NOTES

Safeguard Reforms at the World Bank: Mutual Accountability or a Race to the Bottom?

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ABSTRACT

The World Bank has long been a leader in development finance, pioneering innovative accountability mechanisms, and fostering the values of sustainable development. The Bank has recently adopted a new Environmental and Social Framework stressing the use of Borrowers' domestic legal and regulatory frameworks, referred to as "Country Systems." The Bank has also made a point of prioritizing outcomes, rather than simply process compliance. The adoption of the new Framework and the shift away from mandatory use of the Bank's own safeguards represent a serious shift in approach for the Bank. This Note looks at the changes to the safeguards and the internal and market pressures that brought them about. It analyzes the new system in the context of prior cases at the Bank and the Bank's own internal reporting and Inspection Panel investigations, and it discusses several areas in which the Bank has weakened its ability to influence Borrowers and hold staff accountable.

The Bank has an opportunity for clarification, particularly regarding timelines for meeting agreed benchmarks and monitoring programs. Furthermore, the Inspection Panel must act decisively to assert its continued jurisdiction in the face of a decreased role for the Bank in regulating projects, vague language, and greater flexibility for Bank staff. The Panel's role in this new Framework will likely be to ensure the Bank's initial assessment of Country Systems is done in a conservative and realistic fashion. Recent cases are encouraging that both the Panel and the Board continue to take the Bank's safeguards and best practices seriously, mitigating potential negatives of the new Framework.

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INTRODUCTION

After a four-year process of consultation and editing, the World Bank's board of directors approved the third draft of the *Environmental and Social Framework* (ESF) in 2016.[1] Today, the new framework is live and applicable to all new investment project-financing endeavors.[2] According to the Bank, the major goal of the new Environmental and Social Framework is to allow for greater flexibility for staff and Borrower countries, to build capacity of borrowing countries to create and meet their own safeguard standards, and to allow for less front-loading of the compliance process in favor of involvement throughout the life of project.[3] The new ESF included exciting language on previously unaddressed topics including labor, discrimination, and disability rights, but has had a mixed reception amongst stakeholders.[4] Many non-governmental organizations believe that the framework is a dilution of Bank standards and see a deeply troubling lack of clarity regarding responsibilities for both borrowing countries and the Bank itself.[5]

However, the Bank has strong reasons to support a shift toward a more flexible and less prescriptive regime. The World Bank has been under pressure to retain its primacy in the development lending market because newer outfits like the Asian Infrastructure Development Bank do not always adhere to the same stringent standards and may therefore be more attractive to some Borrowers.[6] At the same time, the *Paris Declaration on Aid and Effectiveness* and the Accra Convention have both evinced an emerging global preference for borrowing countries to take more ownership of development projects and for "alignment of

1. World Bank Grp., *Environmental and Social Framework* (August 4, 2016), https://perma.cc/VT5K-8LDZ [Hereinafter ESF].
2. World Bank Grp., *World Bank Environmental and Social Policy for Investment Project Financing*, *in* ESF, supra note 1, at 3.
3. World Bank Grp., *World Bank Approves New Environmental and Social Framework* (August 4, 2016), https://perma.cc/YUP7-FQN9.
4. *World Bank: Dangerous Rollbacks to Environmental and Social Policy*, INCLUSIVE DEVELOPMENT INTERNATIONAL (August 4, 2015), https://perma.cc/X4CF-KGCA.
5. *Id*.
6. *IDI submits comments to Asian Infrastructure Investment Bank on Draft Safeguards*, INCLUSIVE DEVELOPMENT INTERNATIONAL (Oct. 30, 2015), https://perma.cc/NEU9-JYZR (registering concerns about the proposed consultation process).

aid with partner countries' priorities, systems and procedures."[7] The belief is that development outcomes will improve if there is greater ownership and capacity building on the ground in Borrower countries.

Although not perfect, the World Bank has long led the charge in rights-based developments, and its safeguards have historically been the benchmark for development accountability. Where the World Bank goes, other institutions follow. This Note will address practical issues with the new framework and will discuss whether its goals are truly in the best interest of development or if they are more in line with a troubling "race to the bottom" mentality. Part I outlines the structure of the new Environmental and Social Framework as well as some criticisms surrounding it. Part II examines how the new ESF will likely be applied to projects in light of the difficulties the Bank has outlined in Inspection Panel reports and its briefing on the Use of Country Systems pilot programs. Finally, Part III analyzes what the new framework could mean for the Inspection Panel and possible paths the Panel and the board can take to mitigate any negative effects the Framework may have on Bank standards and performance.

I. THE NEW ENVIRONMENTAL AND SOCIAL FRAMEWORK (ESF)

The new ESF is made up of three major parts: the *Vision for Sustainable Development*, outlining the Bank's environmental and social goals, the *Environmental and Social Policy for Investment Projects (ESPIP)*, stating the Banks mandatory requirements, and ten *Environmental and Social Standards* detailing Borrower responsibilities.[8] The ESF also contains instructions to Bank staff on due diligence and risk management, contained in the *Bank Directive: Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups*.[9] Notable shifts in the new ESF include broader stakeholder engagement and information disclosure protocols, much greater reliance on Borrower's domestic legal and regulatory frameworks—their "Country Systems," and a focus on implementation and involvement throughout the life of the project, rather than voluminous front-end compliance before disbursement of funds.[10] The Bank believes that these new shifts will allow for both better capacity building and autonomy on the part of borrowing countries, but also better and more efficient outcomes for their lending.[11]

The new ESF clearly delineates the requirements of the Bank and Borrower, with a strong shift toward Borrower ownership and less control by the Bank. This is clear from the structure of the new framework, but it is also evinced by subtle

7. *See The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action*, OECD (2005/2008), https://perma.cc/6J4S-SXJG.
8. ESF, *supra* note 1, at 3.
9. *Id.* at 5.
10. *World Bank Approves New Environmental and Social Framework*, WORLD BANK (August 4, 2016), https://perma.cc/A2YL-T539.
11. *Id.*

shifts in language. For example, under the old safeguards, the Bank was required to "ensure" that acceptable environmental assessments were carried out by the Borrower according to Bank policies and using acceptable, "recognized" professionals.[12] The new ESF largely replaces the word "ensure" in the environmental context with "require," a language change noted by both Human Rights Watch and the Inspection Panel as possibly problematic.[13] Arguably, an obligation to *ensure* means that the Bank is required on an ongoing basis to make sure the task is completed satisfactorily, while *require* could simply mean that the Bank and Borrower must check a box before proceeding.[14]

Upon release of the final draft of the Framework, nineteen Separate NGOs voiced concerns regarding changes weakening protections for the environment and affected communities.[15] Jessica Evans, senior advocate and researcher on international financial institutions at Human Rights Watch, said "[t]he draft treats human rights as merely aspirational, rather than binding international law" and the new language and approach "sends a message to its [Bank] staff that respect for rights is discretionary."[16] Similarly, Rayyan Hassan of the NGO Forum on ADB found that there was "a clear intent to push responsibility to potentially weak and inadequate Borrower systems while eliminating the Bank's mandatory due diligence requirements"[17] The World Bank's safeguards compared negatively, in Mr. Hassan's view, with those of the Asian Development Bank:

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12. World Bank Grp., *BP 4.01- Environmental Assessment* ¶ 1 (Annex A, Jan. 1999) ("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. . . ."); *see also id.* at ¶ 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.").

13. *See* World Bank Grp., *Inspection Panel Comments on the Second Draft of the Proposed Environmental and Social Framework*, ¶ 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: World Bank's Second Draft Environmental and Social Framework*, at 1-2 (Oct. 2015).

14. Cristina Passoni et al., *Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards*, 49 N.Y.U. J. INT'L L. & POL. 921, 957–58 (2017)

15. *World Bank: Dangerous Rollbacks to Environmental and Social Policy*, INCLUSIVE DEV. INT'L (Aug. 4, 2015), https://perma.cc/F7SX-AZ64. The independent environmental and human rights groups are: 11.11.11. (Belgium), Alyansa Tigil Mina (Philippines), Bank Information Center (USA), Both ENDS (Netherlands), Bretton Woods Project (United Kingdom), Center for International Environmental Law (USA), Derecho Ambiente y Recursos Naturales (Peru), Forest Peoples' Program (UK), Earthlife Africa (South Africa), NGO Forum on ADB (Philippines/Regional), Gender Action (USA), Human Rights Watch (International), Inclusive Development International (USA), International Accountability Project (USA). International Trade Union Confederation, Oxfam International, Re:Common (Italy), 'Ulu Foundation (USA), Urgewald, (Germany).

16. *Id.*

17. *Id.*

> The ADB requires 120 days of public comment on all Environmental Impact Assessments, which has been removed in the World Bank's new ESF. The ADB must approve all category A subprojects among Financial Intermediaries, a requirement absent from the WB ESF. The ADB safeguards are a result of decades of mass social movements across Asia in response to harm to communities and the environment in the absence of mandatory safeguards. This current dilution of the WB standards jeopardizes communities and the environment across Asia and sends the wrong signal to all IFIs about safeguard standards.[18]

Concerns among civil society groups center around what they see as a step backwards toward an ill-advised flexibility, particularly in the use of Borrower's own legal systems.[19] Many worry that Borrowers and third party intermediaries will not be as stringent as the World Bank when it comes to issues like indigenous populations and climate change.

These concerns are not baseless, as the Bank has previously experimented with Country Systems and reported results some saw as having "serious risks and unclear benefits."[20] The Country Systems Pilot began in 2005 and authorized the use of "Country Systems"—or the legal frameworks already in place in the country—on "low risk" projects. Operational Policy 4.00, "Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects," governed the use of Country Systems. Pursuant to OP 4.00, the Bank conducted safeguard diagnostic reviews in each country to determine the equivalency between Bank policies and the country's existing legal frameworks, which involved "(1) determining equivalence of the Borrower system to the Safeguard-based, operational principles in OP 4.00 Table A1, (2) determining acceptability of the Borrower's implementation practices, track record, and capacity, and (3) 'gap filling' where equivalence or acceptability fell short."[21] The Bank views these changes as necessitated by the "larger context of the times we live in, growing Borrower capacity, and evolving understanding about the necessary policy changes to make Bank lending more efficient, effective, and relevant."[22] The Bank wrote in an internal report that it intends to "catalyze a major shift away from front-loading (project preparation) to back loading (project supervision) and to rely on the use of Country Systems to do so."[23] This implies, troublingly, that the board will be approving projects and disbursing funds after a

18. *Id.*
19. Passoni et al., *supra* note 14, at 924.
20. ERIKA ROSENTHAL, CTR. FOR INT'L ENVTL. LAW, THE USE OF COUNTRY SYSTEMS IN WORLD BANK LENDING: A SUMMARY OF LESSONS FROM THE PILOT PROJECTS AND RECOMMENDATIONS FOR A BETTER APPROACH 1 (2008), https://perma.cc/A6CC-L3LW.
21. QUINTERO ET AL., WORLD BANK GRP., USE OF COUNTRY SYSTEMS FOR ENVIRONMENTAL SAFEGUARDS (2011).
22. *Id.* at 2.
23. *Id.*

much less burdensome disclosure process, with the intention that the Bank and Borrower would mitigate problems that arise after the project has begun. What leverage the Bank will have to enforce this after they have approved disbursement of funds and the project is underway is unclear.

Although there is considerable support for this model's goals of building capacity and ownership in developing countries, even where borrowing countries are highly motivated, the road to building capacity is long and difficult. The consequences of such a shift will necessarily be that, despite best intentions, adherence to international standards will decrease, and the resulting effects on the environment in particular could be dramatic. Take, for example, the government of Vietnam's work to "localize" the Paris Declaration on Aid Effectiveness.[24] In 2005, Vietnam passed a new environmental law on impact assessments and has worked steadily to meet international standards. Although the ADB found in 2010 that Vietnam's framework was sixty-two percent equivalent to their own safeguards, "implementation of the legal framework remains a challenge . . . enforcement power is limited and there is little implementation capacity at the local levels."[25] Although lauded as one of the first countries to proactively work to institute the goals of the Paris Declaration, even after a decade the reality on the ground is not in line with Asian Development Bank standards, and actual enforcement at the local project level is even more questionable.[26]

Regarding climate protection specifically, the Bank has made some troubling changes to the safeguards that could have serious consequences for climate change and environmental degradation. The new ESF only explicitly protects biodiversity, and its new ESS6 approves the use of "biodiversity offsets" which receive criticism from many, including the United States, as having questionable benefits as well as being difficult to design and implement.[27] The Bank has moved thresholds for Greenhouse Gas Emissions into the non-binding guidance section, which would allow countries to opt out of these requirements.[28] Similarly, estimates of emissions, offsets of negative effects, and pollution mitigation only need to be undertaken to the extent "technically and financially feasible."[29] Coupled with a new reliance on Borrower frameworks, and no requirement for the Bank to do its own independent review, this is likely to result in dangerously inaccurate environmental assessments and rampant non-adherence to the Paris

24. Gaia Larsen & Athena Ballesteros, *Striking the Balance: Ownership and Accountability in Social and Environmental Safeguards*, WORLD RESOURCES INSTITUTE (2014).

25. *Id.*

26. *Id.*

27. U.S. Dep't of the Treasury, U.S. Position on the Review and Update of the World Bank's Safeguard Policies (August 4, 2016) [hereinafter U.S. Position].

28. *World Bank: Dangerous Rollbacks to Environmental and Social Policy*, supra note 15.

29. World Bank, *Environmental and Social Standard 3, Resource Efficiency and Pollution Prevention and Management*, *in* ESF, *supra* note 1, at 61.

Accord on Climate Change.[30] In response to these criticisms, the Bank has responded that they are "not engaged in the enforcement nor the monitoring of the Paris Accord."[31] This is surely true, but as the links between development and environmental sustainability continue to strengthen, the Bank's unwillingness to commit itself and its funds to the highest possible environmental standards could have ruinous consequences.[32]

II. IMPLEMENTATION OF THE NEW FRAMEWORK

A dip in adherence to international standards on sustainability might be justifiable if the approach were practical and had a strong likelihood of building capacity for Borrowers over the long term. There are major reasons for concern on this score. Aided by the some recent case examples, this section will attempt to assess how the new framework will actually function through each stage of the project, focusing specifically on: (A) risk assessment and due diligence, (B) mitigation planning, (C) supervision and evaluation, and (D) the Bank's "culture of approval."

A. RISK ASSESSMENT AND DUE DILIGENCE

Under the new ESS1, the Borrower is responsible for identifying risks and possible impacts of a proposed project by performing their own environmental and social assessment.[33] The assessment will utilize "social baseline data at an appropriate level of detail sufficient to inform characterization and identification of risks and impacts and mitigation measures."[34] The Borrower then proposes strategies to mitigate and avoid potential issues, using tools and methods negotiated with the Bank on a case-by-case basis, proportionate to the scale and perceived riskiness of the proposal.[35] The framework explicitly directs Borrowers to account for issues like land use, displacement of populations, and effects on the food supply, but Borrowers may be incentivized to skirt these requirements by defining their projects narrowly and avoiding full assessments of possible downstream effects—particularly in large scale projects with complicated environmental issues.[36]

The Bank is required by the ESS to perform due diligence; it is *not* required to seek third party opinions or contact project-affected people directly.[37] Further,

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30. *World Bank Releases Revised ESF Guidance Notes for Borrowers*, BRETTON WOODS PROJECT (July 24, 2018), https://perma.cc/2BZE-M7E5.

31. *Id.*

32. *Id.*

33. World Bank, *Environmental and Social Standard 1, Assessment and Management of Environmental and Social Risks and Impacts*, *in* ESF, *supra* note 1, at 23–49.

34. *Id.* at 30.

35. *Id.*

36. *Id.*

37. *See* ESF, *supra* note 1 at 29-30.

the Bank's due diligence requirement is cabined by the qualifying language "proportionate to the nature and potential significance of the environmental and social risks and impacts related to the project."[38] The vagueness of this requirement sets Bank staff up to look the other way, if they choose, to move a project through the due diligence phase.

The sparseness of this policy is interesting given the history of problems the Bank has experienced where assessments have been incomplete or inaccurate. For example, during a Bank project to regulate logging concessions in the Democratic Republic of Congo (DRC), the Inspection Panel found that the assessment of environmental impacts and affected populations had completely omitted the possible effects of logging concessions on pygmies, an indigenous group living in the forests where the logging was taking place.[39] Logging concessions threatened not only to destroy the pygmies' way of life, but also represented a lack of understanding by the Bank as to the true value of the forest.[40] While logging stood to create revenue of around 160 million per annum, the total annual value of non-timber products and resources, including firewood, bush meat, forest fruit, honey, and medicinal plants, was estimated to be over 2 billion.[41] This and other facts were missing from initial assessments of the project, and the project was improperly categorized as not having significant environmental or social impacts, despite the existence of indigenous populations and the fact that a significant component of the project included logging concessions.[42] The Panel found that the assessments had been incomplete and better due diligence needed to occur early in the project, as "a safeguard postponed at the design and appraisal stage of a project may become an unapplied measure."[43]

The misclassification and general lack of due diligence in the DRC case shows how risky leaving assessments of this kind up to the Borrower could be. Although the Borrower is required under the ESF to conduct "meaningful" consultations with effected groups, their incentive to do so may be low and the groups themselves have little agency in such discussions.[44] The Inspection Panel advocates for early involvement from third-party, international experts and for initial assessments to be done before the project gets developed too far because the "benefits of undertaking an alternatives analysis are questionable if completed only to validate a preselected technology, siting, or project design."[45] The new

38. *Id.*

39. *See* WILLY LYOMBO & ADRIEN SINAFASI, THE INDIGENOUS PEOPLES OF THE DRC, STORY OF A PARTNERSHIP 85–86, 88 (2017) (booklet produced in cooperation with the World Bank Inspection Panel).

40. *See id.* at 85, 89.

41. *Id.*

42. *See* WORLD BANK GRP. INSPECTION PANEL, EMERGING LESSONS SERIES NO. 3: ENVIRONMENTAL ASSESSMENT 6 (2017) [hereinafter EMERGING LESSONS NO. 3].

43. LYOMBO & SINAFASI, *supra* note 39, at 88.

44. *See* ESF, *supra* note 1, at 9.

45. EMERGING LESSONS NO. 3, *supra* note 42, at 7, 9.

emphasis on shifting away from "front-loaded" due diligence requirements subverts this, and, coupled with a focus on Borrower-driven assessment, the risk of confirmation bias is extremely high.

B. MITIGATION PLANNING

Similar to the initial risk assessments, the Borrower is tasked with proposing mitigation strategies, again heavily emphasizing the use of the borrowing country's laws where the Bank believes outcomes will be "materially consistent" to those achieved using its own safeguards.[46] This is arguably a downgrade from the requirements imposed during the Country Systems Pilot, which required "equivalence" to the Bank's policies.[47] The Bank anticipates that "much of the environmental and social assessment will be conducted pursuant to national requirements."[48] The Borrower is to "prepare and implement projects so they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank."[49] The lack of temporal requirement other than "timeframe acceptable to the Bank" raises questions as to how broad Bank staff's discretion will be in deciding how and when project requirements ought to be met. In its analysis of the Bank's environmental assessment policies, the Inspection Panel has stressed the importance of early and extensive involvement by experts, both to ensure consideration of viable alternatives before the project becomes entrenched and to ensure "timely integration of social and environmental issues."[50]

The Borrower and Bank also agree on an Environmental and Social Commitment Plan (ESCP), which sets out how the project will comply with the Bank's Environmental and Social Safeguards.[51] Encouragingly, Bank and Borrower complete the ESCP before project appraisal, and include full explanations of the borrowing countries expected mitigation plans (such as resettlement of displaced populations or remedying possible environmental damage).[52] However, the ESF also explicitly provides for an "adaptive management process" to be included in the ESCP, which will lay out how the Borrower and the Bank will go about addressing possible unforeseen circumstances and changes to the project.[53] This is all part of the Bank's effort to decrease "front-loading," but it could also encourage Borrowers to skate over amorphous issues like downstream effects in the initial assessments, knowing that they will be able to renegotiate with the Bank once the project has begun and the money has started to flow.

46. *See* ESF, *supra* note 1 at 6.
47. Dr. Natalie Bugalski, *The Demise of Accountability at the World Bank?*, 31 AM. U. INT'L L. REV. 1, 18 (2016).
48. *Id.*
49. *Id.*
50. EMERGING LESSONS NO. 3, *supra* note 42, at 9.
51. *See* ESF, *supra* note 1, at 19.
52. *Id.*
53. *Id.*

Timing is also problematic in terms of how the Bank will enforce its agreements with Borrowers once it disburses funds. Although the Bank agrees in advance with Borrowers as to what "gap fillers" will be necessary for the project, once the project has begun the only real leverage the Bank can use to force compliance is withdrawal of funds, an extreme option the Bank does not deploy often. Although this was an issue in the prior framework, this new focus on using Country Systems places the Bank in the uncomfortable position of enforcing adherence not to its own safeguards, but to domestic law. Development projects can be highly political situations, especially in the case of environmental and social issues, and while trying to be more flexible and less "prescriptive," the Bank may actually place itself in the awkward position of telling governments what their own laws require. This is a much more invasive stance than simply enforcing the Bank's own safeguards pursuant to a contract. This could be a worthwhile growing pain if it would assist in building capacity for the long term in Borrower countries, but because the gap-filling and oversight will be project specific, it is not clear that Borrowers will have much incentive to apply the Bank's interpretation going forward. This is particularly questionable when they know each project will be negotiated anew and Bank staff are heavily incentivized to make projects happen, an issue discussed further below.

It is also worth noting that because the bedrock of the new ESF is still the Bank's decades of experience and research on best practices, Country Systems the Bank finds acceptable will be essentially the same as Bank standards. Conversely, on projects where the Bank finds there is low capacity and has to institute extensive gap-filling measures, achieving the objectives "is almost the same as just applying Bank systems."[54] In this new system, therefore, the Bank will still always be enforcing essentially its own safeguards, just on shakier ground. The Bank's policy says that only projects "expected to meet the requirements of the ESS in a manner and within a timeframe acceptable to the Bank" will be approved, but it is easy to see how riskier projects will be approved, only for their true colors to become apparent after the Bank has signed on the dotted line.

C. "OUTCOME ORIENTED" SUPERVISION AND EVALUATION

Once the ESCP and the project have been approved, the Bank and the Borrower work to ensure that the goals enunciated in the ESCP are achieved. The text of the ESF suggests that the ESSs are no longer directly applicable and the negotiated ESCP takes primacy.[55] The Bank's stated goal for the new ESF was to increase efficiency at the front end to increase monitoring and supervision, but the new guidelines again use vague language and do not clarify explicitly

54. QUINTERO, *supra* note 21, at 39.
55. *See* ESF, *supra* note 1, at 19.

how they intend to monitor Borrower projects.[56] Supervision will be "proportionate to the potential environmental and social risks and impacts," meaning Bank staff could possibly do as little as simply read reports from the Borrower should they believe the risk is low enough.[57] There is nothing in the ESF suggesting funds will be spent to assess projects independent of the Borrower's own reporting or that the Bank will ensure greater cooperation than already exists in the old framework.

Similarly, assessment of outcomes is based entirely upon the goals set down in the ESCP, a quantitative analysis that does advance the Bank's goal of being "project-oriented" but that—because of structural weakness discussed above—may not produce better outcomes in a *qualitative* sense. So long as the ESCP has been fulfilled, the Bank has broad discretion as to whether it will deal with any unforeseen environmental or social issues. The ESF states that "the Bank will determine whether further measures and actions . . . will be required."[58] Particularly in the case of large projects with potentially broad downstream environmental effects, this focus on simply fulfilling the ESCP—a document produced mostly by the Borrower at the beginning of project—is unlikely to fully capture the effects on the ecosystem at large.

D. THE BANK'S "CULTURE OF APPROVAL"

The new ESF is not in line with the lessons of the Bank's prior experience, as evidenced in its internal reports and Inspection Panel documents. The Inspection Panel has repeatedly noted that the Bank has experienced negative outcomes when Borrower capacity is not properly assessed; for example, the Panel's investigation in the Chad-Cameroon Pipeline Project found that a lack of thoroughness in developing the Environmental Management Plan had negatively affected the project.[59] The Borrower had been tasked with creating the document and had not been adequately supported, despite the fact that "the lack of Borrower capacity to prepare this document was evident."[60] Failures early on translate to increased difficulty with mitigation. As the Panel noted in reference to a South African project, "instances of non-compliance likely weakened the ability of the project to take effective steps to minimize or avoid impacts."[61]

The shift to increased flexibility and discretion—although "based on internal pressure from staff and external pressure from Borrowers"—does not logically connect to better outcomes when it comes to environmental and human rights problems.[62] This is particularly true when dealing with the World Bank's client

56. U.S. Position, *supra* note 27, at 4.
57. *See* Bugalski, *supra* note 47, at 29 (discussing the Bank's operational Manual)
58. *See* ESF, *supra* note 1, at 53.
59. EMERGING LESSONS NO. 3, *supra* note 42, at 12–13.
60. *Id.*
61. *Id.*
62. QUINTERO, *supra* note 21, at 2.

portfolio, which includes countries notorious for human rights violations like China, Ethiopia, and Nigeria.[63] For a structure of this kind to adequately maintain the high standards the Bank aspires to, management would need to inculcate a deep belief in the importance of sustainability and adherence to safeguards in all staff. The general tone of the Bank does not necessarily foster this.[64] Many employees take a very utilitarian view of development—believing that adverse impacts ought to be avoided, but that big-picture development is served by large scale projects, and fear of local impacts need not stand in the way of making loans. Staff—particularly country teams—are heavily incentivized to meet lending quotas and bring in big projects.[65] Indeed, it is the input of staff (along with pressure from Borrowers) that has brought this new ESF into being.[66] The motivation of both of these groups, although not ill-intentioned, is almost certainly to fast-track projects, not to be cautious and judicious.

III. CONCERNS AND STRATEGIES FOR THE INSPECTION PANEL

The Inspection Panel, if it can navigate the politics of instituting this new framework effectively, is accountability's best hope. At its founding in 1993, the Inspection Panel was a radical step towards accountability, and it has been an important part of the Bank's safeguards ever since[67] The Inspection Panel is an independent grievance mechanism, which responds to complaints from project-affected people and assesses whether the Bank has adhered to its policies and procedures. When two or more people bring a "request for Inspection" to the Panel, the Panel considers the alleged harms and makes a recommendation to the board on whether or not to authorize an investigation.[68] Once the investigation is authorized the Panel does an in-depth assessment of the project and the requestors' allegations of harm, and makes findings and recommendations to the board.[69] Over the years, the environmental assessment has been the number one policy issue raised in requests, with Borrower capacity, screening and scoping, and monitoring and supervision ranking as some of the most prominent issues identified in the cases.[70] The Panel has had a positive impact on the culture of the Bank and on moving accountability mechanisms forward, and it must continue to do so in order to minimize the new framework's pitfalls. However, the new ESFs

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63. Bugalski, *supra* note 47, at 31, 31 n.134.
64. *See id.* at 55-56.
65. *Id.*
66. *See* QUINTERO, *supra* note 21, at 2 ("Momentum for change is also growing based on internal pressure from staff and external pressure from borrowers for greater flexibility in light of country diversity and advances countries have made in capacity development, governance, and implementation.").
67. *See* Passoni et al., *supra* note 14.
68. THE INSPECTION PANEL, THE WORLD BANK, ANNUAL REPORT: JUL. 1, 2017 – JUN. 30, 2018, at 4 [hereinafter ANNUAL REPORT].
69. *Id.*
70. *See Id.* at Appendix 1; EMERGING LESSONS NO. 3, *supra* note 42, at 3–4.

have the potential to throw the Panel's role into question and degrade its authority and ability to influence Borrower countries.

Although broader due diligence requirements in the areas of determining capacity of Borrower countries may increase the reach of the Inspection Panel, the vague nature of some of these requirements and increased role of Borrower systems puts the Panel in a precarious position: what is their role as the direct responsibility and visibility of the Bank decreases? The Inspection Panel's mandate explicitly excludes it from receiving "[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."[71] Affected peoples, if they are aware of the Bank's role at all, may have a difficult time showing they 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."[72] This problem is remedied by a strong assertion by both the Panel and the board that the Panel's role persists—a move that the Panel has already tried to make in its statement on the use of Country Systems:

> The Inspection Panel 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.[73]

However, if the board does not explicitly voice its support for the Panel, some countries may feel entitled to interfere with investigations through intimidation or even refusal to cooperate. This is a real risk, considering that, in 2013, Ethiopia publicly 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."[74]

The ESF also includes confusing loopholes that make it difficult to know how the Panel would respond. For example, the ESF authorizes staff to waive policies "in response to clearly delineated individual circumstances, so as to allow staff to proceed with processing or implementing steps that are pending."[75] This furthers the Bank's goal of promoting "operational flexibility," but it is unclear what parameters staff will use to make these decisions and what oversight they will be subject to.[76] If the framework explicitly allows waiver of previously required

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71. *The World Bank Inspection Panel*, THE WORLD BANK, Res. No. IBRD 93-10/Res. No. IDA 93-6, ¶ 14 (Sept. 22, 1993), https://perma.cc/F7MZ-ZF7J.
72. *Id.* at ¶ 12 (emphasis added).
73. Chair Person of the Inspection Panel, Senior Vice President, and General Counsel, *Joint Statement on the Use of Country Systems*, (R2004-0077, 0077/3) (June 2004).
74. William Davison, *Ethiopia Refuses to Cooperate With World-Bank-Funding Probe*, BLOOMBERG (May 28, 2013).
75. *See* WORLD BANK, BANK POLICY: OPERATIONAL POLICY WAIVERS 2 (2014).
76. *Id.*

policies, what grounds will the Panel have to retroactively challenge the decision to do so?

Despite these worrisome developments, the Panel can and should take an aggressive stance on early stage compliance under the new ESF. One way to do so could be to find that Staff did not reasonably conduct due diligence or did not reasonably assess the capacity of the Borrower. This is one of the most crucial points for the Panel to assert its jurisdiction over and build strong norms for Bank staff to follow. Careful, cautious review of Borrower systems will be integral to the success of this new framework.[77] The Bank does not incentivize staff to be conservative when assessing frameworks for Borrowers, but a high standard of review set by the Inspection Panel could provide those incentives.

There are encouraging examples of the Inspection Panel's role in emphasizing that cautious review and front-end due diligence cannot be devalued. In a 2017 case involving the construction of new roads in the Democratic Republic of Congo, the Panel investigated claims of gender-based violence, seizure of indigenous communities' resources, and violence perpetrated by military forces hired as security on the project[78] Although management had not been able to substantiate the claims made by requesters, the Panel's investigation confirmed many of the accusations—particularly the instances of sexual violence against women and girls in the area surrounding the project.[79] The Panel found that "project preparation proceeded without seriously reviewing whether the risk profile had changed" and that there had been a "weak assessment of risks and their potential impacts."[80] This led to mitigation measures that were "in turn, inadequate."[81] The flow from an initially inadequate assessment into a much larger issue down the line illustrates the importance of careful due diligence at the front end of projects. Importantly, the Panel noted there were no Bank supervision missions to the project from its approval in February of 2016 until August 2017.[82] This lack of supervision, the Panel found, played a large role in the inadequacy of security and training at the project and the resultant mistreatment of local populations.[83] The Panel noted that this investigation was "especially relevant" given the increased funding at the Bank for "countries suffering from fragility, conflict, and violence [FCV]."[84] In their Annual Report, the Panel writes that Bank management acknowledged that issues like this were likely to be recurrent given the "Bank's broader engagement in FCV environments" and committed to developing

77. *See* U.S. Position*, supra* note 27, at 2.
78. ANNUAL REPORT*, supra* note 68, at 8.
79. *Id.*
80. *Id.* at 10.
81. *Id.*
82. *Id.* at 11.
83. *See* ANNUAL REPORT*, supra* note 68, at 11–13.
84. *Id.* at 11.

strategies for ensuring better supervision of implementation.[85] This case is encouraging in that the Bank did not shirk its responsibility for ensuring implementation of projects adhered to basic human rights standards, and the Panel was able to access requesters and investigate this sensitive issue without serious resistance from the Borrowing Country or Bank management.

It remains to be seen whether the same deference would be afforded to the Panel where issues skewed more towards environmental degradation or climate change, but the Panel has asserted itself in an encouraging way in a pending investigation in Uganda. The Panel received two separate requests relating to a dam project in Uganda in 2016.[86] The requesters alleged that the project had potential to cause social and environmental harm because of flooding in the Kalagala Offset Area, which would affect the protection of resources in the area, a requirement of an indemnity agreement signed during an earlier project funded by the International Development Agency.[87] The World Bank was not funding the current project and was only related to its effects through this environmental offset agreement signed on a past project.[88] Management argued that since the prior project was closed it was not eligible for Panel review, but the Panel recommended deferring its decision, allowing a complete Environmental Assessment to be done by Bank management.[89] The Panel visited Uganda in the interim and, based on further investigation, recommended the case for investigation, which the board approved September of 2018.[90] This is encouraging for several reasons. First and foremost, the Panel pursued jurisdiction over a case concerning downstream, unanticipated effects of a completed project, and second, they did so for an environmental issue. Management's willingness to work with the Panel on this is an encouraging sign that, with the Panel's influence, the Bank will not wash its hands of projects and their downstream environmental consequences.

CONCLUSION

The new Environmental and Social Framework has an admirable goal: to build the ability of developing countries to govern themselves and encourage lasting development results. Unfortunately, the data suggests that this type of regime cannot be rushed into, as the Bank is poised to do now. Building capacity is a long road, requiring strong incentives and expensive monitoring programs. These

85. *Id.* at 13.
86. *Id.* at 14.
87. *Id.*
88. ANNUAL REPORT, *supra* note 68, at 14.
89. *Id.*
90. *Id.*

have not been explicitly provided for in the new framework, and the Bank may be setting its Borrowers up to fail. By ignoring the lessons the Bank has learned throughout its long history, the new policies threaten to become a step backward in the name of flexibility. If the Inspection Panel can continue to assert itself, it may be able to fill some of the gaps left in the Framework, but the Bank should seriously consider more explicit elaborations of temporal requirements as well as its plan to effectively monitor and influence projects as they progress.