The contribution of international financial institutions to international sustainable development law

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I. INTRODUCTION

Lines that traditionally divide debt, equity, and investment, as well as distinctions between public and private finance, are blurring. In *Portigon v Spain*, which involved project finance via long-term loans and interest rate swaps, the arbitral tribunal affirmed that 'protected investments' may include 'loans, promissory notes, hedging instruments and sovereign bonds'.[1] More importantly, the *Portigon* tribunal 'held, for the first time, that project financing provided by a third-party lender to a project company (not directly to the state) is a protected investment under an international investment treaty'.[2] Alongside these jurisprudential changes, the term 'environmental, social and governance (ESG)' has become a buzzword that is often linked to notions of sustainable finance and sustainable investment. Interestingly, these still rather ambiguous notions are now also being endorsed by and becoming part of the vocabulary of international financial institutions (IFIs), which support development projects through loans or grants largely sourced from member governments' contributions, i.e., public funds. Extending this traditional IFI role, the Asian Infrastructure Investment Bank (AIIB) launched its Sustainable Capital Markets Initiative, which has among its pillars the AIIB Asia ESG Enhanced Credit Managed Portfolio.[3] It is far beyond the scope of this Chapter to explain and analyse this complex financial instrument. What is relevant here, however, is that the investing principles in the ESG framework that AIIB uses and promotes derive from its Environmental and Social Framework (ESF),[4] which sets sustainability standards applicable to the projects it funds. This ESF, in turn, is derived from and closely resembles other IFIs' sustainability frameworks.

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[1] C Amirfar et al at Debevoise & Plimpton, 'The *Portigon v. Spain* Decision: Upholding International Law Protections for Financial Instruments' (*Debevoise*, 15 October 2020), available https://www.debevoise.com/-/media/files/pdf/theportigonvspaindecision.pdf?la=en&hash=4558762DDF2CA52EDF68BA4AA369955D (accessed 10 December 2024).

[2] K Apostolova, 'Portigon v Spain: New Frontiers for Financial Institutions in Investor–State Arbitration?' (2020) 36 Arbitration International 601, 608.

[3] AIIB, 'AIIB Asia ESG Enhanced Credit Managed Portfolio' (Project Summary Information, March 2019) available https://www.aiib.org/en/projects/approved/2018/_download/regional/Asia-ESG-Enhanced-Credit-Managed-Portfolio.pdf (accessed 10 December 2024).

[4] AIIB, 'AIIB to Develop Infrastructure as an Asset Class and Catalyze ESG Investing Principles in Emerging Asia' (*AIIB*, 9 January 2019) available https://www.aiib.org/en/news-events/news/2019/AIIB-to-Develop-Infrastructure-as-an-Asset-Class-and-Catalyze-ESG-Investing-Principles-in-Emerging-Asia.html (accessed 10 December 2024).

Independently of how future arbitral tribunals respond to the expansive definition of 'investment' to include project finance loans and security instruments, or the extent to which public and private ESG standards could or should converge, IFIs' contribution to the making of international sustainable development law is important in holistically understanding the normative frameworks through which States, especially developing countries, view the relationship between sustainable development and international (investment) law. For present purposes, the IFIs' participation in the international lawmaking process concerning sustainable development focuses on their environmental and social policies (alternatively, 'safeguards') and on the independent accountability mechanisms (IAM).

The chapter is structured as follows. The section after this Introduction briefly presents the theoretical framework for the IFIs' lawmaking functions concerning sustainable development. Section II describes and explains how the two components of IFIs' safeguard systems work and how they relate not only to one another but also to general international legal instruments that contain sustainability commitments. The discussion here concentrates on the most widely shared policies among IFIs – environmental assessment, involuntary resettlement, Indigenous peoples – that are likewise the most frequently invoked before the IAMs. These mechanisms are then analysed based on their different functions within the safeguard system and as part also of the international lawmaking process. The Conclusion summarizes the main points and sketches some topics and issues – concerning the IFIs' safeguard systems and their implications for international sustainable development law – that require further legal and policy research.

II. IFIs AS LAWMAKERS

While the international legal personality and subjecthood of international organizations (IOs), including IFIs, are largely uncontested,[5] their capacity to make international law is not as well-settled. The controversy, at least from a formalist-positivist perspective, stems from the sources doctrine that focuses exclusively on States as creators of international law. There are nevertheless authors who have theorized and analysed IOs' participation in the international legal system[6] – their non-State character notwithstanding – and specifically their lawmaking

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[5] See *Reparation for the Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

[6] R McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden Journal of International Law 477; M Noortmann, 'Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?' in M Noortmann and C Ryngaert (eds), *Non-state Actor Dynamics in International Law: From Law-takers to Law-makers* (Ashgate 2010); A D'Amato, 'Non-State Actors from the Perspective of the Policy-Oriented School: Power, Law, Actors and the View from New Haven' in J d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011); E Suzuki, 'Non-State Actors in International Law in Policy Perspective' in M Noortmann, A Reinisch and C Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015).

role[7]. Some of these theories, briefly explained below, are relevant to the IFIs' posited contribution to international sustainable development law.

A. International Law as Communicative Process

Given the limits posed by a State-centric view of international law, portraying IFIs as lawmakers in the field of sustainable development begins with approaching international law, not simply as rules, but as a particular decision-making process with various participants.[8] In the international law as a communicative process view, 'any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behaviour must be considered functional lawmaking'.[9] This perspective broadly relies on the New Haven School approach to international law that focuses on various decision-making phases, the context within which authoritative and controlling decisions are made by relevant actors with different viewpoints, the policy choices underlying decisions that are appraised vis-à-vis the international community's expectations, and the ultimate creation of a world public order founded on human dignity.[10] On the notion of international law as 'world social process', its primary proponents explain, 'We speak of "process" because there is interaction; of "social" because living beings are the active participants; of "world" because the expanding circles of interaction among men ultimately reach the remotest inhabitants of the globe'.[11]

International law being a process of interaction among participants not exclusively consisting of States is a valuable lens to understand how *international law in the field of sustainable development* is made and by whom. As this chapter shows, through the safeguard systems, IFIs and other non-State actors interpret and operationalize the concept of sustainability in the context of development project finance – thereby clarifying the interrelationship among 'the specialized fields of international law which aim to promote economic development,

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[7] JE Alvarez, *International Organizations as Law-Makers* (OUP 2006); J Wouters and P De Man, 'International Organizations as Law-Makers' in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011); I Johnstone, 'Law-Making by International Organizations: Perspectives from IL/IR Theory' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012).

[8] See R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 2, 50.

[9] WM Reisman, 'International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture' (1981) 75 Proceedings of the Annual Meeting (American Society of International Law) 101, 107.

[10] MS McDougal, HD Lasswell and WM Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1968) 8 Virginia Journal of International Law 188; RA Falk, 'Casting the Spell: The New Haven School of International Law (Reviewed Work: Jurisprudence for a Free Society: Studies in Law, Science, and Policy by Harold D. Lasswell and Myres S. McDougal)' (1995) 104 The Yale Law Journal 1991; A Bianchi, 'The New Haven School' in A Bianchi (ed), *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 96–7.

[11] MS McDougal and HD Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 American Journal of International Law 1, 7–8.

environmental protection and respect for [human] rights'.[12] Within the foregoing framework, *functional international lawmaking* obtains in the IFIs' formulation of environmental and social policies, their establishment of independent accountability mechanisms, the borrowing States' implementation of such policies, and the project-affected people's engagement with the safeguard system. Relatedly, the *pluralist approach to international law* could also further explain the 'jurisgenerative' or law-creating potential of the project-affected people, who could be considered part of 'transnational, subnational, or epistemic "communities"'[13] that shape or modify the safeguard policies particularly through their interactions with the IFIs and the IAMs.

Moreover, *international sustainable development law* is understood here as a body of congruent international legal principles that, through procedural and substantive norms and instruments 'address the areas of intersection between international economic law, international environmental law and international social law' so that economic growth, environmental protection, and social justice can be reconciled and realized.[14] The IFIs' policies and procedures, which ensure the economic, environmental, and social sustainability of development projects, harden and consolidate the international 'soft' law on sustainable development, by clarifying, elaborating, and contextualizing the essentially contested concept of sustainable development. As illustrated below, the safeguard policies, which are intended to regulate the environmental and social aspects of a project, concretize the sustainable development principles of integration[15] and public participation.[16] They are thus elaborating some of the norms contained in 'soft' law materials, such as United Nations (UN) declarations, resolutions, or conference reports, which signify policies endorsed by the international community and 'may influence the development of international law [by creating] expectations and pressure for implementation and change'.[17]

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[12] P Sands, 'International Law in the Field of Sustainable Development' (1995) 65 British Yearbook of International Law 303, 379.

[13] PS Berman, 'A Pluralist Approach to International Law' (2007) 32 Yale Journal of International Law 301, 322.

[14] M-C Cordonier Segger and D Olawuyi, *Sustainable Development Law: Principles, Practices, and Prospects* (2nd edn, OUP 2025).

[15] UN General Assembly (UNGA), 'Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992' (12 August 1992) UN Doc A/CONF.151/26 (Vol.I) (Rio Declaration) Principle 4; 'Copenhagen Declaration on Social Development' UN World Summit for Social Development (Copenhagen, 6–12 March 1995) (14 March 1995) UN Doc A/CONF.166/9, Annex I, para 6; 'Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations' UN World Summit for Sustainable Development (Johannesburg, 26 August-4 September 2002) (9 August 2002) UN Doc A/CONF.199/8 (New Delhi Declaration) Principle 7. See also V Barral and P-M Dupuy, 'Principle 4: Sustainable Development through Integration' in JE Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015).

[16] Rio Declaration (n 15) Principle 10; New Delhi Declaration (n 15) Principle 5. See also J Ebbesson, 'Principle 10: Public Participation' in JE Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015).

[17] AE Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 108.

B. Harmonization and Externalization of 'Internal' Law

Complementing the New Haven School perspective is the *interactional approach to international law*, which, similar to the emphasis given by policy-oriented jurisprudence to politically relevant actors, accounts for 'the active participation of relevant social actors', thereby 'acknowledg[ing] and reinforc[ing] the diversity of international society, and show[ing] that legal power is more distributed than commonly presumed in rationalist explanations of law'.[18] The IFIs' legal power partly stems from their material wealth. It also derives from their being epistemic communities,[19] whose shared understanding of sustainable development draws from their (more accurately, of their officials and staff) common knowledge base and professional experiences. The growing resemblance of the texts of IFIs' environmental and social policies suggests their efforts, both deliberate and inadvertent, to harmonize their 'internal' law. Their consensus, in turn, increases the persuasiveness, if not the law-creating effect, of their definition of sustainable development among external actors,[20] including States. Indeed, for borrowing countries, these sustainability standards are not only persuasive but also legally binding, since these standards are an integral part of the loan/grant contracts, which are international agreements[21] between a State and an IO. Notably, the World Bank's standard-setting role and approach to sustainability shape the conduct not only of its peers but also of private financial institutions, as seen in the example of the Equator Principles.[22]

Like IFIs, IAMs also form *epistemic communities* – a group of persons with 'recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area'[23] – engaged in transnational dialogues akin to

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[18] J Brunnée and SJ Toope, 'Interactional International Law: An Introduction' (2011) 3 International Theory 307, 309; Cordonier Segger and Olawuyi (n 14).

[19] See generally PM Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1.

[20] See B Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in GS Goodwin-Gill and S Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999); DD Bradlow and AN Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?' (2013) 10 International Organizations Law Review 3.

[21] See M Ragazzi, 'International Financial Institutions', *Max Planck Encyclopedia of Public International Law* (2014) paras 21–22; P Dann and M Riegner, 'Foreign Aid Agreements', *Max Planck Encyclopedia of Public International Law* (2014).

[22] RF Lawrence and WL Thomas, 'The Equator Principles and Project Finance: Sustainability in Practice' (2004) 19 Natural Resources & Environment 20; E Morgera, 'Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation' (2007) 18 Colorado Journal of International Environmental Law and Policy 151; DD Bradlow and MS Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards' (2011) 4 Erasmus Law Review 91; K Mikadze, 'Public Participation in Global Environmental Governance and the Equator Principles: Potential and Pitfalls' (2012) 13 German Law Journal 1386; P Dann and M Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32 Leiden Journal of International Law 537.

[23] Haas (n 19) 3.

cross-border communication among domestic courts.[24] Their efforts to cite one another's reports and their openness to coordinate or cooperate in examining co-financed projects demonstrate this interaction.[25] Given the absence of (judicial) hierarchy in international law, one tribunal's reference to another's ruling or reasoning is a vital component of legal analysis and thus assumes legal significance in resolving actual, concrete issues surrounding the sustainability of development projects.[26] Although only succinctly discussed here, the participation in the international lawmaking process on sustainable development of IAMs, individually through their jurisprudence[27] and as a collective, is likewise central to this author's[28] overall theory about IFIs as lawmakers. Significantly, the 'partnerships, emulation, and coordination' among IFIs – and among IAMs – drive the emergence of a *droit commun* in the field of development finance.[29] Building on this analysis, the next section explains the relationship of such *droit commun* to international sustainable development law.

III. *DROIT COMMUN* ON SUSTAINABLE DEVELOPMENT

The creation of a 'common law' on sustainability in the context of development finance[30] and the IFIs' contribution to international sustainable development law begin with their *safeguard systems*. In broad terms, safeguard systems consist of two components: (i) the IFIs' policies concerning social and environmental matters (variably called 'safeguard policies'; 'environmental and social safeguards'; 'environmental and social standards'), such as Indigenous

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[24] A-M Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99; Anne-Marie Slaughter, 'Judicial Globalization' (1999) 40 Virginia Journal of International Law 1103; MA Waters, 'The Future of Transnational Judicial Dialogue' (2010) 104 American Society of International Law Proceedings 465.

[25] JAP Lorenzo, 'International Law-Making in the Field of Sustainable Development and an Emerging Droit Commun among International Financial Institutions' (2018) 7 Cambridge International Law Journal 327, 343–7.

[26] See FG Sourgens, 'Law's Laboratory: Developing International Law on Investment Protection as Common Law' (2013) 34 Northwestern Journal of International Law & Business 181.

[27] See generally S Schlemmer-Schulte, 'Sustainable Development Priorities in World Bank Inspection Panel Decisions' in M-C Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Routledge 2017); AN Fourie, *The World Bank Inspection Panel Casebook* (Eleven International Publishing 2014).

[28] JAP Lorenzo, *International Financial Institutions and Sustainable Development: Lawmaking and Accountability* (CUP forthcoming, 2025).

[29] L Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance' in H Cissé, DD Bradlow and B Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (Vol 3, World Bank Publications 2012) 173–87.

[30] See MM Mbengue and S de Moerloose, 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development' (2017) 10 Law and Development Review 389; KP Gallagher and F Yuan, 'Standardizing Sustainable Development: A Comparison of Development Banks in the Americas' (2017) 26 The Journal of Environment & Development 243.

peoples' rights, involuntary resettlement, and environmental impact assessment; and (ii) the independent accountability mechanisms that interpret and enforce the safeguard policies in the course of receiving and investigating complaints by project-affected people about potential noncompliance with such policies.

A. Safeguard Policies

The incremental recognition of sustainable development as part of IFIs' operations, if not *the* core of their legal (constitutional) mandates[31] as international organizations, led to the inclusion of environmental and social policies or standards in their 'internal' law. Several authors[32] have traced the evolution of the constituent instruments of the World Bank and other MDBs that resulted to the formulation of policies aimed at addressing and safeguarding the environmental and social concerns arising from development projects. The safeguard policies belong to the IFIs' operational rules and procedures pertaining to the entire development project life-cycle. They are typically addressed to bank management and staff as well as to the borrowing State. The safeguard policies' legal status under international law remains contentious, but several commentators have convincingly argued that, at the very least, they form part of an international normative process that regulates the conduct and interaction of State and non-State actors alike.[33]

Since their inception, the safeguards have undergone revisions. From the 1980s until late 2010s, the World Bank had in place operational policies and procedures (OPPs), which included requirements concerning the environmental and social impacts of Bank-supported development projects. After more than three decades, the OPPs were transformed into the Environmental and Social Framework (ESF),[34] which has three components: (i) the World Bank's Vision for Sustainable Development; (ii) the World Bank Environmental and Social Policy for Investment Project Financing; and (iii) ten Borrower Requirements or Environmental and Social Standards (ESSs). The ESF's overall purpose is to translate the Bank's aspirations regarding environmental and social sustainability 'into practical, project-level applications

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[31] See G Handl, 'The Legal Mandate of Multilateral Development Banks as Agents of Change Toward Sustainable Development' (1998) 92 The American Journal of International Law 642.

[32] IFI Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank' (2000) 2 Journal of the History of International Law 217; L Boisson de Chazournes, 'Compliance with Operational Standards: The Contribution of the World Bank Inspection Panel' in GS Alfredsson and R Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff Publishers 2001); A Ninio, 'Postscript and Update: Accountability and Environmental and Social Safeguards' in D Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff Publishers 2012); Dann and Riegner (n 22); JAP Lorenzo, '"Development" versus "Sustainable Development"? (Re-)Constructing the International Bank for Sustainable Development' (2018) 51 Vanderbilt Journal of Transnational Law 399.

[33] L Boisson de Chazournes, 'Public Participation in Decision-Making: The World Bank Inspection Panel' (1999) 31 Studies in Transnational Legal Policy 84; Kingsbury (n 20); G Jokubauskaite, 'The World Bank Environmental and Social Framework in a Wider Realm of Public International Law' (2019) 32 Leiden Journal of International Law 457.

[34] Approved by the Board of Executive Directors in August 2016 and applied to investment project financing projects starting in October 2018.

within the context of the Bank's mandate'.[35] In line with this mandate, the World Bank, as well as the Inter-American Development Bank (IDB), envisions moving beyond *do no harm* towards *maximize development gains*.[36] Significantly, it sees its activities as supporting the realization of rights expressed in the Universal Declaration of Human Rights (UDHR), and considers project financing as its means to continue 'support[ing] its member countries as they strive to progressively achieve their [the States'] human rights commitments'.[37]

Echoing this stance, the African Development Bank (AfDB) states in the Preamble to its Integrated Safeguards System (ISS) that, following its 'constitutional' mandate, it '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 set out in the UN Charter and the African Charter of Human and Peoples' Rights'. In a subsequent sentence, however, the attention turns to the member countries, whom the AfDB 'encourages … to observe international human rights norms, standards, and best practices on the basis of *their* commitments made under the International Human Rights Covenants and the African Charter of Human and Peoples' Rights'.[38] Likewise, the IDB declares its commitment 'to respecting internationally recognized human rights standards', which are construed to mean those 'provided for in the International Bill of Human Rights, the core human rights treaties, the ILO Declaration on Fundamental Principles and Rights at Work, and other universal and regional instruments relating to human rights'.[39] In line with its own commitment to respecting the rights of Indigenous, African descendants, and other traditional peoples, the IDB 'requires its Borrowers to foster respect' for these groups' rights and 'to comply with national law, including treaty obligations that are part of national law'.[40] It emphasizes that each of its Environmental and Social Performance Standard (ESPS) contains human rights-related elements and that '[d]ue diligence with respect to these dimensions will enable the Borrower to address many relevant human rights issues in its projects'.[41] Similarly, the IDB's commitment to the 'protection, conservation, management, and sustainable use of biodiversity, natural resources, and ecosystem services' includes a requirement for Borrowers (i) to ensure the inclusion of measures to safeguard, if not enhance, natural habitats, the region's biodiversity, and ecosystems; and (ii) 'not to implement any project in critical habitats unless no viable alternative exists, *and* the project can be done with no measurable adverse impact on biodiversity values or supporting ecological processes'.[42] In parallel, the IDB 'will not finance projects … that would contravene [Environmental

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[35] World Bank, 'The World Bank Environmental and Social Framework' (Effective 1 October 2018, World Bank 2017) A Vision for Sustainable Development, para 9, available https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf (accessed 10 December 2024).

[36] ibid Vision, para 6; IDB, 'Environmental and Social Policy Framework' (September 2020) Policy Statement (PS) para 1.4.

[37] World Bank (n 35) Vision, para 3.

[38] Emphasis added.

[39] IDB (n 36) PS para 1.3.

[40] ibid, in relation to ESPSs 1, 4, 5, 7, and 8.

[41] IDB (n 36) ESPS1, para 3.

[42] IDB (n 36) PS, para 1.3 (italics in the original).

and Social Policy Framework (ESPF)] standards, national laws, or country obligations under relevant international treaties, conventions, and agreements'.[43]

The European Bank for Reconstruction and Development (EBRD) similarly commits to withhold financing for non-compliant (i.e. not environmentally and socially sustainable) projects.[44] It bases its commitment to 'ensur[e] that projects are structured to meet EU environmental principles, practices and substantive standards [comprised in EU regulations and directives]' on it being a signatory to the European Principles for the Environment (EPE).[45] It also expressly relies on 'the International Bill of Human Rights and the eight core conventions of the International Labour Organization' for guidance with its commitment to respect human rights.[46] Albeit lacking an express institutional commitment to international human rights or environmental law, the Asian Development Bank (ADB) also makes it a policy not to finance projects that 'do not comply with its safeguard policy statement … [or] with the host country's social and environmental laws and regulations, including those laws implementing host country's obligations under international law'.[47] Curiously, not even such a minimum pledge could be found in the World Bank ESF. Likewise sparse in commitments to international law and human rights, the AIIB 'seeks, through the Projects it finances, to be supportive of these human rights [relating to social development and inclusion] and to encourage respect for them, all in a manner consistent with its Articles of Agreement'.[48] It is less ambiguous in its support of the 2015 Paris Agreement's three aims, which it restates as

> the mitigation goal of holding the increase in the global average temperature to well below two degrees Centigrade above pre-industrial levels; the global adaptation goal of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change; and the goal of making all finance flows consistent with a pathway toward low greenhouse gas (GHG) emissions and climate-resilient development.[49]

In sum, IFIs make broad statements of their own institutional commitment to international law, including human rights and environmental law, even whilst maintaining that they are not the duty-bearers themselves.[50] They have nonetheless clearly imposed upon themselves

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[43] IDB (n 36) PS, para 1.6. See also ADB, 'Safeguard Policy Statement' (June 2009) (SPS) para 47; AfDB, 'Integrated Safeguards System: Policy Statement and Operational Safeguards' (Safeguards and Sustainable Series, Volume 1: Issue 1, 2013) (ISPS) Policy Statement, Commitments and responsibilities; EBRD, 'Environmental and Social Policy' (2019) (ESP) SIII, para 2.3; AIIB, 'Environmental and Social Framework' (2021) Environmental and Social Policy, para 85.

[44] EBRD (n 43).

[45] ibid, SIII, para 2.2, in relation to fns 2 and 3.

[46] ibid, SIII, para 2.4, in relation to fn 4.

[47] ADB (n 43).

[48] AIIB 'Environmental and Social Framework' (Revised, 2022) Vision, para 13.

[49] ibid, para 22.

[50] Even the IDB, which appears to be quite open and explicit about committing to international human rights law and international environmental law, includes in its Policy Statement (para 1.6) the following caveat: 'This ESPF does not represent an express or implied waiver of the IDB's privileges and immunities under the Agreement Establishing the IDB, international conventions, or any applicable law, nor does it provide any contractual or other rights to any party'.

(more accurately, upon their management and staff) standards vis-à-vis the conduct of environmental assessment and the prerequisites for involuntary resettlement and dealing with Indigenous peoples. Moreover, there appears to be emerging among the MDBs a greater recognition of their due diligence obligations. This somewhat paradoxical situation warrants caution. Enabling MDBs to exercise greater flexibility and professional judgment regarding its safeguard policies can exacerbate the glaring gaps in the standards, 'most notably the lack of a clear commitment to ensure [that development] projects do not contribute to violations of human rights'.[51] As one scholar aptly puts, concrete implementation issues concerning environmental, labour, and human rights arise in development projects, and the safeguards portray 'a practice-oriented standard of authoritative behaviour set by international legal obligations, not only for the staff of the Bank but also for its borrowing states as well as private partners'.[52] Therefore, these normative standards contribute, for good or bad, not only to the clarification and elaboration of the concept of sustainable development in the context of project financing and implementation, but also to the creation and consolidation of international sustainable development law through a combination of practice and interpretation.[53]

1. Environmental assessment

Highly essential to operationalizing the concept of sustainable development is the IFIs' environmental impact assessment requirement, which implements the concept's core principle of integration. Most IFIs, including quite recently the World Bank following the adoption of its 2018 ESF, now refer to this requirement – more accurately – as an environmental *and* social assessment (ESA).[54] Notably, while the ADB has yet to update its terminology, it formulated its environmental assessment requirement in 2009 to include the identification of 'potential direct, indirect, cumulative, and induced impacts and risks to … socioeconomic (including impacts on livelihood through environmental media, health and safety, vulnerable groups, and gender issues), and physical cultural resources in the context of the project's area of influence'.[55]

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[51] D Hunter, 'Contextual Accountability, the World Bank Inspection Panel, and the Transformation of International Law in Edith Brown Weiss' "Kaleidoscopic World"' (2020) 32 Georgetown Environmental Law Review 439, 458.

[52] Jokubauskaite (n 33) 458.

[53] See JE Alvarez, 'Governing the World: International Organizations as Lawmakers' (2007) 31 Suffolk Transnational Law Review 591, 596; J von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (2008) 9 German Law Journal 1939, 1955; Johnstone (n 7) 275.

[54] World Bank (n 35) Environmental and Social Standards (ESS) 1 (Assessment and Management of Environmental and Social Risks and Impacts). See also ADB (n 43) Safeguard Requirements (SR) 1 (Environment); AfDB (n 43) Operational safeguard (OS) 1 (Environmental and social assessment); EBRD (n 43) Performance Requirement (PR) 1 (Assessment and Management of Environmental and Social Risks and Impacts); IDB (n 36) Environmental and Social Performance Standard (ESPS) 1 (Assessment and Management of Environmental and Social Risks and Impacts); AIIB (n 43) ESS1 (Environmental and Social Assessment and Management).

[55] ADB (n 43) SPS, 16, para 2; ADB (n 43) SR1, 31, para 5.

To emphasize, for all MDBs, it is the 'client', typically the borrowing State, who is legally tasked to conduct an ESA.[56] The bank, however, is tasked to classify projects according to the risks involved.[57] For this environmental and social risk classification – i.e., High Risk, Substantial Risk, Moderate Risk, or Low Risk – the World Bank

> will take into account relevant issues, such as the type, location, sensitivity, and scale of the project; the nature and magnitude of the potential environmental and social risks and impacts; and the capacity and commitment of the Borrower (including any other entity responsible for the implementation of the project) to manage the environmental and social risks and impacts in a manner consistent with the ESSs.[58]

In slight contrast, the IDB refers to this task as 'impact classification'. The latter is complemented by a 'risk classification', whereby it assigns to a project an Environmental and Social Risk Rating (ESRR), which considers factors, such as 'cause (direct environmental and social impacts), contribution (indirect environmental and social impacts), and additional areas of risk that may be relevant to the delivery of environmental and social mitigation measures and outcomes'.[59] Interestingly, too, the IDB recognizes the possibility that third parties – over whom the borrowing State has limited influence or no control – have the responsibility for assessing and managing environmental and social risks and impacts. In such situations, the IDB requires the Borrower to 'identify the different entities involved and the roles they play, the corresponding risks they present to the project, and opportunities to collaborate with these third parties to help achieve environmental and social outcomes that are consistent with the ESPSs'.[60] For the EBRD, it requires that the environmental and social management system (ESMS), which the client establishes and maintains, will apply even if the project is carried out by third parties.[61] The EBRD Environmental and Social Policy adds that the client should use a contractor management system appropriate to fulfil its responsibility 'to ensure that contractors working on project sites meet the ESMS requirements'.[62]

The AfDB, like its peers, aptly frames the conduct of ESA as following 'the principles of proportionality and adaptive management', meaning, '[t]he level of assessment and management required should be proportionate to the level of risk that the project poses – as identified during categorization and scoping – and the management measures adopted should be capable

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[56] ADB (n 43) SR1, para 1; AfDB (n 43) OS1, OS requirements, 'Project level'; World Bank (n 35) ESS1, para 23; EBRD (n 42) PR1, Introduction, para 2; IDB, (n 36) ESPS1, Requirements, para 5; AIIB (n 43) ESS1, Requirements, para 3.

[57] The same is true for other MDBs. See ADB (n 43) para 49; World Bank (n 35) 6, paras 20–21; EBRD (n 43) SIII, para 4; IDB (n 36) 10, para 3.13; AIIB (n 43) sV, paras 16–17; For AfDB, its OS1 provides for a shared 'responsibility of appropriate categorisation' between the Bank and its borrowers.

[58] World Bank (n 35) 6, para 20. See also ADB (n 43) para 50; EBRD (n 43) para 4.1; IDB (n 36) para 3.16; AIIB (n 43) paras 16.2 and 17.

[59] IDB (n 36) para 3.17.

[60] IDB (n 36) ESPS1, para 2. See also ADB (n 43) SR1, para 15; World Bank (n 35) ESS1, para 45; AIIB (n 43) ESS1, para 6.

[61] EBRD (n 43) PR1, para 26.

[62] EBRD (n 43) PR1, para 27.

of being adapted to changing circumstances during the full project cycle'.[63] Together with the MDB's risk- and impact-based project classification, it is the ESA that determines whether and how the other environmental and social standards are applied.

Most MDBs also offer financial and/or technical assistance (*e.g.* training; capacity-building) for borrowing States to conduct the ESA.[64] To better understand the scope of this assessment, it is worth quoting in full the World Bank's fairly detailed description, which essentially captures the contents of the others' ESA requirement:

> The environmental and social assessment … will take into account all relevant environmental and social risks and impacts of the project, including:
> (a) Environmental risks and impacts, including: … (iii) those related to climate change and other transboundary or global risks and impacts; (iv) any material threat to the protection, conservation, maintenance and restoration of natural habitats and biodiversity; and (v) those related to … the use of living natural resources … ;
> (b) Social risks and impacts, including: … (ii) risks that project impacts fall disproportionately on individuals and groups who, because of their particular circumstances, may be disadvantaged or vulnerable … (iv) negative economic and social impacts relating to the involuntary taking of land or restrictions on land use … (vi) impacts on the health, safety and well-being of workers and project-affected communities; and (vii) risks to cultural heritage.[65]

The ESA importantly includes a requirement, applicable throughout the project life-cycle, of meaningful consultation with project-affected people and/or stakeholder engagement as part of its information gathering and scoping of issues.[66] Significantly, the consultation requirement often includes or closely interrelates with transparency and information disclosure that are essential for meaningful participation in a process, which likewise entails 'examin[ing] project alternatives; identify[ing] ways of improving project selection, siting, planning, design and implementation … and seek[ing] opportunities to enhance the positive impacts of the project'.[67] As elaborated below, some MDBs provide more specific consultation and participation requirements where the project involves Indigenous peoples. The existence of these elements in the ESA explains this chapter's proposition that the IFIs' safeguard policies implement not only the sustainable development principle of integration, but of public participation as well.

Many IFIs' ESA policies contain statements about the assessment's relation to international law, more specifically, the borrower's international legal obligations. For instance, the World Bank requires the borrowing State to ensure that the ESA

> takes into account in an appropriate manner all issues relevant to the project, including: (a) the country's applicable policy framework, national laws and regulations, and institutional capabilities

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[63] AfDB (n 43) OS1.

[64] ADB (n 43) s VI, para 76; AfDB (n 43) Integrated Safeguards Policy Statement (ISPS), 'Support to clients and countries'; IDB (n 36) paras 3.14–3.15; AIIB (n 43) Environmental and Social Framework (ESF), paras 8.12 and 15.

[65] World Bank (n 35) ESS1, para 28.

[66] ADB (n 43) SR1, para 19; AfDB (n 43) OS1; World Bank (n 35) ESS1, paras 24 and 51, in relation to ESS10; EBRD (n 43) PR1, para 8, in relation to PR10; IDB (n 36) ESPS1, paras 27–37, in relation to ESPS10; AIIB (n 43) ESS1, para 23.

[67] World Bank (n 35) ESS1, para 24. See also ADB (n 43) SR1, para 9; AfDB (n 43) OS1, 'OS requirements'; EBRD (n 43) PR1, para 14; IDB (n 36) ESPS1, para 13; AIIB (n 43) ESS1, para 9.

> (including implementation) relating to environment and social issues … and obligations of the country directly applicable to the project under relevant international treaties and agreements.[68]

EBRD clients are also required to identify in their ESA 'applicable environmental and social laws and regulatory requirements of the jurisdictions in which the project operates, including those laws implementing host country obligations under public international law'.[69] Expanding some more the role of international law, the IDB requires borrowing States to 'establish an overarching Environmental and Social Framework', which 'specifies that the project will comply with the applicable laws and regulations of the jurisdictions in which it is being undertaken, including applicable country obligations under international law'.[70]

2. Involuntary resettlement

As development projects traditionally involved (and still involve) large-scale infrastructure and construction activities, IFIs have included specific safeguards for adverse impacts of physical and economic displacement. In this chapter's analysis, these involuntary resettlement safeguard policies contribute to clarifying and elaborating the norms governing the social dimension of sustainable development.

The MDBs' common approach to involuntary resettlement issues consists of 'avoid[ing] or minimiz[ing] physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable' by requiring the borrower to consider feasible alternative project designs.[71] It stems from their shared recognition that improperly managed, inadequately implemented, or unmitigated physical and economic displacement could, and often does, give rise to severe and long-term economic, social, and environmental consequences, including the dismantling of production systems, weakening or breaking down of community institutions and social networks, loss of cultural identity and potential for mutual help, and intensified competition for natural resources and other basic services that could possibly create civil unrest.[72] On this point, it is striking that the relevant AIIB environmental and social standard omits such an acknowledgment and detailed identification of involuntary resettlement's adverse impacts. The omission is even more alarming if one considers that the AIIB is primarily financing expansive, sometimes transnational, infrastructure projects.

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[68] World Bank (n 35) ESS1, para 26. See also ADB (n 43) SR1, para 5; AIIB (n 43) ESS1, para 8.6.

[69] EBRD (n 43) PR1, para 9.

[70] IDB (n 36) ESPS1, para 7.

[71] IDB (n 36) ESPS5 (Land Acquisition and Involuntary Resettlement), para 8; see also ADB (n 43) SR2 (Involuntary Resettlement), para 6; AfDB (n 43) OS2 (Involuntary resettlement: land acquisition, population displacement and compensation); World Bank (n 35) ESS5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement), para 11; EBRD (n 43) PR5 (Land Acquisition, Restrictions on Land Use and Involuntary Resettlement), para 12; AIIB (n 43) ESS2 (Land Acquisition and Involuntary Resettlement), para 4.

[72] ADB (n 43) SR2, para 1; AfDB (n 43) OS2; World Bank (n 35) ESS5, para 2; EBRD (n 43) PR5, para 3; IDB (n 36) ESPS5, para 2.

This important difference aside, the involuntary resettlement safeguards uniformly provide three vital requirements for the borrowing State: (i) preparing a resettlement[73] and/or livelihood restoration[74] plan; (ii) paying compensation or providing other forms of resettlement assistance; and (iii) meaningful consultation with project-affected people. Although not couched as such across the IFIs, these requirements correspond to human rights, especially of involuntarily resettled individuals. Exceptionally, the EBRD Performance Requirement (PR), citing the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides that its application 'is consistent with the universal respect for, and observance of, human rights and freedoms, specifically the right to private property, the right to adequate housing and to the continuous improvement of living conditions'.[75]

Like most of its counterparts, the World Bank prescribes that the resettlement plan 'be designed to mitigate the negative impacts of displacement and … identify development opportunities'; 'include a resettlement budget and implementation schedule'; and 'establish the entitlements of all categories of affected persons (including host communities)'.[76] The MDBs are also more or less aligned about prior compensation being equivalent to full replacement costs. Consensus likewise exists about the preference for 'land-based resettlement strategies' and non-cash (in kind) forms.[77] There are, however, nuances concerning the entitlements of affected persons identified as having 'no recognizable legal right or claim to the land or assets they occupy or use'.[78] Given space constraints, these distinctions cannot be fully discussed here. It suffices to stress that, from the perspective of the IFIs, involuntary resettlement could only be deemed sustainable where all other options have been exhausted and the affected persons are made whole to the fullest extent possible.

Another important prerequisite is meaningful consultation, which thus links the ESA and the involuntary resettlement policies. Indeed, for the World Bank, EBRD, and IDB, the required consultation and participation under the involuntary resettlement policy are conducted through the process described in the separate safeguard policy for stakeholder engagement.[79] The other IFIs likewise require consultation, participation, and broad community support. Meaningful consultation is defined in essentially the same manner amongst all MDBs as:

> a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that

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[73] ADB (n 43) SR2, paras 17–18; AfDB (n 43) OS2, 'Resettlement planning'; World Bank (n 35) ESS5, para 26; EBRD (n 43) PR5, para 55; IDB (n 36) ESPS5, para 19; AIIB (n 43) ESS2, paras 11–15.

[74] ADB (n 43) SR2, para 21; World Bank (n 35) ESS5, para 33; EBRD (n 43) PR5, para 61; IDB (n 36) ESPS5, para 25; AIIB (n 43) ESS2, para 20.

[75] EBRD (n 43) PR5, para 2.

[76] World Bank (n 35) ESS5, para 26. See also ADB (n 43) SR2, paras 17–18; EBRD (n 43) PR5, para 55; IDB (n 36) ESPS5, para 19; AIIB (n 43) ESS2, para 24.

[77] ADB (n 43) SR2, para 9; AfDB (n 43) OS2, 'Compensation procedures'; World Bank (n 35) ESS5, paras 14 and 35; EBRD (n 43) PR5, para 31; IDB (n 36) ESPS5, para 9; AIIB (n 43) ESS2, para 20.

[78] World Bank (n 35) ESS5, para 10. See also ADB (n 43) SR2, para 7; AfDB (n 43) OS2, 'Eligibility and entitlements'; EBRD (n 43) PR5, para 26; IDB (n 36) ESPS5, para 17; AIIB (n 43) ESS2, para 24.

[79] World Bank (n 35) ESS5, para 17; EBRD (n 43) PR5, para 37; IDB (n 36) ESPS5, para 10.

> is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.[80]

Meaningful consultation is likewise a valuable component of the IFIs' Indigenous peoples safeguard policies, which are discussed next.

3. Indigenous peoples

The ADB safeguard policy concerning Indigenous peoples begins by mentioning that the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIPs) is well-supported among States in Asia and the Pacific.[81] It then proceeds to focus on the problem of development projects increasingly intruding into areas that indigenous peoples 'traditionally own, occupy, use, or view as ancestral domain', and to emphasize the need for special efforts to engage them in the development decision-making process, so that their specific needs and aspirations are taken into account.[82] Similarly, UN DRIPs is among the international conventions and instruments that partly guided the requirements in the IDB's indigenous peoples ESPS.[83] Moreover, IDB Borrowers are required to comply with 'standards/principles set out in treaties that are part of national law and applicable by virtue of their ratification'.[84]

A previous comparative analysis of the MDBs' safeguards highlighted the distinctiveness of the World Bank's Operational Policy (OP) 4.10 – the predecessor of ESS7 (Indigenous Peoples/Sub-Saharan Africa Historically Underserved Traditional Local Communities) – for being a rare instance wherein 'human rights' and 'sustainable development' are explicitly and conjunctively mentioned.[85] Shifting to the ESF improved this situation, as the Bank has presumably become more receptive to these terms. The current version of the safeguard policy, which recognizes Indigenous peoples as having a 'vital role in sustainable development',[86] has as its objective 'ensur[ing] that the development process fosters full respect for the human rights, dignity, aspirations, identity, culture and natural resource-based livelihoods'[87] of this distinct and particularly vulnerable social and cultural group. Interestingly, the AfDB is the only IFI examined here that does not have an indigenous peoples safeguard policy. It nonetheless considers the vulnerability of Indigenous peoples in the context of its ESA policy, which requires the borrowing State to implement 'appropriate differentiated measures so that

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[80] ADB (n 43) SR2, para 28. See also AfDB (n 43) OS2, 'Consultation, participation and broad community support'; World Bank (n 35) ESS5, para 17; EBRD (n 43) PR5, para 37; IDB (n 36) ESPS5, para 10; AIIB (n 43) ESS2, para 17.

[81] ADB (n 43) SR3 (Indigenous Peoples), para 1.

[82] ibid.

[83] IDB (n 36) ESPS7 (Indigenous Peoples), para 3. The other instruments are: ILO Convention 169; OAS Declaration on the Rights of Indigenous Peoples; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazù Agreement).

[84] IDB (n 36) ESPS7, para 2, fn 160, in relation to para 8.

[85] Lorenzo (n 25) 342.

[86] WB (n 35) ESS7, para 4.

[87] WB (n 35) ESS7, Objectives. See also ADB (n 43) SR3, para 3.

unavoidable adverse impacts do not fall disproportionately on these vulnerable groups, and so that they are not disadvantaged in sharing development benefits and opportunities'.[88]

Central to the Indigenous peoples policies are consultation and participation – as with other project-affected people – but also and more specifically, free, prior, and informed consent (FPIC). FPIC has no universally accepted meaning, however. Hence, MDBs adopt slightly different definitions of consent, generally agreeing that FPIC does not require unanimity but is an enhanced version of meaningful consultation. For the EBRD, 'consent refers to the collective support of affected indigenous peoples for the proposed project activities' that is 'established through good-faith negotiations between the client and affected indigenous peoples, at the conclusion of which the latter arrive at a decision, in accordance with their cultural traditions, customs and practices'.[89] The rationale for requiring consent is the Indigenous peoples' particular vulnerability when development projects involve

> (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.[90]

In contrast, the AIIB merely requires free, prior and informed *consultation* (FPICon) under these circumstances, albeit its description of the process appears to be essentially akin to FPIC, as defined by other MDBs.[91] Notably, under the AIIB Indigenous peoples policy, FPIC is only applied when it is required by the borrowing/host State's national law 'and the Bank has determined that the requirements of such FPIC are consistent with those of FPICon as set out above'.[92]

Similar to the involuntary resettlement policies, borrowing States are required to (i) 'assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on' Indigenous peoples; (ii) engage the latter in meaningful consultation and ensure their informed participation in project design and implementation; (iii) obtain FPIC in certain circumstances; and prepare, in consultation with the affected Indigenous peoples, a time-bound indigenous peoples (development) plan which specifies protective or mitigating measures whose scope and scale are proportionate to the project's potential risks and impacts.[93] Also akin to requirements for involuntary resettlement, IFIs' clients are expected to 'explore feasible alternative project designs to avoid the relocation of indigenous peoples from their communally held traditional or customary lands',

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[88] AfDB (n 43) OS1, 'Vulnerability and community impacts'. See also AfDB (n 43) ISPS, Box 2 ('Vulnerable groups and indigenous peoples').

[89] EBRD (n 43) PR7 (Indigenous Peoples), para 13. See also ADB (n 43) SR3, para 31; World Bank (n 35) ESS7, paras 25–26; IDB (n 36) ESPS7, para 15.

[90] ADB (n 43) SR3, para 30. See also World Bank (n 35) ESS7, para 24; EBRD (n 43) PR7, para 14; IDB (n 36) ESPS7, paras 16–21.

[91] AIIB (n 43) ESS3, para 16. Para 2 provides: 'FPICon builds on the process of meaningful consultation and requires good faith negotiation between the Client and the affected Indigenous Peoples'.

[92] ibid para 17.

[93] World Bank (n 35) ESS7, paras 12–13. See also ADB (n 43) SR3, paras 16–19; EBRD (n 43) PR7, paras 17 and 25; IDB (n 36) ESPS7, paras 17-18; AIIB (n 43) ESS3, paras 5 and 19.

especially because they often have close ties to these lands and 'their forests, water, wildlife, and other natural resources', and such ties 'can relate to livelihoods, cultural, ceremonial, or spiritual dimensions and can define indigenous peoples' identities and communities'.[94] The AIIB policy does not contain such an express recognition and frames this requirement slightly differently:

> Avoid any restricted access to, or physical displacement from, protected areas and natural resources under the Project. Where avoidance is not feasible, take all measures required so that the affected Indigenous Peoples communities participate in the design, implementation and monitoring and evaluation of management arrangements for such areas and natural resources, and that benefits derived from such areas and resources are equitably shared in a culturally appropriate manner.[95]

Lastly, a common element of MDBs' Indigenous peoples policy is ensuring the provision of compensation and delivery of benefit-sharing measures. The EBRD prescribes that apart from complying with requirements in the involuntary resettlement policy, compensation to affected Indigenous peoples should 'take into consideration the adverse effects of the project on customary livelihoods including nomadic/transhumant practices, as well as family life of indigenous peoples, with specific consideration of women's wage and non-wage subsistence activities'.[96] The World Bank adds the requirement for the borrowing State and the affected Indigenous peoples to identify 'opportunities for culturally appropriate and sustainable development benefits' that 'will aim to address the goals and preferences of the affected [indigenous peoples], including improving their standard of living and livelihoods in a culturally appropriate manner, and to foster the long-term sustainability of the natural resources on which they depend'.[97]

The foregoing discussion illustrates (i) how safeguard policies aim to ensure that IFI-supported economic activities do not disregard environmental and social considerations (*e.g.* biodiversity protection; community preservation/cohesion) and (ii) how, through these policies, IFIs contextualize and implement, albeit imperfectly, the sustainable development principle of integration. Indeed, as the concept of sustainable development has been gaining traction in international policy and law, IFIs are becoming more explicit in acknowledging their sustainable development mandates. A fitting point to conclude this sub-section concerns the fact that there appears to be a more active effort now among MDBs to harmonize their environmental and social policies especially in co-financed projects[98] – a trend that makes their contribution to international sustainable development law potentially more cohesive and, substantively, better aligns their predominantly financial/economic objectives with international human rights and environmental law norms.

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[94] EBRD (n 43) PR7, paras 16 and 18. See also ADB (n 43) SR3, paras 26 and 35; World Bank (n 35) ESS7, paras 4 and 31; IDB (n 36) ESPS7, paras 16 and 19.

[95] AIIB (n 43) ESS3, para 7.

[96] EBRD (n 43) PR7, para 22.

[97] World Bank (n 35) ESS7, paras 20–22. See also ADB (n 43) SR3, paras 34 and 36; EBRD (n 43) PR7, para 24; IDB (n 36) ESPS7, paras 22–24.

[98] See ADB (n 43) paras 11 and 38; AfDB (n 43) ISPS, 'Harmonisation and facilitation of donor co-ordination'; World Bank (n 35) World Bank Environmental and Social Policy for Investment Project Financing, para 9; EBRD (n 43) s III, para 2.10; IDB (n 36) Arrangements for Project Co-Financing, para 6.1–6.3; AIIB (n 43) Environmental and Social Policy, para 10.

B. Independent Accountability Mechanisms

Independent accountability mechanisms, the other component of safeguard systems, interpret the safeguard policies in relation to the complaints they receive from project-affected people, thereby further clarifying and elaborating the concept of sustainable development. The AfDB, for instance, describes the purpose of its Independent Recourse Mechanism (IRM) as ensuring that the Bank 'complies with its own policies and procedures related to sustainability'.[99] By enabling individuals and communities, i.e. non-State actors who have no legal relationship with MDBs, to indirectly hold the latter accountable for violation of their environmental and social policies, IAMs also implement the sustainable development principle of public participation.[100] More broadly, IAMs 'constitute development cooperation law as law', and somewhat distinguish public/official from private finance activities, by providing a 'reasonably independent transnational protection mechanism accessible to project affected people'.[101] Relatedly, IAMs provide 'data and precedents that can influence the evolution of international human rights law, international environmental law and international administrative law' when they address requests for investigation.[102] These points are expounded below in the discussion of IAMs' functions. Lastly, the accountability mechanisms' interpretation of environmental and social policies contributes to international sustainable development law in another way: by constraining or compelling, however obliquely, borrowing States to observe their environmental and social commitments when undertaking economic activities like development projects.

The two-fold rationale for establishing the pioneer accountability mechanism, the World Bank Inspection Panel, is essentially the same for other IAMs that followed:[103] to (i) ensure or preserve the economic efficiency and cost-effectiveness of IFI-funded projects and (ii) prevent or mitigate these projects' adverse effects to people and the environment. The first reason is a reaction to the growing calls by various civil society organizations for MDBs to take responsibility for the harms to people and the environment that occur in connection to development (mostly infrastructure) projects.[104] These calls, in turn, motivated demands by

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[99] AfDB, 'The Independent Recourse Mechanism – Operating Rules and Procedures January 2015' (Approved July 2021) para 3.

[100] Lorenzo (n 25) 333–4.

[101] M Riegner, 'The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective' (2014) 5 Transnational Legal Theory 489, 507.

[102] DD Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 Georgetown Journal of International Law 403, 410.

[103] RE Bissell and S Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Development and Challenges' (2009) 6 Manchester Journal of International Economic Law 2; K Lewis, 'Citizen-Driven Accountability for Sustainable Development: Giving Affected People A Greater Voice - 20 Years On' (Independent Accountability Mechanisms Network 2012) https://www.inspectionpanel.org/sites/default/files/publications/CitizenDrivenAccountability.pdf.

[104] See GS Alfredsson and R Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff Publishers 2001); S Park, 'Assessing Accountability in Practice: The Asian Development Bank's Accountability Mechanism' (2015) 6 Global Policy 455; Hunter (n 51).

member States, especially majority shareholders such as the United States,[105] as creators of the Bank, for the latter to account for the use of their money in relation to these disastrous projects in the eighties and nineties. The second rationale partly explains the unorthodox and arguably state-of-the-art configuration of IAMs that formally recognizes a relationship – legally-relevant, albeit non-contractual – between an IO and the individuals affected by the former's actions and decisions.[106]

Presently, all IFIs have independent accountability mechanisms serving dual functions: compliance review and dispute resolution (also called problem-solving). Before 2020, however, the Inspection Panel[107] has only performed compliance review. Many of its younger peers assumed both functions at the outset. Relatedly, the Compliance Advisor Ombudsman (CAO) was established in 1999 to serve as the IAM for the private sector-oriented members of the World Bank Group, namely, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). The CAO's three discrete functions – indicated by its very name: compliance review/audit, dispute resolution or problem solving (ombudsman), and advice-giving – are distinctive. These functions assist 'in building a credible and responsive structure to ensure that projects are environmentally and socially sound and enhance IFC's and MIGA's contribution to sustainable development'.[108]

1. Compliance review

Clarification, elaboration, and operationalization of the concept of sustainable development are performed not only by IFIs (through formulation of safeguard policies), but also by IAMs, particularly through their interpretive functions during compliance review. Compliance review, as conducted by the ADB Accountability Mechanism's, the IDB Independent Consultation and Investigation Mechanism's (MICI), and the AfDB Independent Recourse Mechanism, is a fact-finding[109] exercise aimed at investigating allegations of safeguard poli-

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[105] K Daugirdas, 'Congress Underestimated: The Case of the World Bank' (2013) 107 American Journal of International Law 517, 552–3.

[106] See D Clark, J Fox and K Treakle (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield Publishing 2003); E Brown Weiss, 'Bottom Up Accountability' (2007) 37 Environmental Policy and Law 259; B Kingsbury and RB Stewart, 'Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law' in O Elias (ed), *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Martinus Nijhoff Publishers 2012).

[107] The mandate of the Inspection Panel only covers the operations of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

[108] World Bank Group, 'Office of the Compliance Advisor/Ombudsman (CAO) Terms of Reference' (1998).

[109] See ADB, 'Review of the Inspection Function: Establishment of A New ADB Accountability Mechanism' (May 2003) 23, para 99; ADB, *Accountability Mechanism Policy 2012* (Asian Development Bank 2012) 22, para 114. The Compliance Review Panel is the ADB Accountability Mechanism's fact-finding body tasked 'to investigate alleged violations by ADB of its operational policies and procedures in any ADB-assisted project that directly, materially, and adversely affects local people in the course of the formulation, processing, or implementation of the ADB-assisted project' and to recommend to the Board remedial changes in the scope or implementation of the project.

cies noncompliance that has caused harm to project-affected people.[110] Investigation or compliance review reports follow a general pattern: they enumerate the applicable and/or invoked safeguard policies, present the complainants' and the Management's respective views, set out the relevant facts, including those gathered from site visits, ascertain compliance, and make recommendations, as necessary and if so authorized, to resolve or rectify any violation of the environmental and social policies.

Compliance review can also be inward-looking, focused on the IFI's performance improvement. For instance, the CAO's objective in investigating alleged noncompliance with IFC/MIGA policies is to 'improv[e] IFC/MIGA environmental and social performance'.[111] Orientation towards the organization's internal workings can be gleaned from the manner by which CAO handles a compliance appraisal, which includes 'discussions with IFC/MIGA team working with the specific project and other stakeholders to understand which criteria IFC/MIGA used to assure itself/themselves of the performance of the project'.[112]

The establishment of the World Bank's new Accountability Mechanism effected minimal changes to the Panel's mandate and operating procedures.[113] As expressly provided in the relevant Board resolutions, 'The Inspection Panel will have no role in dispute resolution and will not opine on policy compliance in dispute resolution or the outcome of the dispute resolution process'.[114] It thus continues to have jurisdiction to receive and investigate complaints wherein individuals and communities allege that their 'rights and interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures' and 'that such failure has had, or threatens to have, a material adverse effect'.[115] The Panel report can still only discuss 'those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies or procedures'[116] and investigate the conduct of Bank management and staff.

One crucial change is that Inspection Panel proceedings could be temporarily suspended, should the project-affected people and the borrowing State mutually agree to pursue dispute

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[110] See IDB, 'Policy of the Independent Consultation and Investigation Mechanism' (Dec 2015) 16, para 37.

[111] World Bank Group, 'Compliance Advisor Ombudsman (CAO) Operational Guidelines 2013' (English version, 2013) 5.

[112] ibid 22–3:

> The compliance investigation criteria include IFC/MIGA policies, Performance Standards, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social outcomes. Compliance investigation may have their origin, or arise from, environmental and social assessments or plans, host country legal and regulatory requirements (including international legal obligations), and the environmental, social, health, or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement in a project.

[113] World Bank, 'Resolution No. IBRD 2020-0005 Resolution No. IDA 2020-0004: The World Bank Accountability Mechanism' (8 September 2020) para 6 (Accountability Mechanism Resolution).

[114] ibid; World Bank, 'Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003: The World Bank Inspection Panel' (8 September 2020) para 32 (Inspection Panel Resolution).

[115] World Bank, Inspection Panel Resolution (n 113) para 13.

[116] ibid para 38.

resolution.[117] It is possible, following the latter process, that the Panel will not be allowed to take further action on the request for investigation if 'the Parties have reached agreement and signed a Dispute Resolution Agreement', since in that scenario the case shall be considered closed.[118]

2. Dispute resolution

The problem-solving or dispute resolution function is outcome-driven and does not focus on identifying and allocating blame.[119] Instead, it responds to the grievances of individuals and communities concerning the development project. The procedure adopted for the dispute resolution function is flexible and includes various processes, such as mediation, conciliation, consultative dialogue, information sharing, and fact-finding. In any of these approaches, the objective is to address the grievances of project-affected people[120] and 'improv[e] environmental and social outcomes on the ground',[121] without focusing on the question of the IFI's compliance with its policies and procedures.[122]

The CAO's Ombudsman or Dispute Resolution role mirrors the other accountability mechanisms' problem-solving function, which ADB[123] introduced to complement the inspection function of the first iteration of its accountability mechanism.[124] Significantly, the ADB's 'dual approach [or bifurcated model] had a ripple effect with its adoption by EBRD, JBIC, AfDB, followed by EIB, and (in 2010) by IADB when it overhauled its previous mechanism

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[117] ibid paras 30–33 (e. Referral to Dispute Resolution).

[118] ibid para 33(b).

[119] ADB, *Accountability Mechanism Policy 2012* (n 109) para 126.

[120] See World Bank Group (n 113) 14. Project-affected people can decide to terminate a dispute resolution process anytime, whether upon their own will or with advice from CAO itself 'that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources'. When such decision is made, the case is transferred to Compliance for appraisal.

[121] ibid 4, 18.

[122] See ADB, 'Review of the Inspection Function: Establishment of A New ADB Accountability Mechanism' (n 109) 16 and 18, paras 64 and 71; ADB, *Accountability Mechanism Policy 2012* (n 109) 24, para 126: In performing the problem-solving or consultation function, the Special Project Facilitator assists parties in 'finding ways to address the problem of the project-affected people in ADB-assisted projects' rather than identifying and allocating blame; IDB, 'Policy of the Independent Consultation and Investigation Mechanism' (n 110) 13–14, paras 24–26: The Consultation Phase is an optional and voluntary feature that project-affected people can invoke 'to address the issues … related to Harm caused by the failure of the Bank to comply with one or more of its Relevant Operational Policies in the context of a Bank-Financed Operation'.

[123] See Park (n 104) 457. The ADB accountability mechanism has undergone several material and innovative transformations since its earliest iteration as the Inspection Function in 1995, as 'part of a donor-led platform of change' and following the 'ripple effect' from the World Bank's creation of the Inspection Panel.

[124] See ADB, *Accountability Mechanism Policy 2012* (n 109) 4, para 13 ('In addition to addressing their concerns, development agencies should empower project-affected people to participate in the problem solving process, rather than just letting them be recipients of the inspection results. Following ADB, most international financial institutions have instituted problem solving in their own accountability mechanisms.').

focused on investigation with this combined approach'.[125] It took some decades for the World Bank to follow this trend through the Dispute Resolution Service (DRS) recently established as part of the new Accountability Mechanism. However, instead of adding it to the Inspection Panel's authority, the World Bank created a separate unit to perform the problem-solving function. The DRS is intended 'to facilitate a voluntary and independent dispute resolution option for Requesters [i.e. project-affected people] and borrowers (the "Parties") in the context of Inspection Panel Requests for Inspection'[126] and assist the Parties in reaching a mutually agreed solution.[127] The jurisdiction *ratione materiae* of the mediator jointly selected by the Parties to deliver dispute resolution services is the same as that of the Inspection Panel, namely, the 'project-related issues raised [by the project-affected people] in the Request for Inspection and identified as the issues to be investigated in the Inspection Panel's report to the Executive Directors recommending investigation'.[128]

The flexibility and consensus-oriented character of the problem-solving function could be vicious as it is virtuous. Because the process usually involves 'difficult compromises about what can be achieved and may result in significant harms being left unaddressed', it could contravene the inalienable nature of human rights.[129] In this regard, the AfDB IRM Operating Rules and Procedures has a noteworthy approach: 'The Problem-Solving exercise shall be particularly sensitive to the existence of power asymmetries between the negotiating parties, particularly concerning the availability of information needed and the capacity of the parties to participate effectively in these processes.'[130]

3. Cooperation and coordination

Converging interpretations of the safeguard policies, as demonstrated by IAMs' citations of one another's reports, reinforce the harmonization of such policies. These complementary processes, in turn, sharpen a shared understanding of how the economic, environmental, and social dimensions of sustainable development can be reconciled in the context of IFI-supported development projects. More concretely still, some IAMs have signed memorandums of agreement to facilitate exchange of information and coordinate country/site visits, as they conduct simultaneous or successive investigations for co-financed projects.[131] The existence of the Independent Accountability Mechanisms Network (IAMnet) – 'a virtual network of dedicated practitioners who contribute to the regular exchange of ideas and assist with institutional

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[125] S Nanwani, 'Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations' (2014) 5 Global Policy 242, 243.

[126] World Bank, Accountability Mechanism Resolution (n 113) para 9.

[127] ibid, para 12(a).

[128] ibid, para 12(d).

[129] United Nations Office of the High Commissioner for Human Rights, *Remedy in Development Finance: Guidance and Practice* (2022) 60.

[130] AfDB, 'The Independent Recourse Mechanism - Operating Rules and Procedures January 2015' (n 99) para 48.

[131] I discussed the dialogical and cooperative behaviour of (i) AfDB and World Bank in the *Uganda-Bujagali* case and (ii) EBRD and World Bank regarding the *Albania-Vlora* case in Lorenzo (n 25) 344–6.

capacity building in accountability and compliance as components of corporate governance'[132] – indicates that these bodies do consider themselves as a discrete professional group. From the theoretical and academic perspective that this chapter assumes, this mindset enables a systematic and grounded study of their collective participation in the international lawmaking process concerning sustainable development.

IV. CONCLUSION

This chapter explained, using a functional approach, how IFIs participate in the international lawmaking process, particularly in the field of sustainable development. The discussion focused on the safeguard systems, highlighting that IFIs' environmental and social policies closely align with and implement the sustainable development principles of integration and public participation. While safeguard policies are arguably considered internal law or rules of the organization that legally bind only the MDB and its agents, they become international legal obligations prescribing certain actions on the part of borrowing States through the incorporation by reference of the safeguard policies in the loan/grant agreements between the IFI and the borrower. The IAMs' interpretation of the policies when they perform compliance review and dispute resolution functions rounds out the IFIs' contribution to international sustainable development law. As alluded to in the Introduction, given the growing interlinkages or overlaps among actors and instruments within different fields of international economic law, there is potential for sustainability standards originating from IFIs to inform or be applied to international investment agreements, and vice versa.

Regrettably left out in the present work, however, are the normative implications of IFIs' participation in the international lawmaking process. A recent study on the 'juridification' of international development finance bolsters the idea posited here, to the extent that it shows how IFIs' policies have now also become standards for many national development finance institutions (DFIs), which consider the safeguards as 'complex international normative frameworks' that define the acceptability of development initiatives and measure their success – thereby also prescribing 'how the exercise of power in this field can be scrutinised'.[133] A similar adoptive process could be discerned among private financial institutions, as illustrated by the example of the Equator Principles.[134] Some authors argue that such norm diffusion bears a darker side: juridification of the environmental and social policies disembeds the project-affected people's entitlements from their humanity, the harms they suffered, and their exposure to an arbitrary exercise of power.[135] Notably, an opposite view also exists: individuals who engage with IAMs do not merely catalyze complaint handling and institutional

[132] The World Bank, 'Independent Accountability Mechanisms Network (IAMnet) – 23 members' https://accountability.worldbank.org/en/iamnet (last accessed 10 December 2024).

[133] G Jokubauskaite and D Rossati, 'A Tragedy of Juridification in International Development Finance' (2022) 43 Canadian Journal of Development Studies / Revue canadienne d'études du développement 39, 40.

[134] See Riegner (n 101).

[135] Jokubauskaite and Rossati (n 133) 44.

review but are actually being empowered 'to enforce *their* interests' at the international level.[136] These topics and debates certainly deserve further exploration.

Another related inquiry pertains to potential legal consequences of the World Bank's new ESF and Accountability Mechanism. Specifically, (i) the shift from clearly binding OPPs to the seemingly mandatory but more open-ended environmental and social *policy*; and (ii) the associated delineation of tasks between Bank management/staff and the borrower, who is mandated to comply with *standards*, could substantially alter not only the jurisdiction of IAMs, but also the allocation of international responsibility between the World Bank *qua* IO and the borrowing State.

From the view of international law adopted in this chapter, the legal significance of IFIs and their safeguard systems is importantly linked to their functions and wealth-based power. As a final point, therefore, and given the growth of alternative financing sources (e.g. Belt and Road Initiative; private investors using instruments mentioned in the Introduction), it is worth considering whether the IFIs' international lawmaking function, especially vis-à-vis sustainable development, will persist should they become less relevant and influential to the developing world.

[136] D French and R Kirkham, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 New Zealand Yearbook of International Law 179, 204 (italics in the original); Cordonier Segger and Olawuyi (n 14).