

ARTICLE

Bringing Multilateral Environmental Agreements into Development Finance: An Analysis of the Asian Infrastructure Investment Bank's Environmental and Social Framework

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Abstract

Multilateral development banks (MDBs) are crucial in promoting economic growth through their project finance activities. Meanwhile, to address negative effects arising from their development projects, MDBs increasingly have focused their attention on the environmental and social impacts of their supported projects in recent decades. This article analyzes the relationship between the Environmental and Social Framework (ESF) adopted by the Asian Infrastructure Investment Bank (AIIB) and multilateral environmental agreements (MEAs). It argues that better compliance with MEAs by the AIIB and its borrowers in implementing AIIB-supported development projects will be achieved only if its independent accountability mechanism (IAM) can actively examine project compliance with the ESF in the light of MEAs. The AIIB has an opportunity to provide leadership in promoting the fulfilment of MEA obligations in development finance. However, this is contingent on ensuring effective oversight by its newly established IAM moving forward.

Keywords: Multilateral development banks (MDBs), Safeguard policies, Multilateral environmental agreements (MEAs), Asian Infrastructure Investment Bank (AIIB), Environmental and Social Framework (ESF), Independent accountability mechanisms (IAMs)

1. INTRODUCTION

Multilateral development banks (MDBs) play a significant role in promoting economic growth through their project finance activities. In recent decades, MDBs increasingly have focused their attention on the environmental and social impacts of their supported

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projects in order to address potential negative effects arising from development projects. Against this background, MDBs have adopted safeguard policies describing the steps that MDBs and their borrowers should follow during project activities, including multilateral environmental agreements (MEAs). The fulfilment of these obligations is supported by independent accountability mechanisms (IAMs), which receive complaints from those affected by MDB-supported projects and examine whether the projects have observed relevant safeguard policies.¹

A growing body of scholarly literature has developed related to a relatively young MDB: the Asian Infrastructure Investment Bank (AIIB), founded in 2015.² Since 2016, the AIIB has approved 172 development projects, with approved financing up to USD 34.26 billion.³ The operation of the AIIB makes a considerable contribution to infrastructure needs in Asia but also poses challenges to global finance governance. According to the AIIB Articles of Agreement (AIIB AoA), its constituent instrument, the Bank strives to ‘foster sustainable economic development’.⁴ In 2016, the AIIB also adopted its safeguard policies in the Environmental and Social Framework (AIIB ESF or ESF), which shows its intention to ‘support the environmental and social soundness and sustainability of Projects’.⁵ Despite considerable discussion and debate about the AIIB, analysis of the relationship between the AIIB ESF and MEAs has thus far been limited. As the world’s newest MDB, the extent to which the AIIB ESF has integrated MEAs in its safeguarding policies – thereby promoting compliance with environmental obligations in AIIB-supported development finance – is the focus of this article.

Section 2 briefly reviews the far-reaching impacts that development finance can have on the environment. It further details the emergence of sustainable development in the mandates of MDBs in their lending operations. Section 2 also considers the development of safeguard policies and IAMs within MDBs to address environmental and social issues. Section 3 analyzes the relationship between various instruments under the AIIB ESF, as amended in 2021, and MEAs, which demonstrates the AIIB’s willingness to

¹ See, generally, O. McIntyre & S. Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMs): Towards Good Governance in Development Finance* (Brill, 2019).

² See, e.g., B. Gu, *The Law and Governance of the Asian Infrastructure Investment Bank* (Wolters Kluwer, 2018); N. Lichtenstein, *A Comparative Guide to the Asian Infrastructure Investment Bank* (Oxford University Press, 2018); J. Ransdell, ‘Institutional Innovation by the Asian Infrastructure Investment Bank’ (2018) 9(1) *Asian Journal of International Law*, pp. 125–52; C. Wu, ‘Global Economic Governance in the Wake of the Asian Infrastructure Investment Bank: Is China Remaking Bretton Woods?’ (2018) 19(3) *Journal of World Investment & Trade*, pp. 542–69; D. Ong, ‘The Asian Infrastructure Investment Bank: Bringing “Asian Values” to Global Economic Governance?’ (2017) 20(3) *Journal of International Economic Law*, pp. 535–60; D. Chow, ‘Why China Established the Asia Infrastructure Investment Bank’ (2016) 49(5) *Vanderbilt Journal of Transnational Law*, pp. 1255–98; X. Wu, ‘Friendly Competition for Co-Progressive Development: The Asian Infrastructure Investment Bank v. the Bretton Woods Institutions’ (2017) 16(1) *Chinese Journal of International Law*, pp. 41–76.

³ AIIB, ‘Project Summary’, available at: <https://www.aiib.org/en/projects/summary/index.html>.

⁴ Articles of Agreement of the Asian Infrastructure Investment Bank (AIIB AoA), Beijing (China), 29 June 2015, in force 25 Dec. 2015, Art. 1(1), available at: https://www.aiib.org/en/about-aiib/basic-documents/_download/articles-of-agreement/basic_document_english-bank_articles_of_agreement.pdf.

⁵ Asian Infrastructure Investment Bank Environmental and Social Framework (AIIB ESF), amended Feb. 2019 and May 2021, Introduction, para. 8.3, available at: https://www.aiib.org/en/policies-strategies/_download/environment-framework/AIIB-Revised-Environmental-and-Social-Framework-ESF-May-2021-final.pdf.

incorporate and put in place environmental treaty obligations in its lending operations. Against this backdrop, Section 4 explores the extent to which various IAMs have examined relevant environmental issues in the light of MEAs. Using the World Bank Inspection Panel (Inspection Panel or Panel) and the Compliance Advisor Ombudsman (CAO) as two distinct examples, the section demonstrates that IAMs have taken different attitudes towards evaluating MEA obligations. Therefore, extensive references to MEAs in the AIIB ESF is only one of the prerequisites for effective implementation of treaty obligations in development finance. The Project-affected People's Mechanism (PPM), which was set up in the AIIB in 2019, will play a key role in ensuring the compliance of the AIIB and its clients with MEAs. Section 5 concludes.

2. THE DEVELOPMENT OF SAFEGUARD POLICIES AND IAMs IN MDBs

2.1. *Nexus between Development Finance and Sustainable Environment*

Development finance has played a crucial role in stimulating investment flows for development purposes. Considering the significance of investment activities in promoting economic growth, MDBs – such as the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), and the International Development Association (IDA) – were established within the World Bank Group after the Second World War to provide financing for governments or private enterprises to implement development projects. Meanwhile, regional MDBs – such as the Inter-American Development Bank (IDB), the African Development Bank (AfDB), the Asian Development Bank (ADB), and the European Bank for Reconstruction and Development (EBRD) – were founded to play similar roles and complement the activities supported by the World Bank Group. In recent years, new MDBs have been launched by developing countries, such as the New Development Bank (NDB) in 2014 and the AIIB in 2015.

Although development finance brings economic benefits to the recipient states, the negative impacts on the environment and on the livelihoods of local populations arising from the investment activities that MDBs finance cannot be ignored.⁶ An early example is the Sardar Sarovar Projects, co-financed by the IBRD and IDA during the 1980s. The projects, which included the construction of dams and associated canal and irrigation systems, were met with widespread opposition. This is because the projects not only called for the resettlement and rehabilitation of a considerable number of people, but also had far-reaching impacts on the environment.⁷ This example shows the importance of establishing a set of environmental and social standards as well as a complaint and grievance mechanism for project-affected people to ensure effective

⁶ See Z. Plater, 'Damming the Third World: Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process' (1988) 17(1) *Denver Journal of International Law & Policy*, pp. 121–53, at 123–35.

⁷ T. Berger, 'The World Bank's Independent Review of India's Sardar Sarovar Projects' (1993) 9(1) *American University Journal of International Law & Policy*, pp. 33–48, at 35–7.

implementation of such standards, thereby promoting non-economic values in the development process.

Modern international law, in many respects, has emphasized the importance of environmental considerations in pursuing economic growth. For example, the principle of integration, which has been endorsed in many non-binding international instruments⁸ and has been recognized by international courts and tribunals,⁹ supports environmental and social aspects as essential elements to be taken into account in the development process.¹⁰ Moreover, although there are controversies over the normative character of the concept of sustainable development,¹¹ there may very well be an obligation for states to ensure that their decision making considers and facilitates the objective of sustainable development.¹² The concept of sustainable development may also have an impact on the interpretation, application and development of other legal rules under international law.¹³

It should be noted that incorporating non-economic concerns into the lending operations of MDBs need not give rise to controversy from legal and policy perspectives.¹⁴ In terms of the constituent instruments of MDBs, there are examples where sustainable development has been referred to as one of the objectives to pursue. For instance, Article 2 of the Agreement Establishing the EBRD provides that the Bank shall ‘promote in the full range of its activities environmentally sound and sustainable

⁸ See, e.g., Declaration of the United Nations (UN) Conference on the Human Environment (Stockholm Declaration), adopted by the UN Conference on the Environment, Stockholm (Sweden), 5–16 June 1972, Principle 13, available at: https://www.ipcc.ch/apps/nj-lite/srex/nj-lite_download.php?id=6471; UN General Assembly (GA) Res. 37/7, ‘World Charter for Nature’, 28 Oct. 1982, UN Doc. A/RES/37/7, paras 7–8, available at: <https://undocs.org/en/A/RES/37/7>; Rio Declaration on Environment and Development (Rio Declaration), adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, Principle 4, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf; Agenda 21, adopted by the Rio Conference, *ibid.*, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex II, Ch. 8.2, available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>; Copenhagen Declaration on Social Development, adopted by the World Summit for Social Development, Copenhagen (Denmark), 6–12 Mar. 1995, UN Doc. A/CONF.166/9, para. 6, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.166_9_Declaration.pdf.

⁹ See, e.g., *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 Sept. 1997, *ICJ Reports* (1997), p. 7, at 77–8; *Iron Rhine Arbitration (Belgium v. The Netherlands)*, Award, 24 May 2005, *XXVII Reports of International Arbitral Awards* (2005), p. 35, at 66–7; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 Apr. 2010, *ICJ Reports* (2010), p. 14, at 74–5.

¹⁰ P. Sands et al., *Principles of International Environmental Law*, 4th edn (Cambridge University Press, 2018), pp. 217–21.

¹¹ See P. Sands, ‘International Courts and the Application of the Concept of “Sustainable Development”’ (1999) 3 *Max Planck Yearbook of United Nations Law*, pp. 389–405; V. Lowe, ‘Sustainable Development and Unsustainable Arguments’, in A. Boyle & D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999), pp. 19–37.

¹² P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford University Press, 2009), pp. 125–7.

¹³ *Ibid.*; D. French, ‘Sustainable Development’, in M. Fitzmaurice, D. Ong & P. Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2011), pp. 51–68, at 54–6.

¹⁴ G. Handl, ‘The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development’ (1998) 92(4) *American Journal of International Law*, pp. 642–65.

development'.¹⁵ As noted, the AIIB AoA is another example. This shows an intention on the part of the contracting parties to MDBs to place importance on sustainable development as one of their mandates.

In situations where the constituent instruments of MDBs do not specifically contain such a mandate, an evolutionary interpretation of the relevant instruments also allows MDBs to have non-economic considerations in their operations. MDBs were founded in the aftermath of the Second World War with the objective of helping to reconstruct the world economy. Their primary focus, therefore, is to promote economic growth through financing development projects. Given such a background, their lending decisions were required to be based on economic considerations and were not to be affected by political or other non-economic factors. This is reflected in their constituent instruments. For example, Article III of the Articles of Agreement of the IBRD (IBRD AoA) provides that the Bank shall ensure that the proceeds of any loan are used 'with due attention to considerations of economy and efficiency and *without regard to political or other non-economic influences or considerations*'.¹⁶ Article IV also states that '[t]he Bank and its officers shall not interfere in the *political affairs* of any member; nor shall they be influenced in their decisions by the *political character* of the member or members concerned'.¹⁷ Similar provisions can be seen in the constituent instruments of other MDBs within the World Bank Group.¹⁸

However, the absence of a definition of 'political considerations' and 'political characters' in these provisions has led to flexible interpretations.¹⁹ With the emergence of the concept of sustainable development, the term 'development' commonly adopted in the constituent instruments of MDBs²⁰ no longer depends exclusively on the pursuance of economic growth in that it actually involves the reconciliation of economic, social and environmental values.²¹ In addition, MDBs have also come to realize that pursuing economic growth without due regard for non-economic factors could affect the effective implementation of development projects and result in harm to local populations.²² As

¹⁵ Agreement Establishing the EBRD, 29 May 1990, in force 28 Mar. 1991, Paris (France), Art. 2, available at: <http://www.ebrd.com/documents/comms-and-bis/pdf-basic-documents-of-ebrd-2013-agreement.pdf>.

¹⁶ Articles of Agreement of the IBRD (IBRD AoA), 22 July 1944, in force 27 Dec. 1945, Bretton Woods (United States (US)), Art. III(5)(b) (emphasis added), available at: <https://thedocs.worldbank.org/en/doc/722361541184234501-0330022018/original/IBRDArticlesOfAgreementEnglish.pdf>.

¹⁷ *Ibid.*, Art. IV(10) (emphasis added).

¹⁸ See, e.g., Articles of Agreement of the IDA (IDA AoA), 26 Jan. 1960, in force 24 Sept. 1960, Washington, DC (US), Arts V(1)(g) and V(6), available at: <https://ida.worldbank.org/sites/default/files/IDA-articles-of-agreement.pdf>; Articles of Agreement of the IFC (IFC AoA), 25 May 1955, in force 20 July 1956, Washington, DC (US), Art. III(9), available at: https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+governance/articles.

¹⁹ D. Bradlow, 'International Law and the Operations of the International Financial Institutions', in D. Bradlow & D. Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International, 2010), pp. 1–30, at 12–7.

²⁰ See, e.g., IBRD AoA, n. 16 above, Arts I(i) and I(iii); IDA AoA, n. 18 above, Arts I, V(1)(a) and V(1)(b); IFC AoA, n. 18 above, Art. I.

²¹ See also J. Lorenzo, "'Development' versus "Sustainable Development"? (Re-)Constructing the International Bank for Sustainable Development' (2018) 51(2) *Vanderbilt Journal of Transnational Law*, pp. 399–476, at 462–72.

²² Handl, n. 14 above, pp. 648–50.

the notion of development evolves constantly, the scope of MDB mandates has also been expected to be broadened to pursue other non-economic values.²³ Accordingly, despite the fact that sustainable development is not endorsed explicitly by most MDB constituent instruments, there can be little doubt that MDBs should not only facilitate economic growth through their lending operations, but also contribute to sustainable development by integrating non-economic concerns into the decision-making process. The fact that MDBs are now actively supporting countries in achieving the Sustainable Development Goals (SDGs) also illustrates this point.²⁴

2.2. *The Emergence of Safeguard Policies and the Establishment of IAMs in MDBs*

Safeguard policies are the internal documents of MDBs that delineate the requirements with which their staff should comply to minimize environmental and social impacts arising from project activities.²⁵ These rules become legally binding when they are incorporated into the loan agreements between MDBs and their borrowers. MDBs not only have to comply with these safeguard policies in project preparation and appraisal, but also have to ensure that their borrowers fulfil these requirements in the implementation of projects. Accordingly, safeguard policies also impose obligations on borrowers. Moreover, safeguard policies are the substantive rules that IAMs apply in conducting their investigations. Project-affected people can make use of these rules to question the legitimacy of MDBs' lending operations before IAMs. Therefore, safeguard policies have far-reaching impact on the manner in which MDBs and their borrowers address environmental and social issues.

The World Bank's safeguard policies were originally issued as Operational Manual Statements and Operational Policy Notes. They were gradually converted into Operational Directives (ODs). ODs were then replaced by Operational Policies (OPs) and Bank Procedures (BPs), both of which are mandatory for Bank staff, as well as Good Practices, which are advisory.²⁶ With regard to mandatory instruments, OPs are statements that set out the requirements for Bank staff to conduct its lending operations. BPs contains the instructions that Bank staff should follow when implementing the policies in OPs.²⁷ The issues addressed in OPs and

²³ A. Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) 72(1) *British Yearbook of International Law*, pp. 213–53, at 216–8.

²⁴ See African Development Bank et al., 'Financing the Sustainable Development Goals: The Contributions of the Multilateral Development Banks', 10 Dec. 2020, available at: <https://www.afdb.org/en/documents/financing-sustainable-development-goals-contributions-multilateral-development-banks>; S. Nanwani, 'SDGs and the Role of International Financial Institutions', in J. Walker, A. Pekmezovic & G. Walker (eds), *Sustainable Development Goals: Harnessing Business to Achieve the SDGs through Finance, Technology, and Law Reform* (Wiley, 2019), pp. 37–52.

²⁵ On safeguard policies, see generally O. McIntyre, 'Development Banking ESG Policies and the Normativisation of Good Governance Standards: Development Banks as Agents of Global Administrative Law', in K. Wendt (ed.), *Responsible Investment Banking: Risk Management Frameworks, Sustainable Financial Innovation and Softlaw Standards* (Springer, 2015), pp. 143–55, at 143–8.

²⁶ I. Shihata, *The World Bank Inspection Panel: In Practice*, 2nd edn (Oxford University Press, 2000), pp. 41–6.

²⁷ World Bank, *A Guide to the World Bank*, 3rd edn (World Bank, 2011), p. 61.

BPs²⁸ include ‘Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects’,²⁹ ‘Environmental Assessment’,³⁰ ‘Environmental Action Plans’,³¹ ‘Performance Standards for Private Sector Activities’,³² ‘Natural Habitats’,³³ ‘Pest Management’,³⁴ ‘Indigenous Peoples’,³⁵ ‘Physical Cultural Resources’,³⁶ ‘Involuntary Resettlement’,³⁷ ‘Forests’,³⁸ ‘Safety of Dams’,³⁹ ‘Projects in Disputed Areas’,⁴⁰ and ‘Projects on International Waterways’.⁴¹

After many years of reviewing its previous safeguard policies and consultation with various stakeholders, in 2016 the World Bank released its updated safeguard policies in the Environmental and Social Framework.⁴² The Framework – which comprises a Vision for Sustainable Development, World Bank Environmental and Social Policy for Investment Project Financing, and Environmental and Social Standards⁴³ – applies to all new investment project financing from October 2018 and gradually replaces OPs and BPs. However, OPs and BPs continue to apply to existing projects.⁴⁴

²⁸ World Bank, Environmental and Social Policies, available at: <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>.

²⁹ OP 4.00, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1564.pdf>; BP 4.00, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1610.pdf>.

³⁰ OP 4.01, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1565.pdf>; BP 4.01, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1578.pdf>.

³¹ OP 4.02, revised July 2015, available at: <https://ppfdocuments.azureedge.net/3528.pdf>; BP 4.02, revised July 2015, available at: <https://ppfdocuments.azureedge.net/3529.pdf>.

³² OP 4.03, May 2013, available at: <https://ppfdocuments.azureedge.net/1566.pdf>; BP 4.03, May 2013, available at: <https://ppfdocuments.azureedge.net/1614.pdf>.

³³ OP 4.04, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1567.pdf>; BP 4.04, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1581.pdf>.

³⁴ OP 4.09, Dec. 1998, available at: <https://ppfdocuments.azureedge.net/1637.pdf>.

³⁵ OP 4.10, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1570.pdf>; BP 4.10, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1582.pdf>.

³⁶ OP 4.11, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1571.pdf>; BP 4.11, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1583.pdf>.

³⁷ OP 4.12, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1572.pdf>; BP 4.12, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1584.pdf>.

³⁸ OP 4.36, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1574.pdf>; BP 4.36, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1585.pdf>.

³⁹ OP 4.37, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1576.pdf>; BP 4.37, revised Apr. 2013, available at: <https://ppfdocuments.azureedge.net/1586.pdf>.

⁴⁰ OP 7.60, revised Mar. 2012, available at: <https://ppfdocuments.azureedge.net/1841.pdf>; BP 7.60, revised Mar. 2012, available at: <https://ppfdocuments.azureedge.net/1844.pdf>.

⁴¹ OP 7.50, revised Mar. 2012, available at: <https://ppfdocuments.azureedge.net/2660.pdf>; BP 7.50, revised Mar. 2012, available at: <https://ppfdocuments.azureedge.net/1843.pdf>.

⁴² See World Bank, ‘World Bank Environmental and Social Framework, 4th August 2016’, *Oxford Public International Law*, updated 21 Mar. 2017, available at: <https://opil.ouplaw.com/view/10.1093/law-oxio/e167.013.1/law-oxio-e167?rskey=dGxqZJ&result=27&prd=OPIL>. For more detailed discussion see G. Jokubauskaite et al., ‘International Law and Practice: Symposium on the World Bank Environmental and Social Framework’ (2019) 32(3) *Leiden Journal of International Law*, pp. 457–559.

⁴³ World Bank, *The World Bank Environmental and Social Framework* (IBRD/The World Bank, 2017), available at: <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf> (World Bank ESF).

⁴⁴ World Bank, ‘What We Do / Projects and Operations: Environmental and Social Framework’, available at: <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>.

The IFC has also adopted the Sustainability Framework, which articulates its strategic commitment to sustainable development.⁴⁵ The Sustainability Framework was initially adopted in 2006 after a review of its original safeguard policies; a revised version was adopted in 2012. The Sustainability Framework consists of the Policy on Environmental and Social Sustainability (Sustainability Policy), Environmental and Social Performance Standards (Performance Standards), and Access to Information Policy. The Sustainability Policy delineates the commitments, roles, and responsibilities of the IFC to the environmental and social sustainability of private sector operations supported by the IFC. It also elaborates on the environmental and social due diligence of the IFC in all investment activities.⁴⁶ The Performance Standards illustrate the requirements that private sector clients must observe in managing environmental and social risks and impacts throughout the life of IFC-supported projects.⁴⁷ The Access to Information Policy articulates IFC policy on the scope of information available to its clients, partners, stakeholders and other interested parties.⁴⁸

Moreover, in order to satisfy public demand for greater accountability, and thereby ensure that economic growth through development projects does not lead to significant negative environmental and social impacts, establishing IAMs to review MDB lending operations became important.⁴⁹ In 1993, the World Bank set up its first IAM, the World Bank Inspection Panel (Inspection Panel), to investigate complaints from the public affected by IBRD/IDA-supported projects about alleged violations of the World Bank's safeguard policies.⁵⁰ In 1999, the Compliance Advisor Ombudsman (CAO) was founded to receive private complaints about projects that are either supported by the IFC or insured by the Multilateral Investment Guarantee Agency.⁵¹ IAMs are also instituted in regional MDBs to address similar issues.⁵²

⁴⁵ IFC, 'IFC Sustainability Framework', available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/sustainability+framework.

⁴⁶ IFC, 'Policy on Environmental and Social Sustainability', 1 Jan. 2012, available at: https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kilrw0g.

⁴⁷ IFC, 'Performance Standards on Environmental and Social Sustainability', 1 Jan. 2012), available at: https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Documents.pdf?MOD=AJPERES&CVID=jkV-X6h.

⁴⁸ IFC, 'Access to Information Policy', amended 25 Nov. 2013, available at: <https://www.ifc.org/wps/wcm/connect/c8a61c48-32c2-49b2-8e46-2ade87f774e0/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES>.

⁴⁹ See McIntyre, n. 25 above, pp.148–9.

⁵⁰ See generally, D. Clark, J. Fox & K. Treacle (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield, 2003); G. Alfredsson & R. Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff, 2001); Shihata, n. 26 above.

⁵¹ See generally R. Altholz & C. Sullivan, 'Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman', International Human Rights Law Clinic, University of California – Berkeley, Mar. 2017, pp. 1–83, available at: http://bibliotheque.pssfp.net/livres/ACCOUNTABILITY_AND_INTERNATIONAL_FINANCIAL_INSTITUTIONS.pdf; B. Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective' (2012) 44(4) *New York University Journal of International Law & Politics*, pp. 1279–329.

⁵² See, e.g., the Independent Consultation and Investigation Mechanism in the IDB, the Independent Review Mechanism in the AfDB, the Accountability Mechanism in the ADB, and the Project Complaint Mechanism in the EBRD.

IAMs enable those affected by development projects to hold MDBs accountable for the manner in which they conduct their lending operations. Their establishment offers private individuals a direct means to redress harm at the international level. Meanwhile, because safeguard policies constitute the standards for IAMs in evaluating the appropriateness of MDB operations, IAMs play crucial roles in interpreting the concepts and phrases adopted in these safeguard policies.⁵³ Moreover, to the extent that MDBs' safeguard policies incorporate MEAs as part of the requirements to be met, the application of these rules by IAMs potentially contributes to the fulfilment of environmental treaty obligations in project activities.

3. AN ANALYSIS OF THE AIIB'S ENVIRONMENTAL AND SOCIAL FRAMEWORK

The AIIB AoA entered into force in December 2015. In contrast to the constituent instruments of many MDBs, the AIIB AoA explicitly requires operations to comply with relevant environmental and social standards. According to the operating principles set out in the AIIB AoA, the AIIB 'shall ensure that each of its operations complies with the Bank's operational and financial policies, including without limitation, policies addressing environmental and social impacts'.⁵⁴ This is despite the fact that the AIIB, as with other MDBs, also declares that the Bank shall not be influenced by the political character of members and only weigh economic considerations in their decisions.⁵⁵

Soon after its opening for business in January 2016, the AIIB approved its AIIB ESF in February 2016.⁵⁶ According to the AIIB ESF, one of its objectives is to 'support the environmental and social soundness and sustainability of projects'.⁵⁷ The AIIB ESF has since been amended – in February 2019 and May 2021.⁵⁸ The latter version applies to all projects included in the AIIB's investment pipeline on or after 1 October 2021, while the former applies to all other projects.⁵⁹

This section focuses on the AIIB ESF as amended in 2021, which consists of sections headed 'Introduction', 'Vision', and 'Environmental and Social Policy' (ESP). The ESP

⁵³ D. Bradlow & A. Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?' (2003) 10(1) *International Organizations Law Review*, pp. 3–80, at 41–5.

⁵⁴ AIIB AoA, n. 4 above, Art. 13(4).

⁵⁵ *Ibid.*, Art. 31(2).

⁵⁶ See generally C. Radavoi & Y. Bian, 'The Asian Infrastructure Investment Bank's Environmental and Social Policies: A Critical Discourse Analysis' (2018) 34(1) *Journal of International and Comparative Social Policy*, pp. 1–18; D. Brombal, 'Planning for a Sustainable Belt and Road Initiative (BRI): An Appraisal of the Asian Infrastructure Investment Bank (AIIB) Environmental and Social Safeguards', in W. Shan, K. Nuotio & K. Zhang (eds), *Normative Readings of the Belt and Road Initiative: Road to New Paradigms* (Springer, 2018), pp. 129–42.

⁵⁷ AIIB ESF, n. 5 above, Introduction, para. 8.2.

⁵⁸ AIIB, 'AIIB Strengthens Its Commitment to Environmental and Social Standards', 21 May 2021, available at: <https://www.aiib.org/en/news-events/news/2021/AIIB-Strengthens-Its-Commitment-to-Environmental-and-Social-Standards.html>.

⁵⁹ AIIB, 'Environmental and Social Framework', Feb. 2016, available at: <https://www.aiib.org/en/policies-strategies/framework-agreements/environmental-social-framework.html>.

is accompanied by three Environmental and Social Standards (ESSs) and an Environmental and Social Exclusion List (ESEL).⁶⁰ These instruments have shaped the relationship between the AIIB ESF and MEAs in various ways.

3.1. *Introduction and Vision*

According to the AIIB ESF, the Introduction ‘provides an overview of the Bank, the ESF’s structure and objectives’.⁶¹ In addition, its Vision ‘sets out the aspirations of the Bank concerning: (a) environmental and social sustainability; and (b) its role in meeting the challenge of sustainable development’.⁶² According to the Introduction, one of the purposes of the AIIB is to ‘foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia, by investing in infrastructure and other productive sectors’.⁶³

In its Introduction, the AIIB expressly declares that promoting the fulfilment of the international obligations pertinent to the project is one of the key objectives that the AIIB ESF seeks to achieve. It provides that the Bank seeks to:

[s]upport Clients, through Bank financing of Projects, to implement their obligations under national environmental and social legislation (including under international agreements adopted by the Member) governing these Projects, including commitments relating to climate change.⁶⁴

This paragraph has far-reaching implications for the AIIB and its clients.

Firstly, the borrowing governments (as public sector clients) are under an obligation to comply with their domestic legislation that is relevant to the project, which may include legal commitments they have undertaken at the international level. Consequently, the environmental treaty obligations imposed upon borrowing governments would also become the requirements they should meet in conducting project activities. Secondly, as the environmental commitments made by an AIIB member in other international fora may become the client’s obligations when implementing AIIB-supported projects, private enterprises (as private sector clients) are also expected to abide, where applicable, by any treaty obligations undertaken by the member in whose territory the project is located during project activities. This is regardless of whether the home state of the private enterprise is a party to the MEA concerned.

Thirdly, as part of the private sector client’s domestic obligations, environmental treaty obligations committed to by the home state of the private enterprise and integrated into its domestic law may also be applied during project activities. This is regardless of whether the member in whose territory the project is located is a party to the

⁶⁰ AIIB ESF, n. 5 above, Introduction, para. 3.

⁶¹ *Ibid.*, Introduction, para. 3.1.

⁶² *Ibid.*, Introduction, para. 3.2.

⁶³ *Ibid.*, Introduction, para. 1.

⁶⁴ *Ibid.*, Introduction, para. 8.11. The term ‘client’ refers to ‘the recipient, guarantor, beneficiary and/or sponsor of the Bank’s financing for a Project, that is/are responsible for the environmental and/or social aspects of the Project’: *ibid.*, ESP, para. 5.1.

MEA concerned. Fourthly, by requiring the client to observe the requirements arising under relevant MEAs, the AIIB may play a crucial role in promoting the fulfilment of environmental treaty obligations in its supported projects.

3.2. *Environmental and Social Policy (ESP)*

The ESP sets out compulsory environmental and social requirements for all AIIB-supported projects.⁶⁵ As with the Introduction and Vision, the ESP also emphasizes in various paragraphs the role of international obligations relevant to project activities when implementing AIIB projects. For example, it provides that the AIIB, by focusing on the requirements set out in the ESP, ESSs and ESEL, supports the client in ‘fulfilling their national and international obligations relating to environmental and social risks and impacts’.⁶⁶ To some extent, this paragraph reiterates the objective of the AIIB ESF,⁶⁷ which seeks to ensure that AIIB-supported projects are not conducted at the expense of breaches of the client’s domestic and international obligations. As noted above, the AIIB should ensure that its clients abide by the obligations committed to by the borrowing governments (as public sector clients) and the home states of the private enterprise (as private sector clients).

Moreover, the ESP states that when the AIIB offers the client the option to use all or part of its existing environmental and social management system (ESMS) for all or part of the project,⁶⁸ the client’s system should include ‘those aspects of the legal, policy and institutional framework of the Member in whose territory the Project is located, which are relevant to the environmental and social risks and impacts of the Project’.⁶⁹ In particular, the client’s ESMS should include, inter alia, ‘the international agreements to which the relevant Member is a party’.⁷⁰ In other words, while the client may use its country or corporate system to address the environmental and social risks and impacts of the project, this does not mean that the client can preclude the project from identifying and complying with the member’s treaty obligations. This provides flexibility for the client in addressing the environmental and social risks and impacts of the project, while also ensuring the applicability of MEAs when tackling such risks and impacts.

3.3. *Environmental and Social Standards (ESSs)*

The AIIB’s ESSs comprise three associated compulsory standards, which set out more detailed environmental and social requirements which should be met by the client during project activities. The issues addressed by ESSs include ‘Environmental and Social Assessment and Management’ (ESS 1), ‘Land Acquisition and Involuntary Resettlement’ (ESS 2), and ‘Indigenous Peoples’ (ESS 3).⁷¹

⁶⁵ Ibid., ESP, para. 2.1.

⁶⁶ Ibid., ESP, para. 4.

⁶⁷ Ibid., Introduction, para. 8.11.

⁶⁸ Ibid., ESP, para. 54.

⁶⁹ Ibid., ESP, para. 58.1.

⁷⁰ Ibid.

⁷¹ Ibid., ESP, para. 2.2.

Among them, ESS 1 is relevant to the present discussion. The objective of ESS 1 is to ‘achieve the environmental and social soundness and sustainability of Projects and to support the integration of environmental and social considerations into the Project decision-making process and implementation’.⁷² According to ESS 1, the client is under an obligation to conduct an environmental and social assessment for the project. General requirements for the client’s assessment and management process are set out in Section B.⁷³ Among others, when conducting an environmental and social assessment, the client should evaluate the legal obligations under national law that are applicable to the project concerned. The obligations also include international agreements adopted by the member.⁷⁴

This paragraph imposes upon the client an obligation to be aware, in the assessment and management process, of the international commitments made by the member where the project is located. Meanwhile, this would also mean that clients may undertake different obligations under international agreements in their implementation of projects in that some members may have committed to more treaty obligations than others.

3.4. *Environmental and Social Exclusion List (ESEL)*

According to the ESP, the AIIB will not knowingly finance a project if it involves activities or items on the ESEL.⁷⁵ The application of the ESEL is closely related to several widely accepted MEAs. Among 14 activities or items listed in the ESEL, four of them refer to particular MEAs. This stands in contrast to the instruments mentioned above, which simply refer to international agreements relating to project activities in relevant paragraphs.

First, the AIIB will not finance projects involving:

The production of, or trade in, any product or activity deemed illegal under national laws or regulations of the Member in whose territory the Project is located, or international conventions and agreements, or subject to international phase out or bans, such as:

- Production of, or trade in, pharmaceuticals, pesticides/herbicides and other hazardous substances subject to international phase outs or bans (Rotterdam Convention, Stockholm Convention).
- Production of, or trade in, ozone depleting substances subject to international phase out (Montreal Protocol).⁷⁶

The objective of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) is to ‘promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their

⁷² Ibid., ESS 1, para. 1.

⁷³ Ibid., ESS 1, Section B, paras 8–27.

⁷⁴ Ibid., ESS 1, Section B, para. 8.6.

⁷⁵ Ibid., ESP, para. 85. ESEL also applies when the client is allowed to use its existing (country or corporate) system as an alternative to the AIIB ESF for the project: *ibid.*, ESP, para. 57.

⁷⁶ Ibid., ESEL, paras 2.2 and 2.3.

environmentally sound use'.⁷⁷ According to its Prior Informed Consent (PIC) Procedure, the state of import must make a decision on whether it allows future import of the chemicals in Annex III through its import responses. The state of export must ensure that the export of chemicals subject to the PIC procedure is in conformity with the decision of the state of import.⁷⁸ As at March 2022, there are 165 parties to the Rotterdam Convention;⁷⁹ currently, 11 AIBB members are not party to this Convention.

The objective of the Stockholm Convention on Persistent Organic Pollutants (POPs Convention) is to 'protect human health and the environment from persistent organic pollutants'.⁸⁰ According to this Convention, the parties are required to prohibit or eliminate the production, use, import and export of the chemicals in Annex A, and to restrict the production and use of the chemicals in Annex B according to the provisions of that Annex.⁸¹ The parties are also required to take measures to reduce or eliminate the total releases derived from anthropogenic sources of the chemicals in Annex C.⁸² As at March 2022, there are 185 parties to the POPs Convention;⁸³ currently, only two AIBB members are not party to the Convention.

With regard to the control of ozone depleting substances, the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) sets targets to phase out the consumption and production of ozone depleting substances.⁸⁴ In this respect, developing states are entitled to a ten-year delay in implementing the control measures in order to meet their domestic needs.⁸⁵ As at March 2022, there are 198 parties to the Montreal Protocol;⁸⁶ only one AIBB member is not party to the Protocol.

Secondly, the AIBB will not finance projects that involve '[t]rade in wildlife or production of, or trade in, wildlife products regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)'.⁸⁷ CITES aims to protect species listed in its Appendices through the regulation of international trade.⁸⁸ Appendix I includes species threatened with extinction that are or may be affected by trade. Trade in Appendix I species is subject to particularly strict

⁷⁷ Rotterdam (The Netherlands), 10 Sept. 1998, in force 24 Feb. 2004, Art. 1, available at: <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048>.

⁷⁸ *Ibid.*, Arts 10 and 11.

⁷⁹ Rotterdam Convention, 'Status of Ratifications', available at: <http://www.pic.int/Countries/StatusofRatifications/tabid/1072/language/en-US/Default.aspx>.

⁸⁰ Stockholm (Sweden), 22 May 2001, in force 17 May 2004, Art. 1, available at: <http://www.pops.int/Portals/0/download.aspx?d=UNEP-POPS-COP-CONVTEXT-2021.English.pdf>.

⁸¹ *Ibid.*, Art. 3.

⁸² *Ibid.*, Art. 5.

⁸³ Stockholm Convention, 'Status of Ratifications', available at: <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatoires/tabid/4500/Default.aspx>.

⁸⁴ Montreal (Canada), 16 Sept. 1987, in force 1 Jan. 1989, available at: <https://ozone.unep.org/treaties/montreal-protocol/montreal-protocol-substances-deplete-ozone-layer>.

⁸⁵ *Ibid.*, Art. 5(1).

⁸⁶ UN Environment Programme (UNEP), Ozone Secretariat, 'Country Data', available at: <https://ozone.unep.org/all-ratifications>.

⁸⁷ AIBB ESF, n. 5 above, ESEL, para. 3.

⁸⁸ Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, Preamble, available at: <https://cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf>.

regulation and is authorized only in exceptional circumstances.⁸⁹ Appendix II species are not necessarily threatened with extinction at present, but they may become so unless trade is subject to strict regulation.⁹⁰ Appendix III species are identified by any party as being subject to regulation within its jurisdiction.⁹¹ For the export of species listed in the Appendices, an export permit issued by the state of export in accordance with the requirements set out in CITES is required.⁹² As at March 2022, there are 184 parties to CITES,⁹³ only three AIIB Members are not party to the Convention.

Thirdly, the AIIB will not finance projects that involve ‘[t]ransboundary movements of waste prohibited under international law (Basel Convention)’.⁹⁴ According to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, hazardous wastes listed in Annexes I and II, or are defined or considered as such by the parties and notified to the Secretariat, are subject to import and export conditions.⁹⁵ As at March 2022, there are 189 parties to the Basel Convention;⁹⁶ only three AIIB members are not party to this Convention.

Finally, the AIIB will not finance projects involving activities prohibited by ‘international conventions relating to the protection of biodiversity resources or cultural resources, such as [the] Bonn Convention, Ramsar Convention, World Heritage Convention and Convention on Biological Diversity’.⁹⁷

According to the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), parties that are ‘range states’ of a migratory species listed in Appendix I shall in principle prohibit the taking of animals belonging to such species.⁹⁸ Parties that are range states of migratory species listed in Appendix II shall endeavour to conclude agreements ‘where these should benefit the species and should give priority to those species in an unfavourable conservation status’.⁹⁹ As at March 2022, there are 133 parties to the Bonn Convention;¹⁰⁰ currently, 23 AIIB members are not party to this Convention.

The Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) requires its parties to designate suitable wetlands within their territories for inclusion in the List of Wetlands of International Importance

⁸⁹ *Ibid.*, Art. II(1).

⁹⁰ *Ibid.*, Art. II(2).

⁹¹ *Ibid.*, Art. II(3).

⁹² *Ibid.*, Arts III, IV and V.

⁹³ CITES, ‘List of Parties to the Convention’, available at: <https://cites.org/eng/disc/parties/index.php>.

⁹⁴ AIIB ESF, n. 5 above, ESEL, para. 4.

⁹⁵ Basel (Switzerland), 22 Mar. 1989, in force 5 May 1992, Arts 1, 3 and 4, available at: <https://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

⁹⁶ Basel Convention, ‘Parties to the Convention’, available at: <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>.

⁹⁷ AIIB ESF, n. 5 above, ESEL, para. 10.

⁹⁸ Bonn (West Germany), 23 June 1979, in force 1 Nov. 1983, Art. III(5), available at: https://www.cms.int/sites/default/files/instrument/CMS-text-en_PDF.

⁹⁹ *Ibid.*, Art. IV(3).

¹⁰⁰ CMS, ‘Parties and Range States’, available at: <http://www.cms.int/en/parties-range-states>.

(Ramsar List).¹⁰¹ They are also required to promote the conservation and wise use of wetlands, whether or not they are on the Ramsar List.¹⁰² As at March 2022, there are 172 parties to the Ramsar Convention;¹⁰³ currently, 11 AIIB members are not party to this Convention.

According to the Convention concerning the Protection of the World Cultural and Natural Heritage (WHC), for a cultural or natural property to be included in the World Heritage List (WHL) it should be of outstanding universal value.¹⁰⁴ The parties are required to take effective and active measures to protect, conserve and present the cultural and natural heritage in their territories.¹⁰⁵ They must also submit an inventory of property they consider to be of cultural and natural heritage value to the World Heritage Committee, which considers the properties on the parties' tentative lists and decides which properties should be added to the WHL.¹⁰⁶ As at March 2022, there are 194 parties to the WHC;¹⁰⁷ currently, only one AIIB member is not party to the Convention.

Finally, according to the Convention on Biological Diversity (CBD), the parties are required to develop national strategies, plans and programmes for the conservation and sustainable use of biological diversity.¹⁰⁸ They must also consider the conservation and sustainable use of biological resources in their national decision making. Measures relating to the use of biological resources are to be adopted to avoid or minimize adverse impacts on biological diversity.¹⁰⁹ Moreover, the parties must ensure that significant adverse effects or impacts on biological diversity are identified and addressed in their proposed projects, programmes and policies through appropriate procedures and arrangements.¹¹⁰ As at March 2022, there are 196 parties to the CBD;¹¹¹ currently, only one AIIB member is not party to the Convention.

In sum, extensive references in the ESEL to those widely accepted MEAs have indirectly imposed obligations on the AIIB, which was not a signatory to any of these MEAs, in being required to consider these treaties when supporting projects. This may also contribute to the fulfilment of MEA obligations by both public and private sector clients. In other words, this has extended the application of interstate obligations in MEAs to AIIB clients in conducting project activities. This is particularly important

¹⁰¹ Ramsar (Iran), 2 Feb. 1971, in force 21 Dec. 1975, Art. 2(2), available at: https://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf.

¹⁰² *Ibid.*, Art. 3(1).

¹⁰³ 'Contracting Parties to the Ramsar Convention', available at: http://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf.

¹⁰⁴ Paris (France), 16 Nov. 1972, in force 17 Dec. 1975, Arts 1 and 2, available at: <https://whc.unesco.org/en/conventiontext>.

¹⁰⁵ *Ibid.*, Art. 5.

¹⁰⁶ *Ibid.*, Arts 11(1) and 11(2).

¹⁰⁷ World Heritage Convention, 'States Parties', available at: <http://whc.unesco.org/en/statesparties>.

¹⁰⁸ Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, Art. 6, available at: <https://www.cbd.int/doc/legal/cbd-en.pdf>.

¹⁰⁹ *Ibid.*, Arts 10(1)(a) and 10(1)(b).

¹¹⁰ *Ibid.*, Art. 14(1).

¹¹¹ CBD, 'List of Parties', available at: <https://www.cbd.int/information/parties.shtml>.

Table 1 Non-Party AIIB Members of MEAs

MEA	Non-Party AIIB Members
Rotterdam Convention	Azerbaijan, Bangladesh, Belarus, Brunei Darussalam, Egypt, Fiji, Hong Kong, Iceland, Myanmar, Timor-Leste, Uzbekistan
POPs Convention	Hong Kong, Timor-Leste
Montreal Protocol	Hong Kong
CITES	Cook Islands, Hong Kong, Timor-Leste
Basel Convention	Fiji, Hong Kong, Timor-Leste
Bonn Convention	Azerbaijan, Brunei Darussalam, Cambodia, Canada, China, Hong Kong, Iceland, Indonesia, Lao PDR, Malaysia, Myanmar, Nepal, Oman, Qatar, Russia, Singapore, Sudan, Thailand, Timor-Leste, Tonga, Turkey, Vanuatu, Vietnam
Ramsar Convention	Afghanistan, Brunei Darussalam, Cook Islands, Ethiopia, Hong Kong, Maldives, Qatar, Saudi Arabia, Singapore, Timor-Leste, Tonga
WHC	Hong Kong
CBD	Hong Kong

when neither the member in whose territory the project is located nor the home state of the private enterprise is a party to the MEA concerned.¹¹² Under such circumstances, MEAs essentially have been applied to non-contracting parties. Moreover, implementation of the ESEL would also require the AIIB to conduct a systematic survey of all relevant MEAs that the proposed project activities may involve in deciding if projects should be financed.

4. COMPARISON WITH OTHER SAFEGUARD POLICIES AND THEIR APPLICATION IN IAMs

A look into the relevant instruments in the AIIB ESF reveals their extensive references to MEAs. However, this has not been the only case on the international plane. Further examination of the safeguard policies adopted by other MDBs indicates that specific MEAs, or general terms such as ‘international environmental treaties and agreements’ or ‘applicable international environmental agreements’, have been referred to in varying degrees. Therefore, the AIIB ESF may have absorbed experiences from other MDBs. Meanwhile, however, the extent to which MEAs are adopted as the applicable rules to evaluate project compliance with relevant safeguard policies still depends on the willingness of respective IAMs in their investigations of complaints from the public.

This section compares the safeguard policies adopted by MDBs within the World Bank Group in specifying MEAs and the application of MEAs by relevant IAMs. The section firstly explores the relationship between MEAs and the safeguard policies of the IBRD/IDA and the IFC respectively. It then analyzes the extent to which the Inspection Panel and the CAO have considered relevant environmental issues in the light of MEAs. It is found that while MEAs have been incorporated into relevant

¹¹² E.g., China is not a party to the Bonn Convention. However, this does not preclude the Chinese government or its private enterprises from complying with relevant obligations under the Convention when the project supported by the AIIB is located in its territory.

safeguard policies, IAMs have taken differing attitudes towards examining project compliance with MEAs. Consequently, whether the AIIB can assume an active role of ensuring the application of MEAs will hinge on the operation of its IAM, which remains to be seen.

4.1. *The IBRD and IDA*

Operational Policies (OPs) and Bank Procedures (BPs)

OPs and BPs are the safeguard policies with which IBDR/IDA-supported projects must comply. They are also the substantive rules in the Inspection Panel's investigation process.¹¹³ The environment-related standards have been revised several times.¹¹⁴ The environmental issues addressed in current OPs and BPs include 'Environmental Assessment' (OP 4.01/BP 4.01), 'Environmental Action Plans' (OP 4.02/BP 4.02), 'Natural Habitats' (OP 4.04/BP 4.04), 'Pest Management' (OP 4.09), and 'Forests' (OP 4.36/BP 4.36).

Certain OPs refer to 'international environmental treaties and agreements' or 'applicable international environmental agreements'. OP 4.01, for example, states that an environmental assessment should consider 'obligations of the country, pertaining to project activities, under relevant *international environmental treaties and agreements*', and '[t]he Bank does not finance project activities that would contravene such country obligations, as identified during the [environmental assessment]'.¹¹⁵ Also, OP 4.36 states that '[t]he Bank does not finance projects that contravene *applicable international environmental agreements*'.¹¹⁶ In practice, these rules have become the basis for the Inspection Panel to examine project compliance with relevant MEA obligations, which will be discussed below.

The World Bank's newly adopted Environmental and Social Framework also refers to the borrower's obligations to comply with applicable treaty obligations in its Environmental and Social Standards (ESSs). For example, ESS1 ('Assessment and Management of Environmental and Social Risks and Impacts') states that the borrower should ensure that the environmental and social assessment of the project considers 'obligations of the country directly applicable to the project under relevant international treaties and agreements'.¹¹⁷

In addition, ESS3 ('Resource Efficiency and Pollution Prevention and Management') states that the borrower will comply with existing requirements for the management of hazardous wastes, which include 'applicable international conventions, including those relating to transboundary movement'.¹¹⁸ The borrower will also:

¹¹³ IBRD and IDA, World Bank Inspection Panel, Res. No. IBRD 93–10/IDA 93–6, 22 Sept. 1993, para. 12, available at: http://web.worldbank.org/archive/website01541/WEB/0_CO-91.HTM.

¹¹⁴ See T. Roessler, 'The World Bank's Lending Policy and Environmental Standards' (2000) 26(1) *North Carolina Journal of International Law and Commercial Regulation*, pp. 105–41, at 110–9.

¹¹⁵ OP 4.01, n. 30 above, para. 3 (emphasis added).

¹¹⁶ OP 4.36, n. 38 above, para. 6 (emphasis added).

¹¹⁷ World Bank ESF, n. 43 above, ESS1, para. 26.

¹¹⁸ *Ibid.*, ESS3, para. 18.

avoid the manufacture, trade and use of chemicals and hazardous materials subject to international bans, restrictions or phase-outs *unless for an acceptable purpose as defined by the conventions or protocols* or if an exemption has been obtained by the Borrower, *consistent with Borrower government commitments under the applicable international agreements*.¹¹⁹

Furthermore, according to ESS6 ('Biodiversity Conservation and Sustainable Management of Living Natural Resources'), the borrower must not implement any project activities which have potential adverse impacts in areas of critical habitat unless the relevant conditions are met, which include '[a]ll due process required under *international obligations* or national law that is a prerequisite to a country granting approval for project activities in or adjacent to a critical habitat has been complied with'.¹²⁰

World Bank Inspection Panel

The Inspection Panel process consists of two stages. At the eligibility stage, the Inspection Panel has to confirm that the complaint (the term 'request' is used in the Operating Procedures of the World Bank Inspection Panel) is eligible.¹²¹ If it is eligible, the Inspection Panel will initially postpone its decision on registration of the complaint to offer additional opportunities for Bank management and the complainant to address the issues concerned.¹²² This optional approach is adopted on a case-by-case basis and depends on the willingness of Bank management and the complainant.¹²³ Following registration, Bank management will submit its response to the Inspection Panel, which will then decide whether to recommend a full investigation to the Board of Executive Directors.¹²⁴ The Board makes the final decision on whether to authorize an investigation.¹²⁵

At the investigation stage, the Inspection Panel examines whether the Bank's actions or omissions have been in serious violation of its safeguard policies during the design, appraisal, and implementation of Bank-financed projects. If non-compliance is found, Bank management submits to the Board its report and recommendations in response to the Inspection Panel's findings, which includes an action plan devised through consultation with the complainant and agreed between the Bank and the borrower.¹²⁶ The Board then makes the final decision on the remedial measures to be taken.¹²⁷

¹¹⁹ Ibid., ESS3, para. 19 (emphasis added).

¹²⁰ Ibid., ESS6, para. 24(4) (emphasis added).

¹²¹ To initiate the investigation, the complainant has to meet the requirements set out in the Operating Procedures of the World Bank Inspection Panel (revised Apr. 2014), para. 25, available at: <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf>.

¹²² Ibid., Annex 1, paras 2–3.

¹²³ Ibid., Annex 1, para. 3.

¹²⁴ Ibid., para. 43.

¹²⁵ Ibid., paras 49–50.

¹²⁶ Ibid., para. 68.

¹²⁷ Ibid., para. 71.

In practice, the Inspection Panel has actively examined project compliance with OPs and BPs in the light of MEAs. For example, the project, in a case concerning the Democratic Republic of Congo (DRC), involved, inter alia, the preparation of a forest zoning plan and the implementation of a new commercial forest concession system.¹²⁸ The complainants contended that the forest-related reform activities had breached relevant safeguard policies and resulted in harm to the forests where Indigenous peoples lived and on which they relied for their livelihood.¹²⁹

The Inspection Panel found that the DRC had obligations under the WHC and CITES, to both of which the DRC was party.¹³⁰ As for the WHC, one of the borrower's natural sites, which was included in the List of World Heritage in Danger, appeared to be adjacent to areas held by concessions.¹³¹ As for CITES, there were high-value species of timber listed in its Appendix II and subject to export control.¹³² The Inspection Panel indicated that the project's environmental assessment should have evaluated the potential implications of the project for the World Heritage sites and CITES-listed species.¹³³

The project in the *Albania: Power Sector Generation and Restructuring Project* case involved the construction of a thermal power station. The complainants maintained, inter alia, that no adequate public consultation had been held during project preparation.¹³⁴ They claimed, in particular, that a complaint had been submitted to the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)¹³⁵ regarding the borrower's non-compliance with its obligations relevant to project activities under that Convention. The Aarhus Compliance Committee had also found violations of the Convention.¹³⁶

The Inspection Panel in this case firstly confirmed that the conclusions reached by the Aarhus Compliance Committee were relevant to the investigation.¹³⁷ It further cited the analysis of the Committee extensively.¹³⁸ The Inspection Panel emphasized that, according to the Bank's policy on environmental assessment (OP 4.01), the Bank does not finance project activities that would contravene the borrower's obligations under international environmental treaties and agreements. Because the Bank

¹²⁸ Inspection Panel, *Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920–DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824–DRC and Grant No. H 064–DRC)*, Investigation Report No. 40746-ZR, 31 Aug. 2007, pp. 5–10.

¹²⁹ *Ibid.*, Request for Inspection, 30 Oct. 2005.

¹³⁰ *Ibid.*, Investigation Report, p. 93.

¹³¹ *Ibid.*, pp. 93–4.

¹³² *Ibid.*, pp. 94–5.

¹³³ *Ibid.*, p. 95.

¹³⁴ Inspection Panel, *Albania: Power Sector Generation and Restructuring Project (IDA Credit No. 3872–ALB)*, Investigation Report No. 49504-AL, 7 Aug. 2009, p. 71.

¹³⁵ Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/treatytext.html>.

¹³⁶ Inspection Panel (*Albania*), n. 134 above, p. 72.

¹³⁷ *Ibid.*, pp. 76–7.

¹³⁸ *Ibid.*, pp. 78–9.

did not ensure the borrower's compliance with its obligations under the Aarhus Convention, the Inspection Panel ruled that the project had breached OP 4.01.¹³⁹

The *Pakistan: National Drainage Program Project* case involved the construction of a drainage system to resolve waterlogging and salinity problems in the existing irrigation system.¹⁴⁰ The complainants argued, inter alia, that the failure of the project had caused significant damage to the wetlands. In particular, two of the wetlands were included in the List of Wetlands of International Importance under the Ramsar Convention, to which Pakistan was a party. They contended that the party was under an obligation to ensure the wise use and conservation of wetlands under the Ramsar Convention. Moreover, the Bank should not finance projects that would contravene the borrower's international environmental obligations.¹⁴¹

The Inspection Panel noted the objectives of the Ramsar Convention as well as the obligations of the parties to designate wetlands within their territories to be included in the Ramsar List and promote the conservation of wetlands in the List.¹⁴² It found that significant negative impacts arising from the failure of the project on the Ramsar-listed wetlands constituted a 'significant conversion or degradation' within the meaning of the Bank policy on natural habitats (OP 4.04).¹⁴³ The Inspection Panel said that 'these Ramsar-listed sites are the type of critical natural habitat that Bank policy promises not to significantly convert or degrade'.¹⁴⁴

The project in the *Cambodia: Forest Concession Management and Control Pilot Project* case involved the establishment of a regulatory framework for forest concession operations. The complainant argued that the flawed project design and implementation had benefited the logging companies with track records of human rights abuses and illegal logging. The forest-dependent communities had suffered and will continue to suffer harm from the project.¹⁴⁵ In particular, the complainants alleged that the project did not comply with Bank policy on forests (OP 4.36).¹⁴⁶ They also contended that the project's environmental assessment should have identified forests of high ecological value (the Prey Long forest). By allowing logging in high ecological value areas, the Bank had failed to observe its own policy on forests.¹⁴⁷

As contended by the complainants, the Inspection Panel held that forests of high ecological value, especially the Prey Long forest, should have been identified.¹⁴⁸ It also found that the forest was included in the tentative list for World Heritage consideration

¹³⁹ Ibid., p. 79.

¹⁴⁰ Inspection Panel, *Pakistan: National Drainage Program Project* (Credit No. 2999–PAK), Investigation Report No. 36382-PK, 6 July 2006, Ch. 2.

¹⁴¹ Ibid., Request for Inspection, 9 Sept. 2004, pp. 16–7.

¹⁴² Ibid., Investigation Report, p. 82.

¹⁴³ Ibid., pp. 82–6.

¹⁴⁴ Ibid., p. 86.

¹⁴⁵ Inspection Panel, *Cambodia: Forest Concession Management and Control Pilot Project*, Investigation Report No. 35556, 30 Mar. 2006, pp. ix–xii.

¹⁴⁶ Ibid., pp. 44–5.

¹⁴⁷ Ibid., p. 48.

¹⁴⁸ Ibid., pp. 48–9.

for Cambodia.¹⁴⁹ By referring to its status under the World Heritage tentative list, the Inspection Panel designated the Prey Long forest as a ‘forest of high ecological value’ under the Bank policy on forests.¹⁵⁰ As the Bank did not identify the high ecological value of the forest during the design and implementation of the project, the Panel concluded that the project failed to observe Bank policy on forests.¹⁵¹

4.2. *The IFC*

IFC Sustainability Framework

Among the above-mentioned instruments in the IFC Sustainability Framework of 2012, the Performance Standards are of particular relevance to the discussion. There are eight Performance Standards. Performance Standard 1 (‘Assessment and Management of Environmental and Social Risks and Impacts’) applies to all IFC-supported projects. It sets out the requirements for the client’s assessment and management of environmental and social risks and impacts. Performance Standards 2 to 8 outline the requirements for the client to avoid, minimize or compensate and/or offset risks to and impacts on specific issues. The environmental issues addressed include ‘Resource Efficiency and Pollution Prevention’ (Performance Standard 3), and ‘Biodiversity Conservation and Sustainable Management of Living Natural Resources’ (Performance Standard 6).

Several paragraphs in the Performance Standards refer specifically to international law (including MEAs). For example, the Performance Standards state in their overview that ‘[i]n addition to meeting the requirements under the Performance Standards, clients must comply with applicable national law, including those laws implementing host country obligations under international law’.¹⁵²

In addition, the application of Performance Standards 3 and 6 is closely related to MEAs. For example, when it comes to pollution prevention, Performance Standard 3 requires the client to avoid, minimize and/or control the release of pollutants to air, water and land use with the potential for local, regional, and transboundary impacts.¹⁵³ Transboundary pollutants include those identified in the Convention on Long-Range Transboundary Air Pollution (CLRTAP).¹⁵⁴ With regard to the transboundary movement of hazardous materials, Performance Standard 3 states that the client (i) should adopt good international industrial practice alternatives for its environmentally sound disposal, and (ii) should comply with national, regional and international law, including the Basel Convention and the London Convention on the

¹⁴⁹ *Ibid.*, p. 49.

¹⁵⁰ *Ibid.*, p. 50. According to OP 4.36 issued in 1993, which was applicable to the project, ‘[i]n forest areas of high ecological value, the Bank finances only preservation and light, non-extractive use of forest resources’; see Shihata, n. 26 above, p. 392.

¹⁵¹ Inspection Panel (*Cambodia*), n. 145 above, p. 51.

¹⁵² IFC, n. 47 above, Overview of the Performance Standards, para. 5.

¹⁵³ *Ibid.*, Performance Standard 3, para. 10.

¹⁵⁴ *Ibid.*; CLRTAP, Geneva (Switzerland), 13 Nov. 1979, in force 16 Mar. 1983, available at: <https://unece.org/sites/default/files/2021-05/1979%20CLRTAP.e.pdf>.

Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).¹⁵⁵ As for the management of hazardous materials, the client should avoid the manufacture, trade, and use of chemicals and hazardous materials that are subject to international prohibitions or phase-out pursuant to the objectives of the POPs Convention, the Montreal Protocol, and certain World Health Organization classes of pesticides.¹⁵⁶

According to Performance Standard 6, the requirements set out in the standard have been guided by the CBD.¹⁵⁷ This Performance Standard requires the client to consider project-related impacts on biodiversity and ecosystem services in the risks and impacts identification process.¹⁵⁸ The client should also seek to avoid impacts, or adopt measures to minimize impacts, and restore biodiversity and ecosystem services.¹⁵⁹ With regard to biodiversity protection and conservation, various types of habitat and area – such as ‘modified habitat’,¹⁶⁰ ‘natural habitat’,¹⁶¹ ‘critical habitat’,¹⁶² and ‘legally protected and internationally recognized areas’¹⁶³ – are subject to different requirements. Among others, ‘internationally recognized areas’ are defined exclusively as UN Educational, Scientific and Cultural Organization (UNESCO) Natural World Heritage Sites, UNESCO Man and the Biosphere Reserves, the International Union for the Conservation of Nature Key Biodiversity Areas, and wetlands designated under the Ramsar Convention.¹⁶⁴ Obviously, MEAs are adopted under Performance Standard 6 either as guidance in formulating the requirements with which the client should comply or in assigning areas as specific types of area.

Compliance Advisor Ombudsman

The CAO has three distinct functions: dispute resolution, compliance, and advisory. Its dispute resolution and compliance mandates are designed as responses to environmental and social issues arising from IFC projects.¹⁶⁵ After receiving a complaint, the CAO will ascertain whether it is eligible for assessment.¹⁶⁶ If the complaint is eligible, the CAO will conduct an assessment to decide its role in addressing the case. The complaint may proceed to CAO-facilitated dispute resolution if the IFC client and the complainant agree to seek a joint resolution to the issues raised in the complaint. The CAO will then

¹⁵⁵ London (United Kingdom), 13 Nov. 1972, in force 30 Aug. 1975, available at: <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/LC1972.pdf>. See IFC, n. 47 above, Performance Standard 3, para. 12 and its accompanying footnote.

¹⁵⁶ *Ibid.*, para 13.

¹⁵⁷ *Ibid.*, Performance Standard 6, para. 1.

¹⁵⁸ *Ibid.*, para. 6.

¹⁵⁹ *Ibid.*, para. 7.

¹⁶⁰ *Ibid.*, paras 11–2.

¹⁶¹ *Ibid.*, paras 13–5.

¹⁶² *Ibid.*, paras 16–9.

¹⁶³ *Ibid.*, para. 20.

¹⁶⁴ *Ibid.*, para. 20 and its accompanying footnote.

¹⁶⁵ CAO, Operational Guidelines, Mar. 2013, para. 1.2, available at: https://www.cao-ombudsman.org/sites/default/files/downloads/CAOOperationalGuidelines2013_ENGLISH_0.pdf.

¹⁶⁶ *Ibid.*, para. 2.2.1.

facilitate a mutually agreed process to address the matter.¹⁶⁷ In this process the CAO seeks to reach a mutually satisfactory solution to issues relating to environmental and social impacts of the project without conducting a formal investigation.¹⁶⁸

The CAO's compliance function focuses on non-compliance and the CAO may decide whether the project has complied with applicable rules. The compliance process is triggered when one or more of the parties decide to pursue a compliance appraisal.¹⁶⁹ Alternatively, the case will be transferred to the compliance process when the CAO considers it unlikely that the complaint will be resolved through dispute resolution, or when dispute resolution is deemed an inefficient use of resources. A compliance appraisal then follows to decide whether an investigation is warranted.¹⁷⁰

The compliance process involves two stages. At the compliance appraisal stage, the CAO must ensure that its compliance investigation takes place only for projects that involve substantial concerns relating to environmental or social outcomes, or issues of systemic importance to the IFC.¹⁷¹ A compliance investigation is initiated if the relevant criteria are met.¹⁷² At the compliance investigation stage, the CAO reviews whether (i) the actual environmental and/or social outcomes conform to the desired effect of the policy provisions; and (ii) the failure to address such issues has resulted in outcomes that are contrary to the desired effect of the policy provisions.¹⁷³ If the project is found to be in non-compliance, the CAO keeps the investigation open and monitors the situation. Only when actions taken by the IFC assure the CAO that the IFC is addressing the non-compliance situation is the process closed.¹⁷⁴

In contrast to the Inspection Panel where MEA obligations have frequently been examined, the CAO has made no reference to MEAs in its compliance investigations. This was despite the fact that the CAO Operational Guidelines note that its compliance investigation criteria 'may have their origin, or arise from ... host country legal and regulatory requirements (*including international legal obligations*)'.¹⁷⁵

In the *Uruguay: Celulosas de M'Bopigua (CMB) & Orion-01/Argentina & Uruguay* case, for example, a complaint was brought against the construction of pulp mills. The complainant argued, inter alia, that the increased emission of dioxins from the proposed project would be contrary to Uruguay's commitment under the POPs Convention. Despite this fact, the project's environmental assessment did not address this issue.¹⁷⁶ The CAO did not respond to this argument in its investigation.¹⁷⁷

¹⁶⁷ Ibid., para. 2.3.

¹⁶⁸ Ibid., paras 3.1 and 3.2.1.

¹⁶⁹ Ibid., paras 2.3 and 2.4.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid., para. 4.2.1.

¹⁷³ Ibid., para. 4.4.2.

¹⁷⁴ Ibid., para. 4.4.6.

¹⁷⁵ Ibid., para. 4.3 (emphasis added).

¹⁷⁶ CAO, *Uruguay: Celulosas de M'Bopigua (CMB) & Orion-01/Argentina & Uruguay*, Complaint, 1 Sept. 2005, p. 10.

¹⁷⁷ The applicable rules in this case are the IFC Procedure for Environmental and Social Review of Projects of 1998, OP 4.01 Policy on Environmental Assessment (EA) of 1998, and the Policy on Disclosure of

Similarly, in the *Colombia: Eco Oro-01/Bucaramanga* case, a complaint was brought against the development of a mining project. The complainants maintained, inter alia, that the IFC had failed to ensure that the client complied with its obligations under Performance Standard 6, which required that the project should not be conducted in critical habitats. They claimed that there were at least six endangered fauna species under CITES in the project area.¹⁷⁸ The complainants also argued that Colombia had made commitments to conserve the ecosystem concerned under several treaties, such as the UN Framework Convention on Climate Change,¹⁷⁹ the CBD, and the Ramsar Convention.¹⁸⁰ However, the CAO ignored these arguments.¹⁸¹

Once again, in the *Mozambique: Mozal-01/Matola and Maputo* case, a complaint was brought in respect of the construction and operation of an aluminum smelter. The complainants stated that many requirements under Performance Standard 1 had been breached.¹⁸² Among others, the host country's domestic and international human rights obligations, including the right to a decent environment, had not been considered. The complainants claimed that the right to a decent environment had been recognized by the Mozambique Constitution and should be interpreted in the light of the Universal Declaration of Human Rights¹⁸³ and the African Charter on Human and Peoples' Rights.¹⁸⁴ However, the CAO did not address this argument in its entirety.¹⁸⁵

Thus, explicit references to MEAs in MDB safeguard policies may be necessary but not sufficient to promote the fulfilment of these treaty obligations. With the lack of any requirement that IAMs must respond to each of the complainant's arguments, which may include alleged breaches of MEAs, much may hinge on the institutional culture of IAMs in examining project compliance with treaty obligations. In other words, extensive references to MEAs in the safeguard policies do not necessarily guarantee better

Information. In addition to OP 4.01, which states that an EA should take into account 'obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements', the IFC 1998 Procedure for Environmental and Social Review of Projects also provides in the relevant part that the 'IFC does not finance project activities that would contravene country obligations under relevant international environmental treaties and agreements as identified during the EA'.

¹⁷⁸ CAO, *Colombia: Eco Oro-01/Bucaramanga*, Complaint to the CAO, 13 June 2012, pp. 24–5.

¹⁷⁹ New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

¹⁸⁰ CAO (*Colombia*), n. 178 above, pp. 25–6.

¹⁸¹ The IFC Sustainability Framework of 2006 was applied in this case. The MEAs referred to in the IFC Performance Standards of 2012 were all invoked in the IFC 2006 Sustainability Framework (i.e., Performance Standards 3 and 6) except the London Convention, the WHC, and the Ramsar Convention. The Performance Standards also provide in their overview that '[i]n addition to meeting the requirements under the Performance Standards, clients must comply with applicable laws, including those laws implementing host country obligations under international law'.

¹⁸² CAO, *Mozambique: Mozal-01/Matola and Maputo*, Complaint, 1 Oct. 2010, pp. 4–5.

¹⁸³ Paris (France), 10 Dec. 1948, UNGA Res. 217A (III), UN Doc. A/810, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

¹⁸⁴ Nairobi (Kenya), 27 June 1981, in force 21 Oct. 1986, available at: <https://www.achpr.org/legalinstruments/detail?id=49>. See CAO (*Mozambique*), n. 182 above, p. 4.

¹⁸⁵ The IFC Sustainability Framework of 2006 was applied in this case.

observance of environmental treaty obligations by MDBs and their borrowers during project activities.

According to the AIIB AoA, the Board of Directors is authorized to institute a mechanism for supervising the AIIB's management and operation on a regular basis.¹⁸⁶ In the AIIB ESF, the ESP also indicates that '[p]eople who believe they have been or are likely to be adversely affected by a failure of the Bank to implement the ESP may submit complaints to the Bank's PPM in accordance with the Policy on the PPM'.¹⁸⁷ The Project-affected People's Mechanism (PPM) was eventually approved by the AIIB Board of Directors in December 2018¹⁸⁸ and the mechanism entered into operation on 31 March 2019.¹⁸⁹ As at March 2022, the PPM has not registered any eligible complaints. The extent to which the AIIB will translate its MEAs into practice will depend on the operation of the PPM, which may take some years to become clear.

5. CONCLUSION

Development finance brings economic growth to recipient states. At the same time, this finance, and the projects it enables, can have potentially negative environmental and social impacts. The priority for MDBs, therefore, is to make financial support available to borrowers, while reducing adverse impacts arising from their lending operations. Most MDBs have thus adopted safeguard policies to address issues related to project finance activities. MDBs should refrain from financing projects that are contrary to their safeguard policies, and ensure that their borrowers conform to these environmental and social standards throughout the project cycle.

Meanwhile, the creation of IAMs is a significant development in holding MDBs to account for the way in which they exercise their powers in international law. IAMs receive private complaints about negative impacts arising from MDB-supported projects. This provides opportunities for those affected by development projects to raise their concerns and seek remedies to redress ill-designed or poorly implemented projects. The safeguard policies also become the substantive standards in assessing the legitimacy of MDB lending operations. From this perspective, IAMs are crucial in securing the quality of development projects and promoting sustainable finance.

A special relationship exists between MDB-supported development finance and MEAs, and this relationship deserves scholarly attention. This includes the potential role played by MDBs in enhancing compliance with environmental treaty obligations pertinent to the project. Because MDBs are created by states, members of MDBs are under an obligation to ensure the observance of their obligations under MEAs to which they are parties during project activities. MDBs should also prompt members and assist them in fulfilling their environmental commitments in their lending

¹⁸⁶ AIIB AoA, n. 4 above, Art. 26(iv).

¹⁸⁷ AIIB ESF, n. 5 above, ESP, para. 72.

¹⁸⁸ AIIB, 'Policy on the Project-affected People's Mechanism', 7 Dec. 2018, available at: https://www.aiib.org/en/policies-strategies/_download/project-affected/PPM-policy.pdf.

¹⁸⁹ AIIB, 'How We Assist You', available at: <https://www.aiib.org/en/about-aiib/who-we-are/project-affected-peoples-mechanism/how-we-assist-you/index.html>.

operations. Although MDBs are not parties to MEAs and do not bear any obligation arising from them,¹⁹⁰ to the extent that MDBs explicitly undertake the environmental commitments and voluntarily assume roles under MEAs in the relevant documents, they are expected to ensure their fulfilment in their lending operations.¹⁹¹

The importance of ensuring that the requirements of environmental protection are integrated into the planning and implementation of national and international activities has been emphasized in the Draft Global Pact for the Environment.¹⁹² In the context of development finance, these requirements should include MEA obligations committed to by states as well as voluntary commitments made by MDBs in respect of MEAs. In addition, a report prepared by the UN Secretary-General in 2018 indicates that the lack of effective implementation of MEAs has been a major gap in tackling environmental challenges.¹⁹³ It also notes that effective implementation of international environmental law could be enhanced through ‘robust compliance and enforcement procedures and mechanisms’.¹⁹⁴ In this respect IAMs could potentially strengthen the obligatory nature of MEAs in the course of project finance activities through their investigatory function.

Moreover, ‘Stockholm+50’ will be held in June 2022.¹⁹⁵ This international meeting includes several Leadership Dialogues, of which Leadership Dialogue 3 will focus on ‘multi-level governance, institutions, multilateral frameworks, and commitments highlighting accountability, accessibility, and incentives necessary to go from commitment to action’.¹⁹⁶ This presents an opportunity to address the issue of MDB accountability in the light of MEAs and reflect these discussions in the outcome document.

Legal scholarship has discussed the AIIB from different perspectives. However, the AIIB’s approach to environmental and social issues has not been fully explored. This article has analyzed the relationship between the safeguard policies of the AIIB (AIIB ESF) and MEAs. It has also compared the practices of various IAMs in examining environmental issues in the light of MEAs, and it has indicated the significance of the AIIB PPM in monitoring and promoting compliance with MEA obligations. The primary conclusion is that while the AIIB ESF does send a signal that the AIIB is willing

¹⁹⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 Mar. 1986, available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf, Art. 34 of which provides that ‘[a] treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization’.

¹⁹¹ Handl, n. 14 above, pp. 658–62.

¹⁹² Draft Global Pact for the Environment, available at: <https://globalpactenvironment.org/uploads/EN.pdf>.

¹⁹³ UNGA Res. A/73/419, ‘Report of the Secretary-General – Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment’, 30 Nov. 2018, UN Doc. A/73/419, p. 36, available at: <https://undocs.org/en/A/73/419>.

¹⁹⁴ *Ibid.*, p. 45.

¹⁹⁵ UNGA Res. A/RES/75/280, ‘International Meeting entitled “Stockholm+50: A Healthy Planet for the Prosperity of All – Our Responsibility, Our Prosperity”’, 24 May 2021, UN Doc. A/RES/75/280, available at: <https://undocs.org/en/A/RES/75/280>.

¹⁹⁶ UNEP, ‘Stockholm+50: A Healthy Planet for the Prosperity of All – Our Responsibility, Our Opportunity’, Thought Piece towards a Concept Note for the International Meeting, 2–3 June 2022, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/36939/STKLM50_HP.pdf?sequence=1&isAllowed=y.

to implement those widely accepted MEAs in its lending operations, the extent to which these environmental treaty obligations can be fulfilled depends on whether the PPM will examine project compliance with MEAs in its investigations. Future research should explore if and how MEAs will be applied and interpreted by the PPM, thereby promoting the role of the AIIB in sustainable finance.