

Sustainable Development and the Use of Borrowing State Frameworks in the New World Bank Safeguards

By *Stéphanie de Moerloose**

Abstract: In 2015, Multilateral Development Banks (MDBs) jointly committed to support the Sustainable Development Goals. This milestone illustrates the gradual integration of the principle of sustainable development in MDB activities over the last forty years. However, a year later, the World Bank adopted its new Environmental and Social Framework (ESF) which provides for, under certain conditions, the use of Borrowing State environmental and social frameworks instead of, or completed with, the World Bank ESF. This paper first analyzes whether a reinforced emphasis on Borrowing States' ownership in the ESF appears compatible in practice with the implementation of the principle of sustainable development, based on the World Bank's previous pilot program to use Borrowing State systems. Then, it will concentrate on the role of the Inspection Panel. Indeed, an increased use of Borrowing State frameworks would entail a new practice for the Panel, consisting of looking into Borrowing State policies in order to review their consistency with the World Bank safeguard objectives. In this context, just like judicial and quasi-judicial mechanisms, the Panel may need to develop a standard of review. The paper will argue that striking a balance between ownership and sustainable development will largely depend on the determination of this standard of review, and especially on the Inspection Panel's degree of deference to Bank staff and Borrowing States' decisions.

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A. Introduction

From the 1972 United Nations Conference on the Human Environment in Stockholm onwards, Multilateral Development Banks (hereinafter MDBs),¹ such as the World Bank, have integrated sustainable development² in their activities and policies.³ MDBs have even voiced their support for the Sustainable Development Goals' approach through joint statements.⁴ Sustainable development is now a principle,⁵ whether directing or normative, which governs the actions of MDBs.⁶

Environmental and social safeguards are instrumental for the integration of sustainable development in MDBs' activities. Indeed, safeguards first detail the eligibility of a Borrower⁷ for funding, and then describe the Borrower's obligations regarding environmental and

- 1 The term "MDBs" includes three institutions of the World Bank Group (the International Bank for Reconstruction and Development (hereinafter, IBRD), the International Development Association (hereinafter IDA), both hereinafter collectively referred to as the "World Bank", and the International Finance Corporation (hereinafter, IFC)) and four Regional Development Banks (the Asian Development Bank (hereinafter, ADB), the African Development Bank (hereinafter, AfDB), the European Bank for Reconstruction and Development (hereinafter, EBRD) and the Inter-American Development Bank (hereinafter, IADB)).
- 2 The most commonly cited definition of sustainable development was expressed in the Brundtland Report, as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." *Gro Harlem Brundtland*, Our Common Future: The Report of the World Commission on Environment and Development, Oxford 1987.
- 3 See *Makane Moïse Mbengue/Stéphanie de Moerloose*, Multilateral development banks and sustainable development: on emulation, fragmentation and a common law of sustainable development, *Law and Development Review* 10 (2017).
- 4 *Heads of the AfDB/ADB/EBRD/European Investment Bank/IADB/World Bank Group/International Monetary Fund*, From Billions to Trillions – Transforming Development, Finance Post2015 Financing For Development: Multilateral Development Finance (16 April 2015), paras. 1, 4-5, <http://www.worldbank.org/en/news/press-release/2015/04/16/joint-statement-mdbs-imf-head-financing-for-development> (last accessed on 9 February 2018). *AfDB/ADB/EBRD/European Investment Bank/IADB/World Bank Group/International Monetary Fund*, From Billions to Trillions: MDB Contributions to Financing For Development (July 2015), p. 2, <http://pubdocs.worldbank.org/en/69291436554303071/dfi-idea-action-booklet.pdf> (last accessed on 9 February 2018).
- 5 *Philippe Sands/Jacqueline Peel/Adriana Fabra and Ruth Mackenzie*, Principles of International Environmental Law, Cambridge 2012, p. 207. The International Court of Justice has labeled sustainable development a "concept" in the Gabčíkovo-Nagymaros case (Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement, ICJ Rep. (1997), 7, para. 140), an "objective" in the Pulp Mills case (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Rep. (2010), 14, para. 177) while, in the Iron Rhine case, the arbitral tribunal has deemed the duty to prevent and to mitigate environmental harm a "principle of general international law" (Award in the Arbitration regarding the Iron Rhine ('IJzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 27 RIAA (2005) 35, para. 59).
- 6 On the evolution of MDB mandates until 1997, concluding that MDBs have an international legal obligation to take sustainable development concerns into account, see *Gunther Handl*, The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development, *The American Journal of International Law* 92 (1998), pp. 642-665.

social matters during project implementation.⁸ 2016 brought an important milestone in development finance: the World Bank adopted new environmental and social safeguards, entailed in the Environmental and Social Framework (hereinafter ESF).⁹ The ESF was presented as aiming to advance sustainable development¹⁰ while providing for, under certain conditions, the use of Borrowers' environmental and social framework instead of, or completed with, the World Bank ESF. In fact, the consultation process leading to the adoption of the ESF had been part of a longstanding debate between two approaches. The first approach advocates for a strict implementation of sustainable development as well as for the accountability of MDBs and their Borrowers for their actions. The second approach advocates for the respect of Borrowers' sovereignty and ownership of their developmental paths, as well as for the swift implementation of development projects.¹¹ This paper presents the sinuous history of the use of country system in the World Bank, including the new ESF's policy on use of the Borrowers' environmental and social framework. It analyzes whether a reinforced emphasis on Borrowers' ownership in the ESF is compatible in practice with the implementation of the principle of sustainable development.¹²

The last part of the paper will concentrate on the role of the Inspection Panel, the World Bank's accountability mechanism. Indeed, an increased use of Borrower frameworks would entail a new and complex practice for the Panel, involving a review of the consistency of Borrower frameworks' objectives with the World Bank safeguards objectives. In this con-

7 The paper refers to a recipient of MDB loans or grants as a "Borrower".

8 Laurence Boisson de Chazournes, Policy Guidance and Compliance: the World Bank Operational Standards, in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford 2000, pp. 282–285; Mbengue/de Moerloose, note 3, pp. 395–396.

9 World Bank, *The World Bank Environmental and Social Framework* (2017), <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework-Dec18-2017.pdf#page=29&zoom=80> (last accessed on 13 February 2018). The ESF applies only to investment lending.

10 World Bank, *Review and Update of the World Bank's Safeguards Policies, Environmental and Social Safeguards* (proposed Third Draft, 4 August 2016), para. 68, p. 23, https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf (last accessed on 9 February 2018).

11 See Philipp Dann, *The Global Administrative Law of development cooperation*, in: Sabino Cassese (ed.), *Research Handbook on Global Administrative Law*, Cheltenham 2016, pp. 430–431.

12 Although its normative content is debated, it is generally understood that the principle of sustainable development is composed of an economic, an environmental and a social pillar and that it includes at least the following principles: the sustainable use of natural resources and equity between generations; the equitable use and distribution of the outcomes of development within one generation; as well as the integration of environmental protection in the development process. See *United Nations Conference on Environment and Development*, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Rio de Janeiro 1992); Sands/Peel/Fabra/Mackenzie, note 5, p. 207; Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, *The European Journal of International Law* 23 (2012), pp. 380–381.

text, like judicial and quasi-judicial mechanisms, the Panel may develop a standard of review and determine its degree of deference to Management and Borrowers' decisions. Based on the premise that accountability mechanisms are instruments to achieve certain goals over others,¹³ the paper argues that striking a balance between ownership and sustainable development will largely depend on the determination of this standard of review.

B. The World Bank's new Environmental and Social Framework

The safeguards revision process was probably the largest consultation on MDB safeguards so far¹⁴ and saw major disagreement between the two competing approaches. On one hand, civil society, some Donors and some Borrowers requested stricter safeguards for environmental and social protection, or at least what has been called the "non-dilution" of the level of protection under the current safeguards. On the other, many Borrowers demanded more ownership: less stringent safeguards and more room for the implementation of projects according to their own regulations.¹⁵ When the ESF was finally approved by the Board of Directors on 4 August 2016,¹⁶ the Bank stated that the new ESF supported sustainable development, improved the consistency and quality of environmental and social appraisal, and strengthened implementation support to Borrowers, while recognizing that "not all stakeholders will find responses to all of their issues."¹⁷

The new ESF therefore appears to be on the continuum of the progressive integration of sustainable development considerations in MDBs' work. However, controversy remains between the proponents of both approaches. Can the increased reliance on Borrowers' sys-

13 Teresa Kramarz/Susan Park, Introduction: The Politics of Environmental Accountability, Review of Policy Research 34 (2017), p. 5.

14 World Bank, note 10, para. 160, p. 53.

15 Ibid, pp. 9-22; see also for instance *ActionAid International*, Civil Society Statement on World Bank safeguards (360 endorsing organizations, 28 October 2014), https://consultations.worldbank.org/Data/hub/files/civil_society_statement_on_world_bank_safeguards_1.pdf (last accessed on 9 February 2018); United States Comments on World Bank Safeguards Review (29 April 2014), <https://www.treasury.gov/resource-center/international/development-banks/Documents/United%20States%20Comments%20on%20WB%20Safeguards%20Review.pdf> (last accessed on 9 February 2018); see for instance United Nations Special Procedures Mandate Holders' letter to the World Bank President Dr. Jim Yong Kim (12 December 2014), <http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf> (last accessed on 9 February 2018); Michael Igoe, World Bank chief defends new safeguards, Devex (5 August 2016), <https://www.devex.com/news/world-bank-chief-defends-new-safeguards-88545> (last accessed on 9 February 2018).

16 World Bank, note 9. The ESF bear many similarity with IFC's Performance Standards, see IFC, Performance Standards on Environmental and Social Sustainability, http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES (last accessed on 3 September 2017).

17 World Bank, note 10, respectively para. 68, p. 23, para. 12, p. 4, para. 160, p. 53.

tems provide effective protection and support sustainable development?¹⁸ If not, will the new ESF in fact constitute a rupture in the integration of sustainable development?

C. The use of country system

The use of country system (hereinafter UCS) is not new to the international aid agenda. The rationale for the UCS can be found on four main grounds:¹⁹ respect for Borrower's sovereignty, the international aid effectiveness agenda, safeguard implementation problems, and structural changes in multilateral development banking.

I. The sovereignty of the Borrower

One of the main difficulties of environmental and social safeguards is their legitimacy when it comes to the sovereignty of borrowing states.²⁰ Indeed, the principle of the sovereign equality of States prohibits intervention in foreign States' political affairs; it is recognized *inter alia* in Article 2 of the United Nations Charter. The charters of most MDBs share this principle, as they explicitly prohibit intervention in the Borrower's political affairs.²¹ The principle of sovereignty is the main ground for rejecting the inclusion of environmental and social safeguards as well as other conditionality.²²

18 See on the second draft *Natalie Bugalski*, The Demise of Accountability at the World Bank, *American University International Law Review* 31 (2016), pp. 17-26. *Philipp Dann/Michael Riegner*, Safeguard-Review der Weltbankgruppe: Ein neuer Goldstandard für das globale Umwelt- und Sozialrecht?, Berlin 2017, pp. 6, 15-16, 26-27.

19 For a different presentation of the rationale for the Use of Country System approach, see *World Bank Inspection Panel*, Investigation Report South Africa: Eskom Investment Support Project (21 November 2011), para. 111, http://siteresources.worldbank.org/EXT/INSPECTIONPANEL/Resources/Eskom_IPN_Investigation_Report_11.21.11.pdf (last accessed on 2 May 2017).

20 *Charles Di Leva*, *International Environmental Law and Development*, *The Georgetown International Environmental Law Review* 10 (1997-1998), p. 502; *Chris Humphrey*, Time for a new approach to environmental and social protection at multilateral development banks, *ODI Shaping Policy for Development*, (April 2016), pp. 2-3, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10419.pdf> (last accessed on 9 February 2018); *Stéphanie de Moerloose*, Estándares ambientales y sociales en la condicionalidad del Banco Mundial, *Revista de Derecho Ambiental de la Universidad de Palermo* 3 (2014), pp. 45-88.

21 See *Philipp Dann*, *The Law of Development Cooperation, A Comparative Analysis of the World Bank, the EU and Germany*, Cambridge 2013, pp. 39-40, 192-195.

22 See for instance *Ngairé Woods*, Making the IMF and the World Bank more accountable, *International Affairs* 77 (2001), i.a. pp. 88-90; see also *Sarah L. Babb/Bruce G. Carruthers*, Conditionality: Forms, Function, and History, *Annual Review of Law and Social Science* 4 (2008), p. 14; *Mary C. Tsai*, Globalization and Conditionality: Two Sides of the Sovereignty Coin, *Law and Policy in International Business* 31 (2000), i.a. pp. 1327-1328.

There are ongoing discrepancies between the safeguards and national systems; national law is generally weaker²³ than World Bank safeguards. In that sense, the principle of sustainable development is generally better supported by the World Bank safeguards than by national law. However, sometimes national law is stricter.²⁴ In both cases, the World Bank safeguards apply to development projects, in addition to applicable national law. Safeguards supersede national law,²⁵ although Borrowers often report on the implementation of both systems. This has been criticized as giving preeminence to norms issued by an organization where Borrowers are minority voters over national strategies.²⁶ The UCS leaves the management of social and environmental issues up to Borrowers and respects national sovereignty.

II. *The aid effectiveness agenda*

The UCS was repeatedly supported by several international declarations on aid effectiveness, which were endorsed by MDBs.²⁷ For instance, the “Rome Declaration on Harmonization” in 2003 recommended making an increased use of Borrower systems.²⁸ It states that Donors’ practices do not always fit well with Borrowers’ national development priorities and that this situation requires urgent action to improve aid effectiveness, whereby Borrowers should assume a stronger leadership role in the coordination of the assistance and be assisted in building their capacity to do so. The objective is to enable progressive reliance by donors on their systems.²⁹ Then, the 2005 “Paris Declaration on Aid Effectiveness” also

23 A typical example is the recognition by the World Bank of eligibility for resettlement assistance of displaced persons who have no recognizable legal right to the land they are occupying, which many Borrowers do not recognize. *World Bank*, Operations Manual, OP 4.12, 15c, <https://policies.worldbank.org/sites/ppf3/Pages/Manuals/Operational%20Manual.aspx> (last accessed on 9 February 2018). See *World Bank*, note 10, para. 23, p. 11. See also *IEG*, Safeguards and Sustainability Policies in a Changing World. An Independent Evaluation of the World Bank Group Experience, Washington DC 2010, p. 43, <https://openknowledge.worldbank.org/handle/10986/2571> (last accessed on 9 February 2018).

24 For instance, several Borrowers have integrated the requirement of informed consent of Indigenous People in their legal framework, while the current World Bank safeguards do not. Here, the application of safeguards is also redundant.

25 Except in the cases foreseen in note 24 which exceed the scope of this paper. See on current analysis of country systems note 54.

26 *Devesh Kapur*, Do As I Say Not As I Do: A Critique of G-7 Proposals on Reforming the Multilateral Development Banks, G-24 Discussion Paper Series no. 20 (February 2003), pp. 7-10; *Humphrey*, note 20, p. 3.

27 *Mbengue/de Moerloose*, note 3.

28 *First High-Level Forum on Aid Effectiveness*, Rome Declaration on Harmonization (February 2003), <http://www.oecd.org/dac/effectiveness/31451637.pdf> (last accessed on 26 April 2017).

29 *Ibid.*, p. 10.

encourages the use of Borrowers' systems.³⁰ The Declaration champions the Borrower's ownership of development projects, understanding the principle of ownership as effective leadership by Borrowers over their development policies and strategies, with Donors respecting this leadership.³¹ This is further embodied in the Declaration's principle of alignment, which directs Donors to base their support on Borrowers' national development strategies.³² The Declaration explains that the UCS will not only be more effective, it will also strengthen Borrowers' capacities.³³ The 2008 "Accra Agenda for Action" states that the UCS should be the first option for aid programs and, should Donors choose to use another option, they shall state the rationale for this and regularly review their positions.³⁴ Finally, the "Busan Partnership for Effective Development Cooperation" declares that the country system shall be used as the default option and that Donors shall support the system's strengthening when necessary.³⁵ Three concepts appear repeatedly in the international aid effectiveness agenda. First, the non-binding principles of ownership and alignment, which can be understood as reformulations of the principle of sovereignty, directed specifically at development cooperation.³⁶ Second, the assessment of the Borrower's system, the results of which should determinate to what extent the country's system can be used.³⁷ Thirdly, the assistance to Borrower capacity building in order to use its system.³⁸

The aid effectiveness agenda thus encourages MDBs to use Borrowers' systems whenever possible in order to respect Borrowers' ownership and align with their strategies. The World Bank's 2012 Approach Paper on the safeguards' review cited the Paris Declaration,

30 *Second High-Level Forum on Aid Effectiveness*, Paris Declaration on Aid Effectiveness (2 March 2005), i.a. paras. 3, 17-30, <http://www.oecd.org/dac/effectiveness/34428351.pdf> (last accessed on 26 April 2017).

31 *Ibid.*, paras. 13-14.

32 *Ibid.*, para. 15.

33 *Ibid.*, para.17.

34 *Third High-Level Forum on Aid Effectiveness*, Accra Agenda for Action (4 September 2008), para. 15, <http://www.oecd.org/dac/effectiveness/34428351.pdf> (last accessed on 26 April 2016).

35 *Fourth High Level Forum on Aid Effectiveness*, Busan Partnership for Effective Development Cooperation (29 November - 1 December 2017), p. 2, <http://www.oecd.org/dac/effectiveness/49650173.pdf> (last accessed on 26 April 2017). Stating that the use of - routinely ignored - country systems "with an extraordinarily high degree of meticulousness, rigor and transparency when doing so" by MDBs strengthens these systems, see *Humphrey*, note 20, p. 5.

36 *Dann*, note 21, pp. 241-43.

37 For instance, in the Paris Declaration, Donors are encouraged to use the country system according to the country's CPIA score, produced by the World Bank, see *Second High-Level Forum on Aid Effectiveness*, note 30, III. Indicators of Progress 2 and 5a. On CPIA and the use of country system, see for instance *Roberto Bissio*, Paris Declaration on Aid Effectiveness, Presentation at the Human Rights Council, Eight Session (7-15 January 2008), paras. 32, 39, 40-41, A/HRC/WG.2/TF/CRP.7 (31 December 2007); *Stephen Knack*, Building or Bypassing Recipient Country Systems, are Donors Defying the Paris Declaration?, *The Journal of Development Studies* 50 (2014), pp. 839-854.

38 See for instance *Fourth High Level Forum on Aid Effectiveness*, note 35, para. 19 b.

the Accra Agenda for Action and the Busan Partnership as evidence of the new international emphasis placed on the use of Borrowers' country systems in order to achieve aid effectiveness.³⁹ Echoing these views, in an earlier review of its safeguards' practice, a report by the World Bank found that the enforcement of safeguards policies often leads to lack of ownership at country level, which then translates into "weak compliance, weak supervision and weak [monitoring and evaluation]".⁴⁰ Conversely, national regulations may be more likely to be obeyed and executed properly than safeguards because of stronger ownership of local laws.

Some could argue that the aid effectiveness agenda was geared toward the use of the public finance system⁴¹ and alignment with national development strategies, rather than leaving the management of social and environmental issues to Borrowers. However, national development strategies generally include social and environmental elements; alignment with national development strategies can hardly exclude environmental and social impacts. Finally, the aid effectiveness agenda, just like its interpretation by the World Bank, does not make an exception for environmental and social considerations when championing Borrower ownership.

III. Implementation difficulties

There are apparent difficulties for Borrowers to implement correctly and report on safeguards with which they are not familiar. Furthermore, they may have limited incentive to thoroughly implement the safeguards, while the World Bank has been described as having few resources to support and supervise the implementation of safeguards on the ground.⁴² This situation can result in delays, increases in costs, noncompliance and may fill in the "vicious circle of conditionality noncompliance":⁴³ when Borrowers fail to comply with the safeguards during project implementation, Donors often keep on disbursing notwithstand-

39 *World Bank*, The World Bank's Safeguard Policies Proposed Review and Update Approach Paper (10 October 2102), para. 18, p. 5, <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/safeguardsreviewapproachpaper.pdf> (last accessed on 7 April 2017).

40 *IEG/Anis Dani/Ade Freeman/Vinod Thomas*, Evaluative Directions for the World Bank Group's Safeguards and Sustainability Policies, Evaluation Brief 15, Washington D.C. 2011, p. 15.

41 The Paris Declaration states that: "Country systems and procedures typically include, but are not restricted to, national arrangements and procedures for public financial management, accounting, auditing, procurement, results frameworks and monitoring", see *Second High-Level Forum on Aid Effectiveness*, note 30, para.17.

42 *IEG/Dani/Freeman/Thomas*, note 40, pp. 5-8, 16; *Gaia Larsen/Athena Ballesteros*, Striking the Balance: Ownership and Accountability in Social and Environmental Safeguards, World Resources Institute Working Paper, 2013, p. 11, <http://www.wri.org/publication/striking-the-balance-ownership-and-accountability-in-social-and-environmental-safeguards> (last accessed on 4 May 2017).

43 See for instance, *Jakob Svensson*, When is foreign aid policy credible? Aid dependence and conditionality, *Journal of Development Economics* 61 (2000), pp. 63-64.

ing the noncompliance. Indeed, the World Bank has noted that, during the consultation phases that lead to the ESF, the main messages from stakeholders referred *inter alia* to the supervision and implementation challenges of the current safeguards and their frequent inconsistency with national law, the need to recognize country context and Borrower institution and the need to build Borrower capacity.⁴⁴ The UCS avoids this type of implementation challenges by allowing Borrowers to implement their national regulations.

IV. Sustainability and competitiveness

Finally, the reliance on country system may relate to the World Bank's objective of remaining attractive and at the forefront in an ever more competitive context.⁴⁵ As stated by the World Bank's Independent Evaluation Group (hereinafter IEG), the current safeguards have a "chilling effect": many staff members have encountered Borrowers who wanted to avoid all or part of a project because of the safeguard policies.⁴⁶ If the safeguards have a deterrent effect on World Bank lending, the organization has to determine whether it involves a tendency towards more sustainable projects or simply results in missed opportunities,⁴⁷ with growing options for Borrowers to find funding elsewhere. Indeed, emerging Donors often place lower environmental and social requirements on Borrowers,⁴⁸ sometimes relying *de facto* on Borrowers' systems. Increased reliance on Borrowers' systems in the World Bank appears to be also related to the quest for better balance between sustainable development and competitiveness.

D. The "Pilot" phase

I. The process for the Pilot Use of Country System

The aid effectiveness agenda,⁴⁹ and perhaps other of the abovementioned rationales, had already resonated with the World Bank's administration when it launched a pilot program in 2005 to start using Borrowers' systems to address environmental and social safeguard is-

44 World Bank, note 10, para. 16, p. 9.

45 World Bank President Kim declared: "We want to be back in the lead, we want to be at the very cutting-edge of these safeguards", see "Jim Kim on safeguards: 'Wait till you see the final product'", interview by Raj Kumar, Devex (16 April 2015), <https://www.youtube.com/watch?v=fvc3agxdPwY> (last accessed on 4 April 2017).

46 IEG, note 23, pp. 46, 72-73.

47 *Ibid.*, pp. 72-73.

48 Ngairé Woods, Whose Aid? Whose Influence? China, Emerging Donors and the Silent Revolution in Development Assistance, *International Affairs* 84 (2008), pp. 1210-1211; Humphrey, note 20, pp. 3-4; Bugalski, note 18, pp. 3-4. On the new institutional environment created by the emergence of new development banks and their challenge to create sound decision-making structures, see for instance Rajiv Biwas, Reshaping the Financial Architecture for Development Finance: The new development banks, LSE Global South Unit, Working Paper no. 2 (2015).

49 Humphrey, note 20, p. 5.

sues.⁵⁰ In January 2008, the Bank scaled up this initiative from the project-level to country-level.⁵¹

The applicable World Bank Operational Policy, “Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects”⁵² (hereinafter the Pilot Policy or the Pilot UCS), defines country systems as the Borrower’s “legal and institutional framework, consisting of its national, subnational, or sectoral implementing institutions and applicable laws, regulations, rules, and procedures.”⁵³ Before using the country system, the Bank must undertake a review to ensure the equivalence of the Borrower system and the acceptability of its implementation.⁵⁴ The Pilot Policy first demands that the Bank determines equivalence, on a policy-by-policy basis, by reviewing whether the Borrower’s system “is designed to achieve the objectives and adhere to the applicable operational principles (...).”⁵⁵ These principles are set out in a separate document and reflect the World Bank’s Environmental and Social Safeguard Policies.⁵⁶ The Bank may determine the equivalence of the Borrower’s system as a whole or in part.⁵⁷ Then, the Bank must determine the acceptability of the Borrower’s implementation practices, its track record and capacity.⁵⁸ When determining equivalence and acceptability, the Bank may take into account measures to improve and fill gaps in the Borrower’s system and implementa-

50 IEG, note 23, p. 85. Daniel D. Bradlow/Megan S. Chapman, Public Participation and the Private Sector: the Role of Multilateral Development Banks in the Evolution of International Legal Standards, *Erasmus Law Review* 4 (2011), pp. 95-96. Other MDBs also foresee the use of their Borrowers’ systems under certain conditions, see Jochen von Bernstorff/Philipp Dann, Reforming the World Bank’s Safeguards. A Comparative Legal Analysis, *Deutsche Gesellschaft für Internationale Zusammenarbeit* (July 2013), pp. 22-23, https://dann.rewi.hu-berlin.de/doc/Dann_2013.pdf (last accessed on 9 February 2018); *World Bank*, note 10, p. 64. The analysis of other MDBs’ practice exceeds the scope of this research paper.

51 *World Bank*, Report to the Executive Directors, First Year Review of Implementation of Incremental Scale-Up Program to Pilot Use of Country Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects (June 2009), p. 1, http://siteresources.worldbank.org/PROJETS/Resources/40940-1097257794915/1stYear_Review-ScaledUpPilotUseCountrySystemsJuly09.pdf (last accessed on 18 April 2017).

52 *World Bank*, note 23, OP 4.00.

53 *Ibid.*, OP 4.00, n3.

54 IEG/Dani/Freeman/Thomas, note 40, p. 15. It is worth noting that the World Bank already undertakes an analysis of country system in its day-to-day work: when investment projects are appraised, the team usually assesses the strengths and weakness of the country system and then receives implementation reports on both the compliance with safeguards and country system. The major difference with the UCS is that the safeguards apply irrespective of the strengths of the system.

55 *World Bank*, note 23, OP 4.00.2.

56 *World Bank*, “Operations Manual”, OP 4.00 – Table A1- Environmental and Social Safeguard Policies – Policy Objectives and Operational Principles, <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3900&ver=current> (last accessed on 18 April 2017).

57 *World Bank*, note 23, OP 4.00.2.

58 *Ibid.*

tion practices, if the Borrower is committed to doing so.⁵⁹ These measures may be supported by the Bank and shall be carried out before the implementation of relevant project activities.⁶⁰ The specific applicable provisions of the country system as well as the gap-filling measures become part of the Borrower's contractual obligations.⁶¹ Finally, the Pilot Policy directs the Bank to disclose, prior to appraisal, its analysis of equivalence and acceptability and the description of the gap-filling measures, if any.⁶²

II. Evaluation of the Pilot UCS

Country systems have been used by the World Bank under the Pilot approach in over twenty projects.⁶³ In its Pilot Policy implementation evaluations, the World Bank declares that the goals for the UCS remain relevant in order to increase development impact and country ownership, to facilitate Donor harmonization and simplify and reduce costs.⁶⁴ However, World Bank and stakeholders' reports have informed that the method prescribed in the Pilot Policy has not worked satisfactorily, and that its implementation has had limited success overall.⁶⁵ The grounds for this rather dire appraisal of the Pilot UCS are twofold and potentially contradictory.

1. Negative appraisal for the Pilot UCS process

The first criticism concerns the "piecemeal approach" of the Pilot UCS: its equivalence and acceptability review is project-based, rather than focused on countries or sectors, and the

59 *Ibid.*, OP 4.00.3.

60 *Ibid.*

61 *Ibid.*, OP 4.00.4.

62 *Ibid.*, OP 4.00.7.

63 Juan D. Quintero/Alberto Ninio/Paula J. Posas, Use of Country Systems for Environmental Safeguards, The World Bank Group 2010 Environment Strategy Analytical Background Papers (22 February 2011), pp. 24-27.

64 *Ibid.*, p. 3; World Bank, note 10, para. 48, p. 18. The World Bank may use also the country systems through: OP 4.01 Footnote 13 on investment lending, see Quintero/Ninio/Posas, note 63, e.g. paras. 42-43, p. 18; OP 8.60 on policy lending, see World Bank, note 51, pp. 2-3; OP 9.00 on Program for Results, see Dann/Riegner, note 18, pp. 16-17. The use of the country system outside OP 4.00 and ESS 1 exceeds the scope of this paper.

65 See for instance IEG, note 23, p. 99; Quintero/Ninio/Posas, note 63, p. 3; Center for International Environmental Law (hereinafter CIEL), The Use of Country Systems in World Bank Lending: A Summary of Lessons from the Pilot Projects and Recommendations for a Better Approach (April 2008), http://www.ciel.org/Publications/WorldBank_CountrySystems_Jan08.pdf (last accessed on 27 April 2017); Alberto Ninio, Postscript and Update, in: David Freestone (ed.), Legal Aspects of Sustainable Development: The World Bank and Sustainable Development: Legal Essays, The Netherlands 2012, pp. 66-67.

review takes into account individual safeguards rather than a country's entire system.⁶⁶ Secondly, the review of equivalence is considered too rigid by World Bank staff and Borrowers, delegating too few to the latter.⁶⁷ This rigidity has the disappointing consequence for the Borrower of requiring a new review for each subsequent project.⁶⁸ Thirdly, the whole process is perceived as more technically difficult, costly and time-consuming than the traditional safeguards approach.⁶⁹ Indeed, the equivalence and acceptability review includes desk and field work, in order to conduct a full diagnostic of the Borrower's law, policies, regulations and judicial decisions and an assessment of Borrower institutional capacity, including its processes, outputs and outcomes.⁷⁰ Then the gap-filling measures must be drafted and agreed upon with the Borrower.⁷¹ During the implementation, the Pilot UCS requires heavy monitoring and evaluation.⁷² The Bank staff needs to work closely with national and local authorities, as well as with other stakeholders rather than solely with the Borrower.⁷³ The World Bank staff has perceived an additional reputational risk in the conduction of the review process.⁷⁴ Furthermore, the social safeguards on involuntary resettlement and indigenous people are generally excluded from the exercise due to the difficult task of finding equivalence in country systems.⁷⁵ The Bank staff and Borrowers warn of an inconsistency between Borrowers' expectations regarding the purpose of the Pilot UCS and its implementation by the Bank; for instance, Borrowers expected that safeguard responsibilities would be transferred to them, which did not happen.⁷⁶ This has translated into implementation difficulties: it has sometimes been complicated for the Bank to get complete

66 See for instance *IEG*, note 23, pp. xx, 87, 98; *IEG/Dani/Freeman/Thomas*, note 40, pp. 15-16; *World Bank*, note 51, p. 9.

67 *IEG*, note 23, pp. 9, 85.

68 *Ibid.*, p. 85.

69 *World Bank*, note 51, p. 1. A Report evaluates the additional costs to an average of 104,000 USD but its estimation of the additional time taken by the review is less conclusive see *World Bank*, Evaluation of the Initial Phase of the Pilot Program for Use of Country Systems for Environmental and Social Safeguards: Lessons Learned and Management Proposal for an Incremental Scale Up of the Program (1 July 2008), pp. vi, 21-22, <http://documents.worldbank.org/curated/en/953491468315325534/pdf/421050R200810005.pdf> (last accessed on 27 April 2017). On difficulties and the provision of incentive funds, see *Quintero/Ninio/Posas*, note 63, pp. 3, 13. See also *Stephanie Chu et al*, International Organizations Clinic at NYU School of Law, The Changing Role of the World Bank Inspection Panel: Responding to Contemporary Challenges at the World Bank (17 September 2014), p. 9, http://chrgj.org/wp-content/uploads/2014/10/ChangingRoleoftheWorldBankIP_IOClinic.pdf (last accessed on 2 May 2017).

70 *World Bank*, note 51, p. 1.

71 *Quintero/Ninio/Posas*, note 63, p. 17.

72 *Ibid.*, p. 6.

73 *World Bank*, note 51, p. 8.

74 *IEG/Dani/Freeman/Thomas*, note 40, p. 16.

75 *IEG*, note 23, p. 86.

76 *IEG/Dani/Freeman/Thomas*, note 40, p. 16.

Borrower cooperation⁷⁷ on matters that the Borrower considers policy choices but are deemed “gaps” by the Bank. The World Bank Independent Evaluation Group concludes that both Borrowers and Bank staff have lost ownership in the Pilot UCS.⁷⁸

Except for some exceptions where equivalence and acceptability were not too difficult to achieve,⁷⁹ World Bank reports seem to warn of issues regarding the review of equivalence and acceptability in nearly all cases. When country systems are weaker than World Bank safeguards, too many gap-filling measures may be required and the application of the Pilot Policy may be rejected.⁸⁰ When the country system appears to be equivalent to or stricter than the World Bank safeguards, for instance in EU accession countries, the systems are sometimes structured so differently that it is difficult for the Bank to determine equivalence;⁸¹ furthermore, in these cases, the cumbersome review is of limited added value.⁸²

2. Country system and sustainability

The same criticisms have also been broadly supported by some influential environmental and social advocacy groups, albeit from a different approach, as part of the call for greater Donor commitment to human rights as well as to sustainable development. The approach finds its legal grounds within the framework of Human Rights law and the principles of sustainable development, participation or precaution.⁸³ Because this perspective inevitably results in stricter environmental and social conditionality, the “piecemeal approach” is criticized here as not strengthening durably the whole country’s environmental and social system. In that sense, the Pilot UCS should either “emphasize or require changes in laws or policies that are mandatory beyond the life of a given project.”⁸⁴ This would avoid the repetition of the equivalence and acceptability reviews in future projects and save time and costs.

Proponents of this approach suggest several complementary measures to avoid social and environmental issues. First, the UCS should be avoided for high risk projects.⁸⁵ Then, a strong country-wide equivalence and acceptability review should be undertaken, taking into

77 *World Bank*, note 51, p. 8.

78 *IEG*, note 23, p. 85.

79 *Quintero/Ninio/Posas*, note 63, p. 4.

80 *Ibid.*, p. 16. It appears that “sophisticated”, in general middle-income countries were the original target of the UCS, see *ibid.*, pp. 14-16.

81 *World Bank*, note 51, p. 8.

82 *Ibid.*, p. 15, citing South Africa’s strong regulations with respect to conservation of protected areas.

83 See *United Nations Conference on Environment and Development*, note 12, Principles 4, 10 and 15.

84 *CIEL*, note 65, p. 2. Noting that UCS doesn’t presume a law reform, see *Quintero/Ninio/Posas*, note 63, p. 6.

85 *CIEL*, note 65, p. 6.

account laws, policies, regulations as well as implementation factors such as the independence of the judiciary, free press, Rule of Law culture, access to information, budget and staff of relevant implementing agency.⁸⁶ Broad consultation should be conducted.⁸⁷ A long-term strategy should be planned, with gap-filling measures and the passage of new laws.⁸⁸ The whole process should be transparent and the commitments undertaken under the review should be monitored by the Bank.⁸⁹ Where this in-depth process is not possible, the World Bank's environmental and social safeguards should be applied.⁹⁰

3. Country system and ownership

Although the same criticisms of the Pilot UCS are issued by supporters of the two approaches ("piecemeal approach", rigidity, redundancy, costs, time, practical issues), the perspectives are very different. Indeed, for the World Bank staff and Borrowers, the support of sovereignty, ownership and swift project implementation demands greater flexibility in order to implement the UCS. On the contrary, for civil society, a greater involvement of the Bank is required in order to uphold and reinforce World Bank environmental and social safeguards and promote sustainable development.⁹¹

This comes down to the traditional conundrum, described above, between Borrowers' ownership and swift project implementation versus sustainable development. Indeed, gap-filling measures, such as project conditionality,⁹² can be seen as an inquiry into domestic affairs which violates national sovereignty; on the contrary, using the Borrower's system without gap-filling measures would limit project conditionality, respect ownership and facilitate project implementation. Furthermore, the infringement on sovereignty in UCS grows proportionally with the scope of the system's reform. There will be no infringement

86 *Ibid.*; *Bank Information Center* (hereinafter BIC), World Bank Safeguards Review, Recommendations, Key Priorities and Lessons Learned (undated), p. i, <http://www.bankinformationcenter.org/wp-content/uploads/2012/11/BIC-Safeguards-Case-Study-Compendium.pdf> (last accessed on 27 April 2017).

87 *CIEL*, note 65, p. 4.

88 *Ibid.*, p. 5.

89 *Ibid.*, pp. 2-3.

90 *Ibid.*, p. 2.

91 *Quintero/Ninio/Posas*, note 63, p. 3. See section B. President Kim of the World Bank also reputedly declared that the most difficult part of his job, was that "on the one hand, lower and middle income countries complain that environmental and social safeguards are too strict, but on the other hand, civil society organizations make the opposite argument", see *Catherine Cheney*, Inside the campaign to support communities harmed by development, *Devex* (27 April 2017), <https://www.devex.com/news/inside-the-campaign-to-support-communities-harmed-by-development-89678#> (last accessed on 9 February 2018).

92 The international aid effectiveness effort also pushed towards limiting conditionality, see *Second High-Level Forum on Aid Effectiveness*, note 30, para. 16, p. 3.

when the Borrowers' system is used, some infringement with project-based gap-filling,⁹³ while a capacity-building approach leading to a country-wide reform with the enactment of national laws could be seen as a significant infringement.⁹⁴

E. The use of country systems in the new ESF

I. Differences and similarities with the Pilot phase

Several of these considerations have been integrated in the new ESF adopted in 2016. The objective of increasing reliance on the UCS is a key part of the ESF; this reliance is described as better for development in that it drives sustainable development through capacity-building, institution-building and country ownership.⁹⁵ The new policy, the "Use of Borrower's Environmental and Social Framework"⁹⁶ (hereinafter UBESF) is accompanied by a draft information note (hereinafter the information note).⁹⁷

The main difference between current and new policies on UCS is that the new UBESF requires determining whether "the Borrower's [environmental and social] framework can be used to enable the project to address the risks and impacts of the project, and achieve objectives *materially consistent* with the [Environmental and Social Standards]."⁹⁸ Thus, contrary to the Pilot UCS, the new policy doesn't require reviewing the legal equivalence of Borrower's system with a list of principles that reflect the World Bank safeguards.⁹⁹ Under the new policy, the World Bank staff shall decide, with the Borrower, whether the Borrow-

93 Bugalski, note 18, pp. 19-20.

94 On the practical side, such wide a country-based approach including law enactment is often extremely complicated under a project cycle, especially in a federal country with different levels of regulations and implementation capacities; it can benefit from the cooperation of multiple donors, see *World Bank*, note 51, pp. 4, 6. See also the difficulty of legal reform in the law and development literature, for instance *Kevin E. Davis/Michael J. Trebilcock*, The Relationship between Law and Development: Optimists versus Skeptics, *The American Journal of Comparative Law* 56 (2008), pp. 895-946.

95 *World Bank*, note 10, para. 5, p. 2.

96 *World Bank*, note 9, paras. 23-29, pp. 6-7 and ESS1, paras. 19-22. The Borrower's system, renamed "Borrower Environmental and Social Framework" (or Borrower's ESF) in the new Policy, is defined as "those aspects of the country's policy, legal and institutional framework, consisting of its national, subnational, or sectoral implementing institutions and applicable laws, regulations, rules and procedures and implementation capacity relevant to the environmental and social risks and impacts of the project". The information note seems to indicate that the World Bank must assess Borrower's ESF *lato sensu*: *World Bank*, Information Note, Assessing the Borrower's Environmental and Social Framework, Deliberative Working Draft (4 August 2016), paras. 4, 5, http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-s-afeguard-policies/en/materials/draft_borrower_framework_information_note_final_for_public_dis-closure_post_board_august_4.pdf (last accessed on 15 February 2018).

97 *World Bank*, Information Note, note 96.

98 Emphasis added. *World Bank*, note 9, ESS1, para. 19, n16.

99 *World Bank*, Information Note, note 96, para. 34.

er's framework can enable the project to achieve objectives materially consistent with a catalogue of objectives listed at the beginning of each Environmental and Social Standard (hereinafter also ESS) of the new World Bank Environmental and Social Framework (hereinafter the 'materially consistent' analysis).¹⁰⁰

A closer look at the wording underlines this shift to an outcome-based¹⁰¹ approach, which had been advocated for by previous World Bank reports, in response to staff and Borrowers' demands for more flexibility in the equivalence process.¹⁰² Indeed, on one hand, consistent is defined as "[c]ompatible or in agreement with something" and materially as "[i]n a significant way; considerably".¹⁰³ The information note provides a similar interpretation, stating that "[t]he term 'materially consistent' is subject to qualitative interpretation, but in essence it means 'substantially' or 'considerably' similar to or 'agreeing/according' in substance with the Environmental and Social Standard objectives".¹⁰⁴ On the other hand, equivalence is defined as "[t]he condition of being equal (...) in value, worth, function, etc."¹⁰⁵ The quest for the achievement of objectives "materially consistent" with safeguard objectives does leave more room for the Bank to appreciate the Borrower's system and its environmental and social outcomes than the equivalence analysis of the Pilot UCS. The new policy may therefore encourage broader use of Borrowers' systems and increase ownership of Borrowers in projects.¹⁰⁶

There are also many similarities with the Pilot UCS: if the Bank identifies gaps in the Borrower system consistency, it shall work with the Borrower to identify gap-filling measures.¹⁰⁷ According to the information note, the gap-filling measures and their completion timeframes shall form part of the contractual obligations of the Borrower, as in the Pilot UCS.¹⁰⁸ The information note also provides guidance on consultation during the analysis of the Borrower's system and disclosure.¹⁰⁹

II. Reception

The World Bank has underlined the importance of its new ESF to support each of the Sustainable Development Goals (hereinafter SDGs).¹¹⁰ The contribution of the UBESF to sus-

100 *Ibid.*, para. 36.

101 On the use of indefinite terms in the new ESF, see *Dann/Riegner*, note 18, pp. 5, 11-12.

102 *Quintero/Ninio/Posas*, note 63, pp. 7-12. *World Bank*, note 51, p. 1.

103 *English Oxford Living Dictionaries*, <https://en.oxforddictionaries.com> (last accessed on 9 August 2017).

104 *World Bank*, Information Note, note 96, para. 42.

105 *English Oxford Living Dictionaries*, note 103.

106 For other differences not addressed here, *World Bank*, Information Note, note 96, paras. 38-43.

107 *World Bank*, note 9, ESS1, paras. 19, n16; *Ninio*, note 65, p. 67.

108 *World Bank*, Information Note, note 96, para. 11; *World Bank*, note 23, OP 4.00.4.

109 *World Bank*, Information Note, note 96, paras. 23-25.

110 *World Bank*, note 10, paras. 5-6, p. 2, para. 1, p. 5, para. 4, pp. 6-7 and Annex 1, pp. 54-56.

tainable development and the SDGs is envisaged in the support of capacity-building and ownership; indeed, the UBESF aims to strengthen, by use or capacity-building, national plans and policies for the implementation of sustainable development and the SDGs.¹¹¹ However, the new safeguards have been received with moderate enthusiasm by civil society and some Donors, arguing that the outcome-based approach sets a lower bar for the implementation of sustainable development because it leaves room for a broader interpretation of the safeguards.¹¹² The new policy has been criticized as in fact watering down the current environmental and social safeguards.

In reality, the UBESF for now only includes several short paragraphs in the ESF, the information note and the guidance note for Borrowers,¹¹³ some of which indicate that there will be various additional tools, such as check-lists, to help staff conduct the assessment.¹¹⁴ Although the new safeguards appear to leave more flexibility to Bank staff in its interpretation and allows it to take a risk-based approach, it seems premature for now to determine *ex ante* whether this flexibility of interpretation will really lead to more ownership or dilute environmental and social protection.¹¹⁵ The room for interpretation, the processes already

111 This relates mainly to SDG 17. See *World Bank*, note 10, para. 5, p. 3, Annex 1, p. 56.

112 *Ulu Foundation et al.*, NGO response to the World Bank's proposed Environmental and Social Framework: Proposed World Bank standards represent dangerous set-back to key environmental and social protections (22 July 2016), pp. 1-2, <http://nebula.wsimg.com/be7ab9098fed4d5d3baca4b4448a74c?AccessKeyId=BBECBE2DB5DCCE90DECA&disposition=0&alloworigin=1> (last accessed on 3 May 2017); calling for caution, see for instance the United States' position "Given the risks, the United States reiterates that the World Bank should be conservative in its use of borrower frameworks, applying its methodology carefully, focusing on selected high capacity borrowers, and devoting resources to building up the capacity of borrowing countries", in *United States Treasury*, U.S. Position on the Review and Update of the World Bank's Safeguard Policies (4 August 2016), p. 3, <https://www.treasury.gov/resource-center/international/development-banks/Documents/US%20Position%20on%20the%20Review%20and%20Update%20of%20the%20World%20Bank's%20Safeguard%20Policies.pdf> (last accessed on 3 May 2017). On the second draft: denouncing "a clear intent to push responsibility to potentially weak and inadequate borrower systems while eliminating the bank's mandatory due diligence requirements to ensure that borrower environmental and social protections are at least as strong as, and equivalent to, those of the bank", see *Human Rights Watch*, World Bank: Dangerous Rollback in Environmental, Social Protections (4 August 2015), <https://www.hrw.org/news/2015/08/04/world-bank-dangerous-rollback-environmental-social-protections> (last accessed on 3 May 2017); *Bugalski*, note 18, p. 18.

113 The guidance note for the Borrowers does not elaborate on parameters that could help define what is understood by "likely to address the risks and impacts of the project and enable the project to achieve objectives materially consistent with the ESSs" – except for its reference to the mitigation hierarchy (GN 20.1), see *World Bank*, Guidance Note for ESS1 Assessment and Management of Environmental and Social Risks and Impacts (June 2018), <http://pubdocs.worldbank.org/en/751541530224071412/ESF-GN-ESS1-June-2018-tracked-changes.pdf> (last accessed on 3 July 2018).

114 *World Bank*, Information Note, note 96, para. 28..

115 *Dann/Riegner*, note 18, p. 15.

in place in the institution¹¹⁶ and pressure from civil society and Donors may also push the “materially consistent” analysis towards an intrusive process in order to avoid diluting safeguards. Practice will show how the staff undertakes this analysis and how it interprets the objectives, the information note and the check-lists.

F. Accountability and the UBESF

Accountability is at the centre of the debate between the competing approaches: while Borrowers and staff alike tend to advocate for Borrower sovereignty in the management of environmental and social issues, civil society and certain Donors also demand institutional accountability for compliance with environmental and social safeguards. In fact, striking a balance between sustainable development and ownership relates to a traditional adjudication question: how to mediate between the policy value for which accountability is sought, and the sovereignty of the decision-maker?¹¹⁷ This question relates to the determination of a standard of review. However, at this early stage of the UBESF, proponents of the second approach have stated their concern about the very competence of the Inspection Panel.¹¹⁸ Assuming that the Panel can overcome the manifest technical obstacles such as the costs, time and expertise required for reviewing programs with UBESF, is the Panel even competent for this exercise? Will the Panel engage in examining whether the “materially consistent” analysis has been undertaken correctly?¹¹⁹ If the Panel did not have this competence, there would be a risk of fragmentation in the World Bank’s activities: some activities, undertaken under the World Bank’s new safeguards system, will not be deemed acceptable by the World Bank; the same activities under the UBESF may be deemed acceptable because they are immune to the Panel’s jurisdiction. Then, if the Panel is competent, how will it conduct this “materially consistent” review and strike a balance between sovereignty and sustainable development?

- 116 On institutional culture, see for instance *Galit A. Sarfaty*, Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank, *The American Journal of International Law* 103 (2009), pp. 647-683.
- 117 *Steven P. Croley/John H. Jackson*, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, *The American Journal of International Law* 90 (1996), p. 212.
- 118 *Dann/Riegner*, note 18, p. 16. On the Inspection Panel, see in general: *Ibrahim F.I. Shihata*, The World Bank Inspection Panel: In Practice, New York 2000; *Laurence Boisson de Chazournes*, The World Bank Inspection Panel: about Public Participation and Dispute Settlement, in: *Tullio Treves/Alessandro Fodella/Attila Tanzi/Marco Frigessi di Rattalma* (eds.), *Civil Society, international courts and compliance bodies*, The Hague 2005; *Andria Naudé Fourie*, The World Bank Inspection Panel and Quasi-Judicial Oversight, in *Search of the ‘Judicial Spirit’ in Public International Law*, Utrecht 2009.
- 119 This is decisive: the majority of noncompliance with safeguards found by the Panel stem from inadequate consultation or inadequate assessment of environmental or community impacts, see *IEG*, note 23, p. 18.

1. Competence

It is unlikely that the Panel will start reviewing the observance by a Borrower of its own national law in a program with UBESF, as it is not part of its competences¹²⁰ and entails the risk of violating the World Bank's political prohibition.¹²¹ However, there are two strong indications of the preservation of the Panel's mandate to review Management's compliance with the Operational Policies, even with UBESF.

First, the Panel's mandate was not limited by the Pilot UCS.¹²² Indeed, under the Pilot, the Panel is competent to review whether the Bank correctly assessed the Borrower's system and the gap-filling measures; correctly supervised the operation; and complied with other applicable policies not affected by the Pilot UCS.¹²³ Secondly, the Panel affirmed its competence and engaged in an equivalence review¹²⁴ in the Eskom Investment case in South Africa, which was part of the Pilot UCS. In its investigation report, the Panel undertook a two-level analysis: the "system level" and the "project level".¹²⁵ It analysed Management's assessment of the equivalence and acceptability of South Africa's environmental and

- 120 *World Bank*, The World Bank Inspection Panel (IBRD Resolution No. 93-10, IDA Resolution No. 93-6, 22 September 1993), ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf (last accessed on 15 February 2018). This Resolution was reviewed in 1996 and 1999, see: *World Bank*, Review of the Resolution Establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution, ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ReviewResolution1966.pdf (last accessed on 12 February 2018); *World Bank*, 1999 Clarification of the Board's Second Review of the Inspection Panel, ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ClarificationSecondReview.pdf (last accessed on 12 February 2018). The Inspection Panel Operating Procedures were updated in 2014, see *The Inspection Panel at the World Bank*, Operating Procedures (April 2014 with Annex added February 2016), ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf (last accessed on 12 February 2018).
- 121 *IBRD*, Articles of Agreement (as amended effective 27 June 2012), Art. 4.X, http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/IBRDArticlesOfAgreement_English.pdf (last accessed on 12 February 2018); *IDA*, IDA Articles of Agreement, Art. V, Section 6, <http://siteresources.worldbank.org/IDA/Resources/ida-articlesofagreement.pdf> (last accessed on 12 February 2018).
- 122 The absence of changes in the Panel's mandate is stated, for instance in: Joint Statement on the Use of Country Systems, Mexico Decentralized Infrastructure Reform and Development Project (R2004-0077, 0077/3), Chairperson of The Inspection Panel and Senior Vice President of the World Bank (8 June 2004), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/JointStatementUseCountrySystems.pdf> (last accessed on 27 April 2017); *World Bank*, Expanding the Use of Country Systems in Bank-Supported Projects: Issues and Proposals (4 March 2005), paras. 39, 49, 52, 79, <http://documents.worldbank.org/curated/pt/856881468780905107/pdf/31734.pdf> (last accessed on 4 July 2017); *World Bank*, Frequently Asked Questions on the Use of Country Systems in Bank-Supported Operations (18 October 2004), para. 20, p. 7, <http://www1.worldbank.org/publicsector/pe/befa05/usecountrysystems.pdf> (last accessed on 27 April 2017).
- 123 See also *World Bank Inspection Panel*, note 19, paras. 115-120.
- 124 On its own competence under the Pilot UCS, see *World Bank Inspection Panel*, note 19, paras. 112-120.
- 125 *Ibid.*, for instance p. viii.

social safeguard system (the system level) and then analysed Management's appraisal and supervision of the Eskom Investment (the project level).¹²⁶ One can assume that the Panel's competence¹²⁷ will be similar for the UBESF, *mutatis mutandis*: it will be competent to assess the Bank's "materially consistent" analysis (the system level) and the supervision of the operation and compliance with all applicable policies (the project level).¹²⁸

II. Standard of review

This system level analysis is new to the Panel. Indeed, only when reviewing a project that uses the Borrower's system is the Panel called upon to look into the Borrower's policies in order to evaluate if these are aligned with those of the Bank. The project level analysis is also new to the Panel inasmuch as it entails the review of Management's supervision of the implementation of national laws. This is a stark departure from the Panel's habitual tasks of reviewing Management's compliance with the World Bank policies only. Furthermore, as one of the purposes of the ESF is the increased use of Borrower framework, the Panel may be confronted with a growing number of cases with UBESF and at the same time with an increased uncertainty as to its new task, especially as to the degree of deference it should display toward Management and Borrowers in their decisions regarding what constitutes the achievement of objectives "materially consistent" with the ESS objectives. In this new context, creating a legal methodology that will determine its degree of deference may require the Panel to develop a standard of review.¹²⁹ The standard of review can be defined as the nature and intensity of review of the decision of the primary decision-maker, here the Management, by an adjudicator, here the Panel, relative to normative and/or factual issues.¹³⁰ It may range from very intrusive, where the adjudicator's decisions are substituted for the primary decision-maker's decisions, to very deferential, which relies totally on the decision of the primary decision-maker.¹³¹

126 *Ibid.*, for instance p. viii.

127 On the Panel's competence in the ESF, see *World Bank*, note 9, Overview, para. 12 and para. 61, p.11.

128 *Cristina Passoni/Ariel Rosenbaum/Eleanor Vermunt*, Empowering the Inspection Panel, The Impact of the World Bank's New Environmental and Social Safeguards, *International Law and Politics* 49 (2017), pp. 955-956.

129 See for instance *Lukasz Gruszczynski/Wouter Werner*, Introduction, in: *Lukasz Gruszczynski/Wouter Werner* (eds.), *Deference in International Courts and Tribunals, Standard of Review and Margin of Appreciation*, Oxford 2014, p. 1. On the possible restraint exercised by the Inspection Panel in cases which do not use country systems, see *Naudé Fourie*, note 118, p. 284-293; this exceeds the scope of this research.

130 *Gruszczynski/Werner*, note 129, p. 2; *Caroline Henckels*, *Proportionality and Deference in Investor-State Arbitration, Balancing Investment Protection and Regulatory Autonomy*, Cambridge 2015, pp. 29-30.

131 *Gruszczynski/Werner*, note 129, pp. 1-2; *Henckels*, note 130, pp. 29-30.

1. Comparative approach to the judicial standard of review

There are of course many differences between traditional adjudicators, such as judicial mechanisms or investment arbitrators, and MDBs' accountability mechanisms, such as the Inspection Panel. The exact nature of accountability mechanisms has been subject to some doctrinal discussions for over twenty years.¹³² Clearly, they are not judicial mechanisms: they cannot determine the consequence of a violation of the safeguards and have to transmit their findings to the Banks' respective authority for its final decisions.¹³³ In the Panel's cases, the primary decision-maker is not a State but the Management; the final decision-maker is not the Inspection Panel but the World Bank Board of Directors.¹³⁴

Scholars have often labelled these accountability mechanisms as "quasi-judicial" mechanisms or bodies.¹³⁵ Quasi-judicial bodies have been defined as having "a mandate to monitor compliance with a body of norms, settle disputes regarding those norms, or make determinations on the basis of investigations of one form or another, yet none [are] empowered to make final, binding decisions on questions of international law";¹³⁶ the Panel is included in this category.¹³⁷ This broad categorization does not contradict the peculiar internal administrative nature of the accountability mechanisms but helps to highlight the commonalities of these mechanisms with classical judicial mechanisms and allows to borrow judicial review concepts for comparative purposes.

- 132 *Kathigamar VS.K. Nathan*, The World Bank Inspection Panel Court or Quango?, *Journal of International Arbitration* 12 (1995), for instance pp. 138-139; *Andria Naudé Fourie*, Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research, Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks, *Erasmus Law Review* 8 (2015); *Elena Mitzman*, The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance, *Jean Monnet Working Paper* 14 (2010), pp. 45-46.
- 133 *Laurence Boisson de Chazournes*, Public participation in decision-making: the World Bank inspection panel, in: Edith Brown Weiss/Andrés Rigo Sureda/Laurence Boisson de Chazournes (eds.), *The World Bank, international financial institutions, and the development of international law: a symposium held in honor of Ibrahim F.I. Shihata*, March 22, 1999, Washington 1999, p. 92.
- 134 *The Inspection Panel at the World Bank*, note 120, para. 71.
- 135 See *Mara Tignino*, Quasi-judicial bodies, in: Catherine Brolmann/Yannick Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham 2016, pp. 245-248; *Naudé Fourie*, note 118; *Dann*, note 21, pp. 21, 495-496; *Michael Riegner*, Towards an International Institutional Law of Information, *International Organizations Law Review* 12 (2015), p. 71; *Makane M. Mbengue/Stéphanie de Moerloose*, Quasi-Judicial Dialogue: Kenya Electricity Expansion Project before the World Bank and the European Investment Bank's International Accountability Mechanisms, *EJIL: Talk! – Blog of the European Journal of International Law* (9 November 2016), <http://www.ejiltalk.org/quasi-judicial-dialogue-for-the-coherent-development-of-international-law/#more-14715> (last accessed on 12 April 2017).
- 136 *Tignino*, note 135, pp. 242.
- 137 *Ibid.*, pp. 245-248.

There are many similarities that justify a comparative approach to the judicial standard of review. First, although the primary decision-maker is the Management, its decision with respect to the UBESF is intrinsically linked to the Borrower's decisions. Indeed, the decision to use all or part of the framework shall be agreed between the Bank and the Borrower;¹³⁸ furthermore, the Borrower has a vested sovereign interest in the use of its own national policies, as explained above. Secondly, the Inspection Panel's findings have an important weight in the decision process: the Board of Directors' decision is based on both the Panel's investigation report – which reviews facts and compliance – and the Management's report, which itself is a response to the Inspection Panel's report.¹³⁹ Thirdly, and perhaps most importantly, the Inspection Panel faces many of the same problems that many judicial mechanisms do: limited resources, democratic deficit, potential perception of inadequacy in its findings and compliance.¹⁴⁰ All these problems may advocate in favor of judicial restraint or deference.¹⁴¹ Furthermore, the Inspection Panel will need to work with a particularly open-worded policy regarding the “materially consistent” analysis, which is an additional rationale for deference: deference is generally displayed by adjudicators when there is normative flexibility,¹⁴² on the basis of regulatory autonomy, proximity, institutional competence and expertise of the primary decision-maker.¹⁴³ These factors relate to the principle of sovereignty (regulatory autonomy)¹⁴⁴ and to the rationales for the support of ownership by the aid effectiveness agenda (proximity, institutional competence and expertise of the Borrower).¹⁴⁵ The standard of review of the Panel is therefore directly related to the conundrum: if the Panel shows the highest degree of deference, meaning total reliance on the Management and the Borrower's agreement in using the Borrower's system, it may support ownership but allow Borrowers to evade their obligations under the safeguards.¹⁴⁶ It may also entail a fragmented application of the safeguards and of the definition of the principle

138 *World Bank*, note 9, para. 23, pp. 6-7.

139 *The Inspection Panel at the World Bank*, note 120, especially paras. 67-71. On the “judicialization” of the Inspection Panel, see *Naudé Fourie*, note 118, for instance pp. 185-255.

140 *Yuval Shany*, *Toward a General Margin of Appreciation Doctrine in International Law?*, *The European Journal of International Law* 16 (2006), pp. 908-909. On an example of reception of the Inspection Panel's findings by the World Bank staff, see *Pieter Bottelier*, *Was World Bank Support for the Qinghai Anti-Poverty Project in China Ill-Considered?*, *Harvard Asia Quarterly* 1 (2001), pp. 47-55.

141 *Croley/Jackson*, note 117, p. 212.

142 *Shany*, note 140, p. 910. On “normative flexibility” or “normative uncertainty”, see respectively *Ibid.*, pp. 909-910; *Henckels*, note 130, pp. 29-30, retaking Robert Alexy.

143 *Henckels*, note 130, pp. 37-41; *Shany*, note 140, pp. 918-922.

144 On sovereignty and International Human Rights instruments, see for instance *Louis Henckin*, *That “S” Word: Sovereignty, and Globalization, and Human Rights*, *Fordham Law Review* 68 (1999-2000), pp. 1-14.

145 See section C. II. on aid effectiveness. .

146 *Croley/Jackson*, note 117, p. 194.

of sustainable development as understood by the World Bank.¹⁴⁷ Indeed, just like traditional adjudication, a consistent interpretation of the ESF by the Panel would help to clarify safeguards and develop their contents.¹⁴⁸ On the other hand, if the Panel exercises a *de novo* review of the “materially consistent” analysis and often concludes that the Borrower’s system should not have been used, it will trump the decision of the Management and the Borrower and may defeat the objective of supporting ownership. The Panel may be deemed an “activist”, which may lessen the authority of its findings.¹⁴⁹

2. Lessons from the Eskom case?

In its review of the Eskom Investment case in South Africa, the Inspection Panel did analyse the equivalence of the South African system and declare that, in certain aspects, it was not equivalent to World Bank policies.¹⁵⁰ The Panel found for instance that the South African law regulating environmental impact assessment, which Management had deemed equivalent to the Bank safeguards, was in fact not yet in effect at the time the environmental impact assessment was conducted.¹⁵¹ Furthermore, the applicable law was not considered equivalent by the Panel, stating that Management’s analysis “did not adequately recognize the gap between Bank Policy requirements and prevailing national legislation with respect to assessing cumulative impacts and environmental management planning in the EIA process at the time that the (...) EIA was prepared, as required by Table A1 of OP/BP 4.00.”¹⁵² Thus, the Panel did not hesitate to analyse South African law and determine the presence of gaps compared to the safeguards. Nevertheless, the Panel concluded that its findings “do not alter the overall conclusion that South African (...) systems are broadly equivalent (...), but point towards gaps that were not identified (...)”.¹⁵³ As a consequence, the Board of Directors decided that the Bank would comprehensively support project implementation, including environmental and social safeguards, but didn’t decide to revert to the use of the World Bank safeguards where gaps were found by the Panel.¹⁵⁴ By concluding the overall equivalence of the country system even in the presence of gaps, the Panel

147 On criticisms to a large degree of deference, see *Shany*, note 140, pp. 922-926. On judicial review, potential relativism and Human Rights law, see for instance *James A. Sweeney*, Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era, *International and Comparative Law Quarterly* 54 (2005).

148 *Shany*, note 140, p. 922.

149 See on that matter in WTO law *Croley/Jackson*, note 117, p. 212.

150 See for instance *World Bank Inspection Panel*, note 19, paras. 192-194.

151 *Ibid.*, paras. 182-186.

152 *Ibid.*, paras. 182-186.

153 *Ibid.*, Overview p. viii.

154 *World Bank*, World Bank Board Discusses Inspection Panel Report on South Africa’s Eskom Investment Support Project (25 May 2012), p. 1, [http://ewebapps.worldbank.org/apps/ip/PanelCase/s/65-Press%20Release%20on%20Board%20Discussion%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCase/s/65-Press%20Release%20on%20Board%20Discussion%20(English).pdf) (last accessed on 2 May 2017); *BIC*, World Bank fails to correct missteps in Eskom coal project in South Africa (4

seems to adopt a standard of review which entails a rather high degree of deference to Management and the Borrower when it comes to the UCS. Time will tell whether this case constitutes an indication of the standard of review that will be adopted by the Panel for UBESF cases, but as explained above, the UBESF contains less stringent wording and no list of principles, which may push the Panel towards a different standard of review – maybe even more deferential.

G. Ways forward

Four suggestions can be made at this stage in order to apply the new UBESF and avoid as much as possible sovereignty infringement, safeguards dilution, project implementation obstacles and reputational risks. First, the UBESF could be applied restrictively, only to Borrowers with systems as compatible as possible with the World Bank's new safeguard objectives.¹⁵⁵ Then, when the systems bear differences, the UBESF could be implemented in a capacity-building perspective when Borrowers require the Bank's support in upgrading their system and therefore "own" the reform; this could be done through stand-alone programs,¹⁵⁶ independently from investment projects. There should be commitment to a transparent process, including meaningful consultation.¹⁵⁷ Because of the technical difficulties, specialized staff should be appointed in sufficient numbers.¹⁵⁸ For the rest of the projects, the World Bank new safeguards could be used.¹⁵⁹ This could hopefully provide a middle ground between the two competing approaches. Finally, the competence of the Inspection Panel must be preserved, as it is a key actor in the balance between ownership and sustainable development.¹⁶⁰ Indeed, if the UBESF is restricted to the cases suggested here, a

June 2012), <http://www.bankinformationcenter.org/world-bank-fails-to-correct-missteps-in-esko-m-coal-project-in-south-africa/> (last accessed on 14 August 2017).

155 This is a difficult task; indeed, even the negatively appraised UCS pilots were foreseen initially for "sophisticated borrowers", see note 80; *Quintero/Ninio/Posas*, note 63, pp. 15-16; *Ninio*, note 65, p. 67. Some advocate for the avoidance of high-risk projects, see *United States Treasury*, note 112, p. 3.

156 *Quintero/Ninio/Posas*, note 63, pp. 15-18.

157 *Larsen/Ballesteros*, note 42, pp. 23-24.

158 *World Bank*, note 10, for instance para. 11, p. 4, para. 127c, p. 43, para. 141, p. 46; *Larsen/Ballesteros*, note 42, p. 23.

159 *Quintero/Ninio/Posas*, note 63, p. 16.

160 The Inspection Panel may be confronted with an additional challenge, this time in co-financed projects: the new safeguards provide that the Bank and co-financing agencies should cooperate to find a "common approach for the assessment and management of environmental and social risks and impacts of the project"; this common approach must "enable the project to achieve objectives materially consistent with the ESSs" (*World Bank*, note 9, para. 9, p. 125). This "common approach" has triggered questions, some related again to the interpretation of the "materially consistent" threshold (see for instance *United States Treasury*, note 109, p. 3). The task of the Panel will be ever-more complex: it may need to review the Bank's "materially consistent" analy-

consistent, albeit deferential, standard of review by the Panel can provide some predictability and harmonization.¹⁶¹

H. Conclusion

The new policy on the Use of Borrower Environmental and Social Framework gives the impression that ownership may be observed to the detriment of sustainable development. In fact, given the open wording of the policy, it is too early to determine how the new UBESF will be interpreted and which of the two competing approaches, ownership versus sustainable development, will have the most influence in the new safeguards implementation. It is also too early to say whether the new safeguards consist of a continuum or a rupture in the progressive integration of sustainable development in MDB mandates. However, based on the problems faced by the current UCS and the room for interpretation left in the UBESF, it is safe to predict that the implementation of this new policy will consist of a delicate exercise. The process will also be placed under the heavy scrutiny of influential and divergent interest groups, representing the two approaches. The lack of guidance of the UBESF wording for the new exercise of reviewing a country's framework will make the task of the Panel difficult and may advocate for the Panel to display a high degree of deference to the Management and the Borrower. However, several criteria such as a restrictive use of the UBESF and a consistent standard of review developed by the Panel for cases involving UBESF may help to strike a balance between ownership and sustainable development, as well as provide predictability.

sis for the “common approach” – which could include the UBESF – as well as the Bank's supervision of the operation and compliance with all applicable policies.

- 161 Depending, of course, on the Board of Directors' final decisions on Inspection Panel cases involving UBESF.