

Both ENDS Comments and recommendations on B. the Bank Group's Environmental and Social Policy of the African Development Bank Integrated Safeguards System (May 15, 2022).

Introduction

The African Development Bank plays a strong role in influencing efforts at promoting sustainable development in African countries. How the Bank conducts itself and take responsibility is important to civil society organizations and other international banks that are concerned with issues related to the climate crisis and human rights, and to the poor and vulnerable poor throughout Africa.

The Bank's social and environmental criteria should serve as an example for its clients and investors. The Bank now tends to take client ownership as an argument to weaken its own safeguards. 'If they don't comply, why not follow them?'

A situation where-in the Bank shifts its own obligations and responsibilities to the client countries and private corporations is extremely worrying given that infrastructure development is often driven by powerful alliances of investors that easily overrule the input from other interested or affected parties.

Safeguard policies are designed to guarantee certain standards of environmental, social and gender protection in projects, even if these protections are not provided in national law or corporate frameworks. To give an example, why this is important: recognition of the power imbalances within countries and communities, through which women's and men's rights are often subverted, was an important factor in the development of these policies.

We strongly recommend you to learn from the experiences of other banks first and take in consideration what the ADB independent evaluation department concluded in its evaluation of the ADB safeguards policy (2020) about the use of Country systems: the ADB equivalence and acceptability for country systems have not worked. (*Effectiveness of the 2009 Safeguards policy statement, The Asian Development Bank IED, April 2020*) .

The Evaluation Department moreover concluded that intermediaries have remained the weakest performers on safeguards: "Intermediaries have remained the weakest performers on safeguards. Applying the banks safeguards to FI projects can be challenging as the policy design is more suitable for stand-alone investment projects where the risk assessments and mitigation plans of investments to be funded are known at approval. In the case of FI projects, the responsibility for identifying safeguard risks and making assessments is with the FI. This actually requires from bank management greater supervision (over the FI and its sub-projects) during implementation than within the existing safeguards system."

Implementation

On overall, the replacement of IFI Safeguards with a model more closely based on IFC Performance Standards for clients leads to a reduction of the Bank's direct and mandatory role in oversight, including assessment, categorization, monitoring, consultation, information disclosure, and evaluation of Bank funded activities and investments along with a shift towards a greater reliance on client self-assessment and self-reporting and the client's environmental and social risk management systems. A shift to client **a self-assessment regime**, such as that of the IFC, means less accountability, less compliance and poorer safeguards results.

The AfDB has to clearly demonstrate that borrowers provide the same level of environmental and social protections. There has to be a requirement included for the full disclosure of an 'equivalence-testing'. Also, "borrowers system" **equivalency testing** has to take into account actual implementation/track record and not only look at overarching legislation (in other words, it should go beyond a paper exercise).

Any delegation of **due diligence responsibility** to borrowers carries the risk of aggravating the inherent tension between speed of implementation and quality of policy. As such, any approach and use of borrower frameworks needs to relate to the Bank's capacity for carrying its responsibility of continuous assessment, monitoring and evaluation, oversight and ensuring stakeholder and civil society engagement, as well the option to seek recourse at the accountability mechanism in case the borrower does not comply with the requirements of the safeguards.

Sound due diligence demands for an implementation framework with clear statements about exactly what the Bank itself is required to do and how requirements will be operationalized (delivery mechanisms). The Bank needs to clarify and make specific its role in monitoring the Borrower, the policy needs to describe the tools the Bank has to do so (i.e. site visits, audits, consequences of non-compliance on disbursements).

Also, the draft updated ISS represents a significant increase for the AfDB in terms of necessary due diligence, Borrower support, and supervision requirements. We are concerned that without considering the additional budget and capacity necessary to implement the updated ISS in conjunction with the draft, any advances in the new policy will not be realized at the project level, and dangerous compliance gaps will be perpetuated.

In addition we call on the AfDB to reflect all our recommendations on the Policy into its Procedures, Operational Manuals, technical guidances to ensure proper implementation. We are disappointed and concerned that the Procedures, Operational Manuals are not subject to this public consultation, despite them being a crucial element linking the Policy and Standards.

B, the Environmental and Social Policy.

- In the Objectives and Principles (**par 1**, as well **par 25** of the Policy) the Bank strongly commits itself to supporting borrowers and enhancing the capacity of borrower frameworks. The Bank should proceed with caution in relying on, the internal systems of

financial intermediaries, as well as on country systems and/or borrower frameworks that currently are going backwards in many parts of the world.

Very few borrower frameworks are adequate, their ready application for risky projects would endanger communities and the environment, as seen in the grievances from applying country systems in China, India, and elsewhere. So it is essential that their equivalence with the Bank safeguards established transparently before applying them.

- As a basic rule borrower framework projects should not take place in countries with military governments or with a track record of human rights violations or corruption.
- **Par 2 a** should mention the role of stakeholders in drafting Country and Regional papers, as civil society groups.
- In **Par 2 b**, proportionate needs to be defined.
- **Par. 2, f & g** of the Policy state that environmental and social performance is monitored in accordance with provisions and the financial agreement. Define the Policy in such way that it is clear that contractual clauses enshrine the standards in all bank operations, enabling for suspension of contracts as well if the standards are not implemented. This is currently absent from the Policy. The Policy needs to include what instances trigger an exit.
- **Par 4**, it needs to be clear that the Bank is to determine which standards apply, this should be explicitly mentioned.
- **Par 6**, not to proceed needs to be further clarified, it should include the possibility of paying back the loan that already has been disbursed.
- **Par 8** of the Policy states that a common approach will be chosen for in co-financed projects. International and bilateral financial institutions do not follow equal standards and are risking the weakening of environmental and social standards through increased competition. The crucial question here is how it can be guaranteed that protections are at par with each other, or even better that strongest regulations and standards prevail. The AfDB should clarify how it determines the commonness in the policies and standards, and do this in a transparent matter. The common approach should not allow the Bank to shy away from its own accountability. The Bank should always keep its own due diligence and the application of its own policies in place, also in co-financed projects. A provision should be in place to allow Project Affected People of co-financed projects to use the accountability mechanism at each of the different banks involved when grievances occur.
- Associated facilities (par 9) are part of a project's area of influence to which the policy should apply: The area of influence in prevailing EIA policies is defined as follows:
- "The area likely to be affected by the project, including all its ancillary aspects, etc., as well as unplanned developments induced by the project etc. etc., the watershed within which the project is located; any affected estuary and coastal zone, off-site areas required for resettlement, etc., the airshed of influence, migratory routes, etc, and areas used for livelihood activities, or religious or ceremonial purposes of a customary nature" (WB OP 4.01, Annex A – Definitions). It is not fully clear if ancillary aspects are fully covered with language about associated facilities
- **Par 13**, It is unclear what appropriate to the nature and scale of operation means, this needs to be defined.

- **Par 15.** As appropriate should be defined, multi-interpretable. The Bank should not only rely on information that is provided by the Borrower and have its own means to gather relevant information on risks and impacts, including consulting CSOs.
- There is no routine way at the bank (yet) for any provision of information from civil society or for any independent assessment of the borrower's track-record. **Par 16** of the Policy states that for "projects already under implementation, or that already received the approval of environmental and social impact assessments, the Bank's due diligence will include a gap analysis against the OSs to identify whether any additional studies, mitigation measures or requirements are necessary to meet Bank requirements." It is necessary that the AfDB due diligence process goes beyond depending on self-reported information from the borrower for the so called 'gap-filling' distances between safeguard requirements and borrower systems/frameworks, be it country systems, financial intermediaries systems or corporate systems.
- The Bank needs to use clear and explicit language for its responsibilities as laid out in the ESP and explain what it means with general terms such as proportionate, appropriate, etc.. **Par 2 (C) and Par. 5** of the Policy state that the desired outcomes are described in the objectives of each OS, followed by specific requirements to help Borrowers achieve these objectives through means that are appropriate to the nature and scale of the project and proportionate to the level of environmental and social risks and impacts. Nature and scale, and proportionality should be determined at the scoping and screening stages through risk categorization: All impacts must be clearly categorized with respect to their severity: Scrutiny of environmental and social impacts can improve project returns. At the World Bank Group and Asian Development Bank, risky projects with the greater scrutiny of Category A have delivered superior project outcomes. But Cat A is also in decline for risk aversion. Safer Cat B and C remain very important for results. (IED, 2016).
- In the AfDB chain of command high level of Bank management should provides clearance for risk classification of a project, appraisal and monitoring of high risk projects.
- Next, **par 18** of the Policy implies that the bank only in exceptional circumstances will provide assistance to executing agencies in formulating and implementing resettlement policies, strategies and specific plans. The Bank has to ensure that the requirement for the Bank to conduct its own due diligence is maintained and the bank in any circumstances should try to avoid involuntary displacement to happen. Apart from that the bank needs clear rules for evaluating whether policies, strategies and plans of borrowers are equivalent in terms of content and implementation track record to that of the Bank. It is essential that their equivalence with the AfDB policy and safeguards is established transparently before applying them. Also the Policy has to contain adequate provisions for ensuring supervision of policies, strategies and plans.
- **Par 6** of the Policy states that "the Bank will only support operations that are consistent with, and within the boundaries of the Bank's Articles of Agreement and are expected to meet the requirements of the OSs in a manner and within a time-frame acceptable to the Bank." **Par 20** of the Policy also states that requirements of the OSs have to be met in a manner and time-frame acceptable to the Bank. Within a time frame, however, due diligence, appraisal, approval and execution are sequential steps that must be taken one after the other. Stakeholder engagement, risks assessment and assuring compliance should both be required **upfront** to inform board appraisal and approval, and improve

development relevance and prevent adverse impacts, but also **throughout** the implementation process and at the **end of the cycle** to adapt to changing circumstances. Management of adverse impact during implementation should not mean less requirement at the front end.

- **Par 23** of the Policy states that the borrower does not have to meet the requirements of the OSs at the time of Board approval. An environmental management plan, a resettlement plan, or a hazardous waste plan may be prepared in a manner and time-frame acceptable to the Bank. “To prevent spillover damages, however, projects must reflect inputs from the communities involved, and their approval be predicated on specific and binding targets for compliance. The approach could open the door to softening requirements during implementation, including not stopping projects that do not observe Bank standards.” (cited here is Vinod Thomas, former *Director-General of Independent Evaluation at the Asian Development Bank, a position he previously held at the World Bank Group*, FT, 2015).
- **par 24** allows borrowers a waiver to the application of EHSs. The Bank should be very clear on when a waiver would apply. The conditions that could apply to a waiver should be specified, an analysis and request by Borrower should be public, and a waiver should be able to be applied only to sections of the policy and never when it means rights can be violated.
- **Par 25** states that the use of all, or part, of the Borrower’s E&S Framework will be agreed between the Bank and the Borrower. If it is no longer clear prior to appraisal and Board approval which due diligence requirements are mandatory or instead negotiable. The draft policy seems to allow for greater discretion on the part of the Bank , regarding which safeguards will be applied and when and regarding which information will be disclosed and when. For vulnerable citizens and for the Accountability Mechanism of the Bank it will be harder to identify clear instances of non-compliance .
- The use of borrower frameworks (par 25), strategies and plans should be excluded from consideration by the Bank in regard to high-risk (cat 1, cat 2, incl. involuntary replacements) or otherwise complex projects with significant substantial impact.
- **Par 27.** This paragraph needs to include how the Borrower is required to commit to ensuring no reprisals will happen and the consequences if the Borrower fails to do this. Furthermore, the Special Directives need to be consulted with experts.
- **Par 30.** It is unclear from this language which information the Bank will use. It should include monitoring visits, which are partly organized independently of the Borrower, and information from other sources than the Borrower (knowledge institutes, religious institutes, CSOs).
- **Par 30 , and footnote 27** permit Adaptive management of E&S risk along the project cycle. Adaptive management” contradicts upfront requirements in prevailing Environmental Impact Assessment policies (WB-OP 4.01, para. 3), that demand EAs to be closely integrated with the economic, financial, institutional, social and technical analyses of a proposed project, and it undermines a fully informed decision making at the time of Board approval.
- **Par 34.** the gap analysis of the project’s environmental and social performance against OSs should be made public, and should include a client’s track record of human rights violations and social and environmental performance.
- **Par 35.** allows for a full shift to a self-assessment and self-monitoring and self-regulating and self-reporting regime, which rely primarily on borrower information

for most of decision--making. While the new draft requires an ESMS and ESDD at project approval, key targets are to be developed and met some time during implementation. The sole reliance on self-monitoring , regulation and self-reporting, opens the door to softening requirements during implementation, including not stopping projects that do not observe World Bank standards. Corrective action is unlikely to follow without specific legal provisions in the first place.

Needed is an increase of oversight requirements for clients engaging in projects with significant risk and requires communities to be allowed a 120 day comment period on operations which may substantially affect their lives and livelihoods to inform decision making of the board.

- **Par 35.** Bank should ensure transparency on sub-projects and programmatic undertakings. The Bank should also clarify more specifically its own role in monitoring whether the sub-projects comply with the OS.
- **Par 38.** The Bank should mention that they ensure transparency on sub-projects.
- **Par 38-41** The Bank should not solely rely on information from its borrowers to make its assessments.
- **Par 42. benchmarking relevant Borrower agencies against the objectives and outcomes of the OSs** should go beyond a paper tick-the-box exercise and civil society should be included in stakeholders consulted. where it concerns borrowers track record of corruption and violation of international human rights.
- **Par 52-54.** The ESMP should be made public.
- **Par 61.** The Bank needs stronger mechanisms to ensure engagement with stakeholders is up to standards. The Bank needs to have its own network of information sources in the regions where it invests (knowledge institutions, NGOs, grassroots groups, religious institutions) to monitor whether engagement is indeed prior, informed and free in all high risk projects.
- **Par 62.** This should apply to all high-risk projects.
- **Par 63.** The Bank is not to define what FPIC is and whether disagreement of individuals can be acceptable, this is up to the people consulted. Furthermore, the Bank needs to include human rights language, where FPIC is a collective right to indigenous groups.
- **Par 68.** The Bank needs to have policies in place that define a responsible exit from a project in case a Borrower fails to fulfill conditions.
- **Par 69.** The Bank should also open its own lines of communication and collection of information with third parties.
- **Par 71.** This should also state how the Borrower is required to make public the existence of the project-level as well as the Bank-level mechanism.
- **Par 75.** Appropriate should be more clearly defined. Up to date, the implementation of the AfDB ISS has been lacking, due to limits of capacity and resources. Dedicating more resources, staff, and capacity training to the implementation is key.
- **Par 80.**
 - i) define fragility or specific vulnerabilities,
 - ii) this is very concerning language and should be very clearly explained and consulted in the public consultations. The conditions that could apply to a waiver should be specified, an analysis and request by Borrower should be public, and a waiver should be able to be applied only to sections of the policy and never when it means rights can be violated.