



HAL
open science

Can multilateral development banks be more environmentally effective? Perspectives from the practice of international accountability mechanisms

Vanessa Richard

► **To cite this version:**

Vanessa Richard. Can multilateral development banks be more environmentally effective? Perspectives from the practice of international accountability mechanisms. The Effectiveness of Environmental Law, Proceeding of the 3rd European Environmental Law Forum, 2017. hal-01455183

HAL Id: hal-01455183

<https://hal.science/hal-01455183v1>

Submitted on 24 Apr 2018

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

CHAPTER 14

CAN MULTILATERAL DEVELOPMENT BANKS BE MORE ENVIRONMENTALLY EFFECTIVE?

Perspectives from the Practice of International Accountability Mechanisms

Vanessa RICHARD
*CNRS Researcher, Aix Marseille Univ, Univ Toulon,
 CNRS, DICE, CERIC, Aix-en-Provence, France**

The adverse environmental impacts of projects supported by Multilateral Development Banks (MDBs), such as the World Bank or its regional counterparts, have been denounced for decades. The domains in which MDBs operate logically bear environmental and social risk which can be significant: development of transportation, of agribusiness, of energy sources, of extractive industries etc. This includes projects to develop highways, airports, dams and reservoirs, irrigation systems, wind farms, coal power plants, mining, to reorganize land management, to reform the legal framework related to land tenures or else forest concessions etc. Such projects may entail changing land use patterns and natural habitats, or else cause disruptions affecting the water cycle, biodiversity, soil, forests ... Not to mention the human impacts: 'involuntary' (in the language of MDBs) and sometimes unwanted resettlement, destruction of cultural or spiritual heritage, loss of livelihoods, forced evictions etc.¹ The poor environmental record of the

* *Principal Investigator of the International Grievance Mechanisms and International Law & Governance (IGMs) project, www.igms-project.org. The research leading to these results has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement no. 312514.*

¹ The International Consortium of Investigative Journalism (ICIJ), who originated the 'LuxLeaks' and 'Panama Papers' scandals, have conducted a series of investigations on the human consequences of some projects the World Bank supports, untitled "Evicted and Abandoned. The World Bank's Broken Promise to the Poor", which are quite telling on how ugly things can sometimes turn: see www.icij.org/project/world-bank. All the URLs referenced in this contribution were last visited 27 August 2016.

World Bank Group² is richly documented, including by the World Bank itself, thanks to the reports of the Operations Evaluation Department, later transformed into the Independent Evaluation Group (IEG).³ For example, the 2001 OED Review of the Bank's Performance on the Environment notes that:

"To be sure, these achievements fell short of the expectations of many of its stakeholders. The momentum of the early 1990s dissipated in the face of constraints faced in the operating environment. Internally, environmental sustainability was not adequately integrated into the Bank's core objectives and country assistance strategies. Intellectually, the linkages between macroeconomic policy, poverty alleviation, and environmental sustainability were not explicitly forged. In sum, the institution's environmental efforts have not been consistent nor have they been held to uniform quality standards. Yet, staff have carried out many worthwhile activities related to the environment (...) This OED report finds that the Bank has made progress on the environment, and notes that its commitments were not accompanied by precise goals and performance monitoring."⁴

In 2008, the IEG finds that:

"When requested, the Bank Group has been generally able to help countries set environmental priorities (although this is ultimately the responsibility of the countries themselves) and private sector clients to identify and address potential direct environmental impacts. However, it has been far less able to integrate these efforts centrally into country programs, incorporate them as requirements for sustainable growth and poverty reduction, and provide lending to help countries address environmental priorities – often because of lukewarm interest in such support from the countries themselves."⁵

² The World Bank Group consists of five organisations: the International Bank for Reconstruction and Development (IBRD) which lends to governments, the International Development Association (IDA) which provides interest-free loans (credits) and grants to governments of the poorest countries, the International Finance Corporation (IFC) which supports private investment in development, the Multilateral Investment Guarantee Agency (MIGA) which promotes foreign direct investment by offering political risk insurance (guarantees) to investors and lenders, and the International Centre for Settlement of Investment Disputes (ICSID) which provides international facilities for conciliation and arbitration of investment disputes.

³ The IEG "is charged with evaluating the activities of the International Bank for Reconstruction and Development (IBRD) and International Development Association (the World Bank), the work of International Finance Corporation (IFC) in private sector development, and Multilateral Investment Guarantee Agency's (MIGA) guarantee projects and services. The Director-General of IEG reports directly to the World Bank Group's Board of Directors. The goals of evaluation are to provide an objective assessment of the results of the Bank Group's work and to identify and disseminate lessons learned from experience": see <http://ieg.worldbankgroup.org/about-us>.

⁴ OED Review of the Bank's Performance on the Environment, 5 July 2001, http://ieg.worldbankgroup.org/Data/reports/oed_environment_review.pdf.

⁵ IEG, "Supporting Environmental Sustainability: An Evaluation of World Bank Group Experience, 1990-2007", Fast Track Brief, 6 August 2008, http://ieg.worldbankgroup.org/Data/reports/env_ftb.pdf, p. 3.

More recently, the IEG report on projects on forest resources states that:

“World Bank policy advice and projects that have supported the reform of industrial timber concession regimes have usually neglected or underestimated the nontimber values and uses of the forests with respect to the livelihoods of forest-dependent people, their traditional claims, sociocultural values, and overall sense of security. Evidence is also lacking that concessioned natural forests are being managed sustainably.”⁶

One can also think of the findings of the World Commission on Dams – jointly established by the World Bank Group and the World Conservation Union (IUCN) – on the magnitude of the adverse environmental impacts of large dams⁷, or the findings of the Extractive Industries Review commissioned by the World Bank Group.⁸ Volumes on the adverse environmental impacts of the activities that the World Bank Group finances, or otherwise supports, have been written by non-governmental organizations (NGOs) and advocates of environmental protection and the respect of social and environmental rights, some being very well-informed and acute.⁹ Though regional MDBs, such as the African Development Bank Group (AfDB), the Asian Development Bank (ADB), the Interamerican Development Bank (IDB) and others, have not generated as abundant a literature on this topic as the World Bank has, their operations entail the same potential impacts to a large extent, with differences due to their own contexts.¹⁰

In contrast with this less-than-satisfying environmental track-record, it is remarkable that MDBs, and first among them the World Bank, have adopted environmental standards which, in some areas, are more detailed than the prescriptions of international environmental law and, what is more, may apply

⁶ IEG, “Managing Forest Resources for Sustainable Development. An Evaluation of World Bank Group Experience”, 5 February 2013, https://ieg.worldbankgroup.org/Data/reports/forest_eval2.pdf, p. XV.

⁷ World Commission on Dams, *Dams and Development. A New Framework for Decision-making*, London/Sterling: Earthscan (2000), *inter alia* available at www.unep.org/dams/WCD/report/WCD_DAMS%20report.pdf.

⁸ The Extractive Industries Review resulted in 6 reports and a series of additional documents, including Management responses. All documents are available at www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Oil,+Gas+and+Mining/Development_Impact/Development_Impact_Extractive_Industries_Review/.

⁹ For an expert analysis of both project-level and systemic failures of the World Bank as regard the environment, see for instance Bruce Rich, *Foreclosing the Future. The World Bank and the Politics of Environmental Destruction*, Washington/Covelo/London: Island Press (2013).

¹⁰ For example, so far the AfDB has relatively modestly participated in big infrastructure projects, and often joined the pool of donors after that the projects’ design had been decided by the largest donor agencies; thus, its responsibility in the adverse impacts remained limited. With the adoption in late 2015 of the new NEPAD-IPPF (New Partnership for Africa’s Development Infrastructure Project Preparation Facility) Strategic Business Plan, this is probably going to change: see AfDB, “Donors welcome improved performance of NEPAD-IPPF in project preparation”, 17 December 2015, www.afdb.org/en/news-and-events/article/donors-welcome-improved-performance-of-nepad-ippf-in-project-preparation-15236/.

to the private sector. One shining example is the requirement that borrowers, either sovereign or private, conduct an environmental assessment (EA). The first environmental safeguards adopted by the World Bank date back to 1987. In 1989, the United States (US) Congress voted the so-called ‘Pelosi amendment’, which:

“requires US Executive Directors at the World Bank and all the regional multilateral development banks (MDBs) to abstain or vote against any proposed action with significant environmental effects if it has not received an appropriate environmental assessment, or if the assessment has not been available to the Executive Directors and the public for 120 days before a vote (...) Environmental assessment and information access procedures have been adopted and put into practice by all the major MDBs, due in large part, most observers agree, to the Pelosi Amendment.”¹¹

EAs were formalized with the adoption of Operational Directive 4.00 (OD 4.00) in 1989.¹² The combination of lobbying within and from the US Congress, NGOs’ pressure and the organisation of the Rio United Nations Conference on Environment and Development in 1992 provided the necessary thrust to the adoption of further environmental standards.¹³ As regards EAs in development projects, the World Bank has a natural role as a standard-setter for international development finance agencies, and its A to C environmental categorization of projects¹⁴, as well as the requirement (at least in theory, as we will see) to complete and disclose the EA prior to the project being approved, have become standard practice in development financing. In 2010, the International Court of

¹¹ Jonathan Sanford, Susan R. Fletcher, “Multilateral Development Banks’ Environmental Assessment and Information Policies: Impact of the Pelosi Amendment”, Congressional Research Service Report for Congress, 12 February 1998, <http://congressionalresearch.com/98-180/document.php?study=MULTILATERAL+DEVELOPMENT+BANKS+ENVIRONMENTAL+ASSESSMENT+AND+INFORMATION+POLICIES+IMPACT+OF+THE+PELOSI+AMENDMENT>; see also *inter alia* Ian A. Bowles, Cyril F. Kormos, “Environmental Reform at the World Bank: The Role of the U.S. Congress”, 35 *Va. J. Int’l L.* (1995), p. 795.

¹² See World Bank Environment Department, “Environmental Assessment Sourcebook. Volume I – Policies, Procedures and Cross-Sectoral Issues”, World Bank Technical Paper Number 139 (1991).

¹³ Susan Park, “Norm Diffusion within International Organizations: A Case Study of the World Bank”, 8 *J. Int’l Rel. Dev.* (2005), pp. 128-132.

¹⁴ “Category A: A proposed project is classified as Category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented”; “Category B: A proposed project is classified as Category B if its potential adverse environmental impacts on human populations or environmentally important areas--including wetlands, forests, grasslands, and other natural habitats--are less adverse than those of Category A projects”; “Category C: A proposed project is classified as Category C if it is likely to have minimal or no adverse environmental impacts. Beyond screening, no further EA action is required for a Category C project”; “Category FI: A proposed project is classified as Category FI if it involves investment of Bank funds through a financial intermediary, in subprojects that may result in adverse environmental impacts.”: OP 4.01, Environmental Assessment, para. 8. Depending on the categorization of the project, the type and extent of the EA will be different and more or less stringent.

Justice (ICJ) recognized the customary nature of the obligation “to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”¹⁵ The ICJ inferred such obligation from a “practice, which in recent years has gained so much acceptance among States”, but also from “due diligence, and the duty of vigilance and prevention which it implies.”¹⁶ The ICJ, however, considered that general international law does not specify:

“the scope and content of an [environmental impact assessment]”. [Consequently,] “it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content (...) required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.”¹⁷

Conversely, OP and BP 4.01 on Environmental Assessment¹⁸ list a series of steps that the Bank’s staff working on projects (the Management) must take. Like-standards of other MDBs have very similar provisions.¹⁹ The first step consists in scoping and screening the proposed project, that is to say that Management must evaluate the type of project (which sector/activities), its scale and proposed location, whether it is *prima facie* sensitive or likely to generate significant social and/or environmental impacts. This leads to categorizing the project, which in turn conditions the type and extent of the Bank’s requirements as regards the EA, which is carried out by the borrower.²⁰ If the latter is considered to have inadequate capacity to carry out the EA, then the project must “include components to strengthen that capacity.”²¹ Category A projects require a full EA, Category B projects require a narrower EA. Category A and B projects require that the borrower consults, as early as is possible, project-affected groups and local stakeholders and takes their views into account. In order to allow for

¹⁵ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports 2010*, para. 204.

¹⁶ *Ibidem*.

¹⁷ *Ibid.*, para. 205.

¹⁸ Which replaced in 1999 OD 4.00 (1989) and then OD 4.01 (1991). The World Bank’s Operational Manual is available at <https://policies.worldbank.org/sites/PPF3/Pages/Manuals/Operational%20Manual.aspx>.

¹⁹ William V. Kennedy, “EIA and Multilateral Financial Institutions”, Presentation at the OECD Conference on FDI and the Environment, The Hague, 28-29 January 1999, www.oecd.org/investment/investmentfordevelopment/2076277.pdf. For an overview of the EA process that may apply to any entity, see T.C. Dougherty, A.W. Hall, HR Wallingford, “Environmental Impact Assessment of Irrigation and Drainage Projects”, FAO Irrigation and Drainage Paper 53 (1995), Chapter 3, www.fao.org/docrep/V8350E/v8350e06.htm#chapter%203:%20eia%20process.

²⁰ OP 4.01, para. 8.

²¹ *Ibid.*, para. 13.

meaningful consultations, the “borrower provides relevant material in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted.”²² The EA:

“evaluates a project’s potential environmental risks and impacts in its area of influence; examines project alternatives; identifies ways of improving project selection, siting, planning, design, and implementation by preventing, minimizing, mitigating, or compensating for adverse environmental impacts and enhancing positive impacts; and includes the process of mitigating and managing adverse environmental impacts throughout project implementation. (...) [It] takes into account the natural environment (air, water, and land); human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical cultural resources); and transboundary and global environmental aspects. EA considers natural and social aspects in an integrated way. It also takes into account the variations in project and country conditions; the findings of country environmental studies; national environmental action plans; the country’s overall policy framework, national legislation, and institutional capabilities related to the environment and social aspects; and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA. EA is initiated as early as possible in project processing and is integrated closely with the economic, financial, institutional, social, and technical analyses of a proposed project.”²³

The Management of the Bank then reviews the EA provided by the borrower, checks whether it is consistent with its EA policy, whether additional information, consultations or studies are needed. Officially transmitted EAs are disclosed by the Bank to the public.²⁴ After approval by the Board, the borrower must report, during the implementation of the project, about its compliance with the EA and, if relevant, with the Environmental Management Plan.²⁵

In most MDBs, the EA requirements are not differentiated between sovereign borrowers and private clients.²⁶ However, the World Bank Group and, this

²² *Ibid.*, para. 15.

²³ *Ibid.*, paras 2 and 3.

²⁴ *Ibid.*, para. 18.

²⁵ OP 4.01, Annex A – Definitions, para. 3: “Environmental management plan (EMP): An instrument that details (a) the measures to be taken during the implementation and operation of a project to eliminate or offset adverse environmental impacts, or to reduce them to acceptable levels; and (b) the actions needed to implement these measures. The EMP is an integral part of Category A EAs (irrespective of other instruments used). EAs for Category B projects may also result in an EMP.”

²⁶ See Asian Development Bank, “Safeguard Policy Statement”, in OM Section F1/BP(2013), www.adb.org/sites/default/files/institutional-document/31483/om-f1-20131001.pdf; African Development Bank, “Operational safeguard 1 – Environmental and social assessment”, in Integrated Safeguards System. Policy Statement and Operational Safeguards (2013), www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf; European Investment

is quite recent, the Interamerican Development Bank Group have different standards for public and private operations. The 2012 Sustainability Framework, which applies to IFC and MIGA, is divided into two complementary parts. One is the Policy on Environmental and Social Sustainability²⁷, which describes IFC's commitments, the other is a set of 8 Performance Standards (PS) which describes the borrower's duties.²⁸ Though core EA obligations are in essence the same as they are for sovereign projects – to which the World Bank OPs apply – the language of PSs is more tailored to the language of the corporate world. Hence, PS1 does not refer to “environmental assessment” but to “Environmental and Social Management System” (ESMS), defined as “a dynamic and continuous process initiated and supported by management, and involves engagement between the client, its workers, local communities directly affected by the project (the Affected Communities) and, where appropriate, other stakeholders.”²⁹ The purpose and content of ESMSs are not significantly different than those of EAs.³⁰ Likewise, within the IDB Group since 1st January 2016, the IDB has focused on sovereign-guaranteed projects, while private projects are entrusted to a consolidated Interamerican Investment Corporation (ICC). The IDB applies the 2006 Inter-American Development Bank, Environment and Safeguards

Bank, “The EIB Statement of Environmental and Social Principles and Standards” (2009), www.eib.org/attachments/strategies/eib_statement_esps_en.pdf; European Bank for Reconstruction and Development, Environmental and Social Policy (2014), www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html

²⁷ International Finance Corporation's Policy on Environmental and Social Sustainability (2012), www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

²⁸ Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts; Performance Standard 2 on Labor and Working Conditions; Performance Standard 3 on Resource Efficiency and Pollution Prevention; Performance Standard 4 on Community Health, Safety, and Security; Performance Standard 5 on Land Acquisition and Involuntary Resettlement; Performance Standard 6 on Biodiversity Conservation and Sustainable Management of Living Natural Resources; Performance Standard 7 on Indigenous Peoples and; Performance Standard 8 on Cultural Heritage: Performance Standards on Environmental and Social Sustainability (2012), www.ifc.org/performancestandards.

²⁹ PS1, para. 1.

³⁰ *Ibid.*, para. 5: “The client, in coordination with other responsible government agencies and third parties as appropriate, will conduct a process of environmental and social assessment, and establish and maintain an ESMS appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risks and impacts. The ESMS will incorporate the following elements: (i) policy; (ii) identification of risks and impacts; (iii) management programs; (iv) organizational capacity and competency; (v) emergency preparedness and response; (vi) stakeholder engagement; and (vii) monitoring and review.” Interestingly, contrary to the ‘public’ arm of the World Bank which has steadily refused to mention human rights considerations in its strategies and standards, the IFC's PS 1 states that “Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project”: *ibid.*, para. 3.

Compliance Policy³¹ and the ICC applies the 2013 IIC Environmental and Social Sustainability Policy.³² Under the latter, the ICC requires “Environmental and social appraisals.” Interestingly, the ICC Environmental and Social Policy introduces a good measure of EES syncretism since it provides that:

“The IIC assesses potential environmental and social risks and impacts of all proposed investments for compliance with host country laws and regulations and this Sustainability Policy and associated standards and guidelines prior to final approval thereof. These standards (see section VI, paragraph 1) include the IDB Environment and Safeguards Compliance Policy, other IDB safeguard policies and sector guidelines, the Performance Standards (PS) on Environmental and Social Sustainability of the International Finance Corporation (IFC), and the World Bank Group/IFC Environmental Health and Safety (EHS) Guidelines (including both General EHS guidelines and Industry Sector EHS Guidelines). Any subsequent revisions to those standards, policies and guidelines will likewise be incorporated into this Sustainability Policy, unless otherwise provided for by the IIC’s Board of Executive Directors.”³³

The standards set by MDBs therefore create specific environmental obligations both directed to the Bank staff and the borrower/client. But do they ‘work’? There are many ways to understand effectiveness. As far as the relationship between law and the environment is concerned, this might mean: Are environmental protection rules applied? Are the environmental issues at stake solved / taken into account adequately thanks to the rule? Is the content of the rule appropriate to achieving its environmental purpose? Is the purpose of the environmental rule achieved (irrespective of whether it has concretely solved the environmental problem at hand)? Over the last twenty years, an impressive corpus of literature on the effectiveness of international environmental law has been produced and it considers all of these aspects and even that of the quantification of effectiveness.³⁴ The present contribution endeavours to contribute to this corpus by exploring a specific angle: that of compliance with the environmental standards of the MDBs, seen through the lens of the cases reviewed by the MDBs’ own accountability mechanisms, cases which are brought by the people directly affected by the adverse environmental impacts of projects that MDBs support.

More precisely, what can we learn about compliance, by the staff of MDBs with the environmental standards adopted by and for the banks, from the cases

³¹ At <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=665902>.

³² At www.icc.org/sites/default/files/pdf/iicdocs-346480-v13-sustainability_policy-2_26_13.pdf.

³³ Para. 2.

³⁴ Carsten Helm, Detlef Sprinz, “Measuring the Effectiveness of International Environmental Regimes”, 45 *Journal of Conflict Resolution* 5 (2000), pp. 630-652; Detlef Sprinz, “The Quantitative Analysis of International Environmental Policy”, in Detlef Sprinz, Yael Wolinsky-Nahmias (eds.), *Cases, Numbers, Models: International Relations Research Methods*, Ann Arbor: The University of Michigan Press (2004).

borne of projects which somehow went wrong? Such an approach has some obvious biases. Among those, the first is, precisely, that it focuses on projects in which something appeared to have gone wrong enough to justify at least a *prima facie* compliance assessment. This leaves aside all of the projects that did not trigger any compliance issue or any serious allegation of environmental and/or social harm. The purpose of this chapter is, however, not to assess the overall compliance of MDBs with their environmental standards but to shed light on the weak spots in MDB's interventions, these areas in which MDBs could learn and hopefully do better. A second bias is that no one knows how many serious compliance issues related to environmental and social harm have never given rise to the submission of a complaint to the accountability mechanism of the concerned MDB, for lack of knowledge that such mechanism existed, fear of reprisals etc. Nevertheless, most of the MDBs' accountability mechanisms – which are referred to as the International Accountability Mechanisms (IAMs) – now have a significant experience in reviewing the compliance of Management with their bank's standards, and I believe the sample is sufficient to distinguish the general dynamics of non-compliance with environmental standards.

The first part of this contribution introduces the scope and purpose of the control of the IAMs over Management, given that it is a kind of compliance review which is quite specific and distinct from judicial review, and compliance control is based on standards the nature and purpose of which are also very specific. The second part describes the findings of the MDBs' accountability mechanisms, as regards the loopholes and pitfalls related to compliance with environmental standards in the design, implementation and monitoring of the contentious projects and, in the light of these findings, puts forward explanations as to why some problems keep arising again and again.

The research presented here is based on a four-year research program funded by the European Research Council, the International Grievance Mechanisms and International Law & Governance (IGMs) project.³⁵ The starting point of the project is that although international law was primarily intended only as the legal framework of inter-state relations, made by and for States, it is increasingly called upon to regulate a number of transnational activities, not necessarily performed by States. At the same time, for lack of direct legal connection between the various actors involved in transnational activities, the people affected by these activities often have no appropriate remedy at their disposal to ask some transnational actors to account for their impacts directly. In other words, decisions taken at the international/transnational level (or lack of) can have consequences that are disregarded by the system.³⁶ The IGMs project intends to explore what can be seen

³⁵ ERC Grant No. 312514 (December 2012-November 2016), www.igms-project.org.

³⁶ On the “problem of disregard in global regulatory governance,” that is to say the fact that “the present structures and practices of global regulatory governance often generate unjustified disregard of and consequent harm to the interests and concerns of weaker groups and targeted

as regulation and justiciability ‘gaps’ in international law and decision-making through an in-depth study of certain international mechanisms that seem to fill some of these gaps. The project focuses on international grievance mechanisms that are not tribunals, but permanent international mechanisms created by non-binding international instruments that nevertheless allow the people affected or potentially affected to ask directly some entities – either public or not – to account for the impacts of their activities when no or hardly any international responsibility/liability mechanism can be triggered. The grievance mechanisms studied include the Inspection Panel³⁷ (hereinafter IPN in the footnotes, the IAM of the World Bank’s IBRD and IDA, created in 1993), the Compliance Advisor Ombudsman³⁸ (CAO, the IAM of IFC and MIGA, created in 1999), the *Mecanismo Independiente de Consulta e Investigación*³⁹ (MICI, the IAM of IDB and ICC, first created under the form of an Independent Inspection Mechanism in 1994), the Accountability Mechanism⁴⁰ (AM, the IAM of the ADB, first created under the form of an Independent Function in 1995), the Project Complaint Mechanism⁴¹ (PCM, the IAM of EBRD, first created under the form of an Independent Recourse Mechanism in 2003), and the Independent Review Mechanism (IRM) entrusted to a Compliance Review and Mediation Unit⁴² (CRMU, the IAM of AfDB, created in 2004). Unfortunately, the IAM of the EIB could not be included in the in-depth study since, until recently (late 2014 or early 2015), no proper registry of the cases was made available to the public and its Complaints Mechanism is the only IAM

individuals”, see Richard B. Stewart, “Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness”, 108 *Am. J. Intl. L.* (2014), p. 211.

³⁷ Inspection Panel Operating Procedures (with Annex 2 added in February 2016), April 2014, <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf>.

³⁸ CAO Operational Guidelines, 2013, www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf.

³⁹ The effective commencement of the ICC’s operations on 1st January 2016 has resulted in increased complexity as regards the MICI rules or procedure. The MICI IDB Policy of 17 December 2014 replaced the 2010 MICI Policy. Because of the take-off of the ICC, the Board adopted a second MICI Policy on 15 December 2015, that applies to the ICC’s operations (hereinafter the MICI ICC Policy), and amended the 2014 MICI IDB Policy. Thus, the MICI is bound by two sets of rules of procedures, depending on whether the case is related to a project supported by the ICC or the IDB. A preamble was added in the MICI IDB Policy to organize how the cases related to private projects that were managed by IDB should be handled. See Policy of the Independent Consultation and Investigation Mechanism, 17 December 2014 (as amended 15 December 2015), www.iadb.org/document.cfm?id=40153237, and Policy of the Independent Consultation and Investigation Mechanism of the ICC, 15 December 2015, www.iadb.org/document.cfm?id=40151002.

⁴⁰ Accountability Mechanism Policy, 24 May 2012, OM Section L1/BP, [http://compliance.adb.org/dir0035p.nsf/attachments/operations-manual-bank-policy-2012.pdf/\\$FILE/operations-manual-bank-policy-2012.pdf](http://compliance.adb.org/dir0035p.nsf/attachments/operations-manual-bank-policy-2012.pdf/$FILE/operations-manual-bank-policy-2012.pdf).

⁴¹ Project Complaint Mechanism Rules of Procedure, May 2014, www.ebrd.com/downloads/integrity/pcmrules.pdf.

⁴² Independent Review Mechanism Operating Rules and Procedures, January 2015, www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM_Operating_Rules_and_Procedures-january_2015-_En.pdf.

that does not automatically disclose its documents, but instead puts them online only if the parties have agreed to it.⁴³

In the framework of this research, the team has performed some sixty semi-directed, qualitative confidential interviews with complainants, persons who work or used to work for the above-mentioned IAMs, and persons who have participated in their creation or revision. In addition, the project's team has created a database of the cases⁴⁴, mostly interested in the cases that have led either to a full compliance review – sometimes called ‘audit’ or else ‘investigation’ depending on the language of each IAM – or at least to a compliance review assessment, which some IAMs conduct to check whether there are *prima facie* serious grounds for believing that the case deserves a compliance review. On 1st September 2015, this database contained 157 cases.⁴⁵ Following a methodology described in the second part of this contribution, the lessons to be learned regarding compliance with environmental standards are largely based on the content of this database.

1. THE PURPOSE AND SCOPE OF IAMs’ CONTROL OF THE IMPLEMENTATION OF ENVIRONMENTAL STANDARDS

The International Accountability Mechanisms of MDBs are peculiar creatures. Complainants turn to IAMs as a last resort mechanism, because of a lack of effective remedies – whether amicable or judicial – at the project, local and national levels.⁴⁶ IAMs are expected by those affected to be a forum in which they can voice their concerns, and to do something, ranging from stopping the project to alleviating the adverse impacts; it is expected by advocacy organisations to play both the role of a(n independent) white knight and that of a watchdog (with teeth) and; more often than not, it is seen by Management as the “big bad wolf.”⁴⁷ They

⁴³ EIB Complaints Mechanism – Operating Procedures, 28 August 2013, www.eib.org/attachments/strategies/complaints_mechanism_operating_procedures_en.pdf.

⁴⁴ Available at <http://igms-project.org/EN/database/indexbase.html>.

⁴⁵ All the documents related to the IAMs’ cases mentioned here are available on the corresponding IAM’s website. AM-CRP: <http://compliance.adb.org/>; CAO: www.cao-ombudsman.org/; IPN: <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx>; IRM/CRMU: www.afdb.org/en/topics-and-sectors/topics/independent-review-mechanism-irm/; MICI: www.iadb.org/en/mici/; PCM: www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html.

⁴⁶ In all the cases about which the IGMs project’s team has interviewed complainants, this point has been clearly mentioned.

⁴⁷ As plainly put by Alistair Clark, Managing Director, Environment and Sustainability Department of the EBRD, during the Open Symposium on the Practice of Independent Accountability Mechanisms (IAMs), organised by the Project Complaint Mechanism of the EBRD, EBRD Headquarters, London, 17 September 2014. See also Jean Aden, “Summary of Targeted Discussions with Bank Management” (2011), <http://ewebapps.worldbank.org/apps/ip/Documents/SummaryTargettedDiscussionBankManagement.pdf>.

assess compliance with environmental and social standards the content and scope of which is designed by MDBs themselves. In addition, IAMs are independent from their institution in varying degrees and their mandates are not identical, depending on the MDB concerned.

1.1. THE SPECIFIC ROLES OF IAMs

MDBs are international organisations. As such, they are covered by jurisdictional immunities and are very, very difficult to bring before a tribunal, even in cases where their activities ended up with obvious violations of local or international law, even as regards human rights law.⁴⁸ Quite recently, an international NGO, EarthRights International, has supported the lawsuit of three fishermen against the IFC before the federal court in Washington DC. The complaint concerns the financing by the IFC of the Tata Mundra Coal Power Plant in India.⁴⁹ The complainants point out that although the IFC's own accountability mechanism, the Compliance Advisor Ombudsman (CAO), has found that part of the project does not comply with IFC's environmental and social safeguards⁵⁰, the IFC is not taking appropriate action to remedy the harm done to the local population. In March 2016, the judge decided that the IFC had not waived its immunity and, therefore, could not be liable, and dismissed the case without oral argument.⁵¹ The plaintiffs are preparing an appeal.⁵² The "untouchability" of MDBs is in stark contrast with the magnitude of the potential impacts of their activities on the

⁴⁸ See *inter alia* August Reinisch, Ulf A. Weber, "In the Shadow of *Waite and Kennedy*. The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", 1 *Int'l Org. L. Rev.* (2004), pp. 59-110; Niels Blokker, "International Organizations: The Untouchables?", in Niels Blokker, Nico Schrijver (eds.), *Immunity of International Organizations*, Leiden/Boston: Brill/Martinus Nijhoff (2015), pp. 1-17.

⁴⁹ IFC, Tata Ultra Mega, Project number 25797, approved 8 April 2008, <http://ifcextapps.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/eab8e042d643a6ec852576ba000e2b15?opendocument>.

⁵⁰ CAO, *India / Tata Ultra Mega-01/Mundra and Anjar*, CAO Audit Report, 22 August 2013. A complaint about the same project has also been filed with the Asian Development Bank's Accountability Mechanism (AM), since ADB also finances part of it. The AM Compliance Review Panel (AM-CRP) has likewise found that the ADB had breached some of its environmental and social standards. See AM-CRP, *India: Mundra Ultra Mega Power Project*, Request 2013/1, CRP Final Report, 7 April 2015 (date of issuance).

⁵¹ United States District Court for the District of Columbia, *Budha Ismail Jam, et al. v. International Finance Corporation*, Civil Action No. 15-612 (JDB), Memorandum Opinion, 24 March 2016, www.earthrights.org/sites/default/files/documents/jam_v_ifc_-_order_granting_mtd.pdf.

⁵² EarthRights International, www.earthrights.org/legal/tata-mundra-coal-power-plant. See also Claire Provost, Matt Kennard, "World Bank Lending Arm Sees off Lawsuit by Indian Fishermen", *The Guardian*, 30 March 2016, www.theguardian.com/global-development/2016/mar/30/world-bank-lending-arm-ifc-sees-off-lawsuit-by-indian-fishermen-power-plant.

ground and their power to influence the course of things. It makes accountability mechanisms all the more precious.

IAMs are not tribunals and they do not look into the legal responsibility of MDBs. They are also distinct from the General Counsel, which is entrusted with the mandate of giving legal advice to the bank. One of the core features of IAMs is that accountability is not polarized on the violation of a norm but on harm, whether it has already occurred or might occur. The logic of the IAMs' accountability process is thus not rights-based but rather wrongs-based. For this reason, except for the Inspection Panel for the public projects (and public-private partnerships) supported by the World Bank Group⁵³, all other IAMs articulate a problem-solving procedure with a compliance control procedure.

Generally speaking, their role is threefold:

- To assess, upon request of the people affected – or likely to be affected – by the bank's activities, the compliance of the Management of the bank with its own internal rules, that is to say, with its policies and procedures inter alia related to the disclosure of information, environmental and social assessment, indigenous people rights ... If the Management is found not to be compliant, it does not result in the legal implication of the bank but it is expected to adopt corrective measures;
- To offer redress for negative environmental and social impacts, based on a problem-solving approach tailored to the needs of the requesters, using techniques such as fact-finding, mediation, consultation, negotiation ... Except for the IRM and the MICI⁵⁴, the latest being the less accessible of all IAMs, access to problem-solving (sometimes called dispute resolution or consultation phase) is not conditioned by the fact that claimants allege a breach of the bank's standards and;
- To provide the bank with lessons learned from the cases, including recommendations related to changes in MDBs' policies and procedures that

⁵³ The 2014 review of the Inspection Panel's Operating Procedures has introduced a highly controversial 'pilot approach to support early solutions' that aims at facilitating dialogue between Management and the complainants before registering the complaint. Though it is not supposed to prevent complainants to access the compliance control procedure if this dialogue fails, the first attempt resulted in some of the complainant seeing the compliance control path barred. See Inspection Panel, 2014 Updated Operating Procedures, *op. cit.*; IPN, *Nigeria: Lagos Metropolitan Development and Governance Project (Pilot – Not Registered)*, Case 91, Complaint received 30 September 2013; Amnesty International, "World Bank: Investigate Inspection Panel's Pilot Approach to Early Solutions and Its Application in Badia East, Lagos, Nigeria", 2 September 2014, www.amnesty.org/download/Documents/4000/afr440202014en.pdf.

⁵⁴ MICI IDB Policy and MICI ICC Policy, para. 24; IRM Operating Rules and Procedures 2014, paras. 1 and 6. Note that in the case of the IRM, the combination of paras. 7c) and 41 reveals that though formally the Operating Rules and Procedures require that the requesters "allege that an actual or threatened material adverse effect on the affected persons' rights or interests arises directly from an act or omission of a member institution of the Bank Group as a result of the failure by the said institution to follow any of its own operational policies and procedures" (para. 1), the question of breach is not considered during problem-solving exercises.

would be needed to prevent future noncompliance situations. In this respect, the CAO used to be the only IAM whose mandate expressly includes direct “advice to the President and IFC/MIGA on broader environmental and social issues related to policies, standards, guidelines, procedures, resources, and systems established to improve the performance of IFC/MIGA projects.”⁵⁵ The recent revision of the AfDB’s IRM has given the CRMU the possibility to propose advisory services.⁵⁶ As for the other IAMs, this ‘lessons learned’ function is part of their compliance review and/or problem-solving roles.⁵⁷

1.2. ON THE BINDING CHARACTER OF THE ENVIRONMENTAL AND SOCIAL STANDARDS OF MDBS

Part of the IAMs’ mandate (or almost all of it, in the case of the Inspection Panel) is thus to look into the Management’s compliance with the institution’s ESSs. From a technical, international law point of view, these ESSs are, according to the terminology of the Draft Articles on the Responsibility of International Organizations (DARIOs), “rules of the organization.”⁵⁸ Their legal nature is debated and there is no consensus on whether they are part of international law or can only bind the organisation’s staff.⁵⁹

Even from the viewpoint of the staff, it is actually not so easy to tell the extent to which the ESSs are binding. In any case, this binding character is usually considered by MDBs’ Managements to result from practical considerations, rather than from any *legally binding* character. It first depends on the language of the ESSs: the vaguer it is, the more Management has leeway in interpreting them. Second, the designation of the different kinds of standards indicates that some are considered to be more binding than others: Management seems to be expected to follow policies and procedures, while guidance notes, good practices and so on are only indicative.⁶⁰ The first cases submitted to IAMs have given an opportunity

⁵⁵ CAO Operational Guidelines, para. 5.1.1.

⁵⁶ IRM Operating Rules and Procedures, para. 71.

⁵⁷ PCM Rules of Procedure, para. 44 a); MICI IDB Policy and MICI ICC Policy, para. 61; CAO Operational Guidelines, para. 1.2; Accountability Mechanism Policy, paras. 128 vii), 128 viii), 131 xiii).

⁵⁸ International Law Commission, “Draft articles on the responsibility of international organizations, with commentaries”, *Yearbook of the International Law Commission*, Part Two (2011), Article 2b): “rules of the organization’ means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.”

⁵⁹ See the debates presented in Giorgio Gaja, Special Rapporteur, International Law Commission, “Third Report on Responsibility of International Organizations”, 13 May 2005, UN Doc. A/CN.4/553, paras. 18-19.

⁶⁰ See Daniel D. Bradlow, Andria Naudé Fourie, “The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?”, 10 *Int’l. Org. L. Rev.* (2013), pp. 18-20.

to clarify the ‘bindingness’ of MDBs’ standards. The first Inspection Panel case, related to the *Arun III Proposed Hydroelectric Project* in Nepal, had given rise to a skirmish on the Managements’ leeway in interpreting the applicable standards.⁶¹ The Inspection Panel’s position in this regard was made clear in the *Western Poverty Reduction Project* case, also called the “Qinghai project”:

“During the course of examining some 20 projects over the past five years, the Panel has encountered certain differences in views among staff on just how the Bank’s operational policies and procedures should be applied. (...) For example, a number of staff members felt that the Bank’s Operational Directives and other policies were simply idealized policy statements, and should be seen largely as a set of goals to be striven after. Others of equal or more senior rank disagreed with this view. They felt that this interpretation could render the policies virtually meaningless and certainly incapable of being employed as benchmarks against which to measure compliance. (...) In discussions about compliance, staff often pointed out that the policies allow for flexibility of interpretation. The decisions made on the specific matters were thus covered and in compliance. It was simply a matter of “judgement at Management’s sole discretion.” (...) Other staff argued, however, that the policies are clear enough to distinguish areas that are binding from areas where some reasonable flexibility in interpretation is called for. Read in their entirety, the Panel feels that the directives cannot possibly be taken to authorize a level of “interpretation” and “flexibility” that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding. (...) Faced with these widely divergent views among the staff, the Panel was forced to revisit its views on and experience with Bank policies and compliance. In the end, it returned to the approach reflected in its earlier reports. There is indeed room for some flexibility and interpretation but, as provided in the Resolution that established the Panel, the Operational Directives (and updated OPs, BPs, GPs, etc.) are the primary source of Bank policy for purposes of assessing compliance.”⁶²

Likewise, the second case before the Inspection Function of the ADB, which was then turned into the Accountability Mechanism, led the IAM of the ADB to vigorously affirm the limits of the leeway Management has in interpreting applicable standards:

“Management said that ADB’s “internal laws” were “not written as rule-based statutes but as operational principles that Staff should apply” and that Management is called upon to make “evaluations and decisions about what is possible and ‘doable’ while adhering to the integrity and spirit of ADB’s internal laws.” Management refers to its qualifications and capacity to make professional judgments. (...) Since the issue of professional judgment is referred to at great length and not inconsiderable reliance

⁶¹ IPN, *Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, Case 1, Management Response, 22 November 1994, p. 5.

⁶² IPN, *China: Western Poverty Reduction Project*, Case 16, Investigation Report, 28 April 2000, paras. 9-15.

is placed on professional judgment as a reason for non-compliance with the Bank's operational policies and procedures, the Panel feels obliged to explain at some length why it shares the General Counsel's view that the "internal laws" of the Bank are mandatory. (...) Good governance requires that the affairs of any organization should be conducted in an orderly and reasonably predictable way. This is usually ensured by a hierarchy of norms, including good practices, guidelines, instructions and policy-based operational procedures. Clues to identifying the importance of a norm and the expected level of compliance are ordinarily found in the manner of its formulation and expression and its source. (...) As far as ADB is concerned, it seems to the Panel that the greatest importance is attached to compliance with its procedures anchored in Bank policy and formally declared and prescribed by the Bank's apex governing body – the Board. Their paramount importance and the nature of the compliance expected is reflected in their description as internal "laws" of the Bank. Merely adhering to their "integrity and spirit" is less than what is expected of those from whom obedience is expected. (...) Unless in the circumstances and to the extent prescribed by the Board expressly permitting departures and deviations, compliance is mandatory. There is no choice. It is not a matter for professional judgment as to whether there may or may not be compliance. The need for compliance is not based on any assumption of the qualifications or qualities of any person. It is based on a perceived need of the Board with regard to the conduct it has prescribed."⁶³

It must be noted that it results from the different ESSs of MDBs that Management is bound by three overarching obligations: due diligence, supervision and do no harm.

Due diligence refers to the fact that when scoping and screening, the bank staff must act by taking all of the relevant data about the borrower/client and the proposed project into account. For example, Management is expected to make sure that the borrower/client has the capacity to implement requirements.⁶⁴ The EBRD PCM stressed for its part that:

"the requirements imposed upon EBRD under the Environmental Policy 2003 primarily amount to 'due diligence' obligations, comprising obligations as to conduct rather than as to result, and so the occurrence of actual harm of the type which the relevant obligation is designed to prevent will not be determinative of non-compliance on the part of the Bank. (...) Therefore, the fact that the Bank exercised appropriate due diligence and discharged its obligations under the Environmental Policy would generally amount to compliance, even in the event that harm nevertheless occurs."⁶⁵

Supervision refers to the duty to make sure that the borrower/client complies with the applicable ESSs and to take the necessary steps in case of non-compliance

⁶³ Inspection Function's *ad hoc* Inspection Panel, *Pakistan: Chashma Right Bank Irrigation Project Stage III*, Final Report, 10 June 2004, paras. 68-72.

⁶⁴ See for example CAO, *Democratic Republic of Congo / Anvil Mining Congo, SARL-01/World Bank President Request*, Audit Report, November 2005, para. 3.3.4.

⁶⁵ PCM, *D1 Motorway Phase I (Slovakia)*, Case 2010/01, Compliance Review Report, 11 May 2011, para. 59.

during the full lifecycle of the project. Thus, non-compliance may result from the fact that “key E&S issues identified by IFC in project supervision were not translated into corrective action plans”⁶⁶ or:

“that IFC is not in a position to demonstrate either that its client’s monitoring is commensurate to risk (as required by PS1) or that its supervision allows it to meet the stated purposes of supervision as set out in the ESRPs: namely, the development and retention of information needed to assess the status of E&S compliance”⁶⁷,

or else that:

“[d]uring implementation, ADB did not act on early information from its own supervision missions on systemic problems with the functioning of the grievance redress process, and in particular the lack of capacity on the part of the government entities managing this process. Notwithstanding later efforts by ADB to address this issue, the omissions during the early stages of implementation resulted in noncompliance.”⁶⁸

Depending on the circumstances of each case, Management’s compliance with the supervision obligation may consist of the fact “that Management responded repeatedly and firmly and brought to the attention of the Borrower instances of non-compliance with social safeguards obligations.”⁶⁹

Finally, the obligation to ‘do no harm’ directly stems from the MDBs’ standards and, arguably, from the very mission of these *development* banks. For example, the IFC’s Policy on Environmental and Social Sustainability states that “Central to IFC’s development mission are its efforts to carry out investment and advisory activities with the intent to “do no harm” to people and the environment.”⁷⁰ The ADB’s Safeguard Policy Statement provides that “The goal of the Safeguard Policy Statement (SPS) is to promote the sustainability of project outcomes by protecting the environment and people from potential adverse impacts of projects.”⁷¹ The AfDB’s Integrated Safeguards Policy Statement indicates that the bank “recognises that human well-being in Africa depends on the quality of the environment and the sustainable use of natural resources. This is why it strives to ensure that Bank operations have no unintended adverse direct or indirect environmental or social impact on communities” ...⁷²

⁶⁶ CAO, *Peru / Quellaveco-01/Moquegua*, Investigation Report, 29 August 2014, p. 3.

⁶⁷ CAO, *India / Tata Ultra Mega-01/Mundra and Anjar*, *op. cit.*, p. 5.

⁶⁸ AM-CRP, *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project*, Request 2012/2, CRP Final Report, 7 February 2014, para. 136.

⁶⁹ IPN, *Kenya: Natural Resource Management Project*, Case 84, Investigation Report, 22 May 2014, para. 16.

⁷⁰ *Op. cit.*, para. 9.

⁷¹ *Op. cit.*, para. 1.

⁷² Integrated Safeguard System, *op. cit.*, p. 15.

What of international law? International organisations are subjects of international law but they hardly subject to it. In sum, international organisations are bound by the terms of their constitutive agreement and by the treaties to which they adhere. As far as I know from my research, no MDB has ever itself adhered to an international environmental, labour or human rights treaty. Being subjects of international law, they may also in theory be subjected to customary international law and to the general principles of international law.⁷³ The elusive nature of the latter is obvious, but the difficulty of identifying any customary rule which would specifically apply to international organisations is also remarkable.⁷⁴ Moreover, both customary international law and the general principles of international law sorely need a judge to decide upon their existence, contours and their applicability to an international organisation.

There is, however, one notable exception to the above statement, namely, that of the European Investment Bank (EIB). The EIB is a body of the European Union (EU). As such, it is required to comply with all of the legal requirements to which the EU has committed, including international environmental treaties. For this reason, failures to comply with some international environmental treaty-based obligations may lead the EIB to face complaints, as a body of a party to these treaties. And it did happen at the international level, before the Compliance Committee⁷⁵ of the Aarhus Convention.⁷⁶

The EBRD's Management is, for its part, indirectly but undoubtedly bound by EU environmental law. Though EBRD is not a body of the EU (the EU and EIB are among the 65 shareholders of the bank), its Environmental and Social Policy provides that:

⁷³ ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, *ICJ Reports 1980*, para. 37: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."

⁷⁴ Daniel D. Bradlow, "International Law and the Operations of International Financial Institutions", in Daniel D. Bradlow, David B. Hunter eds., *International Financial Institutions and International Law*, Austin/Boston/Chicago/New York/The Netherlands: Kluwer Law International (2010), pp. 1-30; Ole Kristian Fauchald, "Hardening the Legal Softness of the World Bank through an Inspection Panel?", PluriCourts Research Paper No. 13-08 (2013), <http://ssrn.com/abstract=2361099>, para. 2.4.

⁷⁵ See Compliance Committee, "Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community", 3 April 2009, UN Doc. ECE/MP.PP/C.1/2009/2/Add.1, www.unece.org/env/pp/compliance/Compliancecommittee/21TableEC.html. Communication ACCC/C/2007/21 had been submitted by the Albanian NGO Civic Alliance for the Protection of the Bay of Vlora "regarding compliance by the European Community with its obligations under the Convention in relation to the actions of the European Investment Bank with respect to access to information and public participation in the decision-making on the financing and construction of a thermal power plant in Vlora (Albania)." The EIB was found compliant.

⁷⁶ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, 2161 *UNTS* 447; 38 *ILM* 517 (1999).

“The EBRD, as a signatory to the European Principles for the Environment, is committed to promoting the adoption of EU environmental principles, practices and substantive standards by EBRD-financed projects, where these can be applied at the project level, regardless of their geographical location. When host country regulations differ from EU substantive environmental standards, projects will be expected to meet whichever is more stringent.”⁷⁷

Consequently, although formally the EBRD’s Management is bound by the Environmental and Social Policy and not by EU law or the international treaties to which the EU adheres, they must apply this policy consistently with the EU environmental law. In addition, in the previous version of the Environmental and Social Policy (2008), the Performance Requirements (PRs) contained direct references to compliance with international treaties and EU law.⁷⁸ This has, in many cases, led the PCM to analyse the content of EU law – for example as regards the Carbon Capture and Storage Directive (Directive 2009/31/EC)⁷⁹ or the Habitats Directive (Directive 92/43/EEC)⁸⁰ – in order to assess whether Management was or was not compliant.

Apart from the special situation of the EIB and the EBRD, it must be noted that the fact that MDBs do not adhere to environmental treaties does not mean that MDBs standards ignore the state of international law, quite the contrary.⁸¹ There are direct references to international instruments, as texts having inspired the drafting of the standards. Thus, the 2009 IDB Environment and Safeguards Compliance Policy “is grounded in the principles of sustainable development as set out in the Declaration of Rio 92, Agenda 21, and most recently reinforced in the World Summit on Sustainable Development in Johannesburg,”⁸² the Preamble

⁷⁷ *Op. cit.*, para. 7. Footnote 6 specifies that: “Substantive environmental standards of the European Union are contained in EU secondary legislation, for example, regulations, directives and decisions. Procedural norms directed at member states and EU institutions and the jurisprudence of the European Court of Justice and the Court of First Instance which applies to member states, EU institutions and EU legal and natural persons, is excluded from this definition”.

⁷⁸ Thus, the 2008 version of Performance Requirement 6, on Biodiversity Conservation and Sustainable Management of Living Natural Resources, for example provided that “the Bank is guided by and supports the implementation of applicable international law and conventions and relevant EU Directives”: EBRD Environmental and Social Policy (2008), PR6, www.ebrd.com/downloads/research/policies/2008policy.pdf, para. 2.

⁷⁹ PCM, *Šoštanj Thermal Power Plant (Slovenia)*, Case 2012/03, Compliance Review Report, 23 September 2013.

⁸⁰ PCM, *Paravani HPP (Georgia)*, Case 2012/01, Compliance Review Report, 1 January 2014; PCM, *Ombla HPP (Croatia)*, Case 2011/06, Compliance Review Report, 1 January 2014; PCM, *Boskov Most Hydro Power (FYR Macedonia)*, Case 2011/05, Compliance Review Report, 1 January 2014; PCM, *D1 Motorway Phase I (Slovakia)*, Case 2010/01, Compliance Review Report, 11 May 2011.

⁸¹ See in particular Charles E. Di Leva, “International Environmental Law, the World Bank, and International Financial Institutions”, in Daniel Bradlow, David B. Hunter (eds.), *op. cit.*, pp. 343-385.

⁸² *Op. cit.*, para. 2.3.

of the 2013 AfDB Integrated Safeguards System states that “[t]he AfDB (...) views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples’ Rights”⁸³ and, for example, its Operational safeguard 3–Biodiversity, Renewable Resources and Ecosystem Services affirms that it:

“reflects the objectives of the Convention on Biological Diversity to conserve biological diversity and promote the sustainable management and use of natural resources. It also aligns with the Ramsar Convention on Wetlands, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the World Heritage Convention, the UN Convention to Combat Desertification and the Millennium Ecosystem Assessment. Its recommendations also align with the International Plant Protection Convention.”⁸⁴

One can find similar references to international instruments in the policies of all MDBs.

Finally, it is important to recall that ESSs of MDBs are not only directed to Management but also to borrowers/clients. Being internal rules, they are not as such legally binding over them. It is the loan agreement (or guarantee, or shareholder agreement depending on the kind of support) – which is a legally binding document signed between the MDB and the borrower/client – that creates legal obligations for the latter.⁸⁵ Loan agreements stipulate, one way or another, that support from MDBs is conditional on the borrowers/clients’ respect of the bank’s ESSs related to borrowers/clients’ behaviour.⁸⁶ Yet, the mandate of the IAMs of MDBs only allows them to assess the behaviour of the bank’s staff, not of the borrower/client’s.

⁸³ *Op. cit.*, Preamble, p. 1.

⁸⁴ *Ibid.*, OS3, p. 39.

⁸⁵ John W. Head, “Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks”, 90 *Am. J. Int’l L.* (1996), pp. 214-234.

⁸⁶ Except when the bank forgets to include the environmental and social requirements in the agreement ... This happened in the *Quellaveco* case. “CAO recognizes that this investment was initiated at a time when IFC E&S procedures were relatively underdeveloped. (...) Nevertheless, CAO finds that IFC omitted to include necessary E&S requirements in the Shareholders Agreement which formed legal basis for the investment. This resulted in a significant gap in terms of the Company’s E&S obligations, particularly given IFC’s undertaking to its Board of Directors in March 1993 that the Project would “comply with all applicable World Bank environmental and occupational health and safety guidelines.” CAO finds that the absence of E&S requirements in IFC’s investment agreement made E&S supervision difficult”: CAO, *Peru / Quellaveco-01/Moquegua*, *op. cit.*, p. 3.

1.3. THE SCOPE OF THE IAMs' REMIT

The IAMs' remit is limited in a number of reasons, some being common to all IAMs, others depending on their specific rules of procedure and on the unique culture of each MDB and of each IAM.

First, the IAMs' mandates do not include the power to make decisions on the remedial actions that will be implemented by Management in response to the IAM's compliance review report. All IAMs make findings and some – the PCM, the MICI, the CRMU, the CAO – are also mandated to recommend remedial actions. These recommendations are primarily related to the case at hand, but they can also highlight the systemic changes that might prove necessary at the level of the bank, the need to clarify the procedures that the Management applies for example. The compliance reviews of the Inspection Panel and the AM-CRP⁸⁷ have 'only' fact-finding purposes; remedial actions are proposed by Management on the basis of the findings.⁸⁸ In any case, it is the Board of the MDB, composed of Executive Directors representing the shareholders (countries), or sometimes the President of the MDB⁸⁹ which have the power to decide on remedial actions. Depending on the institution, such power to make the final decision can be purely formal, as it is the case as regards the CAO's reports⁹⁰, or gives rise to internal debates that may end with the Board amending the recommendations⁹¹ or even rejecting the whole report.⁹²

Second, the fact that IAMs are concerned with MDB's accountability only is a common crucial point. IAMs do not investigate the borrower/client. It is inscribed in the rules of procedures of every IAM. In practice, however, the line is very thin between investigating the bank and the borrower. In order to check whether

⁸⁷ It has lost its power to make recommendations in the latest version (2012) of its policy, but kept its power to monitor the implementation of remedial actions.

⁸⁸ Inspection Panel Operating Procedures 1994, in Inspection Panel, *Annual Report 1996-1997*, Annex 2, <http://ewebapps.worldbank.org/apps/IP/IPPublications/inspectionPanelAnnualReport1996-1997.pdf>, paras 52 and 54, and Operating Procedures 2014, *op. cit.*, paras 63 and 67; Accountability Mechanism Policy 2012, *op. cit.*, paras. 79 and 83.

⁸⁹ CAO Operational Guidelines, *op. cit.*, para 4.4.5; IRM Operating Rules and Procedures, *op. cit.*, p. 1: the IRM "reports to the Boards of Directors of the Bank and Fund (collectively the 'Boards') on approved projects or to the President of the Bank Group (the 'President'), on projects under consideration for financing by the Bank Group."

⁹⁰ CAO Operational Guidelines, *op. cit.*, para 4.4.5: "CAO will forward the Investigation Report and the IFC/MIGA response to the President. The President has no editorial input as to the content of the compliance Investigation Report, but may take the opportunity to discuss the investigation findings with CAO. Once the President is satisfied with the response by IFC/MIGA senior management, the President will provide clearance for the Investigation Report and the response. The President retains discretion over clearance."

⁹¹ It has happened for example in the *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project* case: AM-CRP, Request 2012/2, Board's Decision, 31 January 2014.

⁹² MICI, *Paraguay – Program to Improve Highway Corridors in Paraguay*, Case PR-MICI002-2010, Final Decision of the Board of Executive Directors, 12 July 2013. The reason is mentioned in the next paragraph of this chapter.

Management is compliant, IAMs must assess whether Management has complied with its due diligence and supervision obligations *vis a vis* the borrower/client's implementation of the safeguards. This possibly implies stating that the borrower/client's capacity was insufficient or did not deliver the environmental and social assessments and plans, as required, before the Board approval, which would trigger the due diligence obligation of Management, or else that the measures necessary to complying with the safeguards have not been properly implemented by the borrower/client, which triggers Management's supervision duty. Thus, IAMs have to look into the shortcomings of the borrower/client in order to make findings on the Management's compliance with the ESSs. Unsurprisingly, some borrower/clients, despite being told that their own accountability is not at issue, do not appreciate feeling investigated.⁹³ In addition, the Executive Director concerned sitting in the Board, and other Executive Directors who defend the same interests, sometimes take up the borrower/client's 'cause' to such an extent that the Board ends up preventing the IAM from doing its job. This has resulted in the Board not authorizing a compliance review despite the fact the IAM finds the complaint eligible⁹⁴, or agreeing to a compliance review but on conditions⁹⁵ or else, in the end, rejecting the compliance review report.⁹⁶

Indeed, and it is a third point, when looking at the IAMs' remits in detail and putting them in the broader context of each bank's culture, depending on the MDB concerned, there are clear differences regarding the leeway they are granted. The MICI is the least advantaged in this respect. Despite having created its IAM as early as 1994, in the wake of the Inspection Panel's establishment, the IDB has always displayed a great mistrust of its IAM.⁹⁷ This has resulted in hardly understandable

⁹³ See for example AM-CRP, *Sri Lanka Southern Transport Development Project*, Request 2004/1, 5th and Final Monitoring Report, 5 August 2011, paras. 27-33. Another example is China's refusal to authorize an IAM to make a site visit, thus preventing the IAM to perform an important part of its fact-finding mission: AM-CRP, *People's Republic of China: Fuzhou Environmental Improvement Project*, CRP Final Report, 21 October 2010.

⁹⁴ MICI, *Bolivia – Santa Barbara- Rurrenabaque Northern Corridor Highway Improvement Program*, Case BO-MICI001-2011, Decision of the Board of Executive Directors, 22 December 2014; MICI, *Brazil – Mario Covas Rodoanel Project – Northern Section 1*, Case BR-MICI003-2011, Decision of the Board of Executive Directors, 10 July 2013; MICI, *Brazil – Mario Covas Rodoanel Project – Northern Section 1*, Case BR-MICI005-2011, Decision of the Board of Executive Directors, 10 July 2013; IPN, *Brazil: Itaparica Resettlement and Irrigation Project*, Case 9, Request received 12 March 1997.

⁹⁵ IPN, *India: NTPC Power Generation Project*, Case 10, Investigation Report, 22 December 1997 (the Board authorized only a desk study and no on-site fact-finding mission); CRMU, *South Africa: Medupi Power Project*, Request 2010/2, Revised Reassessment and Revision of the Terms of Reference for the Compliance Review, July 2011 (the Board refused that the sixth point of the complaint, which claimed that "the poor people will not benefit from the project", be included in the compliance review's terms of reference.).

⁹⁶ MICI, *Paraguay – Program to Improve Highway Corridors in Paraguay*, Final decision of the Board of Executive Directors, *op. cit.*

⁹⁷ Walter Leal Filho, Angel René Rios, *Accountability Issues in International Development Projects*, Frankfurt am Main: Peter Lang (2007), especially pp. 49-146. This point has also been emphasized during the confidential interviews.

delays in the Board making decisions on the MICI's assessments or else, as mentioned above, refusal to follow the MICI's recommendation to proceed with an investigation or rejection of the investigation report, based on what, seen from the outside, looks very much like institutionalised nit-picking.⁹⁸ All of the MDB's IAMs except one have the power to monitor the implementation of the remedial actions approved by the Board on the basis of the compliance review report; the Inspection Panel was not granted any monitoring power, which can however be allowed by the Board on a case by case basis.⁹⁹ Generally speaking, the IAMs are allowed to use only specific types of standards¹⁰⁰ which do not automatically apply to all of the MDBs' activities. For example, the World Bank's ESSs apply to what they call 'investment project financing,' meaning operations related to specific, circumscribed projects (a dam, a road etc.) but not to 'development policy lending', which supports programs of policy and institutional actions and replaces structural adjustment loans and sectoral adjustment loans, or to the trust funds managed by the bank.¹⁰¹

Fourth, depending on the culture of the IAM, harm is more or less important in the triggering of a compliance review. Central to the CAO's mandate are the questions of the IFC/MIGA environmental and social performance, whether the project raises "substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA."¹⁰² In order to decide to undertake an investigation, the CAO considers whether:

"There is evidence of potentially significant adverse environmental and/or social outcome(s) now, or in the future; There are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA; There is evidence that indicates that IFC's/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection."¹⁰³

⁹⁸ See in particular MICI, *Paraguay – Program to Improve Highway Corridors in Paraguay*, Final decision of the Board of Executive Directors, *op. cit.*

⁹⁹ Lately the Inspection Panel has made a cautious move in the direction of monitoring and has negotiated with Management some procedures which allow tracking the state of implementation of Management Action Plans in response to the Panel's reports. See IPN Operating Procedures, *op. cit.*, Annex 2 "Enhancing Consultation with Requesters and Tracking Action Plans"; World Bank Management, "Overview of Status of Implementation of Management Action Plans Prepared in Response to Inspection Panel Eligibility and Investigation Reports", April 2016, <http://ewebapps.worldbank.org/apps/ip/Documents/Tracking%20Management%20Action%20Plan%20-%20April%202016.pdf>.

¹⁰⁰ For example, the global and sectoral Strategies of the MDBs cannot be used by IAMs. The CRMU however used AfDB's handbooks, draft policies, and strategies to determine whether there was compliance with applicable standards in the Medupi case, without triggering any noticeable reaction from the Board: CRMU, *South Africa: Medupi Power Project*, Request 2010/2, Compliance Review, 19 December 2011. It is unsure that the CRMU will enjoy this leeway again in the future.

¹⁰¹ On the latter situation see IPN, *Haiti: Haiti Mining Dialogue Technical Assistance*, Case 100, Notice of non-registration, 9 February 2015.

¹⁰² CAO Operational Guidelines, *op. cit.*, p. 22.

¹⁰³ *Ibid.*, p. 23.

The CAO's compliance investigation process is thus not aimed at detecting non-compliance with applicable policies strictly speaking. In contrast, the PCM does not require any allegation of harm. Access to problem-solving is open to: "One or more individual(s) located in an Impacted Area, or who has or have an economic interest, including social and cultural interests, in an Impacted Area" and access to compliance review is open to "One or more individual(s) or Organisation(s)."¹⁰⁴ In its compliance review function, the PCM acts much more like an enforcement device than other like-mechanisms. This does not mean that harm is not considered at all¹⁰⁵, but it is only marginally what is at issue during a compliance review.

2. THE MERRY-GO-ROUND OF LOOPHOLES AND PITFALLS IN THE IMPLEMENTATION OF ESSS

What do the compliance review reports of IAMs reveal about the reasons why a project causes environmental harm and/or why environmental considerations were not properly taken into account? The hypothesis is that a study on the types of findings of non-compliance with environmental standards can contribute to identifying systemic issues that can be remedied.

2.1. METHODOLOGY OF THE STUDY

The first stage in the selection of the relevant cases has consisted of identifying the complaints before the 6 IAMs studied, which actually ended up with a final compliance review report. As mentioned previously, as of 1st September the IGMs' database¹⁰⁶ contained 157 cases of the AM-CRP (9 requests for a compliance review, including one case of the AM-CRP's predecessor – the Inspection Function), the CAO (26 compliance investigations completed or ongoing, 1 CAO

¹⁰⁴ PCM Rules of Procedure, *op. cit.*, paras 1 and 2.

¹⁰⁵ See PCM, *Tbilissi Railway Bypass 1, 2 & 3 (Georgia)*, Cases 2011/01, /02, /03, Joint Compliance Review Report, 23 July 2012, p. 4: "There is no evidence that the Bank's actions in this regard caused harm to the complainants. (...) Consequently, the complainants did not suffer any harm as a result of this instance of Bank non-compliance and it can be regarded as *de minimus*."; see also Independent Recourse Mechanism (which was replaced in 2009 with the PCM), *Vlore Thermal Power Generation Project (Albania)*, Case 2007/01, Compliance Review Report, 9 May 2008, para. 7: "the potential seriousness of any possible consequences of a breach of EBRD procedures will be taken into account in determining whether that breach amounts to a material violation of a Relevant EBRD Policy along with whether, in the event of a finding of non-compliance, the violation is so critical so as to warrant remedial changes to the scope or implementation of the Project or remedial changes to the Bank's practices and procedures so as to avoid recurrence of such or similar violations in the future."

¹⁰⁶ [Http://igms-project.org/EN/database/indexbase.html](http://igms-project.org/EN/database/indexbase.html).

sectoral audit and 36 cases which stopped at the stage of the compliance review appraisal)¹⁰⁷, the Inspection Panel (38 cases eligible to an investigation, completed or ongoing), the IRM/CRMU (2 completed compliance reviews), the MICI (14 cases eligible to a compliance review completed or ongoing, including 4 cases of the MICI's predecessor – the Independent Investigation Mechanism – and 6 cases non-eligible to a compliance review), and the PCM (25 cases completed or ongoing, including 2 cases of the PCM's predecessor – the Independent Recourse Mechanism). Among those 157 cases, if one removes the ongoing investigations, the complaints which were finally declared non-eligible or assessed as not meriting an investigation, the cases in which the IAM could not complete the review¹⁰⁸ and the cases in which the investigation was not authorised by the Board, 76 complaints¹⁰⁹ resulted in the IAM delivering a compliance review report remain.

The second stage consisted in identifying, from among these 76 cases, those which raise issues of compliance with environmental standards. The discriminating marker used here was the fact the requests filed with IAMs included allegations of environmental harm and/or of the violation of an environmental standard, whether the bank's or a national or international environmental text. This information was retrieved from the columns entitled: "Alleged harm/ Invoked policies & procedures by the claimant(s)" in the tables of the database. Very few complaints that ended up with the IAM performing a compliance review do not include any sort of environmental concern: only 3 CAO cases and 4 Inspection Panel cases. Thus, 69 compliance review reports on cases, in which environmental harm and/or the breach of an environmental instrument were alleged, remained.

The third stage consisted in a systematic exploration of the findings of non-compliance in these 69 compliance review reports, primarily based on the "Outcome of the procedure" column of the database's tables, which are abstracts of the main findings of the IAMs; this was complemented, for greater detail, by an analysis of the synopsis of the cases, which were drafted by the project's

¹⁰⁷ The CAO's compliance review appraisals aim at determining if *prima facie* the cases are worth investigating under the compliance review function of the CAO.

¹⁰⁸ This happened in the Fuzhou case, about a Category A project. The AM-CRP was denied by China the possibility to make a site visit and the CRP considered that in the absence of a site visit, it was unable to complete the compliance review: AM-CRP, *People's Republic of China: Fuzhou Environmental Improvement Project*, *op. cit.* The CRP asked the Board to clarify or modify the policy in this regard. No consensus on the possibility to deny the CRP a site visit was reached during the negotiation of the 2012 version of the Accountability Mechanism Policy. Consequently, paragraph 82 of the 2012 Accountability Mechanism Policy provides: "in the unlikely event that a site visit is declined, a closure of the compliance review process will be highly desirable, especially from the perspective of the complainants. The CRP will complete its work and deliver its final report without a site visit."

¹⁰⁹ AM-CRP: 7 cases, CAO: 16 cases, IRM/CRMU: 2 cases, MICI: 7 cases, IPN: 33 cases, PCM: 11 cases.

team to prepare the field interviews.¹¹⁰ This allowed some main categories of non-compliances found by the IAMs to be drawn out, with an emphasis on the environmental sub-issues: consultation and/or participation (36 cases), process and content of the EA /Assessment of the management of environmental and social risks (35 cases), information (28 cases), resettlement (23 cases), assessment of borrower's/local institutions' capacities (18 cases), indigenous people (17 cases), social assessment (17 cases), monitoring of the project (15 cases), identification of the affected people (15 cases), biodiversity/natural habitats (13 cases), compensation of affected people (13 cases), economic assessment (13 cases), economic and social impacts (12 cases), cumulative impacts (11 cases), loss of livelihoods (11 cases), water quantity or quality (surface and/or groundwater, 9 cases), poverty reduction (benefits to population, 9 cases), project-level grievance mechanism (9 cases), cooperation of/coordination with borrower/local institutions (9 cases), categorization of the project (8 cases), pollution (7 cases), cultural and/or spiritual issues (6 cases), disaster risk management (6 cases), health (5 cases), international law (5 cases), security (4 cases), forced evictions (3 cases), gender (3 cases), legacy issues (3 cases), tilted balance between economic interests and environmental considerations (3 cases), climate change (2 cases), human rights (2 cases), compliance with local/national law (2 cases), supply chains (2 cases), environmental and social risks associated with financial intermediaries and their sub-clients (1 case proper and 1 CAO sectoral audit), labour rights (1 cases), country system (use of the borrower's legislation instead of the MBD's standards when it is estimated functionally equivalent, 1 case). It is important to bear in mind that all of this does not relate to the number of references made by IAMs to these issues in their compliance reviews reports, but to actual findings of non-compliance on these issues. This also means that findings of compliance on these issues are not included in this indicative tally.

Besides, some of the main categories of issues proposed here are intertwined and the decision to single some of them out (water, climate change and so on) is obviously arbitrary. Imagine that some complainants allege that a project has partly destroyed the natural habitat of some protected species and that this harm could and should have been avoided; the IAM finds that it is indeed the case and determines that one of the roots of the situation is the fact the Management submitted the project to the Board's approval despite the absence, in the EA, of baseline data studies on the biodiversity of the area. Perhaps the Management knew, and neglected to mention that the EA was failing – for instance because they believed the issue of local biodiversity was not really relevant regarding this project and wanted the project cycle to keep going – or they failed to notice the absence of this data, either way it is a breach of the EA standards of MDBs,

¹¹⁰ Part of these synopses is available at <http://igms-project.org/EN/database/indexbase.html>.

which provide for the due diligence and supervision obligations. As such, the case would be listed in the ‘EA /Assessment of the management of environmental and social risks’ category of non-compliance findings. In addition, because the breach resulted in some unjustifiable and avoidable harm to natural habitats and protected species, the case would also be listed in the ‘biodiversity/natural habitats’ category.¹¹¹

Admittedly, because the present study is based on data which has already been processed – short abstracts for the tables, long abstracts for the synopses of the cases –, there is a risk that some of the findings were not taken into account and, if truth be told, it is highly likely that this did happen. The aim behind the methodology is, however, not to offer some ‘hard’ statistical data, but to draw out patterns of non-compliance and, backed up by the interviews of the people who work of have worked in IAMs that the project’s team has collected, I believe it provides a good insight into the loopholes and pitfalls in the implementation of the MDBs’ environmental and social standards by the Management of MDBs.

This opinion is also supported by the fact that the lessons that emerge from the present study are not ground-breaking at all, in a sense – at least from the viewpoint of any person who knows about the profuse literature on the World Bank’s serious shortcomings regarding environmental adverse impacts, which was mentioned in the introduction. It is in itself an interesting output: the issues that the present study identifies, which includes five MDBs with different cultures, some operating at the global level, others at the regional level, are in essence the same that one can find in the reports of the IEG of the World Bank, the slides on the lessons drawn from the cases that the Inspection Panel and its then-Chair, Alf Jerve, presented in 2012¹¹² and, this is an educated guess, in the upcoming Inspection Panel’s report on lessons emerging from cases involving environmental and social assessment.¹¹³

¹¹¹ This fictional example was *inter alia* inspired by the *Boskov Most Hydro Power* case, related to the EBRD’s support to the project of the Macedonian government to build a high dam with a reservoir in the Mavrovo National Park: PCM, *Boskov Most Hydro Power (FYR of Macedonia)*, *op. cit.*

¹¹² Alf Jerve, “The Issue of Consultation and Participation in Panel Cases”, Presentation at the World Bank Spring Meetings, Civil Society Organisations Forum, 18 April 2012, http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Anticonstitutionnellement&Participation_session_Apr2012.pdf; Inspection Panel, “Lessons from Panel Cases: Inspection Panel Perspectives”, Committee on Development Effectiveness (CODE) Seminar, 22 October 2012, http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/IPNpresentation_CODE__Oct2012.pdf.

¹¹³ Inspection Panel, “Panel Joins Other IAMs at Impact Assessment Meeting in Japan”, 13 May 2016, <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=250&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx>.

2.2. KINDS OF NON-COMPLIANCE: THE USUAL SUSPECTS

Looking at the categories of non-compliance findings that are proposed here, three appear as being particularly frequent: in about half of the 69 compliance reviews studied, the IAM found non-compliances with consultation and/or participation requirements (in 36 cases) – which are very often coupled with non-compliances with the information obligation (in 28 cases) –, and with requirements regarding the environmental assessment process and content (in 35 cases) – which very often are a consequence of a lack of information, consultation or participation of affected people, or have the consequence that affected people are not informed properly, not consulted or are not given an opportunity to participate.

Non-compliances with environmental standards mix case-specific considerations and systemic shortcomings or loopholes. What can be seen as essentially case-specific considerations is mainly related to highly technical standards, such as letting the client use incorrect sampling methods, which resulted in the baseline ambient air quality data being unreliable and in a breach of the Management's due diligence obligation¹¹⁴, or else letting the client use less stringent standards than those from the World Bank's Pollution, Prevention and Abatement Handbook (PPAH).¹¹⁵ Other non-compliance findings, which pop up again and again whatever the MDB at issue is, rather seem to reveal systemic problems and may be summarized as follows: too narrow, too late, too confident.

'Too narrow' essentially relates to the scoping and screening phase. In a number of cases, it is the so-called "area of influence" of the project that has been underestimated. Under OP. 4.01 of the World Bank, it is "[t]he area likely to be affected by the project, including all its ancillary aspects, such as power transmission corridors, pipelines, canals, tunnels, relocation and access roads, borrow and disposal areas, and construction camps, as well as unplanned developments induced by the project (e.g., spontaneous settlement, logging, or shifting agriculture along access roads)."¹¹⁶ Where Management does define the area of influence too narrowly, some potential environmental and social impacts will not be assessed and no management or mitigation plan can be set up¹¹⁷ – possibly resulting in neglecting some disaster risks such as floods

¹¹⁴ AM-CRP, *Philippines: Visayas Base-Load Power Development Project*, Request 2011/1, CRP Final Report, 11 April 2012.

¹¹⁵ See the similar findings, about the same project financed *inter alia* by the IFC and the ADB, of CAO, *India / Tata Ultra Mega-01/Mundra and Anjar*, *op. cit.*, and of AM-CRP, *India: Mundra Ultra Mega Power Project*, *op. cit.*

¹¹⁶ OP. 4.01, Annex A, para. 6.

¹¹⁷ IPN, *China: Western Poverty Reduction Project*, *op. cit.*; IPN, *India: Mumbai Urban Transport Project (First Request)*, Case 32, Investigation Report, 21 December 2005; IPN, *Uganda: Private Power Generation Project*, Case 44, Investigation Report, 29 August 2008; IPN, *Ghana: Second Urban Environment Sanitation Project*, Case 49, Investigation Report, 13 March 2009; CAO,

risks.¹¹⁸ Likewise, failure to correctly identify the scope of affected people – mainly by not taking people who do not have an official title over the land where they live, lower casts, or ethnic minorities into account –¹¹⁹ has resulted in environmental, social and economic impacts that have not taken the design of the project and costly remedial measures into account. ‘Too narrow’ may also relate to the fact that alternative sites for the project¹²⁰, alternative project design¹²¹ or strategy¹²² were not or insufficiently taken into account. In non-compliance findings, it also frequently points at the fact that the full range of environmental matters raised by the project was not assessed, resulting in a lack of environmental and social data that impairs the project¹²³ or the cumulative impacts of the different operations within and surrounding the project were not considered.¹²⁴ The scoping and

Honduras / Dinant-01/CAO Vice President Request, Audit Report, 20 December 2013; CAO, India / Tata Ultra Mega-01/Mundra and Anjar, op. cit.

¹¹⁸ IPN, *Argentina: Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project (Third Request)*, Case 51, Investigation Report, 2 July 2009.

¹¹⁹ IPN, *Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, Case 1, Investigation Report, 21 June 1995; IPN, *China: Western Poverty Reduction Project, op. cit.*; IPN, *Congo, Democratic Republic of: Transitional Support for Economic Recovery Credit (TSERO) and Emergency Economic and Social Reunification Support Project (EESRSP)*, Case 37, Investigation Report, 31 August 2007; AM-CRP, *Mundra Ultra Mega Power Project, op. cit.*; CRMU, *Uganda: Bujagali Hydropower Project and Bujagali Interconnection Project*, Request 2007/1, Compliance Review, 20 June 2008; MICI (IIM), *Brazil – Cana Brava Hydroelectric Power Project*, Investigation Report, 6 February 2006; CAO, *Honduras / Dinant-01/CAO Vice President Request, op. cit.*

¹²⁰ IPN, *Paraguay/Argentina: Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá)*, Case 26, Investigation Report, 24 February 2004; IPN, *Ghana: Second Urban Environment Sanitation Project, op. cit.*; IPN, *Albania: Power Sector Generation and Restructuring Project*, Case 46, Investigation Report, 7 August 2009; IPN, *Nepal: Power Development Project*, Case 87, Investigation Report, 12 February 2015; AM-CRP, *Philippines: Visayas Base-Load Power Development Project, op. cit.*; PCM (IRM), *Vlore Thermal Power Generation Project (Albania), op. cit.*

¹²¹ CAO, *India / Tata Ultra Mega-01/Mundra and Anjar, op. cit.*; AM-CRP, *Visayas Base-Load Power Development Project, op. cit.*

¹²² CAO, *Peru / Agrokasa-01/Ica*, Audit Report, 22 February 2011; Inspection Function’s *ad hoc* Inspection Panel, *Pakistan: Chashma Right Bank Irrigation Project Stage III, op. cit.*

¹²³ IPN, *Paraguay/Argentina: Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá), op. cit.*; CAO, *Honduras / Dinant-01/CAO Vice President Request, op. cit.*; PCM, *Boskov Most Hydro Power (FYR Macedonia), op. cit.*

¹²⁴ AM-CRP, *Mundra Ultra Mega Power Project, op. cit.*; CRMU, *Uganda: Bujagali Hydropower Project and Bujagali Interconnection Project, op. cit.*; CRMU, *South Africa, Medupi Power Project, Compliance Review, op. cit.*; MICI (IIM) *Mexico -Termoeléctrica del Golfo Project*, Investigation Report, 21 February 2003; MICI, *Panama – Pando-Monte Lirio Hydroelectric Power Project*, Case PN-MICI001-2010, Compliance Review Report, 19 October 2012; CAO, *India / Tata Ultra Mega-01/Mundra and Anjar, op. cit.*; IPN, *Chad: Petroleum Development and Pipeline Project-Management of the Petroleum Economy Project-and Petroleum Sector Management Capacity Building Project*, Case 22, Investigation Report, 17 July 2002; IPN, *Uganda: Third Power Project-Fourth Power Project and proposed Bujagali Hydropower Project*, Case 24, Investigation Report, 23 May 2002; IPN, *Cameroon: Petroleum Development and Pipeline Project and Petroleum Environment Capacity Enhancement Project*, Case 27, Investigation Report, 2 May 2003; IPN, *Uganda: Private Power Generation Project, op. cit.*

screening phase may also be too narrow in its time dimension, while failing to take the foreseeable long-term impacts into account¹²⁵, but also when using outdated studies and information¹²⁶ rather than commissioning new studies. A too-narrow scoping and screening phase might end up with the project's categorization being wrongly downgraded¹²⁷, which has serious consequences over the type and stringency of the EA requirements.

'Too late' refers to the fact that the environmental and social studies were not conducted at the time when they were needed to adequately design or to implement the project. It often consists in not presenting the project for approval to the Board with all of the necessary data; it may also refer to the fact that, over the course of its implementation, changes in the project, the discovery of omissions in the necessary data or of new information needs would have warranted an update of the studies or additional ones. A late environmental assessment means that information to stakeholders and consultations were not early enough to meaningfully inform the project's design.¹²⁸

Some 'too late' aspects can be closely related to the 'too confident' pitfall. It may occur when the Management knows that they do not have some important environmental data yet but they nevertheless submit the project to the Board's approval, because they are overly confident that they are going to be able to handle problems later if they arise¹²⁹, or because they decide that the missing environmental considerations would not have changed a thing in the Board's decision. Such a practice was denounced in vigorous terms by the PCM:

"As regards the Bank's environmental and social governance more generally, the approach taken in approving the Ombla HPP Project subject to contractual conditions requiring satisfactory completion of an appropriate biodiversity assessment might amount to an excessive delegation of the Board's decision-making powers and

IPN, *Albania: Power Sector Generation and Restructuring Project*, *op. cit.*; IPN, *South Africa: Eskom Investment Support Project*, Case 65, Investigation Report, 21 November 2011.

¹²⁵ IPN, *Albania: Power Sector Generation and Restructuring Project*, *op. cit.*; CAO, *Peru / Quellaveco-01/Moquegua*, *op. cit.*

¹²⁶ IPN, *Ghana: Second Urban Environment Sanitation Project*, *op. cit.*; AM-CRP, *Visayas Base-Load Power Development Project*, *op. cit.*; CAO, *Honduras / Ficohsa-01/ CAO Vice President Request*, *op. cit.*

¹²⁷ Inspection Function's *ad hoc* Inspection Panel, *Pakistan: Chashma Right Bank Irrigation Project Stage III*, *op. cit.*; AM-CRP, *Kyrgyz Republic: CAREC Transport Corridor I (Bishkek-Torugart Road)*, Request 2011/2, CRP Final Report, 9 August 2012; CAO, *Brazil / Amaggi Expansion-01/IFC Executive Vice President*, Audit Report, May 2005; CAO, *Indonesia / Wilmar Group-01/West Kalimantan*, Audit Report, 19 June 2009; CAO, *Honduras / Dinant-01/CAO Vice President Request*, *op. cit.*; IPN, *China: Western Poverty Reduction Project*, *op. cit.*; IPN, *Pakistan: National Drainage Program Project*, Case 34, Investigation Report, 6 July 2006; IPN, *Cambodia: Forest Concession Management and Control Pilot Project*, Case 36, Investigation Report, 30 March 2006.

¹²⁸ PCM, *Paravani HPP (Georgia)*, *op. cit.*; CAO, *Peru / Agrokasa-01/Ica*, *op. cit.*, AM-CRP, *Philippines: Visayas Base-Load Power Development Project*, *op. cit.*

¹²⁹ PCM, *Paravani HPP (Georgia)*, *op. cit.*

responsibilities in the absence of any clear stipulation that the ultimate decision on the disbursement of funds be referred once again to the Board.”¹³⁰

‘Too confident’ also occurs when the Management estimates that the information they have is sufficient and that they do not have to commission additional studies for supplementary loans¹³¹ or known risks.¹³² All in all, the findings of non-compliance which point at ‘too confident’ behaviours are rooted in situations when the Management’s “professional judgement” has taken precedence over the substance and spirit of EESs.

The same threefold root can be seen in the findings of non-compliance with information, consultation and/or participation requirements. Without the appropriate information from correctly identified stakeholders, no real consultation/participation can take place. All MDBs require that borrowers/clients consult project-affected people and local NGOs as early as possible for Category A and B projects, which means before the terms of reference of the EA are finalized; “the borrower provides *relevant* material in a *timely* manner *prior* to consultation and in a *form and language* that are understandable and accessible to the groups being consulted.”¹³³ Compliance review reports describe situations in which the information given, if any¹³⁴, was too scarce or incomplete to be useful¹³⁵, not in the language of affected people¹³⁶, and/or delivered in a form that was inappropriate, for example in written form solely even though part of the project-affected people are illiterate.¹³⁷ This, of course, significantly impairs the consultation process and does not allow it to help design a sound, well-founded project. Consultation must also be organised in such a way

¹³⁰ PCM, *Ombra HPP (Croatia)*, *op. cit.* See also CAO, *Peru / Agroksa-01/Ica*, *op. cit.*

¹³¹ Inspection Function’s *ad hoc* Inspection Panel, *Pakistan: Chashma Right Bank Irrigation Project Stage III*, *op. cit.*

¹³² MICI, *Panama – Panama Canal Expansion Program*, Case PN-MICI002-2011-31, Compliance Review Report, 4 August 2015.

¹³³ OP. 4.01., para. 15 (emphasis added). All MDBs have similar standards in this regard.

¹³⁴ See for example AM-CRP, *Sri Lanka Southern Transport Development Project*, *op. cit.*, para 116: “there is no evidence that the EIA (...) was brought to public attention other than meeting the legal requirements of a notice in the newspaper that the EIA had been approved”; CAO, *Honduras / Dinant-01/CAO Vice President Request*, *op. cit.*, p. 7: “The rationale for foregoing consultation as explained by IFC was that the project did not pose adverse impacts to local communities, and therefore that consultation was not required. Given the risks described in the E&S Assessment and acknowledged by IFC in applying E&S category B to the project, CAO finds that consultation was required as part of the E&S Assessment process.”

¹³⁵ IPN, *Uganda: Private Power Generation Project*, *op. cit.*

¹³⁶ PCM, *Tbilisi Railway Bypass 1, 2 & 3 (Georgia)*, *op. cit.*; PCM, *Paravani HPP (Georgia)*, *op. cit.*; IPN, *Papua New Guinea: Smallholder Agriculture Development Project*, Case 62, Investigation Report, 19 September 2011; CRMU, *South Africa: Medupi Power Project*, Compliance Review, *op. cit.*; IPN, *Ghana: Second Urban Environment Sanitation Project*, *op. cit.*; AM-CRP, *Philippines: Visayas Base-Load Power Development Project*, *op. cit.*; AM-CRP, *Kyrgyz Republic: CAREC Transport Corridor I (Bishkek-Torugart Road)*, *op. cit.*

¹³⁷ AM-CRP, *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project*, *op. cit.*

that it allows the people involved to effectively convey their concerns.¹³⁸ The information/consultation/participation requirements will also be deeply impacted by the bank's failure to correctly identify the project-affected people. Some compliance review reports highlight the fact that vulnerable groups in a given society – ethnic minorities, lowest castes, women, the marginalized, the poorest – are often disregarded during consultation processes¹³⁹, sometimes because the Management is 'too confident' that the borrower/client has provided accurate social baseline data.

Here again, timing is crucial. Consultations that take place after the project's design and location are decided¹⁴⁰ do not make sense, since it is the very purpose of early consultations to inform the project design and location on the people's concerns. In addition, "the lack of adequate consultations [might be] a spark for tension and conflict."¹⁴¹

2.3. THE DETAILS THE DEVIL IS IN: SYSTEMIC INSTITUTIONS' SHORTCOMINGS

The study of the IAMs' compliance review reports, of existing literature on the functioning of MDBs and the IGMs' project team interviews of 27 people, who have either participated in the creation or revision of IAMs, or who work or have worked in an IAM, reveal some systemic non-incentives and loopholes.

The first type of non-incentive is the work conditions of the staff. There is a strong pressure on the staff to develop the institution's portfolio and to work quickly, which is probably faring worse and worse in a context of competition with commercial banks and the creation of the Asian Infrastructure Investment Bank. Moreover, neither compliance with ESSs nor the sustainable development

¹³⁸ IPN, *Paraguay/Argentina: Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá)*, *op. cit.*; IPN, *Ghana/Nigeria: West African Gas Pipeline Project*, Case 40, Investigation Report, 25 April 2008.

¹³⁹ IPN, *Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, Investigation Report, *op. cit.*; IPN, *China: Western Poverty Reduction Project*, *op. cit.*; IPN, *Colombia: Cartagena Water Supply, Sewerage and Environmental Project*, Case 31, Investigation Report, 24 June 2005; IPN, *Panama: Land Administration Project (First Request)*, Case 53, Investigation Report, 16 September 2010; AM-CRP, *Sri Lanka Southern Transport Development Project*, *op. cit.*; AM-CRP, *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project*, *op. cit.*; IPN, *Cambodia: Land Management and Administration Project*, Case 60, Investigation Report, 23 November 2010; CAO, *India / Tata Ultra Mega-01/ Mundra and Anjar*, *op. cit.*; AM-CRP, *Mundra Ultra Mega Power Project*, *op. cit.*

¹⁴⁰ IPN, *Argentina: Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project (Third Request)*, *op. cit.*; IPN, *Colombia: Cartagena Water Supply, Sewerage and Environmental Project*, *op. cit.*; CAO, *India / Tata Ultra Mega-01/Mundra and Anjar*, *op. cit.*; AM-CRP, *Mundra Ultra Mega Power Project*, *op. cit.*

¹⁴¹ IPN, *Peru: Lima Urban Transport Project*, Case 61, Investigation Report, 18 January 2011.

effectiveness of projects is taken into account for career advancement.¹⁴² In addition, several interviewees have emphasised that the high turnover of the Management's staff was a hurdle for any lesson to be learned from the cases.

IAMs' non-compliance findings also show that 'the Management' or 'the staff' is not a one-piece body. Competing interests within the staff sometimes result in tilting the balance between considerations of economic stakes and environmental and social stakes towards the first. A striking example can be found in the CAO *Agrokasa* case. The CAO discovered that:

"CES [IFC Environmental and Social Development Department] review staff were clear in their recommendations regarding the investment. In the face of resistance from the CAG [IFC Agribusiness Department] and commercial pressure to move ahead with funding of an existing client, CES management were complicit in sidelining specialist(s) assigned to the investment who intensified their concern about the sustainability of the situation in Ica and had pointed out inconsistencies in the apparent permitting of water extractions. The concerns of CES specialists relating to the environmental and social impacts of groundwater extraction in the Ica Valley were not reconciled by consecutive layers of IFC management through engagement with the project team. The resulting capitulation on the requirement for an EA in advance of taking the project to the Board exposed IFC to increased risk and was inconsistent with IFC procedural and disclosure requirements. CAG staff assured the CAO that commercial pressure was not applied to seek to ensure inclusion of the commitment within the 2008/09 program. However, the CAO has reviewed documentation showing clear pressure, culminating in a request from CAG to move the requirements in the ESAP [Environmental and Social Action Plan] to a condition of disbursement rather than a condition of commitment. The CAO concludes that CES management did not play an effective role in supporting the professional judgment of CES specialists, in protecting the broader interests of the IFC in applying its standards, and in protecting the interest of weaker parties in the emerging water conflict over scarce water resources in the Ica Valley. This, in combination with mismanaged client communications, produced an incoherent IFC approach, undermining and fragmenting IFC's position."¹⁴³

Another issue revealed by some IAM's non-compliance findings is the absence or an inadequate number of social specialists, such as ethnologists and anthropologists. This has sometimes caused significant mistakes in the scoping of affected people, with the corresponding non-compliances with standards on information, consultation and indigenous peoples.¹⁴⁴

¹⁴² See *inter alia* Robert Wade, "Greening the Bank: The Struggle Over the Environment, 1970-1995", in Devesh Kapur, John P. Lewis, and Richard Webb (eds.), *The World Bank: Its First Half Century - Volume 2: Perspectives*, Washington DC: Brookings Institution Press (1997), pp. 611-734; Walter Leal Filho, Angel René Rios, *Accountability Issues in International Development Projects*, *op. cit.*; Bruce Rich, *Foreclosing the Future*, *op. cit.*

¹⁴³ CAO, *Peru / Agrokasa-01/Ica*, *op. cit.*, pp. 30-31.

¹⁴⁴ See for example IPN, *Pakistan: National Drainage Program Project*, *op. cit.*; AM-CRP, *Indonesia: Integrated Citarum Water Resources Management Investment Program - Project 1*, Request 2012/1, CRP Final Report, 10 April 2013.

Finally, compliance review reports show that, in some cases, the loophole is in the lack of a clear indication of what is required from the staff. The vaguer the wording of standards is, the more the staff has leeway in interpreting them and the more they risk taking ill-informed decisions. Thus, in a number of cases IAMs made findings such as “IFC’s procedures on categorization are loosely defined however, and implicitly rely heavily on professional discretion. As IFC’s procedures do not provide for in-depth public disclosure around decisions on categorization, it is not possible for interested or affected parties to make an informed judgment about IFC’s decision-making process.”¹⁴⁵ Moreover, some “non-compliances are largely rooted in underlying weaknesses in the Policy and due diligence framework,”¹⁴⁶ when ESSs are unsuitable for the operations they are supposed to cover.¹⁴⁷

Can MDBs do better? Certainly. Are they willing to make the necessary cultural changes? That one is less certain. In reaction to findings of non-compliance, and in a cultural context in which accountability is felt by part of the staff and part of the Executive Directors as a naming and shaming exercise, the reaction of the Management of all MDBs has been to ‘panel-prsoof’ the projects. This is how staff and IAMs call the practice that has been developed to minimize the risk to be subjected to a compliance review, by “omitting important but risky elements”¹⁴⁸ in their projects or by finding a way to transfer those risks on the borrower for example.¹⁴⁹ On the one hand, it spurs Management to make a compliance screening of projects, to check whether they are in line with ESSs’ requirements. On the other hand, it has sometimes been described as a box-ticking exercise which may have little to do with the environmental and social effectiveness of projects in the field.¹⁵⁰ Although the world’s (im)balances and global concerns have considerably changed since the nineties, the statements of early studies on the Inspection Panel and the *de facto* disregard of the sustainable development effectiveness of MDB-supported projects are depressingly familiar.¹⁵¹ However, the heated debates on the occasion of the

¹⁴⁵ CAO, *Brazil / Amaggi Expansion-01/IFC Executive Vice President*, *op. cit.*

¹⁴⁶ PCM, *Paravani HPP (Georgia)*, *op. cit.*

¹⁴⁷ Regarding the inadequacy of IFC’s procedures applied to financial intermediaries, see CAO, *Compliance Audit of IFC’s Financial Sector Investments*, 10 October 2012, released 5 February 2013, www.cao-ombudsman.org/newsroom/documents/FIAUDIT.htm.

¹⁴⁸ Edith Brown Weiss, “On Being Accountable in a Kaleidoscopic World”, 104 *Am. Soc’y Int’l L. Proc.* (2010), p. 488.

¹⁴⁹ Richard E. Bissell, “The Arun III Hydroelectric Project, Nepal”, in Dana Clark, Jonathan Fox, Kay Treacle (eds.), *Demanding Accountability. Civil-Society Claims and the World Bank Inspection Panel*, Lanham/Oxford: Rowman & Littlefield (2003), p. 41.

¹⁵⁰ Jonathan Fox, “The World Bank Inspection Panel: Lessons from the First Five Years,” 6 *Global Governance* 3, (2000), pp. 279-318.

¹⁵¹ Dana Clark, Jonathan Fox, Kay Treacle (eds.), *Demanding Accountability*, *op. cit.*; Jonathan Fox, “The World Bank Inspection Panel: Lessons from the First Five Years”, *op. cit.*; Jonathan Fox, David Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements*, Cambridge: MIT Press (1998); Daniel Bradlow, “International Organizations

drafting of the World Bank's new Environmental and Social Framework¹⁵² show that such standards can now no longer be decided without the public's scrutiny and input.¹⁵³

and Private Complaints: The Case of the World Bank Inspection Panel", *Va. J. Int'l L.* (1994), pp. 553-613; Dana Clark, David Hunter, "Amplifying Citizen Voices for Sustainable Development", in Gudmundur Alfredsson, Rolf Ring (eds.), *The Inspection Panel of the World Bank. A Different Complaint Procedure*, La Haye/Londres/Boston: Martinus Nijhoff (2001), pp. 167-189

¹⁵² "World Bank Environmental and Social Framework. Setting Environmental and Social Standards for Investment Project Financing", 4 August 2016, http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf. The new Framework will take effect in early 2018.

¹⁵³ See the documents on the two-year consultations with governments, development experts, and CSOs at <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies..>