensure that assistance from the Funds is transparent."^[64] The Panel could also enhance its outreach by informing communities about its function as an accountability mechanism.

If the Bank's (in)visibility concern does not materialize or is appropriately addressed, the expanded thematic coverage of the Proposed Safeguards and the new principles of non-discrimination that encompass a wider category of vulnerable groups protected under the Proposed Safeguards could lead to an increase in the amount of applications submitted to the Panel, which may provide an opportunity for the Panel to strengthen and enhance its accountability role.^[65]

B. The less prescriptive nature of the Bank's obligations in the Proposed Safeguards should not negatively impact the Panel's ability to assess the Bank's (non)compliance

The less prescriptive nature of the Bank's obligations in the Proposed Safeguards raises a question of whether the Panel might find it more difficult to assess the Bank's (non)compliance with the Safeguards. However, in the cases it has considered thus far, the Panel does not merely assess the language of the Safeguards when determining if they have been fulfilled; instead, it holds the Bank to a *reasonableness* standard of care, going further than merely assuring that the Bank has followed the letter of particular duties in the ESF. As the Panel itself has explained, "[a]fter all, tests of reasonableness and common sense must be applied."^[66] Moreover, the Panel has made clear in past cases that, regardless of the language used, the Bank cannot shirk duties essential to accomplishing the objectives of the Safeguards:^[67] "Read in their entirety... the directives cannot possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding."^[68]

This object-and-purpose approach gives the Panel discretion to exercise its interpretive powers in an organic way, assessing compliance with the Safeguards within the facts and circumstances of the particular case to assure that relevant substantive requirements have been met. For example, in the *China Western Poverty Reduction Project* case, the Panel found that "[i]n appraising compliance, Management had an obligation to satisfy itself not only that the process and procedures mandated

by the policies had been followed, but also that the work under review met professionally acceptable standards of quality . . . [i]n other words, both process and quality were essential components of compliance."^[69]

The Panel has also indicated in several cases that the Bank is required to provide proper guidance to the Borrower in the implementation of certain standards. For example, in *Argentina Santa Fe*, the Panel found that the Bank failed to comply with its responsibilities in the Environmental Assessment Policy (OP 4.01), which requires the Bank to "advise the borrower on the Bank's EA requirements" and "review the findings and recommendations of the EA to determine whether they provide an adequate basis for processing the project for Bank financing."^[70] The Panel found that the reports written by a consulting firm on hydraulic studies of roads for the environmental assessment showed a "lack of rigor and robustness."^[71] Most importantly, the Panel concluded that the Bank failed to identify "the lack of coherence and consistency in the methodologies used" by the consulting firm,^[72] which amounted to the Bank's failure to "succeed in guiding appropriately the Borrower to ensure a rigorous analysis of flood reports during the implementation phase."^[73]

Furthermore, in the *Nepal Power Development Project*, the Panel found that the Bank inadequately assisted the Borrower concerning consultation with indigenous peoples. The Indigenous Peoples policy (BP 4.10) provides that the Bank "assists the borrower in carrying out free, prior, and informed consultation with affected communities about the proposed project throughout the project cycle," taking into consideration the voluntary nature of consultation and the need for access to information in an appropriate language and form, recognition of existing indigenous peoples organizations, early commencement of the consultation process, and a record of consultation.^[74] The Panel concluded that "a lack of sustained communication and consultation during project preparation and implementation led to the spread of misinformation about the transmission line" finding that the Bank, among its failure to comply with other Safeguards, did not ensure adequate, timely, and meaningful consultations under BP 4.10.^[75] The Panel thus repeatedly found that the Bank cannot simply fulfill its obligations by "ticking boxes" but must be actively involved and should guide the Borrower in carrying out its duties.

Moreover, the Panel has used the object-and-purpose approach to assess the Bank's exercise of discretion. Although the Bank may have some freedom in deciding when to fulfill its obligations, as granted by temporal qualifiers (discussed in more detail in the Annex) - e.g., in a "timeframe acceptable to the Bank"^[76] or on a "regular"^[77] basis - the Panel had taken the approach that "a safeguard postponed is a safeguard denied."^[78] For instance, in the 2005 Congolese case, the Panel assessed whether completion of the EA was done "in a timely manner," as required by OP 4.01(15). The Panel ultimately decided that it was not on the grounds that the 24-month period of creation was longer than the Bank's normal timeframe and was unacceptable to achieving the Safeguard's objectives.^[79] The Panel can continue to use the same approach when analyzing the Bank's exercise of discretion under the Proposed Safeguards.^[80]

Thus, applying the object-and-purpose standard, the Panel can continue assessing whether the Bank complies with the Proposed Safeguards in a manner that would achieve the purported goal of the provisions. The less prescriptive nature of the Proposed Safeguards should not be an impediment and, in fact, may lend itself more easily to such an analysis than the current Safeguards.

C. Separation between the obligations of the Borrower and the Bank in the Proposed Safeguards should not impede the Panel's ability to hold the Bank accountable for harm caused to affected communities

The shift to Borrower's ownership of the project and the transfer of primary obligations in the ESS to the Borrower raise concerns about the extent to which the Bank can be linked to violations of the ESS. First, it may be difficult for claimants to establish that their rights and interests were "*directly affected by an action or omission of the [Bank]*" as a result of a

failure of the Bank to follow its operational policies and procedures" (emphasis added).[81] The resolution establishing the Panel provides that "the following requests shall not be heard by the Panel: (a) Complaints with respect to actions which are the responsibility of other parties, such as a borrower, or potential borrower, and which do not involve any action or omission on the part of the Bank." [82] Hence, if the ESS places the duty-in-question on the Borrower or the action being analyzed is taken under the country's legal framework, the Panel may not be able to hold Bank Management liable for harms committed if those harms cannot be linked to a corresponding Bank obligation or policy. To the extent that Bank Management's obligations under the ESF are primarily confined to conducting due diligence or requiring the Borrower to do something, those actions of the Bank may not only be obfuscated but may also require affected communities to have knowledge and expertise to show that the harm is caused, e.g., by the failure of the Bank to conduct proper due diligence or by faulty or inadequate risk assessments.

However, the Panel has shown itself capable of distilling the Bank's obligations and finding causal links between the Bank's failure to comply with operational policies and harm caused to the communities via Borrower's violations. For example, in *Ethiopia: Protection of Basic Services II Project-Additional Financing and Promoting Basic Services III Project* (hereinafter the "PBS Project"), the requesters, the Anuak indigenous peoples, alleged that they "have been harmed by the Bank-supported PBS Program as a result of World Bank's non-compliance with its policies and procedures because the PBS Program is 'contributing directly to the Ethiopian Government's Villagization Program in the Gambella Region'" (emphasis added).[83] The "villagization" resulted in indigenous peoples being forced to leave their ancestral lands under the pretext of improving the livelihoods of their community. In the Bank Management's view, the Safeguard policies did not apply to the harms alleged as the Bank neither financed nor worked with the villagization program.[84] The Panel recommended an investigation with a "specific focus" to "examine in greater depth risks stemming from the concurrent implementation of VP and PBS in Gambella region, and Management's analysis and subsequent management of these risks under PBS III. The investigation will not seek to verify allegations of specific human rights abuses linked to VP, nor will it examine the underlying purposes of VP." [85] Upon investigation, the Panel found an operational link between the villagization program and the Bank's PBS on the grounds that:

both PBS and [villagization program] have the ultimate objective of providing improved basic services to the population. There was a chronological and geographic overlap in the two programs' implementation.... [The villagization program]...aims at restructuring settlement patterns, service infrastructure and livelihoods, including farming systems, and as such constitutes a significant part of the context in which PBS operates. In this sense, and from a development perspective, the two programs may influence each other's results.[86]

Additionally, the Panel has, from its inception, affirmed that Bank Management cannot evade its own responsibility simply because the primary obligation for a specific action lies with a third-party. Bank Management cannot "disclaim responsibility for adverse effects of Bank/IDA-financed projects simply because it is not the executor of the activities included therein" as such an interpretation would unduly limit the Panel's jurisdiction.[87] That is to say, the Bank cannot be a bystander in relation to harmful activities carried out in the context of Bank-financed projects.[88] In fact, historically, the Panel has taken the approach that Borrower non-compliance creates a rebuttable presumption of Bank non-compliance. Thus, in all the cases described below, the Panel first established whether the Borrower was non-compliant before evaluating the Bank's own conduct to mitigate those errors. This principle has two effects: (1) it strengthens the proposition that Bank and Borrower obligations are in fact closely connected and (2) it lowers the burden on the requestor who can allege an injury caused either directly by the Bank or by the Borrower, if the latter implicates the Bank. The following cases illustrate this standard.

In the *Ghana/Nigeria West African Gas Pipeline* case, the Panel found the Bank non-compliant with OP 4.12,[89] under which "the Bank... requires [that]: ...appropriate and accessible grievance mechanisms are established for [displaced] groups." [90] In its evaluation, the Panel looked at actions of both the Sponsor (in this case, a private company) and the Bank. It first found that the Sponsor's grievance mechanism lacked meaningful consultation and effective disclosure

procedures.[91] The Panel then turned to Bank Management's documented commitment to assessing the adequacy of the grievance process for project-affected people and concluded that, while it had taken some actions, it failed to correct the mechanism's deficiencies.[92] Although the Panel did identify an underlying Bank duty (to correct), the obligation is not identified as explicitly within the Safeguards and is mentioned only after the Panel discusses the Borrower's duty. Additionally, in this case the Panel found that the Bank's obligations encompass an implicit duty of substantive follow up.[93]

Subsequent Panels have taken similar approaches. For instance, in the *Albania Power Sector Generation and Restructuring Project*, the Panel found Bank responsibilities inherent to obligations that reference only the Borrower. It evaluated the Bank's compliance with a duty under OP 4.01[94] that requires the Borrower to consult with project-affected groups as early as possible and at least twice. Despite the fact that the obligations of consultation under OP 4.01 are imposed on the Borrower, and the Bank's responsibility under the OP is an overall one of "requiring environmental assessment (EA) of projects proposed for Bank financing to help ensure that they are environmentally sound and sustainable," the Panel still concluded "that through a deficient EA process, Management failed to ensure meaningful public consultation for the Project, which is not in compliance with OP 4.01." [95] Its investigation centered primarily on the actions taken by the Borrower, determining that although the Borrower held multiple meetings, consultation occurred only after the site had been selected, thus creating "only the appearance of consultation, while contributing nothing to improving Project selection, siting, planning or design of the Project." [96] Although the requirement of consultation in OP 4.01(14) makes no mention of the Bank,[97] the Panel derived the Bank's duty to ensure Borrower compliance from OP 4.01(5), which requires the Bank to advise the Borrower, to review the Borrower's findings, and, where necessary, to require additional public consultation and disclosure.[98]

In the case of the Proposed Safeguards, despite the division in obligations, the Borrower's duties are linked to those of the Bank through three main categories: (1) consultation and participation; (2) documentation and assessment; and (3) monitoring and implementation.

i. Consultation and Participation

The Bank is accountable for Borrower's actions through its duties to consult with the Borrower and other parties and to participate in the development of the project. Such obligations can be found throughout the ESF's Vision, ESP, and ESPP. The Bank's obligation to consult and participate includes, among other responsibilities: (1) discussing with the Borrower the measures required by the framework;[99] (2) advising the Borrower on and assisting the Borrower with carrying out assessments in accordance with the ESF;[100] and (3) ensuring that the Borrower also fulfills its own consultation requirements.[101] The first two sets of obligations appear to reserve a degree of Bank ownership in the development of projects. The third set links Bank responsibility directly to the Borrower's action; that is to say, the Borrower's failure to consult could be seen as the Bank failure to ensure the fulfillment of the Borrower's obligation.

The ESP explicitly extends these duties to more complex financial situations in which various funding agencies are involved. For instance, where projects are jointly financed by other multilateral or bilateral funding agencies, the Bank must cooperate with such agencies in order to ensure that the common approach is consistent with the Bank's own ESF.[102] Furthermore, the Bank must require the Borrower to apply this common approach. Thus, the Bank may be held liable both if the approach does not comply with the Bank's own standards (despite the involvement of other funding agencies) and, even if it is compliant, if the Borrower fails to implement it properly.

ii. Documentation and Assessment

The Bank continues to play a vital role in the project lifecycle through (1) the joint development with the Borrower of an ESCP, a new mandatory tool under the Proposed Safeguards;^[103] and (2) its obligations to assess and review the Borrower's project documentation.

The ESCP sets out the project commitments and is a binding document that forms part of the legal agreement between the Bank and the Borrower.^[104] The purpose of the ESCP is to "facilitate project participation and support compliance throughout the lifetime of the project."^[105] The ESCP is a living document that develops, as necessary, according to the needs of the project.^[106] Its key functions include: (1) consolidating in a clear and unambiguous manner the significant measures and actions that are required to achieve compliance with the ESS as well as the timeframe in which they must be implemented; (2) taking into account the findings of the environmental and social assessment, the Bank's due diligence, and the results of stakeholder engagement; (3) providing a basis for monitoring the performance of the project; (4) defining the means and frequency of reporting on the implementation of measures and actions required to achieve compliance with the ESS; and (5) specifying the aspects of the national environmental and social framework to be used, if any.^[107]

The ESCP provides a crucial link between the Bank and the Borrower under the Proposed Safeguards. It ensures Bank involvement in the project starting from project preparation and appraisal through to its implementation. In addition, it requires the Bank to continually monitor the project throughout its life cycle. Under the Proposed Safeguards, the Bank has several obligations relating to the ESCP. For example, if the project comprises facilities or activities that do not meet the requirements of the ESS, "the Bank will require the Borrower, as part of the ESCP, to adopt and implement measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of each ESS within a timeframe acceptable to the Bank."^[108] In addition, the ESP dedicates a section to the Bank's obligations regarding the ESCP.^[109] In the initial planning stages of the project, the Bank assists the Borrower with the development of the ESCP.^[110] The Bank will also "require the Borrower to implement the measures and actions identified in the ESCP diligently, in accordance with the timeframes specified in the ESCP," and has an ongoing obligation to "review the status of implementation of the ESCP as part of its monitoring and reporting."^[111] The Bank is also required to agree with the Borrower on an adaptive management process for "proposed project changes of unforeseen circumstances." The adaptive management process must also be set out in the ESCP.^[112]

Furthermore, the Bank is linked to the Borrower through its environmental and social due diligence assessments. For instance, under the ESP and ESPP the Bank is required to review all relevant project information provided by the Borrower relating to the environmental and social risks of the project, and to request additional information where there are gaps.^[113] The Bank also assists the Borrower in preparing the terms of reference for any tools to be used as part of the ES assessment,^[114] as well as providing guidance to the Borrower in developing measures to address environmental and social risks in accordance with the ESS.^[115] The Bank's role is ongoing, which is evident from its obligation to "ensure that the documents relating to the ES assessment and management of the project provide adequate, accurate and up to date information regarding the potential risks and impacts of the project, and the agreed mitigation measures."^[116] In addition, the Bank is required to play an active role in the evaluation and review of the Borrower's Environmental and Social Framework, which is set out in detail in the ESPP.^[117] Such obligations last throughout the project life cycle, and include ongoing discussions with the Borrower if significant changes in the Borrower's ES Framework may adversely affect the project.^[118]

iii. Implementation Support and Monitoring

Once due diligence of the risks and impacts has been completed and a project has been approved, the Bank still must monitor the project "on an ongoing basis."^[119] The Bank's general implementation and monitoring duties^[120] assure that the Bank retains some degree of oversight for the entirety of the project, regardless of whether it has remaining, on-site actions to complete. The fact that, where appropriate, independent experts and affected communities must be engaged to monitor the project^[121] demonstrates that the Bank's monitoring responsibilities exceed a perfunctory assessment. Furthermore, the Bank's implementation and monitoring obligations necessitate examining any changes in the project or environment to assure that relevant plans and documents remain applicable. For instance, although the Bank assigns a project a risk classification status during due diligence, the Bank must actively scrutinize the project throughout implementation and operation to ascertain that the classification is still accurate.^[122]

This duty of implementation support and monitoring links the Bank's obligations to the Borrower's. For example, although the Borrower has the primary responsibilities under the ESS, "[i]n accordance with OP/BP 10.00, the Bank carries out regular reviews of the Borrower's compliance with the ES requirements relating to the project, as set out in the legal agreement, including the ESCP."^[123] Though this powerful duty is connected to what is delineated in the ESCP, as described above, the Bank does have substantive obligations regarding its development. Therefore, the Bank could be held accountable for assuring that the ESSs are upheld. This presumption is supported by the provision that the "[Task Team] (including ESF Accredited Staff) are responsible and accountable for project-level preparation, implementation support, and monitoring activities relating to the ESF, and... handling grievances related to implementation at the project level."^[124] The Bank must listen and provide redress to affected communities throughout the project lifecycle. Moreover, the obligation does not limit the Bank's accountability to its own actions, instead holding it generally accountable for "implementation at the project level." This suggests the Bank's responsibility to oversee extends to the Borrower's actions.

Lastly, though the extent to which the ESF shifts the responsibilities for the project to the Borrower is arguably unprecedented, it is not dissimilar to the Country System Pilot - a program that used the the country's own legal and institutional framework instead of the Bank-prescribed Safeguards. The Joint Statement on the Use of Country Systems issued by the Chairperson of the Inspection Panel and Senior Vice President and General Counsel in July 2004 makes it clear that "the country systems strategy would not change the role of the Inspection Panel as set forth in the 1993 Resolutions establishing the Panel."^[125] The joint statement further affirms that the "Inspection Panel will continue to investigate whether Management is in compliance with its policies and procedures in the design, appraisal and implementation of projects and programs" and

could, with regard to the issues raised, examine Management's assessment of the equivalence of the relevant Bank policies and procedures with the country system (and any additional measures agreed upon to achieve equivalence) in materially achieving the objectives of Bank policies and procedures, as well as Management's supervision of the project.^[126]

Although the Joint Statement pertains to the Country Systems Pilot and refers specifically to OP 13.05 ("Supervision"), which has since been replaced by OP 10.00 outlining "implementation and support" obligations of the Bank, it seems reasonable to conclude that the spirit (if not the letter) of the Joint Statement should guide the role of the Panel in assessing the Bank's obligations under the ESF, including the Bank's obligations associated with the review of the Borrower's framework's compliance with the ESSs. Accordingly, the mere shift to Borrower ownership of the project and the use of the Borrower's framework should not reduce the Panel's ability to hold the Bank accountable.^[127]

IV. Conclusion

Based on our analysis, we conclude that the Panel has a high degree of authority and flexibility to retain their traditional accountability function even in the face of the changes embodied in the Proposed Safeguards. The Bank has specific duties in the Proposed Safeguards which makes it responsible for the Borrower's actions, or at least for overseeing them throughout the lifecycle of the project. Additionally, the interpretative standards the Panel has employed when previously evaluating Management's compliance are still applicable. Moreover, the less prescriptive nature of the Bank's obligations under the ESP lend them more easily to the object-and-purpose approach historically taken by the Panel in assessing the Bank's compliance.

As a practical matter, given the shift to greater Borrower ownership in the Proposed Safeguards and the apparent decrease of the Bank's control over the projects, the Panel might face resistance from Bank Management and the Board of Executive Directors who might argue that, given the qualitative changes contemplated by Borrower ownership of the project, Bank Management should not have the same level of responsibility it did in regard to the current Safeguards. To this end, we recommend that throughout the third round of consultations, the Panel continues to engage with Bank Management and the Board of Executive Directors to clarify its role under the Proposed Safeguards. Additionally, the Bank has historically differentiated itself by being a leader among development lenders, setting the standards other monetary organizations follow. If the Bank eschews responsibility for the ESSs by claiming they are in the domain of the Borrower, the Proposed Safeguards will be perceived as mere window dressing. Consequently, the Bank's legitimacy and leader status would be greatly challenged if it appeared to be more concerned with who had the specific duty to assure environmental and social protections as opposed to holistically focusing on achieving positive development outcomes.

If the Bank does not explicitly recommit itself to high environmental and social standards and does not reaffirm the saliency and importance of the Panel, there is a serious risk that states, particularly those with more autocratic regimes, might be emboldened to refuse the Panel access or to intimidate witnesses from cooperating with the Panel. This concern is not unfounded, as the Panel has already faced such issues under the current Safeguards.^[128] The investigation is a core component of the Panel's work, and field investigation is crucial to its role.^[129] Accordingly, if countries interpret the ESF as allowing them to keep the Bank (and the Panel) at arm's length from their projects, it would significantly jeopardize the Panel's accountability function. The extent to which this shift may hinder the Panel's work depends on the degree of Bank support the Panel receives; the stronger the stance of the Bank towards the Proposed Safeguards and the Panel's role (as incentivized by its desire for legitimacy), the less likely Borrowers will be to oppose Panel involvement.

The Panel's accountability role is essential to the Bank maintaining its legitimacy. Accordingly, the Panel should continue to assert its unchanged role and power in the first few cases it investigates after the adoption of the new Safeguards.

Notes

- [1] International Bank for Reconstruction and Development/International Development Association, Resolution No. IBRD 93-10 Resolution No. IDA 93-6 (Sept. 22, 1993), available at <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf> [hereinafter *Resolution*].
- [2] *Resolution*, *supra* note 1, ¶ 14.
- [3] For more information on the Panel, see <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx>.
- [4] See Daniel Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 *Georgetown J. Int'l L.* 403, 409 (2005).
- [5] *Review and Update of the World Bank Safeguard Policies*, The World Bank, <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> (last visited Dec. 18, 2015).
- [6] *Id.*
- [7] For examples see Bank Information Center, *BIC's Guide to a First Look at the World Bank's Revised Environmental and Social Framework* (Aug. 15, 2015), available at <http://www.bankinformationcenter.org/wp-content/uploads/2015/08/BIC-guide-to-1st-look-at-safeguards-draft2.pdf> [hereinafter *Bank Information Center*]; Human Rights Watch, *The World Bank Second Draft Environmental and Social Framework* (Oct. 7, 2015), available at <https://www.hrw.org/news/2015/10/07/human-rights-watch-submission-world-banks-second-draft-environmental-and-social>; Inclusive Development International, *World Bank: Dangerous Rollback in Environmental and Social Protections* (Aug. 4, 2015), available at <http://www.inclusivedevelopment.net/world-bank-dangerous-rollback-in-environmental-and-social-protections/>; Civil Society Statement on World Bank Safeguards (Oct. 28, 2014), available at https://consultations.worldbank.org/Data/hub/files/civil_society_statement_on_world_bank_safeguards_1.pdf.
- [8] The CSO critiques have also focused on the substance of the environmental and social standards that set out the Borrower's requirements in relation to such standards.
- [9] *Overview of the World Bank Environmental and Social Framework*, Environmental and Social Framework (2nd Draft) (July 2015), ¶ 2 [hereinafter *Overview*].
- [10] The intention to remove all primary, affirmative obligations from the Bank is evident even when one compares the original and the second draft of the Proposed ESF. For instance, in the first draft of the ESF, the provision related to assessment and management of environmental and social risk impacts provides that "If the Borrower's ES Framework is changed in a manner inconsistent with the objectives of the ESSs and the ESCP, the *Bank will* . . . either: (a) require revisions to the ESCP . . . and/or (b) take such other measures as the Bank deems appropriate . . .", *Assessment and Management of Environmental and Social Risk and Impacts: Environmental and Social Standard 1*, Environmental and Social Framework (1st Draft) (July 2014), ¶ 20. In contrast, the second draft of the proposed ESF states that "If the Borrower's ES Framework is changed in a manner inconsistent with the objectives of the ESSs and the ESCP, *the borrower* will carry out, as appropriate, additional assessments and stakeholder engagement in accordance with the ESSs . . ." (emphasis added), *Assessment and Management of Environmental and Social Risk and Impacts: Environmental and Social Standard 1*, Environmental and Social Framework (2nd Draft), ¶ 20 [hereinafter *ESS1*].

- [11] *Environmental and Social Policy for Investment Project Financing*, Environmental and Social Framework (2nd Draft), (July 2015), ¶ 18 [hereinafter *ESP*].
- [12] *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action*, <http://www.oecd.org/dac/effectiveness/34428351.pdf> (last visited Dec. 18, 2015).
- [13] See International Organizations Clinic at NYU School of Law, *The Changing Role of the World Bank Inspection Panel: Responding to Contemporary Challenges at the World Bank*, New York University School of Law (2014), at 2 ("Although the international aid community (including the Bank) had been cognizant of the centrality of country ownership to the success of development efforts well before the Paris Declaration and Accra Accord, these international instruments marked a consensus that any dialogue between international aid organizations and borrowing countries on development initiatives needed to prioritize country ownership").
- [14] Prescriptive requirements are generally characterized by greater, more specific details. For instance, the current Safeguards often specify the time by which certain obligations must be fulfilled. See, e.g., *Indigenous People*, Bank Procedure 4.10, ¶ 3 (establishing that the TTL must initiate the process for determining the presence of Indigenous Peoples "[e]arly in the project cycle") [hereinafter *BP 4.10*].
- [15] For examples of other documents using principle-based standards, see the UN Global Compacts, OECD Guidelines for Multinational Enterprises; the Clarkson Principles of Stakeholder Management; Dirk U. Gilbert et al., *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 *Bus. Ethics Quarterly* 23, 26 (2010).
- [16] C.f. Neil Gunningham & Darren Sinclair, *Integrative Regulation: A Principle-Based Approach to Environmental Policy*, 24 *L. & Social Inquiry* 853, 855 (2006) (recognizing that only a flexible regulatory scheme, such as a principle-based one, adequately address the varied forms that threats to the environment can take).
- [17] Julia Black, *The Rise, Fall and Fate of Principles Based Regulation*, 3 (London Sch. of Econ., Working Paper No. 17/2010, 2010).
- [18] *Id.* at 3.
- [19] C.f. Gunningham & Sinclair, *supra*, note 14, at 860-62 (noting that prescription is a component of interventionist policies, and that less-interventionist regulation as opposed to interventionists ones generate greater efficiency, effectiveness, and political acceptability with regards to private firms).
- [20] Inclusive Development International, *World Bank: Dangerous Rollback in Environmental and Social Protections* (Aug. 4, 2015), <http://www.inclusivedevelopment.net/world-bank-dangerous-rollback-in-environmental-and-social-protections/> (quoting Cesar Gamboa from Derecho Ambiente y Recursos Naturales).
- [21] Nezir Sinani, *Leaked Document Reveals Internal Struggle for Human Rights Protections at the World Bank*, *The World Post* (Nov. 18, 2015), http://www.huffingtonpost.com/nezir-sinani/leaked-document-reveals-i_b_8582120.html.
- [22] *Overview*, *supra* note 9, ¶ 2.
- [23] *ESP*, *supra* note 11, ¶ 2.
- [24] *Id.*

- [25] *Environmental and Social Procedure*, Deliberative Working Draft (July 1, 2015), available at https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/clean_draft_es_procedure_final_draft_for_consultation_july_1_2015.pdf, ¶ 15.
- [26] *Id.* ¶ 17.
- [27] *Id.* ¶ 32.
- [28] *Id.* ¶ 33.
- [29] *Id.* ¶ 34.
- [30] *Id.* ¶ 35.
- [31] *Id.* ¶ 37.
- [32] *Id.* ¶ 38.
- [33] Annex 1 provides an extensive review of the changes between the Proposed and current Safeguards.
- [34] *Indigenous Peoples*, Operational Policy 4.10, ¶ 20 [hereinafter *OP 4.10*].
- [35] *Safety of Dams*, Operational Policy 4.37, ¶ 8 [hereinafter *OP 4.37*].
- [36] See, e.g., *Environmental Assessment*, Bank Procedure 4.01, Annex A ¶ 1 ("During project identification and before assigning an environmental category, the task team (TT) ensures that the borrower selects and engages independent, recognized experts or firms, whose qualifications and terms of reference (TOR) are acceptable to the Bank, to carry out environmental reconnaissance that includes . . .") [hereinafter *BP 4.01*]; see also *id.*, ¶ 5 ("The TT ensures that the borrower establishes within the implementing ministry or agency an in-house environmental unit, with adequate budget and professional staffing strong in expertise relevant to the project, to manage the project's environmental aspects.").
- [37] See, e.g., *ESP*, *supra* note 11, ¶ 15 ("The Bank will require Borrower to conduct environmental and social assessment of projects proposed for Bank support in accordance with ESS1."); *id.*, ¶ 16 ("The Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank...").
- [38] Compare *BP 4.10*, *supra* note 14, ¶ 8(e) (" . . . the TT ensures that the borrower carries out an SA and prepares an IPP and other relevant instrument(s) in accordance with the requirements of OP 4.10.") with *ESP*, *supra* note 11, ¶ 15 ("The Bank will require Borrowers to conduct environmental and social assessment of projects proposed for Bank support in accordance with ESS1.")
- [39] One could argue that the verb "agree" also links the obligation of the Bank to that of the Borrower and thus merits similar attention. However, the obligation born in those instances is a new one shared equally by the Bank and the Borrower. Here, the responsibility of the Bank is distinct from that of the Borrower.
- [40] *Merriam-Webster Dictionary*.
- [41] *Id.*

- [42] See World Bank Inspection Panel, *Comments on the Second Draft of the Proposed Environmental and Social Framework*, World Bank, ¶ 10 (June 17, 2015) ("The Panel remains unclear about the roles and ultimate responsibilities of the Bank and borrower countries . . . The Panel notes a change in terminology and language from the current safeguard policies, which call for the Bank to "ensure" the consistency of Borrower's actions with applicable safeguard policies."); See also Human Rights Watch, *Human Rights Watch Submission: The World Bank's Second Draft Environmental and Social Framework*, Human Rights Watch (2015), 2 (noting similar concerns regarding the dilution of Bank responsibility and calling for a return to the language of the first draft generally).
- [43] Compare *OP 4.10*, *supra* note 34, ¶ 20 ("The Bank requires the borrower to explore alternatives project designs to avoid physical relocation of Indigenous People.") with *ESP*, *supra* note 11, ¶ 52 (" . . . the Bank will require the Borrower to obtain the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples when such circumstances described in ESS7 are present."). For an example of a current Safeguards that utilizes "require" instead of "ensure," see *OP 4.37*, *supra* note 35, ¶ 8 ("the Bank requires that the borrower arrange one more independent dam specialists to inspect and evaluate the safety status of the existing dam . . ."). In fact, the current Safeguards employ a wide range of verbs, all of which serve a very similar function to "require" under the Proposed Safeguards: in *BP 4.11*, "the TT requests that the borrower inform the Bank of the relevant requirements of its legislation and of its procedures for identifying and mitigating potential impacts" (emphasis added). *Physical Cultural Resources*, Bank Procedure 4.11, ¶ 4 [hereinafter *BP 4.11*]. In *OP 4.12*, "the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of [vulnerable groups]" (emphasis added). *Involuntary Resettlement*, Operational Policy 4.12, ¶ 9 [hereinafter *OP 4.12*].
- [44] *BP 4.10*, *supra* note 14, ¶ 3.
- [45] *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects*, Operational Policy 4.00, ¶ 7 [hereinafter *OP 4.00*].
- [46] *ESP*, *supra* note 11, ¶ 16 ("The Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank. In establishing the manner and an acceptable timeframe, the Bank will take into account the nature and significance of the potential environmental and social risks and impacts, the timing for development and implementation of the project, the capacity of the Borrower and other entities involved in developing and implementing the project, and the specific measures and actions to be put in place or taken by the Borrower to address such risks and impacts.") (emphasis added).
- [47] *Id.*, ¶ 18.
- [48] A "Comparative Review of Multilateral Development Bank Safeguard Systems" is available online at http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf.
- [49] Some civil society organizations have criticized the ESF's inconsistent approach to "emerging areas." For example, community health and safety, labor and working conditions, land acquisition, and biodiversity conservation all have separate ESSs specifically allocated to them, which address detailed standards for each of these issues that Borrowers are required to adhere to. On the other hand, the same degree of focus has not been applied to climate change, gender, disability, disadvantaged groups, or human rights. *World Bank, Review and Update of the World Bank's Policies: Environmental and Social Framework Consultation Paper* (July 1, 2015), at 1 [hereinafter *Consultation Paper*]. For instance, reference to human rights in the Proposed Safeguards is made in aspirational terms, and Bank Management has maintained a "firm view that it should refrain from proposing that Borrower human rights compliance be a standard requirement within the ESF." *Consultation Paper*, at 26. In addition, the Proposed

Safeguards do not comprehensively provide for specific requirements for assessing and managing the impacts of climate change on ecosystems, or on the viability of projects.

- [50] *Consultation Paper*, *supra* note 49, at vi.
- [51] *Labor and Working Conditions: Environmental and Social Standard 2, Environmental and Social Framework (2nd Draft)* [hereinafter *ESS 2*].
- [52] *Pest Management*, Operational Policy 4.09 [hereinafter *OP 4.09*]; *Pest Management*, Bank Procedure 4.09 [hereinafter *BP 4.09*].
- [53] *Resource Efficiency and Pollution Prevention and Management: Environmental and Social Standard 3, Environmental and Social Framework (2nd Draft)* [hereinafter *ESS3*].
- [54] *Community Health and Safety: Environmental and Social Standard 4, Environmental and Social Framework (2nd Draft)* [hereinafter *ESS 4*].
- [55] *Id.*, ¶¶ 15-16.
- [56] *Id.*, ¶¶ 24-27.
- [57] *Indigenous Peoples: Environmental and Social Standard 7, Environmental and Social Framework (2nd Draft)*, ¶¶ 18-20 [hereinafter *ESS 7*].
- [58] *Cultural Heritage: Environmental and Social Standard 8, Environmental and Social Framework (2nd Draft)*, ¶4 [hereinafter *ESS 8*].
- [59] *Stakeholder Engagement: Environmental and Social Standard 10, Environmental and Social Framework (2nd Draft)* [hereinafter *ESS 10*].
- [60] *Consultation Paper*, *supra* note 49, at 12.
- [61] *ESS1*, *supra* note 10, ¶ 4(b).
- [62] *Id.* ¶ 4(b), n. 22.
- [63] *Consultation Paper*, *supra* note 49, at 1.
- [64] European Council Regulation, 1083/2006, (July 11 2006), art. 69.
- [65] Although the new standards, such as labor and working conditions, community health and safety, and resource efficiency and pollution prevention are set out under the Borrower's obligations, the Panel could use the connections between the Bank and Borrower obligations, outlined *infra*, to hold the Bank accountable for compliance with the new standards.
- [66] *Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project, (P001409) Panel Report and Investigation*, (Aug 18, 1998), 13, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/12-Eligibility%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/12-Eligibility%20Report%20(English).pdf).

- [67] *China: Western Poverty Reduction Project, (P046564)*, Investigation Report, (June 18, 1999), ¶ 45, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Investigation%20Report%20(English).pdf) ("While not all the standards provided for in the ODs are binding (it depends on the wording of each standard), those stated in binding terms create a duty for the staff to exert their best efforts to achieve them.") (quoting senior Vice President and General Counsel of the World Bank, Mr. Shihata) [hereinafter *China*].
- [68] *Id.* ¶ 11.
- [69] *Id.* ¶ 38.
- [70] *Environmental Assessment*, Operational Policy, 4.01, ¶ 5, [hereinafter *OP 4.01*].
- [71] *Argentina: Santa Fe Road Infrastructure Project, (P070628)*, Investigation Report, (Sept. 13, 2007), ¶ 97, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/51-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/51-Investigation%20Report%20(English).pdf).
- [72] *Id.* ¶ 98.
- [73] *Id.*
- [74] *BP 4.10*, *supra* note 14, ¶ 2 (a)-(d).
- [75] *Nepal: Power Development Project (PO43311)*, Investigation Report, (Feb 12, 2015), ¶ 255, available at <http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Investigation%20Report-Nepal%20Power%20Development%20Project.pdf>.
- [76] *ESP*, *supra* note 11, ¶¶ 16, 18.
- [77] *See Bank Procedure*, Environmental and Social Procedure (Deliberative Working Draft July 1, 2015), ¶¶ 28, 54 [hereinafter *ESPP*].
- [78] *Cambodia: Forest Concession Management and Control Pilot Project, (P060003)*, Investigation Report, (Mar. 30, 2006), ¶ 212, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Investigation%20Report%20(English).pdf).
- [79] *Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (P081850) and Emergency Economic and Social Reunification Support Project (EESRSP)*, Investigation Report, (Aug 31, 2007), at ¶ 364-67, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/37-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/37-Investigation%20Report%20(English).pdf).
- [80] One area of concern that may not be fully addressed by past practice may be the absence of guidelines for interpreting "regular" responsibilities that are not tied to specific stages of the project. Yet, again, if the Bank's conduct would not pass a reasonableness test as to why the delay is required and also would not defeat or undermine the goals of the Safeguards, the Panel should have the same authority to consider Bank practice non-compliant.
- [81] *Resolution*, *supra* note 1, ¶ 12.
- [82] *Id.* ¶ 14(a).

- [83] *Ethiopia: Protection of Basic Services II Project-Additional Financing (P121727) and Promoting Basic Services Phase III Project (P128891)*, Report and Recommendation on Request for Inspection, (Feb. 8, 2013), ¶ 16, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Eligibility%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Eligibility%20Report%20(English).pdf) [hereinafter *PBS Project Eligibility Report*].
- [84] *Ethiopia: Promoting Basic Services Phase III Project (P128891)*, Investigation Report (Nov. 21, 2014), ¶4, available at <http://ewebapps.worldbank.org/apps/ip/PanelCases/82-%20Inspection%20Panel%20Investigation%20Report%20Ethiopia%20PBS%20Phase%20III%20Project.pdf> [hereinafter *PBS Investigation Report*].
- [85] *PBS Project Eligibility Report*, *supra* note 83, ¶106.
- [86] *PBS Investigation Report*, *supra* note 84, ¶10.
- [87] *Bangladesh: Jute Sector Adjustment Credit Project (P009553)*, Eligibility Report (Mar. 14, 1997), ¶ 4, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/6-Eligibility%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/6-Eligibility%20Report%20(English).pdf) [hereinafter *Bangladesh*].
- [88] *Kenya: Natural Resource Management Project (P095050)*, Investigation Report (May 22, 2014), ¶ 149 available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/84%20-%20Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/84%20-%20Investigation%20Report%20(English).pdf).
- [89] *Ghana/Nigeria: Western African Gas Pipeline Project (P082502)*, Investigation Report (April 27, 2006), ¶ 296, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/40-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/40-Investigation%20Report%20(English).pdf) [hereinafter *Ghana*] ("The Panel finds that Management failed to ensure that the Sponsor had in place an effective grievance process to identify and redress resettlement issues, as required by OP 4.12."); The Panel found that the Bank failed to comply with several provisions of the Involuntary Resettlement Policy (OP 4.12) by not ensuring that the requisite socio economic information was gathered by the Borrower, the Sponsor performed an adequate analysis of the socioeconomic risks to vulnerable people (*Id.* ¶ 138), project planners used reliable and specific data on individuals or households (*Id.* ¶ 141), the displaced people were at least as well off as they were before the displacement (*Id.* ¶ 1184), and effective grievance mechanisms were in place (*Id.* ¶ 296).
- [90] *OP 4.12*, *supra* note 43, ¶ 13(a).
- [91] *Ghana*, *supra* note 89, ¶ 296.
- [92] *See, e.g., id.* ¶ 295 (noting that Management's decision to disseminate non-technical translation of the mechanism's procedures "too late for institution of any meaningful process").
- [93] *Id.* ¶ 189.
- [94] *OP 4.01*, *supra* note 70, ¶ 14.
- [95] *Albania: Power Sector Generation and Restructuring Project (P077526)*, Investigation Report (Aug. 7, 2009), at xxx, available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20(English).pdf).
- [96] *Id.*
- [97] *See OP 4.01*, *supra* note 70, ¶ 4 ("The borrower is responsible for carrying out the EA. For Category A projects, the borrower retains independent EA experts not affiliated with the project to carry out the EA.").

- [98] *See Id.* ¶ 5 ("The Bank advises the borrower on the Bank's EA requirements. The Bank reviews the findings and recommendations of the EA to determine whether they provide an adequate basis for processing the project for Bank financing. When the borrower has completed or partially completed EA work prior to the Bank's involvement in a project, the Bank reviews the EA to ensure its consistency with this policy.").
- [99] *See, e.g., ESPP, supra* note 77, ¶ 18 ("The TT discusses with the Borrower the information on the project, and the measures and actions that will be required for the Borrower to conduct ES assessment of the project, including the methods and tools to be used . . . and the type and timeframe for the preparation of specific instruments, including any ESS-specific plans.").
- [100] *See, e.g., id.* ¶ 5c (requiring the Bank to "assist the Borrower in identifying appropriate methods and tools to assess and manage potential ES risks and impacts on the project"); *ESPP, supra* note 77, ¶ 29 ("The Bank advises the Borrower on carrying out the ES assessment of the project in accordance with the requirements of ESS1").
- [101] *See, e.g., id.*, ¶ 49 (requiring the Bank to ensure that the Borrower provides sufficient information about the project risks to affected parties so as to allow effective participation and consultation); *id.* ¶ 50 (requiring the Bank to require Borrower to engage with stakeholders and with other interested parties through "information disclosure, consultation, and informed participation"); *id.* ¶ 51 (requiring the Bank to undertake a screening to determine whether Indigenous Peoples are present, in part to ensure that the Borrower does engage with all such communities).
- [102] *See, e.g., id.* ¶ 9 ("The Bank will cooperate with such agencies and the Borrower in order to agree on a common approach for the assessment and management of environmental and social risks and impacts of the project. A common approach will be acceptable to the Bank, provided that such approach will enable the project to achieve objectives materially consistent with the ESSs. The Bank will require the Borrower to apply the common approach to the project.")
- [103] *Id.* ¶ 45; *see also ESS1, supra* note 10, Annex 2 ¶ 1 ("The Environmental and Social Commitment Plan (*ESCP*) will be agreed between the Borrower and the Bank, and forms part of the legal agreement. It is designed to consolidate into one summary document the material measures and actions that are required for the project to achieve compliance with the ESSs over a specified timeframe in a manner satisfactory to the Bank.").
- [104] *ESP, supra* note 11, ¶ 45.
- [105] *Consultation Paper, supra* note 49, at 10.
- [106] *See ESP, supra* note 11, ¶ 47 ("The Bank will require the Borrower to prepare, submit to the Bank for approval and implement a process that allows for adaptive management of proposed project changes or unforeseen circumstances. The agreed adaptive management process will be set out in the ESCP. The process will specify how such changes or circumstances are to be managed and reported, and how any necessary changes will be made to the ESCP and the management tools used by the Borrower.")
- [107] *Consultation Paper, supra* note 49, at 10.
- [108] *ESP, supra* note 11, ¶ 18.
- [109] *Id.* ¶¶ 45-47.
- [110] *Id.* ¶ 45; *ESS1, supra* note 10, Annex 2, ¶ 1.

- [111] *Id.* ¶ 46.
- [112] *Id.* ¶ 47.
- [113] *Id.* ¶ 30; *ESPP*, *supra* note 77, ¶ 34; *ESS1*, *supra* note 10, Annex A ¶ 4.
- [114] *ESPP*, *supra* note 77, ¶ 31.
- [115] *ESP*, *supra* note 11, ¶¶ 30-31.
- [116] *ESPP*, *supra* note 77, ¶¶ 37, 57.
- [117] *Id.* ¶¶ 40-48.
- [118] *Id.* ¶ 48.
- [119] *ESP*, *supra* note 11, ¶ 53.
- [120] *See generally id.* ¶ 3 ("To carry out this Policy, the Bank will: ... (e) Monitor the environmental and social performance of a project in accordance with the ESCP and the ESSs."); *ESPP*, *supra* note 77, ¶ 5 ("As set out in the Policy, paragraph 3, the responsibilities of the Bank to manage ES risks and impacts of a project are: ... e. monitor the ES performance of the project in accordance with the ESCP and the ESSs").
- [121] *ESP*, *supra* note 11, ¶ 55.
- [122] *See ESPP*, *supra* note 77, ¶ 28; *ESP*, *supra* note 11, ¶ 21.
- [123] *ESPP*, *supra* note 77, ¶ 54.
- [124] *Id.* ¶ 10.
- [125] *See Joint Statement on the Use of Country Systems*, available at: <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/JointStatementUseCountrySystems.pdf>.
- [126] *Id.*
- [127] Additionally, the standard of review in relation to the Borrower should not be lowered to make Bank compliance easier as accepting what would "otherwise be seen as inadequate assessment seems especially patronizing in developing countries whose scientists are clearly capable of world class contributions" and burdens the Borrower with the social and environmental costs of inadequate assessment. *China*, *supra* note 67, ¶ 41.
- [128] In 2013, the government of Ethiopia publically refused to cooperate with the Panel, stating "to an extent that there's a need for cooperation, it's not going to be with the Inspection Panel, but with the World Bank." (William Davison, *Ethiopia Refuses to Cooperate With World-Bank-Funding Probe*, BloombergBusiness (May 28, 2013), <http://www.bloomberg.com/news/articles/2013-05-27/ethiopia-refuses-to-cooperate-with-probe-on-world-bank-funding>). Most recently, Ethiopia arrested a former World Bank Translator (who had assisted with the Panel's investigation) on trumped-up charges of terrorism. (Press Release, World Bank Inspection Panel, Statement of the Inspection Panel Regarding the Charges Filed Against Pastor Omot Agwa in Ethiopia (Sept. 25, 2015), available at <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/>

[NewsFromThePanelDisp.aspx?ID=224&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx](http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx); Natienael Berhe, *Activists Heading for Food Workshop Charged With Terrorism*).

- [129] See generally World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (2009), available at <http://ewebapps.worldbank.org/apps/ip/IPPublications/InspectionPanelAt15yearsEnglish.pdf>.



Empowering the Inspection Panel

The Impact of the World Bank's Safeguards Review

SUPPLEMENT



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Supplement

This Supplement provides an in-depth linguistic analysis of the Proposed Safeguards, focusing on language that could be read in a way that allows the Bank to evade responsibility for central, project-related actions. Additionally, it aims to identify whether the current Safeguards contain provisions raising similar concerns, determining whether these linguistic issues are unique to the Proposed Safeguards.

A. Obligations Using the Formulation "Bank will require Borrower to..."

The formulation "the Bank will require Borrower to . . ." is one of the most common types of obligations found in the ESP. This formulation merits particular attention because it links the obligations of the Bank with obligations of the Borrower.^[130] A close analysis of this construction in the context of the Proposed Safeguards as well as in comparison to the current Safeguards provides insights not only into the content of the Bank's obligation to "require," but also into the relationship between the Bank's and Borrower's obligations.

The question of their relationship is interesting for two reasons. First, the relationship may shed light on the Bank's obligations vis-à-vis the ESS, as the ESS themselves rarely outline Bank obligations directly.^[131] Second, it might affect the extent to which the Panel may initiate investigations. Under its Resolution, the Panel cannot hear "complaints with respect to actions which are the responsibility of other parties, such as the borrower . . . and which do not involve any action or omission on the part of the Bank." ^[132] Thus, the extent to which the Bank's obligation overlaps with or is connected to the corresponding obligation of the Borrower, may clarify how the Panel can continue to generate accountability under the Proposed Safeguards.

The ESP uses the formulation "the Bank will require Borrower to . . ." nineteen times, while the ESPP never employs it. Even though the Bank's obligation is always to require, the corresponding Borrower's obligations vary greatly. In these examples alone, the Borrower must "conduct," "prepare," "adopt," "achieve," "implement," "provide," "undertake," "obtain," and "ensure," ^[133] raising the question discussed above of whether the Bank's obligation (to require) varies in relation to each different substantive obligation of the Borrower.

The ESP commonly uses this formulation when referring to other parts of the ESF-in particular to the ESS. For instance, ESP 51 and ESP 52 explicitly refer to ESS 7 on Indigenous Peoples.^[134] In fact, ESP 51 even references the specific paragraphs of the ESS.^[135] ESP 18 refers not only to the ESS generally, but also to the ESCP, the content and implementation of which is established by ESS 1.^[136] It states, "[i]f the project comprises or includes existing facilities or existing activities that do not meet the requirements of the ESSs at the time of approval by the Bank, the *Bank will require the Borrower*, as part of the ESCP, *to adopt and implement* measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of the ESSs within a timeframe acceptable to the Bank..."^[137] In doing so, this provision has two effects: first, it expands the Borrower's obligation under the ESCP to existing facilities and activities, and, more interestingly, it connects the Bank to the ESCP, which deals mainly with the obligations of the Borrower. ESP 19 indicates that the Bank will require the Borrower to apply the World Bank Group's Environment, Health, and Safety Guidelines.^[138]

B. Country Systems Analysis

Under Part B of the ESP, the Bank will allow a Borrower country to replace the ESS with its own regulation and legislation as the governing framework for a specific project financed by investment project financing if the rules are found to enable the project to achieve objectives 'materially consistent' with the ESS and to address the social and environmental risks and

impacts of the project. Moreover, in certain circumstances,^[139] a borrowing country can also employ another development Bank's requirements instead of the Bank's, as long as these requirements once again enable the project to achieve objectives materially consistent with the ESS. However, without more detailed guidelines on how to determine if the two sets of standards allow for the achievement of materially consistent objectives, there is a risk that the Borrower will apply inadequate social and environmental safeguards.

The country systems mechanism permits a nation to use its own regulatory framework instead of the ESS in determining the responsibility of a Borrower for the environmental and social risks of a particular project. The relevant provisions^[140] delineate specific actions the Bank must take and documents it must consider. For instance, ESPP 42 requires the Bank to review:

- a. the country's general policy, legal and institutional framework, as these are relevant to the specific ES risks and impacts of the project;
- b. laws, regulations, rules and procedures (including permits and approval requirements) applicable to the project's sector, including regional and local requirements that are relevant to the ES risks and impacts of the project;
- c. inconsistencies, lack of clarity or conflict as to relevant authorities or jurisdiction, including differences between national and regional/local authorities or jurisdictions;
- d. previous experience with the Bank or other IFIs and the track record of the Borrower and the national, subnational, sectoral and local institutions involved in the preparation and/or implementation of the project, including stakeholder engagement; and
- e. technical and institutional capacity of the Borrower and relevant national, subnational or sectoral implementing institutions or agencies related to the project, as these are relevant to the ES risks and impacts of the project.

However, none of the provisions provide criteria or standards for evaluating the country's regulations. Consequently, it would appear that the Bank could technically fulfill its obligations by merely analyzing these documents, even if it approves a project that doesn't afford the same material protection as the ESS.

ESP 24, ESP 25 and ESPP 43 require the Bank to "assess whether use of the Borrower's ES Framework will enable the project to achieve objectives materially consistent with the ESSs" and establish "project-specific actions and measures to fill the identified gaps." Yet, once again, "materially consistent objectives" and "gaps" are neither defined nor is any evaluative tool provided to analyze the differences between the two. In fact, ESP 24 explicitly asserts, "[t]he use of Borrower's ES Framework will be determined at the discretion of the Bank." The Proposed Safeguards thus depend heavily upon the Bank's good judgment with little guidance on how to conduct the evaluation of the borrowing country's framework or what criteria to use in such review.

Moreover, ESPP 49 allows the Borrower to "apply the requirements of other multilateral or bilateral funding agencies for the assessment and management of ES risks and impacts of a project involving" a financial intermediary or an associated facility, a provision not found in the current Safeguards. Again, ESPP 50 identifies what the Bank should consider - "[t]he TT takes into account the policies, standards and implementation procedures of the multilateral or bilateral funding agencies" - but does not indicate how these frameworks might be assessed. The proposed ESF even cedes the responsibility for "due diligence, supervision and implementation" to these agencies if the Bank so chooses in ESPP 51.

The Country Systems Pilot within the current Safeguards in fact uses much of the same language as the Proposed Safeguards, and raises some similar concerns. For example, the current Safeguards specify that a country's framework must be "designed to achieve the objectives and adhere to the applicable operational principles"^[141] of the safeguards, similar to the language of ESPP 43. The current country-systems safeguards appear to be weaker in actually identifying or providing tools to address gaps in the Borrower's system. OP 4.00 provides: "Similarly if the borrower has to fill gaps in implementation practices and capacity to achieve acceptability and is committed to doing so, the Bank may, when determining acceptability, take account of measures to strengthen borrower implementation practices and capacity."^[142]

The Proposed Safeguards, by comparison, articulate an affirmative obligation on the Bank to find and address gaps. The current Safeguards use less mandatory language such as "may" and indicate that the Bank need only consider capacity-strengthening methods if the Borrower has to fill gaps, although without specify in what circumstances the Borrower must fill these gaps.

However, both sets of Safeguards share the same overarching problem. The current Safeguards do not mention how one could achieve materially consistent objectives without using the same kind of safeguard mechanisms, nor do they explain what a "gap" is and to what extent a gap must be addressed before a Borrower's system can be accepted. The lack of overarching standards could be problematic in that the Bank could decide to utilize a country's framework for expedient reasons, without truly being assured that the country's regulatory framework will sufficiently protect the environmental and social rights of any affected communities. Alternatively, the Bank may approve the Borrower's regulatory scheme on the basis that it seemingly provides sufficient environmental and social protection, even while in practice it does not. While these problems might be caught at the monitoring stage, such monitoring may not be sufficient to detect that specific rights are not being observed, or at least not until significant harm has already been inflicted on the affected community.

Moreover, the current Safeguards do not sufficiently delineate the Bank's affirmative obligations to monitor or ensure that the Borrower's system will indeed accomplish what it is supposed to do. While they perhaps offer more protection than the Proposed Safeguards, they do not ensure that the Bank is made accountable for the implementation and use of a country's framework. Under the existing country systems pilot, the Bank has a responsibility to address a change in national legislation that could impact the project or the fulfillment of objectives materially consistent with the safeguards,^[143] whereas in the Proposed Safeguards the Borrower must inform the Bank of a change before the Bank has a duty to act,^[144] and the Bank does not have a duty to ascertain that the Borrower actually addresses the change. The Bank is only under an obligation to discuss potential problems with the Borrower, and is not required to ensure that newly developed gaps are identified and nullified.^[145] Consequently, the Borrower's system could be failing to uphold a functionally equivalent level of protection, and the Bank would still have satisfied its affirmative obligations.

C. Primary Obligations

The proposed ESP and ESPP define the Bank's general responsibilities using a range of verbs, such as "assist," "agree," "ensure," "review," and "monitor." These largely mirror the types of obligations the Bank has under the current safeguards.

The Bank's obligation to "assist" the Borrower mainly relates to the measures and tools used when assessing and managing environmental and social risks and impacts under the ESPP.^[146] The Bank has a similar obligation under the current Safeguards.^[147] The Bank's obligation to assist the Borrower with the preparation of the ESCP is not found in the current Safeguards because the ESCP is a new mandatory tool under the Proposed Safeguards.^[148]

The Bank is obliged to "agree" with the Borrower on measures relating to the following: the Borrower's application of the Safeguards, as well as the documents to use for financial intermediaries and subprojects,^[149] corrective and preventive measures,^[150] due diligence,^[151] and gaps in the Borrower's framework.^[152] In contrast, under the current Safeguards, the Bank's obligation "to agree" with Borrower relates to specific project contexts.^[153] For instance, "For small dams, generic dam safety measures designed by qualified engineers are usually adequate. The task team will agree on appropriate safety measures with the borrower . . .",^[154] and "the TT agrees with the borrower on a timetable for preparing and furnishing to the Bank the relevant resettlement instrument . . ."^[155]

The Bank's obligation to "ensure" appears several times throughout the proposed ESP and ESPP,^[156] but significantly less frequently than in the current Safeguards.^[157] Moreover, under the Proposed Safeguards, the Bank's obligation "to ensure" is a lot broader than under the current standards, which tend to provide more content for the Bank's obligation. For

example, under the Proposed Safeguards "the Bank will ensure that the project includes measures to strengthen" procedures involving financial intermediaries,[158] the Bank "ensures that the ESCP incorporates such measures and actions, as well as agreed timeframes and all the relevant information to ensure the implementation of these actions and measures,"[159] the Task Team "ensures that sufficient information about the potential risks and impacts of the project is made available by the Borrower,"[160] and the "TT ensures that the documents relating to the Environmental and Social (ES) assessment and management of the project provide adequate, accurate and up to date information. . ."[161] In contrast, under the current Safeguards, the Bank's obligations are more specific. Thus, under BP 4.36 on Forests, the Bank has an obligation to ensure that: an EA category is assigned; the Borrower assesses potential impact of the project on local communities; the project incorporates a time bound action plan; and the Borrower makes available to the public results of forest management assessment.[162] The obligation to "ensure" also appears several times in OP 4.01 on the Environmental Assessment.[163] For instance, the Bank "ensures that the borrower selects and engages independent, recognized experts or firms . . ."[164] . In the OP/BP 4.37 relating to Physical and Cultural Resources,[165] examples include, the "TT ensures that the findings and recommendations of the physical cultural resources components of the EA . . . are recorded in the Project Appraisal Document (PAD).[166]

The Bank's obligation to "review" appears throughout the project lifecycle under the ESP and ESPP, and includes a review of: the risk classification assigned to the project,[167] the use of the Borrower's ES Framework,[168] information provided by the Borrower during due diligence[169] , the capacity of the Borrower to develop and implement the project in accordance with the ESS during due diligence,[170] the classification of and environmental and social assessment of sub-projects and FIs,[171] the status of the ESCP,[172] the Borrower's monitoring reports,[173] and the Borrower's compliance with the ES requirements.[174] The Bank's obligation to review also appears in the current Safeguards, although by reference to specific sectors. [175] As in the case of the "obligation to ensure," the current Safeguards provide more content to the Bank's obligation to review. For example, under OP 4.01 on Environmental Assessment the Bank is required to review, among other things, aspects of the results of the EA, the coverage of the TOR, and the project implementation plan.[176] The Bank also has various obligations to review under OP 4.37 on Dams,[177] BP 4.12 on Involuntary Resettlement,[178] and OP 4.11 on Physical and Cultural Resources, in relation to the EA.[179] In addition, the Bank "reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples' communities have provided their broad support to the project." [180]

Under the general objectives and principles section of the World Bank Environmental and Social Policy for Investment Project Financing of the ESF the Bank has a general duty to "monitor the environmental and social performance of a project in accordance with the ESCP and the ESSs." [181] Furthermore, the ESP and ESPP provide several specific monitoring obligations on the Bank - including in relation to the risk rating of subprojects and financial intermediaries.[182] Along with the Bank's specific obligation to monitor aspects of projects, the Bank has a general overarching duty of monitoring and implementation, which is set out in section H of the ESP,[183] and section XI of the ESPP.[184] The obligation includes monitoring the environmental and social performance in accordance with the legal agreement, including the ESCP on an "ongoing" basis[185] in accordance with OP 10.00 of Investment Project Financing.[186]

The Bank's general implementation support and monitoring responsibilities are set out in OP 10.00,[187] which replaced BP/OP 13.05 on Project Supervision. The current Safeguards still make some reference to "supervisory" obligations on the Bank - something that is absent in the Proposed Safeguards.[188] However, the likely explanation for this is that the change from "supervision" to "implementation support" marked a reduction in the Bank's control over projects under the current Safeguards, and the remaining references to "supervision" in the current Safeguards are "left overs." For example, OP 4.10 at Footnote 14 provides ". . . the Bank may agree with the borrower that prior Bank review of the Indigenous Peoples Plan ("IPP") is not needed. In such case, the Bank reviews the IPP and its implementation as part of supervision (see OP/BP 10.00, Investment Project Financing)." The reference to OP/BP 10.00 indicates that any reference to

"supervision" should be understood in light of the meaning of OP 10.00, which focuses on implementation support and monitoring, rather than overall control.

D. Strength of the Bank's Obligation

Despite the breadth of the Bank's responsibilities under the ESPP and the ESP, the Panel's ability to ensure that the Bank is effectively held accountable for its actions is based not only on the number and scope of obligations, but also on their strength. The choice of language used suggests a spectrum of obligations, with mere guidance or suggestion, on the one hand, and mandatory requirements on the other.

References to softly-worded obligations or guidance statements may hinder the Panel's accountability function, despite the breadth of the Panel's jurisdiction over claims alleging Bank non-compliance with the ESPP and ESP.^[189] Not only do they render it more difficult for a requestor to define the precise violation, but vague language may also impair the Panel's assessment of the seriousness of the claim.^[190] Thus, the goal of exploring the overall strength of the obligations is to evaluate whether the formulation of each responsibility threatens the Panel's ability to hold the Bank accountable.

The overall strength of the language used in the ESP and the ESPP to define Bank responsibilities is evaluated in four ways. First, it is measured by the forcefulness of the verb; "will, must, shall" represent firm obligations, while verbs like "should, may, can" suggest a space for Bank discretion and, consequently, a degree of vagueness. The Proposed Safeguards appear to consistently use each category to refer to distinct concepts. Stronger verbs-particularly "will"-are used primarily in reference to actions that the Bank must take. ESP 20, for instance, states "The Bank *will classify* all projects . . . into one of four classifications . . ." (emphasis added).^[191] In the same vein, "The bank *will conduct* environmental and social due diligence of all projects proposed for support through Investment Project Financing" under ESP 28.^[192] On the other hand, weaker verbs are used with reference to resources available to the Bank to conduct an evaluation or to set the standards for that same evaluation. ESP 51 demonstrates this distinction clearly as it contains both kinds of verbs; it states not only that "the Bank *will* undertake a screening . . ." and "*will* undertake the necessary due diligence," but also that "the Bank *may* follow the Borrower's framework for identification" and "*may* seek technical advice of specialists."^[193] While the first two statements tell the Bank what to do, the latter two suggest how to do it.

Second, the sentence structure may affect the strength of the responsibility. For instance, sentences written in active voice (that is, with the subject performing the action rather than receiving it) or placing "the Bank" as the subject more seem to create a firmer obligation for the Bank than do sentences written in passive voice or with the Bank's obligation found in merely a dependent clause. While the ESP obligations mentioned above suggest a stronger obligation, ESP 38 states that "If the risk rating of a subproject increases to a higher risk rating, the Borrower will apply relevant requirements of the ESSs in a manner *agreed with the Bank*"^[194] (emphasis added). On the whole, however, the Bank's responsibilities are expressed in a relatively consistent and strong way. Although there are examples of weaker sentences,^[195] most of the Bank's obligations are expressed clearly and actively.^[196] Thus, it would appear that, despite some variation, the language in this respect does not weaken or obfuscate the obligations of the Bank.

Third, like the Proposed Safeguards, the current Safeguards create Bank obligations that vary in strength. They do so primarily by alternating between weaker verbs like "may" and stronger substantive verbs (the current Safeguards rarely employ "will").^[197] In contrast to the Proposed Safeguards, the current Safeguards apply weaker verbs to both actions and assessment criteria. For instance, OP 4.36 uses weaker permissive language rather than mandatory language in relation to Bank action by stating "The Bank may finance harvesting projects conducted by small scale landholders . . ."^[198] while "the Bank may accept previous assessments of dam safety . . ." gives the Bank the option of selecting the basis for evaluation.^[199] However, it is incorrect to conclude that by confining weaker or more discretionary language only to the obligations that require the Bank to set standards, the Proposed Safeguards strengthen the Panel's accountability function

by decreasing the subject-matter outside the Panel's purview. The Panel can nonetheless find the Bank non-compliant even in circumstances in which the Bank apparently enjoys discretion, so long as the condition triggering the discretion was not met. OP 4.01 provides an example of this: it states, "[w]hen compliance with any requirement of this policy would prevent the effective and timely achievement of the objectives of such a project, the Bank may (subject to the limitations set forth in paragraph 11 of OP 10.00) exempt the project from such a requirement."^[200] The Panel can hold the Bank accountable for exempting a project by finding either that compliance did not foreclose the achievement of the projects objectives or that the exception fell outside the limitations of paragraph 11. Further, most of the weaker, discretionary language used in relation to Bank obligations relate to additional matters that are not part of the core actions of the Bank.^[201]

Fourth, the Proposed Safeguards also impose conditions on some of the weakly worded obligations. For instance, ESPP 51 states that the Bank may choose to rely on the ES due diligence conducted by other agencies "where the Bank has agreed to apply a common approach." However, even though the exercise of discretion by the Bank appears to be made conditional on a prior agreement to apply a common approach, it seems as though the Panel's role in assessing compliance in such a case is likely to be little more than a box-ticking exercise for the Panel, and does not enable the Panel to assess the appropriateness of the Bank's choice.^[202]

It is clear that even though both the strength of the Bank's obligations under both the current and the Proposed Safeguards is varied, it differs in diverging ways. While the Proposed Safeguards use weak or discretionary language only with reference to the Bank's selection of assessment criteria, the current Safeguards appear to limit the scope of Bank discretion imposing conditions on the exercise of such discretion, or conferring such discretion mainly in relation to actions that go beyond the Bank's primary responsibilities. The existence of discretionary and permissive language nonetheless could create difficulties for the Panel in assessing compliance were it not for the Panel's use of certain kinds of interpretative techniques.

E. The Imposition of Qualifications on the Bank's Obligations

In some cases, even when affirmative obligations are imposed on the Bank by the terms of the ESP and ESPP, the mandatory nature of these responsibilities seem to be weakened somewhat by the addition of qualifications or conditions. Below we identify four such categories of qualifying language: factual, temporal, potentially objective, and self-referential. The degree to which the Panel is likely to be able to hold the Bank accountable for the Bank's affirmative obligations may be influenced by the nature and strength of the qualifying language.

Factual Qualifications. A series of qualifications appear to moderate the Bank's responsibilities depending upon easily observable, objective factual circumstances, such as "upon Borrower request"^[203] or "where the bank is approached to provide support for a project that is under construction . . ."^[204] The Panel can generally assess a situation to see whether these scenarios, upon which the Bank's duty depends, have occurred, thus whether or not the Bank fulfilled its requirement to act. While they may be easier to assess, these qualifications sometimes involve flexibility and could render it more difficult to pinpoint the responsibility of the Bank. One example is where the Bank's obligation depends upon the degree of risk inherent in a project; ESPP 19 enumerates, "*[i]f the potential ES risks and impacts of the proposed project are considered to be High Risk or Substantial Risk, the TT includes dedicated ES specialists. The type and level of expertise of the ES specialists reflects the type and level of risks and impacts of the project*" (emphasis added). Therefore, the Task Team only must procure specialized experts if the project is classified as high or substantial risk.

Other provisions also allude to the risk system, though they do not specifically delineate responsibilities based on a project's categorization,^[205] while others merely allude to potential environmental and social risk.^[206] To illustrate the latter, ESPP 33 affirms "*[d]epending on the potential significance of environmental and social risks and impacts, the Bank will determine whether the Borrower will be required to retain independent third party specialists to assist in the*

assessment of environmental and social impacts" (emphasis added).[207] These clauses suggest that the riskier a project is the more likely the Bank will have a responsibility to complete the enumerated act, without specifying what the Bank must do to fulfill the duty. The more specific clauses, such as those found in ESPP 19, allow the Panel to straightforwardly assess whether the Bank had an obligation and whether it fulfilled it. If the project was high or substantial risk, then the task team must be comprised of at least one "dedicated specialist." However, the less specific language in ESPP 33, for example, does not create such a clear affirmative obligation for the Bank. The Panel cannot point to the assigned level of risk and determine that the Bank thus had a responsibility to assure that the Borrower retained third party specialists. On the other hand, this more vaguely worded language could also afford the Panel more freedom to assess the Bank's compliance. For example, if the Panel finds that the significance of a particular risk on a project was high, even if the overall project was not of great risk, it could potentially find the Bank to be noncompliant with the provision. It may be that both the ability to hold the Bank accountable in a more straightforward way, as under ESPP 19, and the flexibility for the Panel to assess the situation itself as under ESPP 33, could prove valuable to the Panel in carrying out its task of holding the Bank accountable for harms caused to affected communities by projects financed by the Bank.

Another type of qualifying language places the initial responsibility upon the Borrower to act before the Bank has any ensuing duty. For example, ESPP 16 specifies that action must be taken only "upon Borrower request"[208] and ESPP 13 depicts that the Bank need only base its screening analysis on "the available information," which must be provided by the Borrower.[209] While both of these provisions could seem innocuous as they apply only to an initial assessment or one of many reviews, ESPP 48 notes that a Bank need only review a change in the Borrower's ES framework, when being utilized in place of the ESS's, if first notified by the Borrower that a significant modification has occurred.[210] An amendment to a country's legislation or regulation could significantly impact the requirements of a project, to the point of it being inconsistent with the ESS's. Nonetheless, the Panel could hold the Bank accountable even in the absence of Borrower action, by utilizing other provisions. For example, even if the Borrower has not notified the Bank of a change in its framework, the Bank has affirmative obligations to monitor projects, which suggests that the Bank would have to assess the newly changed legislation at the monitoring stage if it impacted the project. Moreover, when combined with ESPP 17, ESPP 13 does not seem to transfer too much of the responsibility to the Borrower given the enumeration of the types of information the Bank must gather from the Borrower during the screening process.

This kind of qualification to the Bank's obligation-i.e., its dependence on prior action by the Borrower-is new under the Proposed Safeguards. Whereas other kinds of qualification outlined above, such as easily assessed factual contexts,[211] risk classification,[212] and general environmental and social risks[213] are already present in the current Safeguards, the Proposed Safeguards introduce Bank obligations that are dependent upon Borrower action. Under the current Safeguards, the Bank cannot evade responsibility for an affirmative duty by claiming that the Borrower has not acted or requested that action be taken. This point is best illustrated by a provision in country systems analysis, almost identical to the one referenced in the previous factual qualifiers section, except it does not place any onus on the Borrower.[214] The responsibility is on the Bank to identify changes in a state's legislation, as well as subsequently assessing if the difference will affect the project and how it should be reflected in the project requirements.

Temporal Qualifications. Temporal qualifications generally afford the Bank some flexibility in when to execute its responsibilities, which could conceivably affect the Panel's ability to hold the Bank accountable. For instance, ESP 16 mentions that projects must "meet the requirements of the ESSs *in a manner and a timeframe acceptable to the Bank...*"[215] (emphasis added). Similarly, ESP 18 provides that

If the project comprises or includes existing facilities or existing activities that do not meet the requirements of the ESSs at the time of approval by the Bank, the Bank will require the Borrower, as part of the ESCP, to adopt and implement measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of the ESSs *within a timeframe acceptable to the Bank.* In determining satisfactory measures and an acceptable timeframe, the

Bank will take into account the nature and scope of the project and the technical and financial feasibility of the proposed measures.[216]

These provisions, which both concern the central task of the Borrower fulfilling the ESS obligations, require the Borrower to comply at the discretion of the Bank. Therefore, even though the Bank must still comply with its affirmative obligations, if it chooses to do so over a prolonged period, the Panel must either hold the Bank accountable under other provisions, as specified in the previous section, or use the terms of each provision to argue that the chosen timeframe should not have been acceptable to the Bank.

Similarly, several responsibilities outlined in the ESPP contain the requirement to review on a regular basis.[217] While the word "regular" denotes a continuous responsibility, beneficial in guaranteeing that a project remains compliant with the ESS's and minimizes harm to affected communities throughout the project, the Panel is not given any indication of how often regular reviews must be conducted. It could be that even annual reviews might be considered regular, even if that extended time period allows for significant damage before the Bank intervenes.

The current Safeguards only rarely contain temporal qualifications, and they tend to be more limited than those in the Proposed Safeguards. For instance, BP 4.10 specifies, "Early in the project cycle, the task team leader (TTL) initiates a process to determine whether Indigenous Peoples (see OP 4.10, paragraph 4) are present in, or have collective attachment to, the project area." [218] As frameworks for respecting indigenous peoples must be included in the EA and other initial documents, however, this provision does not enable the Bank to avoid or prolong its duties. Even open-ended language such as "in a timely manner" appears to impose firmer constraints, such as "the Bank ensures that relevant project-related environmental and social safeguard documents . . . , including the procedures prepared for projects involving subprojects, are disclosed in a timely manner before project appraisal formally begins, in an accessible place and understandable form and language to key stakeholders" (emphasis added).[219] Hence, the timely manner must still be understood within a specific moment in the project. Therefore, the temporal qualifications, which are sparingly utilized in the current Safeguards, do not allow the Bank too great a degree of open-ended discretion to decide when to accomplish their affirmative obligations. These more stringent time requirements can be extremely beneficial to complainants as they can hold the Bank accountable for not fulfilling specific responsibilities without the Bank being able to counter that it still had time to execute them.

Potentially Objective. A further type of qualifying language renders the exact extent and scope of the Bank's obligations difficult to discern. A range of open-ended phrases such as "as necessary" or "where appropriate" fail to clarify what standard the Panel should use to identify whether something is necessary or appropriate. The standard could be read as being either objective, based on the context of the provisions and following the requirements, which have been used for similar projects, or it could be read as a subjective standard, based on what the Bank itself finds necessary or appropriate. The question is whether the Panel's task of holding the Bank accountable for non-compliance with the safeguards is made easier or more difficult by this ambiguity.

Certain responsibilities may be more susceptible to objective factual assessment. For instance, ESPP 35 notes: "[i]f a project is classified by the Bank as High Risk or Substantial Risk, the Bank's due diligence includes site visits by an environmental and/or social specialist, *as appropriate*" (emphasis added). It might be easier to decide whether a specific specialist is needed to assess a particular environment, than for example, whether the Bank should "*as and where required*, support the Borrower in carrying out early and continuing engagement and meaningful consultation with stakeholders, in particular affected communities, and in providing project-based grievance mechanisms." [220] While the Bank should presumably always aspire to foster communication with the potentially affected parties, it could be more difficult to determine when meaningful engagement is required. Both the Panel and the Bank would have to balance costs, accessibility, timeliness, and the importance of the project. Therefore, while the Panel may wish to give a more specific definition to the terms "appropriate and necessary," Bank Management may adopt a legitimate but differing interpretation

of the same words. The same issues and concerns arise under the current Safeguards in relation to this kind of language.[221]

To aid the Panel in its determination of the meanings of the terms, specifically when applied to particular Bank responsibilities, the provisions themselves sometimes contain descriptions of what to consider. For example, both ESP 29 and ESPP 32 contain similar language in their due diligence obligations, indicating that due diligence is "appropriate to the nature and scale of the project, and proportionate to the level of environmental and social/ ES risks and impacts." Additionally, ESP 53 and 57 specify that monitoring activities and grievance mechanisms "will be proportionate to the (environmental and social) risks and impacts of the project." Hence, the Panel can use the risk classification system to determine what level of activity and redress are needed for a particular project. The Panel can especially focus on the environmental or social issues implicated to determine what actions or preventative measures should be taken. ESPP 54 supports this idea in delineating specific actions necessary as "appropriate to the type and scope of the requirements," based on what makes sense for this particular project and what both parties have already committed to do based on the legal agreement, including the ESCP. The content of the ESCP seems particularly important in this regard. Therefore, the Panel could utilize these risk classifications and project documents to help determine what "necessary" or "appropriate" means, drawing on these objective sources to bolster its interpretation.

Self-Referential. Certain qualifying language appears to confer substantial discretion on the Bank in deciding whether and to what extent it should carry out an action, with such phrases as if "the Bank deems relevant"[222] or if "the Bank is not satisfied." [223] It is thus left completely to the discretion of the Bank whether the obligation should be completed or not. Although the Panel may use objective criteria to assess whether an ESS is relevant or a financial intermediary has adequate capacity, it will ultimately be assessing the Bank's discretionary decisions and it may be difficult for the Panel to second-guess the Bank in this regard. Self-referential language of this kind is similarly found within the current Safeguards.

Notes

- [130] One could argue that the verb "agree" also links the obligation of the Bank to that of the Borrower and thus merits similar consideration. However, the obligation born in those instances is a new one shared equally by the Bank and the Borrower. Here, the responsibility of the Bank is distinct from that of the Borrower.
- [131] Unlike the current safeguards, which merge Bank obligations with Borrower obligations, the current ESSs list very few Bank obligations. *See generally Environmental and Social Safeguards, Environmental and Social Framework* (2nd draft) (July 2015) (hereinafter *ESS*)
- [132] *Resolution, supra* note 1, ¶ 14.
- [133] *See, e.g., ESP, supra* note 11, ¶ 15 ("The Bank will require Borrower to conduct environmental and social assessment of projects proposed for Bank support in accordance with ESS1."); *id.* ¶ 16 ("The Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank...").
- [134] *Id.* ¶ 52 ("... the Bank will require the Borrower to obtain the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples when such circumstances described in ESS7 are present ... the Bank will require the Borrower to ensure that the project will not cause adverse impacts on such Indigenous Peoples"); *id.* ¶ 51 ("Where Indigenous Peoples are present in, or have a collective attachment to, the proposed project area, the Bank will require the Borrower to undertake a process of meaningful consultation tailored to Indigenous Peoples in accordance with ESS7.").
- [135] *See id.* fn. 29. (providing ESS7, paragraph 17 as a reference for defining the Borrower's obligation to undertake a process of meaningful consultation tailored to Indigenous People).
- [136] *See ESS1, supra* note 10, ¶¶ 3-11 (delineating the requirements that must be met under ESP 18). *It should be noted that these paragraphs never refer to the Bank itself.*
- [137] *See ESP, supra* note 11, ¶ 18.
- [138] *See id.*, ¶ 19.
- [139] *Id.* ¶¶ 12-13; *ESS8, supra* note 58, ¶¶ 8, 11-12.
- [140] *See ESP, supra* note 11, ¶¶ 23-24, 26-27; *See also ESPP, supra* note 77, ¶¶ 40, 42-45, 47-52.
- [141] *OP 4.00, supra* note 45, ¶ 2.
- [142] *Id.* at ¶ 3.
- [143] *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects*, Bank Procedure 4.00, ¶ 5 [hereinafter *BP 4.00*].
- [144] *ESPP, supra* note 77, ¶ 48.
- [145] *BP 4.00, supra* note 143, ¶ 5.
- [146] *ESPP, supra* note 77, ¶¶ 8, 10, 30-31.

- [147] The Bank's obligation to *assist* the Borrower appears numerous times throughout the OPs and BPs. *See, e.g., Forests*, Operational Policy 4.36, ¶2 [hereinafter *OP 4.36*]; *Physical Cultural Resources*, Operational Policy 4.11, ¶3 [hereinafter *OP 4.11*]; *BP 4.11*, *supra* note 43, ¶¶ 3, 5; *Natural Habitats*, Operational Policy 4.04, ¶8 [hereinafter *OP 4.04*]; *OP 4.09*, *supra* note 52, ¶ 7. Similar to the Proposed Safeguards, there are several examples of an obligation to *assist* with the preparation of tools for environmental and social assessment of projects. For instance, the Bank "assists the Borrower, as necessary, in drafting TORS for the physical cultural resources component of the EA." *Id.* ¶1.
- [148] ESP, *supra* note 11, ¶ 45.
- [149] ESP, *supra* note 11, ¶¶ 38, 55; ESPP, *supra* note 77, ¶ 39.
- [150] ESP, *supra* note 11, ¶ 56.
- [151] ESPP, *supra* note 77, ¶ 36; *id.* ¶ 37.
- [152] *Id.* ¶44.
- [153] *OP 4.10*, *supra* note 34, n. 14; *OP 4.12*, *supra* note 43, ¶ 30; *OP 4.01*, *supra* note 70, ¶ 19; *BP 4.10*, *supra* note 14, ¶12. For instance, "[T]he task team will agree on appropriate safety measures with the borrower . . ." (*Forests*, Bank Procedure 4.36, ¶ 9 [hereinafter *BP 4.36*]) and "the TT agrees with the borrower on a timetable for preparing and furnishing to the Bank the relevant resettlement instrument . . ." (*Involuntary Resettlement*, Bank Procedure 4.12, ¶ 8 [hereinafter *BP 4.12*]).
- [154] *BP 4.36*, *supra* note 153, ¶ 9.
- [155] *BP 4.12*, *supra* note 153, ¶ 8.
- [156] ESP, *supra* note 11, ¶¶ 36-37.
- [157] *Safety of Dams*, Bank Procedure 4.37, ¶ 4 [hereinafter *BP 4.37*]; *BP 4.10*, *supra* note 14, ¶¶ 8(e), 10, 12; *OP 4.00*, *supra* note 45, ¶ 7.
- [158] ESP, *supra* note 11, ¶39.
- [159] ESPP, *supra* note 77, ¶44.
- [160] *Id.*, ¶ 56.
- [161] *Id.* ¶ 57.
- [162] *BP 4.36*, *supra* note 153, ¶¶ 3, 4, 5, 6, 7, 8, 9, 10.
- [163] *BP 4.01*, *supra* note 36, ¶¶ 11, 20, 21, 22; *Id.*, Annex B, ¶ 4.
- [164] *Id.*, Annex A, ¶ 1.
- [165] *BP 4.11*, *supra* note 43, ¶¶ 7, 8, 18
- [166] *Id.* ¶ 15.
- [167] ESP, *supra* note 11, ¶ 21; ESPP, *supra* note 77, ¶ 28.

- [168] ESP, *supra* note 11 ¶¶ 24-25; ESPP, *supra* note 77, ¶¶ 36(a), 36(f).
- [169] ESP, *supra* note 11, ¶ 30; ESPP, *supra* note 77, ¶ 34.
- [170] ESPP, *supra* note 77, ¶¶ 15, 36(a), 36(f).
- [171] ESP, *supra* note 11, ¶¶ 34, 36, 39, 43.
- [172] *Id.* ¶¶ 43, 46.
- [173] *Id.* ¶¶ 54, 58.
- [174] ESPP, *supra* note 77, ¶¶ 54(a), 54(c), 54(d).
- [175] *OP 4.10*, *supra* note 34, ¶ 4; *OP 4.12*, *supra* note 43, ¶30.
- [176] *BP 4.01*, *supra* note 36, ¶ 5, 7, 11, 12, 15, 19, 21; *Id.*, Annex A, ¶¶ 3, 5.
- [177] *OP 4.37*, *supra* note 35, ¶ 6; *BP 4.37*, *supra* note 157, ¶¶ 5, 6, 8.
- [178] *BP 4.12*, *supra* note 153, ¶¶ 2, 9, 14.
- [179] *BP 4.11*, *supra* note 43, ¶¶ 7, 20, 10.
- [180] *OP 4.10*, *supra* note 34, ¶ 11.
- [181] ESP, *supra* note 11, ¶ 3(e); ESPP, *supra* note 77, ¶ 5(e); ESP, *supra* note 11, ¶ 38; *id.*, ¶ 44; *id.*, ¶ 53.
- [182] *Id.*, ¶ 38; *id.*, ¶ 44.
- [183] *Id.*, ¶¶ 53-56.
- [184] ESPP, *supra* note 77, ¶ 54.
- [185] ESP, *supra* note 11, ¶ 53.
- [186] *Investing Project Finance, Operational Policy 10.00*, ¶ 21 ("During Project implementation, the Bank *monitors* the Borrower's or the Project Participants' compliance, with its (or their) obligations as set out in the legal agreements with the Bank. The Bank also provides implementation support to the Borrower or the member country by reviewing information on implementation progress, progress towards achievement of the Project's development objectives and related results, and updates the risks and related management measures. Project implementation support and monitoring carried out by the Bank ends at the completion of the Project. However, monitoring carried out by the Bank of a Bank Guarantee continues until the Bank Guarantee Expiration Date . . .").
- [187] For the Bank's general monitoring and implementation support function, *see id.*, ¶¶ 19-21.
- [188] For examples of BPs with separate sections on "supervision," *see BP 4.11*, *supra* note 43, ¶¶ 17-18; *BP 4.12*, *supra* note 153, ¶¶ 14-17; *BP 4.37*, *supra* note 157, ¶¶ 11-13. Other references to "supervision" include: *BP 4.10*, *supra* note 14, ¶ 8(e) ("However, the TT supervises the preparation of the SA (see paragraph 6 of this BP), and the formulation of any IPPs and other instrument(s) and their implementation by the borrower"); *id.*, ¶12 (Separate

provision on Supervision); *BP 4.11*, *supra* note 43, ¶ 17-19 (supervision provisions); *OP 4.12*, *supra* note 43, ¶ 24 ("The Bank regularly supervises resettlement implementation to determine compliance with the resettlement instrument").

- [189] *Id.* (defining the complaints that a Panel may hear as having to demonstrate that "rights or interest have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its *operational policies and procedures* . . .").
- [190] *Cf.* Office of the High Commissioner for Human Rights, Letter dated Dec. 12, 2014 from U.N. Special Rapporteur on Extreme Poverty and Human Rights addressed to the President of the World Bank (noting that the vague language of the proposed ESF generally creates difficulties for both the requestor and the Panel because it renders defining and evaluating a violation more burdensome) [hereinafter OHCHR Letter] While this conclusion refers primarily to the obligations' lack of detail, the same concerns also arise wherever the obligation actively generates imprecisions, whether through word-choice, sentence structure, or discretionary clauses.
- [191] ESP, *supra* note 11, ¶ 20.
- [192] *Id.* ¶ 28.
- [193] *Id.* ¶ 51.
- [194] *Id.* ¶ 38.
- [195] *See, e.g., id.*, ¶ 24 ("The use of Borrower's ES Framework *will be determined at the discretion of the Bank.*")
- [196] *See, e.g.,* ESPP, *supra* note 77, ¶ 17 ("The TT [a component of "the Bank"] *gathers* sufficient informational regarding the project to enable the TT to: (1) identify key ES risks and impacts . . . (2) propose a project risk classification; (3) consider the most appropriate type of ES assessment to be conducted by the Borrower . . . (4) identify and assess details of the Borrower's ES Framework and possible gaps . . ."); *see also* ESP, *supra* note 11, ¶ 9 (" . . . *the Bank will cooperate* with such agencies and the Borrower in order to agree on a common approach for the assessment and management of environmental and social risks and impacts of the project. A common approach *will be acceptable to the Bank*, provided that such approach will enable the project to achieve objectives materially consistent with the ESSs. *The Bank will require* the Borrower to apply the common approach to the project.") *contra* ESPP, *supra* note 77, ¶ 38 ("If the risk rating of a subproject increases to a higher risk rating, the Borrower will apply relevant requirements of the ESSs in a manner *agreed with the Bank*. The measures and actions agreed will be included in the ESCP, and will be monitored by the Bank.").
- [197] *See, e.g.,* *OP 4.04*, *supra* note 147, ¶ 9 ("The Bank *encourages* borrowers to incorporate into their development and environmental strategies analyses of any major natural habitat issues . . .") (emphasis added); *See also id.*, ¶ 10 ("The Bank *expects* the borrower to take into account the views, roles, and rights of groups . . . affected by Bank financed projects involving natural habitat . . .") (emphasis added).
- [198] *OP 4.36*, *supra* note 147, ¶ 12. It should be noted that this option is conditional on the fact that the operations either have achieved a standard of forest management consistent with certain World Bank principles or adhere to a plan aimed at achieving those principles. For more examples, *see id.*, ¶ 13.
- [199] *OP 4.37*, *supra* note 35, ¶ 9.

- [200] *OP 4.01, supra* note 70, ¶ 12. For more examples, *see OP 4.09, supra* note 52, ¶ 4 ("The Bank *may* finance the purchase of pesticides *when their use is justified under an IPM approach.*") (emphasis added); *OP 4.01, supra* note 70, ¶ 5 ("The Bank may, if appropriate, require additional EA work, including public consultation and disclosure.").
- [201] *See, e.g., OP 4.37, supra* note 35, ¶ 13 ("To ensure that completed dams are inspected and maintained satisfactorily, Regional staff may carry out supervision beyond the closing date of the project, either during work to follow up projects or during specially scheduled supervision missions.").
- [202] ESPP, *supra* note 77, ¶ 51; *but see* ESP, *supra* note 11, ¶ 51 (allowing the Bank to choose to "follow the Borrower's framework for the identification of Indigenous Peoples during project screening, *when that framework is consistent with this Policy*") (emphasis added).
- [203] ESPP, *supra* note 77, ¶ 16.
- [204] ESP, *supra* note 11, ¶ 32.
- [205] ESPP, *supra* note 77, ¶ 21 ("The Bank allocates its resources, and provides corporate oversight and operational support to a project, *in accordance with the risk classification of the project.* ") (emphasis added).
- [206] ESP, *supra* note 11, ¶ 42 ("The Bank may require the FI to adopt and implement additional or alternative environmental and social requirements, *depending on the environmental and social risk and impacts of the potential FI subprojects and the sectors in which the FI is operating.*") (emphasis added).
- [207] ESPP, *supra* note 77, ¶ 33.
- [208] *See id.* ¶ 16 ("The TT undertakes an initial review of the Borrower's ES Framework specific to the project *upon Borrower request.*") (emphasis added).
- [209] *See id.* ¶ 13 ("The TL assembles a TT for the proposed project. The TT screens the proposed project to identify, *with the available information*, the key ES risks and impacts and capacity issues associated with the project. The initial screening of potential ES risks and impacts is based on an examination of the type, sector, location, sensitivity and scale of the proposed project, and the nature and magnitude of its potential ES risks and impacts. ") (emphasis added).
- [210] *See id.* ¶ 48 (" *Where the Bank has been notified by the Borrower of a significant change in the Borrower's ES Framework that may adversely affect the project*, the Bank assesses the extent to which the change is inconsistent with the ESSs and the ESCP and discusses with the Borrower ways to address the change, and agree on any additional actions and measures that may be required. ") (emphasis added).
- [211] *See OP 4.09, supra* note 52, ¶ 5. (" *In Bank financed public health projects*, the Bank supports controlling pests primarily through environmental methods. Where environmental methods alone are not effective, the Bank may finance the use of pesticides for control of disease vectors.") (emphasis added).
- [212] *See OP 4.01, supra* note 70, ¶ 11. ("If the Bank is not satisfied that adequate capacity exists for carrying out EA, all Category A subprojects and, as appropriate, Category B subprojects including EA reports are subject to prior review and approval by the Bank.") (emphasis added).
- [213] *See OP 4.00, supra* note 45, ¶ 5. ("The Bank is responsible for determining the equivalence and acceptability of borrower systems, and for appraising and supervising pilot projects that use these systems. The Bank carries out its

responsibility, including supervision of borrower implementation practices, track record, and capacity, *in a manner proportional to potential impacts and risks.*") (emphasis added).

- [214] *See id.* ¶ 6. ("Changes in Borrower Systems and Bank Remedies. If, during project implementation, there are changes in applicable legislation, regulations, rules or procedures, the Bank assesses the effect of those changes and discusses them with the borrower. If, in the judgment of the Bank, the changes reflect a further improvement in the country systems, and if the borrower so requests, the Bank may agree to revise the legal framework applicable to the operation to reflect these improvements, and to amend the legal agreement as necessary. Management documents, explains, and justifies any changes to such framework, and submits them for Board approval (normally on an absence of objection basis). If the country system is changed in a manner inconsistent with the legal framework agreed with the Bank, the Bank's contractual remedies apply.").
- [215] *See* ESP, *supra* note 11, ¶ 16 ("The Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs *in a manner and a timeframe acceptable to the Bank*. In establishing the manner and an acceptable timeframe, the Bank will take into account the nature and significance of the potential environmental and social risks and impacts, the timing for development and implementation of the project, the capacity of the Borrower and other entities involved in developing and implementing the project, and the specific measures and actions to be put in place or taken by the Borrower to address such risks and impacts. .") (emphasis added).
- [216] *Id.* ¶ 18
- [217] *See* ESPP, *supra* note 77, ¶ 28 ("The Bank reviews the risk classification on a *regular* basis throughout the project life-cycle in order to ensure that it continues to reflect accurately the level of risk the project presents...") (emphasis added); *see also id.*, ¶ 54. ("In accordance with OP/BP 10.00, the Bank carries out *regular* reviews of the Borrower's compliance with the ES requirements relating to the project, as set out in the legal agreement, including the ESCP..") (emphasis added).
- [218] BP 4.10, *supra* note 14, ¶ 3.
- [219] OP 4.00, *supra* note 45, ¶ 7.
- [220] ESPP, *supra* note 77, ¶ 5 (emphasis added). Other examples of the use of the vague terms appropriate and necessary include ESP, *supra* note 10, ¶ 7, 30, 39; ESPP, *supra* note 77, ¶¶ 15, 31.
- [221] "As appropriate" is found in BP 4.11, *supra* note 43, ¶ 14; BP 4.36, *supra* note 153, ¶¶ 6-7 and OP 4.00, *supra* note 45, ¶ 5. "As necessary" is found in BP 4.01, *supra* note 36, ¶ 7; *Natural Habitats*, Bank Procedure 4.04, ¶ 1 [hereinafter BP 4.04]; BP 4.36, *supra* note 153, ¶ 2; OP 4.09, *supra* note 52, ¶ 2.
- [222] *See* ESP, *supra* note 11, ¶ 35 ("The Bank will require the Borrower to carry out appropriate environmental and social assessment of: ... (b) *Substantial Risk, Moderate Risk and Low Risk* subprojects, in accordance w/ national law and any requirement of the ESSs *that the Bank deems relevant to the subproject.*") (emphasis added).
- [223] *See id.* ¶ 43 ("Where the FI is classified by the Bank as High Risk or Substantial Risk and *the Bank is not satisfied that adequate capacity exists for categorizing*, carrying out environmental and social assessment or reviewing the results of environmental and social assessment, all FI subprojects that involve resettlement (unless the risks or impacts of such resettlement are minor), adverse risks or impacts on Indigenous Peoples or significant risks or impacts on the environment, community health, biodiversity or cultural heritage will be subject to prior review and approval by the Bank.") (emphasis added).