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Due Diligence in World Bank Project Financing

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1. Introduction

Due diligence practices and methods used in the context of World Bank project financing constitute a significant application of due diligence as an evolving international law norm. As an intergovernmental organisation mandated to advance economic growth, poverty reduction, and social development through projects undertaken in its member countries,¹ the World Bank Group and its International Finance Corporation (IFC) are described as significant ‘law-making and law-governed institutions’² in the international economic system. These institutions’ particular usages of due diligence bear scrutiny not only to map the contours of due diligence as an international law norm, but to evaluate how the World Bank has reached its authoritative decisions as to what it deems to be relevant risks affecting the Bank’s sovereign and private development projects that purposely require due diligence. I submit that the due diligence practices and methods for the assessment of environmental and social risks attendant to World Bank and IFC projects reflect the continuing legal position of these international financial institutions that they create their own distinct *lex specialis*,³ quite problematically distancing themselves from expressly admitting the binding nature of international human rights law⁴

* With thanks for research support from the Klau Center for Civil and Human Rights and the Kellogg Institute of International Studies at the Keough School of Global Affairs, University of Notre Dame.

¹ See Antje Vetterlein, ‘Economic Growth, Poverty Reduction, and the Role of Social Policies: The Evolution of the World Bank’s Social Development Approach’, *Global Governance* 13 (2007), 513–533, at 516–518.

² Daniel Bradlow/Andria Naudé-Fourie, ‘The Operational Policies of the World Bank and the International Finance Corporation’, *International Organizations Law Review* 10 (2013), 3–80, at 3.

³ World Bank Group, ‘Comments of the World Bank (IBRD and IDA) on the Draft Articles on the Responsibility of International Organizations Adopted by the International Law Commission on First Reading in 2009’, available at: <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/ILCREsponsibilityofIntlOrgIBRDComments.pdf> (accessed 10 May 2019).

⁴ United Nations Office of the High Commissioner for Human Rights, ‘“The World Bank is a Human Rights-free Zone” – UN Expert on Extreme Poverty Expresses Deep Concern’, Press Release, 29 September 2015, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16517&LangID=E> (accessed 30 May 2019).

and especially due diligence requirements under business and human rights.⁵ As I show in this chapter, while there is demonstrably a significant hardening of environmental and social risk identification and corresponding due diligence practices and methods of the World Bank and the IFC in their respective operational policies, these institutions nevertheless still reject the full applicability of international environmental, social, and human rights law standards to Bank projects. The Bank's own track record in its projects, as seen from the corpus of Inspection Panel reports, demonstrate that while the most vulnerable stakeholders of these projects—local communities, indigenous peoples, minorities, among others—might possess some degree of public participation,⁶ they ultimately depend on the robustness of the World Bank's environmental and social risk due diligence practices to oversee Bank projects and managing community impacts. As the current body of Inspection Panel decisions itself shows, however, the human rights outcomes remain variably challenging for these most affected stakeholders in a climate of continuing denial of the full applicability of international human rights law to World Bank and IFC due diligence practices.⁷ I further show in this chapter that in some instances it appears that the Bank could (or has) taken into consideration a borrowing country's international environmental, social, or human rights law commitments in designing an environmental and social risk assessment for a Bank project, but without explicitly holding the Bank bound by the same treaty or legal norms. Finally, I observe how the World Bank's own nascent Environment and Social Framework (ESF) could serve as a functional and interpretive gateway for operationally intermediating international human rights law in the due diligence practices of the World Bank, by expanding the scope of the sources of a borrowing country's environmental, labour, and social regulatory framework.

2. Project Financing and Its Risks

Preliminarily, it should be recalled that project finance refers to the 'financing of the construction or development of a project where the lenders rely primarily on the expected cash flow generated by the operation of the project for repayment of their loans as well as for the value of the project's assets.'⁸ Project finance is distinguished

⁵ Jonathan Bonnitcha/Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', *European Journal of International Law* 28 (2017), 899–919, at 901–906.

⁶ Laurence Boisson de Chazournes, 'Public Participation in Decision-Making: The World Bank Inspection Panel', *Studies in Transnational Legal Policy* 31 (1999), 84–94, at 89.

⁷ See NYU Law School Clinic on International Organizations, 'The World Bank Inspection Panel and International Human Rights Law', 2017, available at: <https://www.iilj.org/wp-content/uploads/2017/08/The-World-Bank-Inspection-Panel-FINAL-REPORT.pdf> (accessed 30 May 2019).

⁸ Harold Moore/Evelyn Giaccio, 'International Project Finance', *North Carolina Journal of International Law and Commercial Regulation* 11 (1987), 597–612, at 597–598.

from other modes of financing, ‘in which the general assets of a sponsoring company, often owning several projects, are wholly or in part the subject of claims by the lender in the event of a failure to repay the loan.’⁹ The distinction matters, because project finance loans are made on a

C20.P3 non-recourse or limited recourse basis. Whereas lenders normally assess a loan proposition based on the creditworthiness of the borrower reflected by his asset portfolio and aggregate earning capacity, the lender in a project finance is willing to look primarily to the expected income stream of the project for his repayment. If the project fails or the expected income stream fails to materialize, the liability for the repayment of the loan does not pass to the project sponsors or operators—except to the extent expressly assumed by them.¹⁰

C20.P4 International project finance could involve a mixed universe of private sector companies as project operators, international development financing institutions (including multilateral development banks (MDBs)), state-owned enterprises, or sovereign lenders among others.¹¹ Project finance transactions are thus very complex. As one author stated: ‘It may take a much longer period of time to structure, negotiate, and document project financing than traditional financing, and the legal fees and related costs associated with project financing can be very high.’¹²

C20.P5 Among the critical transactions in international project finance is the conduct of due diligence by the project lenders. Due diligence, in this context, refers to ‘the process of reviewing and analysing the various project participants and contracts for the purpose of determining risks present in a project.’¹³ The main purpose of due diligence in international project financing is risk identification. To this aim, it is required to conduct an ‘interdisciplinary process of legal, technical, environmental, and financial specialties, designed to detect events that might result in total or partial project failure.’¹⁴ Precisely because the nature of lending in project financing makes repayment dependent on the project’s future expected income stream, project lenders must undertake as comprehensive an assessment of foreseeable risks as possible, balancing such risks against the stream of expected returns from project revenues and all other income derived from the multi-year operation of the project:

⁹ Sheldon Leader, ‘Project Finance and Human Rights’, in Juan Bohoslavsky/Jernej Cernic (eds), *Making Sovereign Financing and Human Rights Work* (London: Hart Publishing 2016), 199–212, at 200.

¹⁰ Alexander Loke, ‘Risk Management and Credit Support in Project Finance’, *Singapore Journal of International and Comparative Law* 2 (1998), 37–75, at 37.

¹¹ See Edward Yescombe, *Principles of Project Finance* (Oxford: Elsevier Academic Press 2nd ed. 2014), 61–78.

¹² Katharine Baragona, ‘Project Finance’, *Transnational Lawyer* 18 (2004), 139–158, at 139.

¹³ Scott Hoffman, *The Law and Business of International Project Finance* (Cambridge: CUP 2007), 327.

¹⁴ *Ibid.*, 59.

C20.P6 the lender's responsibility for full investigation and surveillance extends to the whole process of the financing of the project, including the reasonably foreseeable consequences. A lender is therefore under the duty to consider factors such as the likely environmental effects of the project, the consequence of the project for indigenous peoples in affected areas, possible damage to archaeological or culture heritage sites and so forth.¹⁵

C20.P7 Among the many risks that frequently affect international projects are completion risks (also known as 'development, delay, cost-overrun, or construction risk');¹⁶ operating risks (e.g., facility under-performance or excessive operating and/or maintaining costs);¹⁷ supply risks (the sufficiency of inputs for the project, depending on 'the nature of the project itself');¹⁸ currency risks;¹⁹ as well as political risks (such as war and civil disturbance).²⁰ Most crucially, environmental and social risks also comprise part of the general risks affecting international projects. Environmental and social risks include:

C20.P8 a) liability for the discharge of contaminants into the environment; b) liability for non-compliance with environmental, health, and safety laws, and permits; c) uncertainty in environmental permitting; d) changes in laws and enforcement priorities that tend to make environmental requirements more stringent over time; and e) potential exposure to challenges brought against the project by affected populations or the interested non-governmental organizations (NGOs) on their behalf.²¹

C20.P9 For the purposes of this chapter, I focus on due diligence with respect to the assessment of environmental threats and social risks,²² considering both the risk of transboundary harm and the evolving nature of social and technical regulation,²³ as distinctly evidenced by the practices of the World Bank Group in financing international projects for development,²⁴ in order to draw a practice-based illustrative

¹⁵ Xiuli Han, 'Crisis Prevention for China as a Sovereign Creditor and the UNCTAD Principles,' in Carlos Esposito/Yuefen Li/Juan Pablo Bohoslavsky (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford: OUP 2013), 261–286, at 275.

¹⁶ John Dewar/Oliver Irwin, 'Project Risks,' in John Dewar (ed.), *International Project Finance: Law and Practice* (Oxford: OUP 2011), 81–112, at 83.

¹⁷ *Ibid.*, 88.

¹⁸ *Ibid.*, 89.

¹⁹ *Ibid.*, 91.

²⁰ *Ibid.*, 94.

²¹ *Ibid.*, 99.

²² See Pierre-Marie Dupuy/Jorge E. Viñuales, *International Environmental Law* (Cambridge: CUP 2nd ed. 2018), 314–315.

²³ Patricia Birnie/Alan Boyle/Catherine Redgwell, *International Law and the Environment* (Oxford: OUP 2009 3rd ed.), 147–148.

²⁴ See Diane Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford: OUP 2015), 253–280.

nexus with the broader concept of due diligence in international law. To this aim, I examine due diligence in World Bank project financing from two polar ends of the spectrum of its practices. First, I examine conceptual and practice-based trends that have emerged from the World Bank Inspection Panel's scrutiny of failed or defective due diligence processes for environmental threats and social risks in World Bank-financed projects, which, as of writing this, involve 131 cases since 1994.²⁵ As seen in the next section, the Inspection Panel's investigation reports demonstrate an accretion of evolving internal practice-based understanding of due diligence—one that often readily melds interdisciplinary lenses and approaches to 'due diligence' in the Panel's findings. Second, I then turn to the Bank's codified due diligence policies and the particular turn towards the assessment of environmental and social risks. This, in my view, necessarily crystallised in tandem with the Bank's own record at the Inspection Panel, where the bulk of due diligence problems have arisen from the defects or failures of Bank-financed projects to anticipate, plan for, adjust, or appropriately respond to environmental hazards, the welfare and rights of indigenous peoples, and related social risks of long-term displacement of inhabitants impacted by these projects. I then briefly contrast these approaches with other MDBs that have some environmental and social policies in place,²⁶ but which neither have the particular institutional template of the Bank's Inspection Panel procedures, nor the same experiences as the Bank as it evolved its cohesive ESF for Bank financing of investment projects. In conclusion, I submit that the World Bank's particular operations-based conception of due diligence in project financing signifies an entrenched institutional understanding of transboundary harm that is demonstrably broad (encompassing environmental, social, labour, economic, cultural, and related human rights risks), all the more so since the Bank determines impacts on multiple stakeholders (and most especially local communities) affected by World Bank-financed projects well beyond the traditional actors in an international project finance transaction.

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3. Inspection Panel Review of Due Diligence in World Bank Projects

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Established in 1993 by the World Bank, the Inspection Panel provides an accountability dimension to the Bank's project financing practices, since it 'functions as

²⁵ World Bank Inspection Panel Cases, data accessed, available at: <https://inspectionpanel.org/panel-cases> (accessed 1 February 2019).

²⁶ On this aspect see Gunther Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change for Sustainable Development', *American Journal of International Law* 92 (October 1998), 642–665; Eisuke Suzuki/Suresh Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks', *Michigan Journal of International Law* 27 (2005), 177–226.

an organ reviewing acts and omissions of the Management of the World Bank as a response to requests from private parties [hereinafter requesters] affected by World Bank projects.²⁷ The Inspection Panel is a non-judicial body that is designed to be an independent mechanism, comprised of diverse interdisciplinary professionals on five-year terms, who are never allowed to be employed by the Bank after their terms finish.²⁸ The precise mandate of the Inspection Panel is to:

C20.P11 [ensure] that the voices of people who may be adversely affected by Bank-financed projects are heard, and to promote accountability at the Bank (...) The Panel does not investigate unless it receives a formal, written Request for Inspection. The Panel has the power to review Bank-funded projects, and determine whether Bank Management is following the World Bank's operational policies and procedures (...) which were put in place in order to provide social and economic benefits, and to avoid harm to people or to the environment.²⁹

C20.P12 Once the Panel has made its findings to the Bank's Board of Executive Directors, Bank Management must prepare a response with recommendations and actions to address the Panel's findings of non-compliance and harm.³⁰

C20.P13 The 131 cases brought before the Inspection Panel show evolving interdisciplinary methodologies to determine flaws in the due diligence processes underlying World Bank-financed projects. Not all these requests for inspection proceeded to a full-blown investigation. Several were either not registered or dismissed,³¹ or

²⁷ Kristian Fauchald, 'Hardening the Legal Softness of the World Bank through an Inspection Panel?', *Scandinavian Studies in Law* 58 (2013), 101–128, at 102.

²⁸ See Daniel Bradlow, 'International Organizations and Private Complaints: The Case of the World Bank Inspection Panel', *Virginia Journal of International Law* 34 (1994), 553–614, at 553–555.

²⁹ World Bank Inspection Panel, *Filing a Request for Inspection*, available at: <https://inspectionpanel.org/how-to-file-complaint> (accessed 1 February 2019).

³⁰ IBRD Resolution No. 93-10 and IDA Resolution No. 93-6, dated 22 September 1993, creating the World Bank Inspection Panel, available at: <https://inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/Resolution1993.pdf>, paras 22–27 (accessed 30 May 2019).

³¹ See, among others, Inspection Panel, *Ethiopia: Compensation for Expropriation and Extension of IDA Credits to Ethiopia (Not Registered)*, 4 April 1995, available at: <https://inspectionpanel.org/panel-cases/compensation-expropriation-and-extension-ida-credits-ethiopia-not-registered> (accessed 30 May 2019); *Tanzania: Power VI Project*, Report and Recommendation, 15 August 1995, available at: <https://inspectionpanel.org/panel-cases/power-vi-project> (accessed 30 May 2019); *Chile: Financing of Hydroelectric Dams in the Bio-Bio River (Not Registered)*, 17 November 1995, available at: <https://inspectionpanel.org/panel-cases/financing-hydroelectric-dams-bio-bio-river-not-registered> (accessed 30 May 2019); *Bangladesh Jute Sector Adjustment Credit*, 14 March 1997, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/6-Eligibility%20Report%20%28English%29.pdf> (accessed 30 May 2019); *Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project*, Panel Report and Recommendation, 18 August 1998, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/12-Eligibility%20Report%20%28English%29.pdf> (accessed 30 May 2019); *Argentina: Special Structural Adjustment Loan*, Inspection Panel Report and Recommendation, 16 December 1999, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/17-Eligibility%20Report%20%28English%29.pdf> (accessed 30 May 2019); *Brazil: Land Reform and Poverty Alleviation Pilot Project*, Report and Recommendation on Second Request for Inspection, 17 December 1999, available at: <https://inspectionpanel.org/sites/>

the Bank Management deemed the request ineligible for further consideration because loan proceeds had already been disbursed.³² For the most part, however, the Inspection Panel consistently emphasises the importance of expanding its risk assessment to include short- and long-term environmental risks, community displacements and resettlement feasibilities, the unique legal rights of indigenous peoples to natural resources, and the need to *timely* embed these main considerations at the outset of project planning for all Bank-financed projects.

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In the first Inspection Panel Report, on a proposed hydroelectric and access road project in Nepal,³³ the Panel investigated issues regarding the Bank's economic analysis of investment operations, environmental assessment, information disclosures, involuntary resettlements, and indigenous peoples. The Panel explicitly found that it was necessary to create a panel of social and environmental experts for the project on: (i) environmental impacts and flooding risks; (ii) the displacement of families because of the project and the need for resettlement plans; and (iii) that indigenous peoples affected by the project should have 'informed participation through public consultations, security over land tenure, and an action program with socially and culturally appropriate components.'³⁴ Another Inspection Panel Report on natural resources management in one part of the Amazon Basin (Rondônia, Brazil) found increased deforestation, invasions of indigenous and extractive areas, and many legal and operational policy challenges to the long-term sustainability of protected areas for indigenous peoples, and required the Bank to address these challenges.³⁵ Another report, relating to a bridge project in Jamuna, Bangladesh, found that the project design did not take into account char dwellers (thousands who live on mid-channel islands in the Jamuna river) in the process of planning, designing, and implementing resettlement plans as well as preventive and mitigative environmental measures, and required revisions to the Bank's Erosion and Flood Policy for the project 'to meet [Bank operational] policy requirements' and held that a 'full and informed participation of affected people

inspectionpanel.org/files/ip/PanelCases/18-Eligibility%20Report%20%28English%29.pdf (accessed 30 May 2019).

³² See among others Inspection Panel, *Management Response to Request for Inspection Panel Review of Itaparica Resettlement and Irrigation Project*, 28 April 1997, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/9-Management%20Response%20%28English%29.pdf> (accessed 30 May 2019).

³³ Inspection Panel, *Report on Request for Inspection, Nepal: Proposed Arun III Hydroelectric Project and Restructuring of the Arun III Access Road Project*, Request No. RQ94/01, 16 December 1994, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/1-Eligibility%20Report.pdf> (accessed 30 May 2019).

³⁴ Inspection Panel, *Proposed Arun III Hydroelectric Project, Investigation Report*, 21 June 1995, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/1-Investigation%20Report%20%28English%29.pdf>, 32–34 (part 7—Findings) (accessed 30 May 2019).

³⁵ Inspection Panel, *Report on Progress Review of Implementation of Brazil: Rondônia Natural Resources Management Project*, 25 March 1997, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/4-Progress%20Report.pdf>, 13–14 (accessed 30 May 2019).

would be needed to ensure its success.³⁶ In another case, this time involving the Yacyretá Hydroelectric Project in Argentina and Paraguay, the Inspection Panel found that site selection alone ‘locked the project into a series of inevitable and irreversible impacts, including flooding over 100,000 hectares and affecting over 50,000 people in two major urban areas.’³⁷ The Panel also learned that the basic ‘imbalance’ between the 99.8% completion of the civil and electro-mechanical works for the Project, vis-à-vis less than one third completion of complementary works such as environmental plans and resettlement plans, resulted in the project ‘incur[ring] important environmental and social liabilities that are causing frictions which could have been foreseen and avoided.’³⁸ This problem was further exacerbated because of ‘the usual Bank practice’³⁹ of wholly focusing on financing civil and electro-mechanical works, leaving environmental and resettlement plans to counterpart funding by other project financiers. The same disproportionate emphasis by Bank Management (neglecting funding for environmental and social impacts) was again detected by the Inspection Panel over a power generation project in India, where senior regional management was found to have focused mainly on accelerating loan approvals, while ‘not granting the same relevance to Resettlement and Rehabilitation and Environmental Action matters as to other project components.’⁴⁰

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The Inspection Panel has also emphasised the importance of timely and meaningful consultations with affected indigenous peoples, *well before* project formulation and implementation. In its report and recommendation over the World Bank financing for the India Ecodevelopment Park (Rajiv Gandhi Nagarhole National Park), the Panel found (and the Bank Management acknowledged) that consultations were not made with indigenous peoples at the appraisal stage for the project, and neither was there an indigenous peoples’ development plan prepared at the same time to properly evaluate ‘the tension between biodiversity protection objectives and the condition and aspirations of the indigenous people at Rajiv Gandhi National Park.’⁴¹ In another project involving environmental management in Lake Victoria, Kenya, the Inspection Panel emphasised that:

³⁶ Inspection Panel, *Report and Recommendation to the Executive Directors of the International Development Association on Request for Inspection, Bangladesh: Jamuna Bridge Project*, 26 November 1996, available at: <https://inspectionpanel.org/panel-cases/jamuna-new-multipurpose-bridge-project>, 18, para. 56 (accessed 30 May 2019).

³⁷ Inspection Panel, *Review of Problems and Assessment of Action Plans, Argentina and Paraguay: Yacyretá Hydroelectric Project*, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/7-Review%20and%20Assessment%20%28English%29.pdf>, 57, para. 252 (accessed 30 May 2019).

³⁸ *Ibid.*, 58, para. 253.

³⁹ *Ibid.*, 58, para. 255.

⁴⁰ Inspection Panel, *India: NTPC Power Generation Project*, Report on Investigation, 22 December 1997, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/10-Investigation%20Report%20%28English%29.pdf>, 8, para. 16 (accessed 30 May 2019).

⁴¹ Inspection Panel, *India Ecodevelopment Park (Rajiv Gandhi Nagarhole National Park)*, Report and Recommendation on Request for Inspection, 21 October 1998, available at: <https://inspectionpanel.org>.

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consultations should have been undertaken not only with the experts but the potentially affected people (. . .) involving them in the design [of the project] could have avoided a lot of unnecessary misunderstanding (. . .). Thus, Management is left with a situation in which there was no prior review of the environmental consequences of the method and the environmental and other data needed for a subsequent assessment of the method have not been obtained. This appears to contradict Operational Directive 4.01 concerning the ‘purpose and nature of [environmental assessment]’, including to improve decision making and to ensure that the project options under consideration are environmentally sound and sustainable.⁴²

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Notably, the Panel underscored the obligatory nature of the Bank’s social and environmental policies as the benchmark for determining Bank Management’s compliance. In the *China: Western Poverty Reduction Project* case (a massive project involving voluntary resettlement of 57,775 poor farmers practicing high-altitude rain-fed agriculture, to a new irrigation project in the drylands of the Haixi Tibetan and Mongolian Autonomous Prefecture in Dulan County), the Panel noted that some members of Bank Management staff argued that ‘the Bank’s Operational Directives and other policies were simply idealized policy statements, and should largely be seen as a set of goals to be striven after (. . .) policies allow for flexibility of interpretation.’⁴³ The Panel rejected this position, stressing that the Bank’s Operational Directives ‘are the primary source of Bank policy for purposes of assessing compliance.’⁴⁴ Ultimately, the Panel identified several violations of Bank Operational Directives pertaining to environmental assessment, indigenous peoples, and involuntary resettlement, among others.⁴⁵

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It is also worth noting the few instances when the Panel has found the due diligence assessments in projects to be somewhat in compliance with the Bank Operational Directives and policies on environmental assessment and/or community impacts. With respect to a mining development project in Ecuador, the Panel found that while it appeared that the Bank Management was ‘substantially in compliance’ with Bank Operational Directives and policies on environmental assessment, the very limited scope of the initial environmental assessment (which

[org/sites/inspectionpanel.org/files/ip/PanelCases/11-Eligibility%20Report%20%28English%29.pdf](https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/11-Eligibility%20Report%20%28English%29.pdf), paras v. and vi. of the Executive Summary (accessed 30 May 2019).

⁴² Inspection Panel, *Kenya: Lake Victoria Environmental Management Project*, Investigation Report, 15 December 2000, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/19-Investigation%20Report%20%28English%29.pdf>, 18, paras 46 and 47 (accessed 30 May 2019).

⁴³ Inspection Panel, *The Qinghai Project: China: Western Poverty Reduction Project*, Investigation Report, 28 April 2000, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/16-Investigation%20Report%20%28English%29.pdf>, xiv, para. 10 (accessed 30 May 2019).

⁴⁴ *Ibid.*, xv, para. 15.

⁴⁵ *Ibid.*, i of Investigation Report.

did not provide adequate baseline environmental data necessary for ongoing assessments) made such compliance easy to begin with:

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the [environmental assessment] was written almost entirely from an abiotic environment point of view, focusing on the effects of pollution caused by artisanal mining activities. It does not address issues of the living environment; it does not cover the biological environment; and it is virtually silent on the extraordinarily rich biodiversity of Ecuador (. . .) the [environmental assessment] does not elaborate on possible future negative impacts of the Project on the natural environment, caused in this case by potential future mining activities.⁴⁶

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With respect to the Chad-Cameroon Oil Pipeline Project (dubbed by the Panel as ‘the largest energy infrastructure development on the African continent’),⁴⁷ the Panel expanded the scope of its assessment of the project’s due diligence to include subject matter such as oil spills, groundwater contamination, air pollution, natural habitats, forestry, pest management, consultations with local communities, involuntary resettlement, indigenous peoples, cultural property, governance and human rights, economic evaluations, and poverty reduction.⁴⁸ The Panel found that the pipeline project largely complied with environmental assessment requirements and made necessary preparatory planning and mitigation measures for feared environmental externalities. It did find, however, that certain consultations with affected groups and local communities that were ‘conducted in the presence of security forces (. . .) [were] incompatible with the Bank’s policy requirements (. . .) [Full] and informed consultation is impossible if those consulted perceive that they could be penalized for expressing their opposition to, or honest opinions about, a Bank financed project.’⁴⁹ Moreover, while the Panel stressed that:

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[it] is not within the Panel’s mandate to assess the status of governance and human rights in Chad in general or in isolation (. . .). However, the Panel felt obliged to examine whether issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank’s policies . . . the situation is far from ideal. It raises questions about

⁴⁶ Inspection Panel, *Ecuador: Mining Development and Environmental Control Technical Assistance Project*, Investigation Report, 23 February 2001, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/20-Investigation%20Report%20%28English%29.pdf>, para. 34 (accessed 30 May 2019).

⁴⁷ Inspection Panel, *Chad-Cameroon Petroleum and Pipeline Project*, Investigation Report, 17 July 2002, available at: <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/22-Investigation%20Report%20%28English%29.pdf>, para. 1 of the Executive Summary (accessed 30 May 2019).

⁴⁸ *Ibid.*, paras 16–54.

⁴⁹ *Ibid.*, para. 26.

compliance with Bank policies, in particular with those that relate to informed and open consultation, and it warrants renewed monitoring by the Bank.⁵⁰

C20.P22 As seen from various investigation reports of the Inspection Panel, the due diligence processes expected for the appropriate environmental, social, and economic risk assessment of World Bank projects require conducting timely, informed, and free consultations with affected communities well *before* the start of project implementation as well as during project implementation, with regular monitoring from the Bank as the project lender. The scope of the risk assessment is necessarily extensive as to subject-matter, multidimensional as to tools and methods used for risk analysis, interrelated in the approach to identifying individual and collective environmental and social risks, and continuing as part of the Bank Management's project oversight. At the very least, these internal practices suggest a high threshold in the Inspection Panel's expectations for designing the substance and procedure involved in due diligence compliance mechanisms aimed at holistically assessing risks in World Bank-financed projects.

4. Due Diligence Processes at the World Bank and Other Multilateral Development Banks

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C20.P23 MDBs provide capital specifically targeted towards countries' economic development and related social goals:

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multilateral development banks are bodies or agencies created by international agreement among multiple nations whose purpose is to promote development among all or certain member states. These development goals focus primarily on the economic and social benefits to be achieved through the investment, as well as corollary matters such as protection of the environment and sustainability. Unlike [export credit agencies], [MDBs] are generally funded or financed by contributions from member states party to the multilateral agreement or other arrangement creating such [MDB].⁵¹

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Due to the wide scope of their development mandates, due diligence processes for MDB-financed projects necessarily involve broader dimensions beyond standard project risks, covering, in particular, the assessment of environmental, labour, and social risks in the states hosting MDB-financed projects within their territories.

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Given its own record of operational practices on risk assessments in financing development projects as discussed in the previous section, the World Bank Group

⁵⁰ Ibid., paras 35 and 37.

⁵¹ John Dewar, *International Project Finance: Law and Practice* (Oxford: OUP 2011), at 218.

has chosen to prescribe its own detailed due diligence processes in its ESF, setting environmental and social standards for investment project financing,⁵² composed of four main pillars: (i) the Bank's Vision for Sustainable Development (indicating the World Bank's policy understanding and vision for environmental and social sustainability of its projects); (ii) the World Bank Environmental and Social Policy for Investment Project Financing (which sets out the mandatory requirements that apply to the World Bank Group); (iii) the specific Environmental and Social Standards (with annexes, that are mandatory requirements imposed on the borrower and the projects financed by the World Bank); and (iv) the Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Groups. The World Bank ESF cohesively articulates, restates, and further develops the World Bank Group's previous and current due diligence practices for assessing environmental and social risks.⁵³

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4.1 Vision for Sustainable Development

C20.P27

The World Bank Group's Vision for Sustainable Development recognises that 'the corporate goals of ending extreme poverty and promoting shared prosperity in all its partner countries'⁵⁴ ultimately requires being 'globally committed to environmental sustainability, including stronger collective action to support climate change mitigation and adaptation,⁵⁵ as well as ensuring inclusion ('empowering all people to participate in, and benefit from, the development process')⁵⁶ and supporting 'the realization of human rights expressed in the Universal Declaration of Human Rights.'⁵⁷ To this end, the World Bank Group stresses that it 'uses its convening ability, financial instruments, and intellectual resources to embed this commitment to environmental and social sustainability across all its activities, which range from the Bank's global engagement in issues such as climate change, disaster risk management, and gender equality, to ensuring that environmental and social considerations are reflected in all sector strategies, operational policies, and country dialogues.'⁵⁸ The vision for sustainable development—explicitly premised on international human rights law and fully embedding sustainable development in

⁵² As of 1 October 2018, the World Bank Group's Environmental and Social Framework (ESF) is now being implemented to all new World Bank investment project financing. See full text of the 2017 ESF, available at: <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf> (accessed 30 May 2019).

⁵³ See International Finance Corporation, *Understanding IFC's Environmental and Social Due Diligence Process*, available at: <https://www.ifc.org/wps/wcm/connect/b58ead804942ee5da7a5ff4f5dda76e/IFC+Process.pdf?MOD=AJPERES> (accessed 1 September 2018).

⁵⁴ World Bank ESF 2017 (n. 2), 1, para. 1.

⁵⁵ *Ibid.*, 1, para. 2 (italics added).

⁵⁶ *Ibid.*, 1, para. 3.

⁵⁷ *Ibid.*, 1, para. 3 (italics added).

⁵⁸ *Ibid.*, 4, para. 4.

all its civil, political, economic, social, cultural, environmental, and dimensions— is arguably the most comprehensive among other MDBs.⁵⁹ The World Bank ESF has in turn inspired other recent environmental and social policy or operational frameworks in new MDBs, such as those from the New Development Bank (established by the ‘BRICS’ countries Brazil, Russia, India, China, and South Africa),⁶⁰ and the recently established Asian Infrastructure Investment Bank (led by China and joined by over twenty states, for the purpose of collectively funding infrastructure investments in the Asian region).⁶¹

C20.S6

4.2 Environmental and Social Policy for Investment Project Financing

C20.P28

The second pillar of the World Bank’s ESF is its Environmental and Social Policy for Investment Project Financing, which sets out the ‘mandatory requirements that apply to the Bank.’⁶² The Bank deliberately ‘undertake[s] its own due diligence of proposed projects, proportionate to the nature and potential significance of

⁵⁹ See among others, the Environmental and Social Policy of the European Bank for Reconstruction and Development (EBRD), May 2014, available at: <https://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html>, 2, para. 8 (‘The EBRD recognizes the ratification of international environmental and social agreements, treaties and conventions by its countries of operations. Within its mandate, the EBRD will seek to structure the projects it finances so that they are guided by the relevant principles and substantive requirements of international law (...)’) (accessed 30 May 2019); Safeguard Policy Statement of the Asian Development Bank, June 2009, available at: <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>, 4 (‘Safeguard policies are generally understood to be operational policies that seek to avoid, minimize, or mitigate adverse environmental and social impacts, including protecting the rights of those likely to be affected or marginalized by the development process. ADB’s safeguard policy framework consists of three operational policies on the environment, Indigenous Peoples, and involuntary resettlement.’) (accessed 30 May 2019); Inter-American Development Bank, Environment and Safeguards Compliance Policy, 19 January 2006, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=665902>, 2, para. 2.3 (‘This Policy is grounded in the principles of sustainable development as set out in the Declaration of Rio 92, Agenda 21 (...). Sustainability goals, in this context, depend on the alignment of social and economic development goals with long-term environmental sustainability (...) this policy encompasses social, cultural and economic aspects ... this policy identifies environment as a dimension of development to be mainstreamed and internalized across all sectors.’) (accessed 30 May 2019); African Development Bank Group, Policy on the Environment, February 2004, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/1000027-EN-BANK-GROUP-POLICY-ON-THE-ENVIRONMENT.PDF>, 2–3 (‘The new policy on the environment, therefore, focuses more on integrating social, economic and environmental objectives rather than protecting and conserving the physical environment for its own sake (...). The Bank also has to ensure that provisions contained in various [multilateral environmental agreements] are implemented taking into account specific constraints in the [regional member countries](...)’ (last accessed 30 May 2019).

⁶⁰ See New Development Bank, Operations Division Environment and Social Framework, Version 2016, available at: <https://www.ndb.int/wp-content/uploads/2017/02/ndb-environment-social-framework-20160330.pdf> (accessed 30 May 2019).

⁶¹ Asian Infrastructure Investment Bank, Environment and Social Framework, February 2016, available at: https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf (accessed 30 May 2019).

⁶² World Bank ESF 2017 (n.2), ix.

the environmental and social risks and impacts related to the project', including 'carry[ing] out early and continuing engagement and meaningful consultation with stakeholders, in particular affected communities, and (...) providing project-based grievance mechanisms.'⁶³ The World Bank assists borrowing states to identify 'appropriate methods and tools to assess and manage the potential environmental and social risks and impacts of the project',⁶⁴ as well as to set out specific conditions for the Bank's support for the project in the borrowing state, through an Environmental and Social Commitment Plan (ESCP). The Bank will refer to the ESCP, apart from all other aspects of the ESF, in monitoring the environmental and social performance of the project in the borrowing state. The ESCP is part of the borrower's legal agreement with the Bank, and sets out the 'material measures and actions required for the project to meet the [Bank's Environmental and Social Standards] over a specified timeframe.'⁶⁵

C20.P29 The World Bank's due diligence process for investment project financing enumerates the following environmental and social risks as part of its assessment:

- C20.P30 (a) Environmental risks and impacts, including: (i) those identified in the World Bank Group Environmental, Health, and Safety Guidelines (EHSGs); (ii) those related to community safety (including dam safety and safe use of pesticides); (iii) those related to climate change and other transboundary or global risks and impacts; (iv) any material threat to the protection, conservation, maintenance, and restoration of natural habitats and biodiversity; and (v) those related to ecosystem services and the use of living natural resources, such as fisheries and forests; and
- C20.P31 (b) Social risks and impacts, including: (i) threats to human security through the escalation of personal, communal, or interstate conflict, crime, or violence; (ii) risks that project impacts fall disproportionately on individuals or groups who, because of their particular circumstances, may be disadvantaged or vulnerable; (iii) any prejudice or discrimination towards individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable; (iv) negative economic and social impacts relating to the involuntary taking of land or restrictions on land use; (v) risks or impacts associated with land and natural resource tenure and use, including (as relevant) potential project impacts on local land use patterns and tenurial arrangements, land access and availability, food security and land values, and any corresponding risks related to conflict or contestation over land and natural resources; (vi)

⁶³ Ibid., 3, paras 3(a) and 3(b).

⁶⁴ Ibid., 4, paras 3(c) to 3(e).

⁶⁵ Ibid., 9, para. 46.

impacts on the health, safety and well-being of workers and project-affected communities; and (vii) risks to cultural heritage.⁶⁶

C20.P32 The Bank's due diligence process yields its determination on the classification of a project as either 'high risk, substantial risk, moderate risk, or low risk'.⁶⁷ The ultimate purpose of the Bank's environmental and social due diligence is to 'assist the Bank in deciding whether to provide support for the proposed project and, if so, the way in which environmental and social risks and impacts will be addressed in the assessment, development, and implementation of the project'.⁶⁸ Broadly described, the due diligence process of the Bank includes functions such as:

C20.P33 (a) reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the project and requesting additional and relevant information where there are gaps that prevent the Bank from completing its due diligence; and (b) providing guidance to assist the Borrower in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the [Environmental and Social Standards of the Bank].⁶⁹

C20.P34 Apart from these, the Bank also takes into account the:

C20.P35 (a) risks and impacts inherent to the type of project and the specific context in which the proposed project will be developed and implemented; and (b) the capacity and commitment of the Borrower to develop and implement the project in accordance with the [Environmental and Social Standards of the Bank].⁷⁰

C20.P36 The Bank's due diligence process includes extensive stakeholder consultations, particularly with affected communities, indigenous peoples, and other local community organisations.⁷¹ In the course of its due diligence, the Bank can also use independent verification of information, such as from independent experts, local communities, or non-governmental organisations.⁷²

C20.P37 Separately from the Bank's due diligence risk assessment above, the World Bank also requires its borrower states to conduct their own environmental and social assessments for the prospective projects on which they seek Bank financing.⁷³ In implementing Bank-funded projects, borrower states are subject to the Bank's ten

⁶⁶ Ibid., 4, paras 4(a) and 4(b).

⁶⁷ Ibid., 6, para. 20.

⁶⁸ Ibid., 7, para. 30.

⁶⁹ Ibid., 7, para. 32.

⁷⁰ Ibid., 8, para. 33.

⁷¹ Ibid., 10, paras 53–55.

⁷² Ibid., 11, para. 58.

⁷³ Ibid., 6, para. 15.

Environmental and Social Standards, inter alia including assessment and management of environmental and social risks and impacts; labour and working conditions; resource efficiency and pollution prevention and management; as well as community health and safety.⁷⁴ The borrower state's environmental and social assessment should be based on current information, including an accurate description and delineation of the project, as well as on appropriately detailed environmental and social baseline data (...).⁷⁵

C20.P38

The Bank applies the following mitigation hierarchy when adverse environmental and social impacts are found:

C20.P39

(a) Anticipate and avoid risks and impacts;

C20.P40

(b) Where avoidance is not possible, minimize or reduce risks and impacts to acceptable levels;

C20.P41

(c) Once risks and impacts have been minimized or reduced, mitigate (which may include measures to assist affected parties to improve or at least restore their livelihoods as relevant in the particular project setting); and

C20.P42

(d) Where significant residual impacts remain, compensate for or offset them, where technically and financially feasible.⁷⁶

C20.P43

Most critically, the Bank requires the borrower state's environmental and social assessments to be premised on the widest set of environmental legal and policy frameworks, including:

C20.P44

a) the country's applicable policy framework, national laws and regulations, and institutional capabilities (including implementation) relating to environment and social issues; variations in country conditions and project context; country environmental or social studies; national environmental or social action plans; and *obligations of the country directly applicable to the project under relevant international treaties and agreements*; b) applicable requirements under the [Bank's Environmental and Social Standards]; and c) the [Bank's Environmental, Health, and Safety Guidelines] and other relevant Good International Industry Practice.⁷⁷

C20.P45

The Bank recommends tools and methods to the borrower state to carry out environmental and social assessment and to document the results from their assessment.⁷⁸ Finally, the operational timeframe and modalities for implementation of

⁷⁴ Ibid., 4, para. 5.

⁷⁵ Ibid., 18, para. 24.

⁷⁶ Ibid., 19, para. 27.

⁷⁷ Ibid., 19, para. 26 (emphasis added).

⁷⁸ These include, among others, an environmental and social impact assessment and an environmental and social audit, *ibid.*, 23–24, paras 5(a) to 5(j).

any investment project in the borrower state are set by the Bank, in a manner that purposely takes into account:

- C20.P46 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.⁷⁹
- C20.P47 The Bank's Environmental, Health, and Safety Guidelines set performance levels and measures that are ordinarily applicable to Bank-financed projects, and is the baseline of implementation expected by the Bank—the borrower state, if it chooses, can impose a higher or more stringent set of environmental, health, and safety guidelines.⁸⁰ Finally, the borrower state is always required by the Bank to provide a grievance mechanism for all project-affected parties, especially on environmental and social performance.⁸¹ Separate from the borrower state-initiated grievance mechanism, the World Bank also has its own corporate grievance redress service to receive complaints on all project-related concerns, as well as the Bank's independent Inspection Panel that can conduct inspections to determine whether harm has occurred as a result of project noncompliance with Bank policies and procedures, including especially the ESCP, the Environmental, Health, and Safety Guidelines, and the rest of the Bank's ESF.⁸²

C20.S7 **4.3. Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Groups**

- C20.P48 The 2016 Bank Directive Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups established directions for the World Bank 'regarding due diligence obligations relating to the identification of, and mitigation of risks and impacts on, individuals or groups because of their particular circumstances, [who] may be disadvantaged or vulnerable.'⁸³ The Bank's task team determines in its due diligence process whether the borrowing state's assessment properly identified the disadvantaged or vulnerable individuals or groups, and whether there are appropriate differentiated mitigation measures incorporated into the Bank's project 'so that adverse impacts do not fall disproportionately on the disadvantaged or vulnerable, and they are not disadvantaged in sharing any

⁷⁹ Ibid., 6, para. 16.

⁸⁰ Ibid., 6, para. 19.

⁸¹ Ibid., 11, para. 60.

⁸² For an analysis of the Inspection Panel's practice see above section 3.

⁸³ World Bank ESF 2017 (n. 2), para. 1.

development benefits resulting from the project.⁸⁴ The 2018 Environmental and Social Directive for Investment Project Financing⁸⁵ recently succeeded and expanded the 2016 Bank Directive.⁸⁶ It also committed the Bank to assess environmental and social risks as part of its own due diligence process and to, inter alia, assesses the adequacy of the capacity of institutions responsible for the management of environmental and social risks and impacts.⁸⁷

Czo.S8

4.4 Convergence of Due Diligence Standards Regarding Environmental and Social Risks

Czo.P49

Since the World Bank's adoption of the 2018 revised comprehensive Environmental and Social Framework, the Bank has steadily made its due diligence documents publicly available, including in particular recent Environmental and Social Review Summaries for various projects.⁸⁸ A 2015 expert study commissioned by the World Bank concluded that there are many similarities between the World Bank's environmental and social safeguard frameworks (including due diligence processes therein) and that of other MDBs.⁸⁹ This suggests, at the very least, that there is some

⁸⁴ Ibid., para. 6.

⁸⁵ World Bank Group, Environmental and Social Directive for Investment Project Financing, 3 October 2018, available at: <https://policies.worldbank.org/sites/ppf3/PPFDdocuments/18479bc9036d43f980875b7ba94cd934.pdf> (accessed 30 May 2019).

⁸⁶ World Bank Group, Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups, 4 August 2016, available at: <https://policies.worldbank.org/sites/ppf3/PPFDdocuments/Forms/DispPage.aspx?docid=e5562765-a553-4ea0-b787-7e1e775f29d5> (accessed 1 September 2018).

⁸⁷ Ibid., at footnote 56, para. 5.

⁸⁸ See among others World Bank Group, Environmental Social and Review Summary: Network Reinforcement and Access Project P16670, Zambia, Africa, 24 October 2018, available at: <http://documents.worldbank.org/curated/en/252311540385185729/Environmental-and-Social-Review-Summary-ESRS-Network-Reinforcement-and-Access-Project-P166170> (accessed 30 May 2019); Morocco-Noor Solar Power Projects environmental assessment: Environmental and Social Review Summary, 8 March 2018, available at: <http://documents.worldbank.org/curated/en/565341517589494999/Environmental-and-social-review-summary> (accessed 30 May 2019); Zambia—West Lunga Scaling Solar Energy Project: Environmental and Social Review Summary, 1 January 2017, available at: <http://documents.worldbank.org/curated/en/186661485338957768/Environmental-and-social-review-summary> (accessed 30 May 2019); Grenada Digital Governance for Resilience—Environmental and Social Review Summary, 24 October 2018, available at: <http://documents.worldbank.org/curated/en/310541540411444931/Environmental-and-Social-Review-Summary-ESRS-Grenada-Digital-Governance-for-Resilience-P167588> (accessed 30 May 2019); Tunisia-Italy Power Interconnection Project Preparation Technical Assistance—Environmental and Social Review Summary, 5 July 2018, available at: <http://documents.worldbank.org/curated/en/541431531167022689/Environmental-and-social-review-summary> (accessed 30 May 2019); Africa Environmental Health and Pollution Management Program—Environmental and Social Review Summary, 2018 October 27, available at: <http://documents.worldbank.org/curated/en/850361540664230193/Environmental-and-Social-Review-Summary-ESRS-Africa-Environmental-Health-and-Pollution-Management-Program-P167788> (accessed 30 May 2019).

⁸⁹ Harvey Himberg, *Comparative Review of Multilateral Development Bank Safeguard Systems*, May 2015, available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/related/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf (accessed 30 May 2019).

growing normative convergence between the World Bank and other MDBs on the conduct of due diligence for environmental and social risks. The due diligence processes give some consideration for the recipient state's environmental and human rights treaty commitments, but it has not yet been made explicit that either the World Bank or other MDBs deliberately internalise these treaty commitments as their normative baseline. Rather, the World Bank and other MDBs have still driven due diligence processes from the authoritativeness of their internal institutional mandates under their respective articles of agreement, acknowledging some similarities with concepts in environmental and human rights treaties without purposely treating the latter to be obligatory on these institutions.⁹⁰

5. Conclusion

C20.S9

C20.P50

International project finance due diligence processes focus on risk assessment, but not all institutional lenders or sovereign lenders evaluate risk or conduct due diligence review in a uniform way. The World Bank's due diligence process in its investment project financing operations is significant practice for public international lawyers to consider, in that it purposely internalises states' existing environmental and social treaty obligations and commitments under international human rights law, and deliberately operationalises these obligations and commitments through the World Bank's Environmental and Social Framework implemented in every Bank-funded project. The fact that the Bank recognises a broader understanding of project risks to include environmental and social risks, as well as direct and indirect impacts to affected, displaced, or vulnerable communities, indigenous peoples, and other groups, itself exemplifies that the World Bank Group frames its development duties with consciousness towards international human rights and the international rule of law. While not all MDBs completely replicate the World Bank's ESF, the growing consideration for some of the environmental and social treaty obligations of borrowing states into MDB-funded development projects suggests that in the area of international project finance due diligence may be headed towards possible convergence with international human rights obligations, particularly in environmental and social treaty commitments of states. For the present, however, the World Bank and other international financial institutions declare that they are themselves not bound by the hard law of states' human rights, environmental, and climate change treaty obligations.

⁹⁰ See World Bank, *The International Bill of Rights and IFC Sustainability Framework*, 2016, available at: <http://documents.worldbank.org/curated/en/470681480669101836/pdf/110689-IBHR-and-IFC-Policies-PS-DRAFT.pdf> (accessed 1 February 2019).