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Prospects for the Respect and Promotion of Internationally Recognized Sustainable Development Practices: A Case Study of the World Bank Environmental Guidelines and Procedures

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ARTICLES

PROSPECTS FOR THE RESPECT AND PROMOTION OF INTERNATIONALLY RECOGNIZED SUSTAINABLE DEVELOPMENT PRACTICES: A CASE STUDY OF THE WORLD BANK ENVIRONMENTAL GUIDELINES AND PROCEDURES

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INTRODUCTION

Sustainable development links economic development with protection of the environment and human rights.¹ It starts with the premise that economic development is an indispensable pol-

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1. Intergenerational equity rights is one integral element of sustainable development. See text *infra* accompanying notes 28-30. See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS (1989); Daniel Callahan, *What Obligations Do We Have to Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS (E. Partridge ed., 1981); Anthony D'Amato, *Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT'L L. 190 (1990); Edith Brown Weiss, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990).

Also implicated are the rights of indigenous peoples. See Editorial, *Citizen Shell*, N.Y. TIMES, Mar. 31, 1997, at A14; see also Deborah Frazier, *Third World Supporters Rip Exploitation*, ROCKY MTN. NEWS, June 20, 1997, at 13S.

icy goal and a right,² but that such development must be “ecologically, economically, and socially sustainable.” At the United Nations Conference on Environment and Development (Rio Conference),³ the international community declared that “environmental protection . . . constitute[s] an integral part of the development process and cannot be considered in isolation from it.”⁴ The Brundtland Report of the World Commission on Environment and Development (WCED),⁵ further, officially recognized the critical implications for human rights in development decisions.⁶

Integrating sustainability principles with development has come to be viewed as an imperative rather than an aspiration. As noted by economist Michael E. Colby, developing countries in the 1980s came to recognize that they were compromising their own future development potential by adopting environmentally unsustainable development practices:

A vicious circle of poverty and ecological destruction has been set up, often as a direct result of ‘development,’ with a unifying theme of increasing marginalization of people and the land on which they live. Natural resources and ecological services are now becoming ‘scarcer,’ and so economic practice must incorporate them.⁷

Multilateral Financial Institutions (MFIs) involved in funding development projects have taken significant steps in recent years toward incorporating sustainable principles into their loaning guidelines and procedures.

2. See REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1, U.N. Sales No. E.73.II.A.14 (1973), princs. 1, 2 [hereinafter *Stockholm Declaration*].

3. See *Rio Declaration, United Nations Conference on Environment and Development* A/CONF.151/5/Rev.1, princ. 3 (1992) [hereinafter *Rio Declaration*].

4. *Id.* princ. 4.

5. WORLD COMM’N ENV’T & DEVEL. (WCED), *OUR COMMON FUTURE* (1987) [hereinafter *BRUNDTLAND REP.*].

6. *Id.* at 43; see also *Problems of the Human Environment*, G.A. Res. 2398 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218, para. 4, at 2-3 (1968).

7. See MICHAEL COLBY, WORLD BANK, *ENVIRONMENTAL MANAGEMENT IN DEVELOPMENT* 12 (1990).

This article examines the fundamental principles and implementation goals⁸ of sustainable development and the MFI response, specifically, the procedures and guidelines of the World Bank (the Bank).⁹ Part I formulates a working definition of sustainable development derived from scholarly interpretations and international community standards. Part II first extrapolates the Bank's internal definition of sustainable development and its environmental policy, and then proceeds with an examination of the Bank's potential for effective enforcement of sustainable development through its Inspection Panel.¹⁰ Part III analyzes the revised draft changes to the Bank's environmental assessment procedures. The article concludes with an evaluation of the World Bank's success in embracing and incorporating sustainable development goals.

I. DEFINING "SUSTAINABLE DEVELOPMENT"

Prior to the late 1960s, development goals were evaluated predominantly in economic terms, with little or no consideration of potential negative impacts on the environment.¹¹ Similarly, en-

8. *United Nations Conference on Environment and Development*, Agenda Item 21, U.N. Doc. A/CONF.151/PC/100/Add. 1 (1992) [hereinafter Agenda 21] (plan of action accompanying the *Rio Declaration*, *supra* note 3); *see also* AGENDA 21: EARTH'S ACTION PLAN (Nicholas A. Robinson ed., 1993).

9. The World Bank refers to the collective group of four institutions: the International Bank for Reconstruction and Development; the International Development Association; the International Finance Corporation; and the Multilateral Investment Guarantee Agency. The International Bank for Reconstruction and Development is the original member of the World Bank Group. *See* Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, *as amended* Dec. 16, 1965, 16 U.S.T. 1942, 2 U.N.T.S. 134.

10. *World Bank Inspection Panel*, Res. 93-10 (IDA Res. 93-6), Int'l Bank Reconstruction & Devel. Doc. SecM93-988 (Int'l Devel. Ass'n Doc. SecM93-313) (Sept. 22, 1993).

11. *See* COLBY, *supra* note 7. During this earlier period, "frontier economics" was the prevailing ideology for development:

At its most basic [frontier economics] treats nature as an infinite supply of physical resources (i.e., raw materials, energy, water, soil, and . . . air) to be used for human benefit, and as an infinite sink for the by-products of the development

vironmental regulation responded primarily to economic utility and commerce factors.¹² The sustainable development principle emerged, in large part, from changes in conception of the priorities and purposes of environmental regulation and its relation to development policy. It will therefore be useful briefly to review the evolution of international environmental regulation and development concepts in formulating a working definition of sustainable development.

The first major shift in priority and purpose of environmental regulation occurred during the 1950s and early '60s when the atomic age and the toxic materials released by nuclear bomb testing induced a move toward the establishment of safety standards and the assignment of legal liability for environmental harms.¹³ The late '60s and early '70s was another turning point,¹⁴

and consumption of these benefits, in the form of various types of pollution and ecological degradation.

Id. at 9 (citing Kenneth E. Boulding, *The Economics of the Coming Spaceship Earth*, in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY (Henry E. Jarrett ed., 1966)).

12. The first international agreement relating to the environment was the Convention for the Protection of Birds Useful to Agriculture, 1902, Paris, 30 Martens Menvlan Recueil (ser. 2) 686; 102 B.F.S.P. 969 (1902). Other early treaties which defined the priorities of the times include: United States-Mexico Convention Concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, 1906, UN Doc/St/Leg/Ser. 8/12, 34 Stat. 2953, 9 Bevans 924 (1902) (first treaty to address regulation of natural resources shared by two or more states); and Convention for the Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349 (first treaty to address the economic use of natural resources existing in a territory owned by no particular territory or state).

13. See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 677 (1993) [hereinafter Brown Weiss, *New World Order*]. Some early examples of multilateral treaties which address environmental harm from the atomic age include: Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1043, 276 U.N.T.S. 3; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251, 677; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Moscow, 1964, 14 U.S.T. 1313, 480 U.N.T.S. 43.

14. See Brown Weiss, *New World Order*, *supra* note 13, at 678.

witnessing the creation of domestic environmental regulatory bodies;¹⁵ a growing recognition among newly independent nations of a right to a clean and healthy environment;¹⁶ a multilateral declaration of intent to protect the global environment;¹⁷ and the institution of an international environmental body, the United Nations Environment Programme (UNEP).¹⁸

The General Assembly resolution calling for the first United Nations Conference on the Human Environment asserted, in 1968, that protecting the environment and respecting human rights were interrelated:

[Pollution and other environmental harms violate] the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries.¹⁹

The resulting document, the Stockholm Declaration,²⁰ in 1972, made this new integrated policy explicit in its Preamble:

Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that per-

15. The Council on Environmental Quality was created in 1971. See 40 C.F.R. § 1.1 (1991) (implementing Reorganization Plan No. 3 of 1970), *reprinted in* 5 U.S.C. app. at 1343 (1988); 40 C.F.R. § 1500 (1991).

16. Virtually all national constitutions adopted or revised since 1970 recognize an environmental right in one form or another. See ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 27 (1991).

17. See Stockholm Declaration, *supra* note 2.

A growing class of Environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organisations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

Id. pmbl.

18. UNEP was mandated to gather, disseminate and examine information relating to international environmental concerns. See *Institutional and Financial Arrangements for International Environmental Co-operation*, G.A. Res. 2997, U.N. GAOR, 27th Sess., Supp. No. 30, at 43, U.N. Doc. A/8730 (1972).

19. *Problems of the Human Environment*, *supra* note 6, para. 4, at 2-3.

20. Stockholm Declaration, *supra* note 2.

mits a life of dignity and well-being.²¹

The Brundtland Report,²² in 1987, took the culminating step to a fully integrated policy as it concluded that environmental protection, human rights and development practices are interdependent and interrelated:

A development path that is sustainable in a physical sense . . . cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. . . [which] implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.²³

The Brundtland Report succinctly defined sustainable development with respect to protecting the environment and rationally and equitably meeting the developmental needs of present and future generations.²⁴ Building upon the conclusions of the Brundtland Report, the Rio Declaration,²⁵ in 1992, expanded upon the definition of sustainable development and established an "Earth's Action Plan" in its accompanying "Agenda 21."²⁶

21. *Id.* pmb1.

22. BRUNDTLAND REP., *supra* note 5.

23. *See id.* at 43; *see also supra* note 1; *infra* text accompanying notes 28-30.

24. *Id.*

25. *See Rio Declaration, supra* note 3.

26. *See* AGENDA 21: EARTH'S ACTION PLAN, *supra* note 8. Broadly speaking, Agenda 21 is concerned principally with integrating environmental and developmental goals in all relevant activities throughout the United Nations system and within States parties' domestic legislation. *See id.*

Concurrent to the UN Conference on Environment and Development, the Commission on Sustainable Development (CSD) was formed for the purpose of promoting, monitoring and reviewing States parties' progress in implementing the principles of Agenda 21, the Program of Action of the 1992 Conference. Toward this end, the Commission engages in (a) promoting dialogue between the various United Nations organizations, non-governmental organizations and others in both private and government sectors; (b) making recommendations on "capacity-building programmes, information networks, task forces and other mechanisms for regional and subregional levels integration of environmental and developmental goals"; and (c) submitting reports to the General Assembly, through the Economic and Social Council on recommended means of implementing the integrated environmental and developmental goals. The CSD receives its information from member

Professor Philippe Sands has proposed that four distinct legal principles comprise the sustainable development paradigm:

- (a) equitable use;
- (b) intergenerational equity;
- (c) sustainable use; and
- (d) the integration of environmental concerns with development strategies.²⁷

“Equitable use” addresses the current exploitation of natural resources and calls for each nation to use no more than its fair share as a member of the global community.²⁸ “Intergenerational equity” adds the dimension of a generational time line to the conceptual natural resources “pie.” Intergenerational equity asks that the present generation preserve the environment and abstain from depleting natural resources to the point where future generations would have impaired use.²⁹ The principle of intergenerational equity was recognized in the Stockholm Declaration:

The natural resources of the earth . . . must be safeguarded for the benefit of present and future generations . . .³⁰

Agenda 21 of the Rio Declaration approaches the dual goals of equitable use and intergenerational equity from the perspective of production and consumption patterns worldwide. Chapter Four of Agenda 21 states:

[T]he major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries, which is a matter of grave concern, aggravating poverty and imbalances.³¹

governments, including periodic communications and reports, as well as from non-governmental organizations. See *Commission on Sustainable Development, Outline of a Multi-Year Thematic Programme of Work for the Commission*, U.N. Doc. E/CH.17/1993/2 (interpreting GAOR 47/191, para. 3). See also *Report of the Commission on Sustainable Development on Its First Session*, U.N. Doc. E/CN.17/1993/3/Add.1.

27. See Philippe Sands, *International Law in The Field of Sustainable Development: Emerging Legal Principles*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 58-62 (Winfried Lang ed., 1995).

28. *Id.* at 60.

29. *Id.* at 58-59.

30. Stockholm Declaration, *supra* note 2, princ. 2.

31. Agenda 21, *supra* note 8, ch. 4.3.

Agenda 21 proposes a three-point strategy to redress unsustainable production and consumption patterns:

- (a) Management-related activities;
- (b) Data and information;
- (c) International cooperation and coordination.³²

Before definite strategy conclusions can be drawn, comprehensive information gathering and analysis must be undertaken on present consumption and production patterns, as well as on conditions of economic growth, wealth and prosperity.³³ Furthermore, the implementation of any global strategy of sustainable production and consumption will, by definition, require international cooperation and coordination.³⁴

"Sustainable use," the third prong of the sustainable development paradigm, refers to a strategy of responsibly exploiting natural resources such that use will remain within the "carrying capacity of the environment,"³⁵ and within the bounds of renewability.³⁶ Sustainable use mandates the maintenance of natural resources at their current level, with no contraction of the *currently* existing resource stock.³⁷

These three preceding principles — equitable use, intergenerational equity, and sustainable use — support and merge into Professor Sands' fourth principle: the integration of environmental concerns with development strategies.³⁸

Thus, a working definition of the sustainable development principle, as recognized by the international community and legal scholars is:

32. *Id.* ch. 4.7-4.13.

33. *Id.* ch. 4.10-4.11.

34. *Id.* ch. 4.12-4.14.

35. See Sands, *supra* note 27, at 27; see also Agenda 21, *supra* note 8, ch. 4.11.

36. See International Convention for the Regulation of Whaling, Dec. 2, 1946, pmbl., 62 Stat. 1716, 161 U.N.T.S. 72, cited in Sands, *supra* note 27, at 59.

37. But see Ismail Serageldin & Andrew Steer, *Epilogue: Expanding the Capital Stock*, in MAKING DEVELOPMENT SUSTAINABLE: FROM CONCEPTS TO ACTION 30 (World Bank Environmentally Sustainable Development Occasional Paper Series No. 2, 1994) for an alternative approach to defining sustainable development. See also *infra* Part IIA.

38. See Sands *supra* note 27, at 61; see also *Rio Declaration*, *supra* note 3, princs. 2, 4.

- (1) a right to development,³⁹ that involves
- (2) the equitable use of resources among the nations, developed and developing,⁴⁰ and
- (3) the equitable use of resources across generations,⁴¹ consisting of,
- (4) sustainable use,⁴² and
- (5) the integration of environmental concerns with development strategies.⁴³

In sum, this means development that respects and preserves the environment such that current and future generations will have their fair and equitable share.

II. THE WORLD BANK AND SUSTAINABLE DEVELOPMENT

As mentioned in Part I, until relatively recently, MFIs did not make provisions for non-economic factors, such as environmental protection or human rights, in their lending decisions. In fact, they were seemingly prohibited from doing so. The Articles of Agreement of the World Bank, for example, make explicit the requirement that only economic considerations shall be evaluated in loan-making decisions:⁴⁴

The 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 members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially to achieve the purpose [of the World Bank]⁴⁵

39. *Rio Declaration*, *supra* note 3, princ. 3; *see also Problems of the Human Environment*, *supra* note 6, para. 4; *Stockholm Declaration*, *supra* note 2, pmb.

40. *See BRUNDTLAND REP.*, *supra* note 5, at 43; *Rio Declaration*, *supra* note 3, princ. 5-12; *Sands*, *supra* note 27, at 60.

41. *See BRUNDTLAND REP.*, *supra* note 5, at 43; *Rio Declaration*, *supra* note 3, princ. 3; *Sands*, *supra* note 27, at 58-59.

42. *Rio Declaration*, *supra* note 3, princ. 11; *Agenda 21*, *supra* note 8, ch. 4.11; *Sands*, *supra* note 27, at 59.

43. *Sands*, *supra* note 27, at 58-62.

44. *See Gunther Handl, Sustainable Development: General Rules versus Specific Obligations*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW*, *supra* note 27, at 41 (1995).

45. *Articles of Agreement of the Int'l Bank for Reconstruction and Development*, *supra* note 9, art. 5.

The concern of the World Bank's creators was to prevent political strong-arming by the wealthier nations that could occur if loans were made conditional on non-economic factors. However, while the Articles of Agreement of the World Bank may operate to preclude the attachment of environmental conditions to *loan-making decisions*, they are silent on the use of non-economic factors, including environmental standards, in the *structuring of loan projects*. It is at the planning, approval and execution phases of the projects that the loaning institution has great latitude in decision-making and can act as a major force in the advancement and implementation of environmentally sustainable development procedures.

As early as 1970, in fact, the World Bank, under the presidency of Robert McNamara, was the first MFI to create a full-time environmental review office: the Permanent Environmental Advisor. Despite this bold effort at reform, the Bank's record in advancing environmentally responsible development throughout the 1970s and '80s was abysmal, as it funded large-scale projects which resulted in negative and even irreversible impacts on the environment.⁴⁶ The past decade has seen significant structural reform in World Bank policies and in the structuring of decision-making processes and evaluation methods, including the adoption of an environmental operational directive in 1991,⁴⁷ the creation of the World Bank Inspection Panel in 1993,⁴⁸ and, most recently, the ongoing revision of the environmental operational procedures.⁴⁹

However, the potential for the Bank to implement sustainable development practices is hindered by three principle factors:

(a) the Bank's interpretation of the meaning of sustainable development;

46. See generally 50 YEARS IS ENOUGH, U.S. CAMPAIGN ANNUAL REPORT (1994). For case evaluations on environmentally harmful loan decisions, see BRADFORD MORSE & T. BERGER, SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW (1992) and WORLD BANK, EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT, REPORT OF THE PORTFOLIO MANAGEMENT TASK FORCE (1992).

47. Operational Directive 4.01: Environmental Assessment (World Bank Operational Manual, Oct. 3, 1991) [hereinafter Operational Directive 4.01 (1991)].

48. See *World Bank Inspection Panel*, *supra* note 10; see also *infra* Part II.B.

49. See *infra* Part III.

(b) the capacity of the Inspection Panel to reach and uphold independent, transparent and accountable decision-making with the Bank's environmental procedures; and

(c) the degree of clarity and transparency in the Bank's environmental procedures themselves.

The extent to which Bank procedure and policy reforms will result in substantive environmentally sustainable development procedures is the subject of the following sub-sections.

A. *The World Bank's Definition of Sustainable Development*

The Bank's internal working definition of sustainable development appears to be modulated to suit, first and foremost, the economic priorities of the Bank as a lending institution, without satisfactorily integrating environmental and human rights concerns. The Bank's approach premises that four categories of capital exist, including: "[H]umanmade or 'fabricated' capital (machines, factories, buildings, and infrastructure), natural capital [natural resources] . . . human capital (investments in education, health and nutrition of individuals), and social capital (the institutional and cultural bases for a society to function)."⁵⁰ The Bank appears to view these four categories of capital stock as interchangeable elements in a policy of sustainability such that any one element may be traded for another without resulting in an overall reduction in sustainability among the four elements combined:

[The capital stock approach to sustainability] clearly enables us to set aside the simplistic view that sustainability requires leaving to the next generation exactly the same amount and composition of natural capital [natural resources] as we found ourselves, and to substitute a more promising concept of giving future generations the same, if not more, opportunities than we found ourselves. . . . This new paradigm immediately opens the door for *substituting one form of capital for another*.⁵¹

According to this model, therefore, a decrease in the "capital stock" of natural resources, such as clear-cutting an old growth forest, would be acceptable as long as it was accompanied by a proportional increase in the capital stock of fabricated capital,

50. Serageldin & Steer, *supra* note 37.

51. *Id.* (emphasis added).

such as the improvement of the infrastructure through the building of roads.

The Bank's extremely broad view of the sustainable development principle thus may lead to some profoundly environmentally unsustainable results and belies the spirit of the Stockholm⁵² and Rio Declarations.⁵³ As discussed *supra*, sustainable development does not mean a simple trade-off of environmental destruction for the sake of economic development. A trade-off would describe a transaction that exchanges one good for another and presumes an equivalent value for the set of goods on both sides of the trade. In notable contrast, sustainable development is an *integrated* principle — not the either-or choice of the construction of roads or power plants as substitutions for natural resources — but a principle of protection and preservation of natural resources themselves within the context of respect for human rights.

Thus, the Bank's internal definition of sustainable development immediately restricts the Bank's capacity for promoting internationally recognized sustainable development practices.

B. *The World Bank Inspection Panel*

The World Bank established, in 1991, environmental impact assessment standards as part of its lending procedures,⁵⁴ as well as a policy of promoting environmental sustainability in its development decisions.⁵⁵ Additionally, in an unprecedented move among

52. Stockholm Declaration, *supra* note 2.

53. Rio Declaration, *supra* note 3.

54. See Operational Directive 4.01 (1991), *supra* note 47. The creation of environmental impact assessment policies and procedures is a relatively recent occurrence among multilateral and regional development institutions. The Council of the European Communities was the first, in 1985, with its Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 27 June, 1985, which required all European Community member states to formulate environmental impact procedures. The World Bank adopted Operational Directive 4.01 in October of 1989, which established its environmental impact assessment procedures. The European Bank for Reconstruction and Development adopted environmental procedures in February, 1992. See CENTER FOR INT'L ENVTL. L. (CIEL), A COMPARISON OF EIGHT ENVIRONMENTAL IMPACT ASSESSMENT REGIMES (1995).

55. Including the European Bank for Reconstruction and Develop-

international lending institutions, the Bank created an Inspection Panel, in 1993, to further the goal of greater transparency of and accountability to its established procedures.⁵⁶ The Inspection Panel's ability to uphold sustainable development procedures, however, is impaired by its questionable independence from Bank control, loyalty issues, and the clarity and transparency of the newly revised Bank's environmental procedures.

The Inspection Panel was established as an independent forum to investigate complaints brought by "affected parties"⁵⁷ alleging a violation of rights or interests caused by the Bank's failure to follow its own operational procedures.⁵⁸ However, some specifications of the operational procedures of the Panel itself appear to conflict with the ostensible independence and goals of the Panel.

The procedural rules for nominating, appointing and removing the members of the Panel raise immediate questions of its actual independence. The Panel is composed of three members, nominated by the Bank president and appointed by the executive directors of Bank member countries.⁵⁹ Each member of the Panel is required to be of a different nationality.⁶⁰ The executive

ment, the European Bank for Reconstruction and Development and the Council of the European Communities.

56. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL* 8-9 (1995).

57. The Panel's procedures specify that the term "affected party" precludes a single individual complainant and includes "a community of persons such as an organization, association, society or other groupings of individuals." *World Bank Inspection Panel*, *supra* note 10, para. 12. The complaint must establish a causal link between an action or omission of the Bank resulting from a failure of the Bank to follow its own operational policies and procedures and an actual or likely injury to the rights or interests of the affected party. *See id.*

58. *Id.* paras. 1, 12. For an extensive discussion on the procedural history and framework of the World Bank Inspection panel written by a World Bank associate, see SHIHATA, *supra* note 56, ch. 2 (1995). For a review of the events leading up to the establishment of the Panel and the role that the Panel may play in advancing human rights and international law, see Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

59. *See World Bank Inspection Panel*, *supra* note 10, para. 2.

60. *Id.*

directors of the Bank can permanently remove a member of the Panel for cause.⁶¹

The requirement that the Panel members be of different nationalities is a positive step toward achieving diversity of backgrounds for the purpose of achieving culturally balanced decisionmaking. However, the Panel may benefit from additional background diversity requirements, such as limiting the number of members who are from developed countries to a maximum of two of the three, so that at least one and possibly even two members may be from developing countries during a given term. The Bank may also want to consider achieving a degree of gender balance among Panel members, particularly because a significant majority of the Bank's development projects impact disproportionately on women in developing countries.⁶² For example, adding to the rules of procedure a preference that at least one member should be a woman during each term would go a long way toward improving, or at least supporting, gender equity in Bank procedures and in Panel decisions.

The rule that the members of the Panel must come from Bank member countries seems a reasonable restriction despite a possible concern that a Panel member who comes from a member country may have a greater interest in finding in favor of the Bank. On the other hand, this potential conflict of interest seems to be a minor concern, and indeed, regardless of whether or not one comes from a member country, one could be just as likely to find in favor of the Bank either to maintain or to create a good relationship. Further, Panel procedures protect against a multitude of conflict of interest concerns, as they allow for the temporary disqualification of a specific Panel member from hearing or investigating a particular matter in which he or she has, or has had, a significant involvement, whether personal, profes-

61. *Id.* para. 8.

62. Women (and children) often make up the greatest number of impoverished and disenfranchised individuals. Additionally, sustainable development goals often involve a pivotal role for women. Principle 20 of the Rio Declaration asserts that: "Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development." *Rio Declaration, supra* note 3, princ. 20.

sional or otherwise.⁶³

A greater conflict of interest problem is raised, however, by the specification in paragraph ten of the operational procedures that "members of the Panel . . . shall be subject to the requirements of the Bank's Articles of Agreement concerning their exclusive loyalty to the Bank. . . ." ⁶⁴ Does this mean that the Panel shall be exclusively loyal to the Bank, in the narrow sense of loyalty to upholding the letter of the rules and procedures of the Bank? Or does this mean that the Panel must be exclusively and generally loyal to the Bank in the broad sense of promoting the best interests of the Bank as an institution, and if so, would it ever strictly be permissible to decide against the Bank and in favor of the complainants? Surely it is arguable that where the Bank has failed to uphold its own procedures, then a Panel decision against the actions or omissions of the Bank could work to the Bank's long-term benefit. It is also reasonable to deduce, however, that the short-term harm to the Bank's reputation, were the Panel to decide against the Bank, would violate, or at least compromise, the Panel's exclusive loyalty requirement to the Bank.

The stated independence of the Panel is strengthened by the procedural requirement that members of the Panel must not have served as executive directors, alternates, advisors or staff members of the Bank for two years before their appointment to the Panel.⁶⁵ The fact that service in the Bank and service on the Panel may not overlap, and furthermore, that a two-year period must pass separating the two, reduces the possibility of conflict of interest or interdependence between the Panel and the Bank.⁶⁶ The Bank, thereby, has made an effort to distinguish Bank service from the investigatory service of the Panel.

63. See *World Bank Inspection Panel*, *supra* note 10, para. 6.

64. *Id.* para. 10.

65. *Id.* para. 5.

66. This division may be compared to the United States' requirement that military persons must be decommissioned before serving in the legislative, executive or judicial branches of government, which thereby maintains a clear distinction between military and political service.

Greater concerns regarding the independence of the Panel do exist; the principal one is that it is the same body — the executive directors of the Bank — that both appoints the Panel members and can permanently remove them for cause.⁶⁷ A further concern is that this body, by its mandate, exists to preserve the policies of the World Bank. The Panel procedures do not expand upon what may constitute a “for cause” removal of a Panel member. It is conceivable that where a Panel member consistently finds against the Bank and in favor of the complainants and where his or her reasoning is deemed unsatisfactory by the executive directors, that such decision making or reasoning might constitute cause for removal. Thus, there exists a need for greater clarification on the causes for removal as well as the procedures for deciding upon removal. For example, must a decision to remove be taken as a majority vote of the executive directors, and may one member of the executive directors veto a decision to remove? May a Panel member be removed only where he or she acts in violation of established Bank procedures, but not merely against Bank policies? Without such clarifications, the independence of the Panel is questionable, and without independence, the stated purpose of the Panel is compromised.

III. THE WORLD BANK'S ENVIRONMENTAL PROCEDURES

The environmental procedures of the World Bank were formally established in October, 1991 in Operational Directive 4.01.⁶⁸ Presently, the Bank is in the process of reformatting and revising the Operational Directive (OD) for the stated purpose of “provid[ing] clearer guidance on the Bank’s policy to its staff.”⁶⁹ Operational Directive 4.01 is being reformatted into three separate writings: Operational Policy (OP), Bank Procedures (BP) and Good Practices (GP).⁷⁰ The OP and BP will be

67. See *World Bank Inspection Panel*, *supra* note 10, para 8.

68. Operational Directive 4.01 (1991), *supra* note 47.

69. Letter from Andrew Steer, Dir. World Bank Envtl. Dep’t, to David Hunter, Ctr. Int’l Envtl. L. (Nov. 3, 1995) (on file with *Fordham Envtl. L.J.*).

70. *Id.*

mandatory procedures, while the GP will be advisory only.⁷¹ The revised OP, BP and GP will serve as the guidelines according to which the World Bank Inspection Panel will decide upon allegations of violations resulting in environmental harm.

The Bank has been actively soliciting comments from representatives of nongovernmental organizations (NGOs) on these revisions. While the Bank's interest in feedback from NGOs is viewed as a positive move, concern is raised over the Bank's explicit restriction that comments should not address the substance of the procedures *de novo*, and should be "limited to whether the substance of the former policy withstood the conversion, and whether the various elements are correctly placed in the OP, BP and GP statements."⁷²

Moreover, the policy statements that formerly were sprinkled throughout the original text, and which provided clarity of purpose and guidance to the borrower in preparing the EA and in observing sustainable development practices, are notably absent in the revised draft. It might be hypothesized that perhaps the Bank is attempting to appear less paternalistic in choosing to use conclusory statements over policy remarks. Or perhaps the Bank has chosen to step aside from the role of policy standard-setter so as to avoid accountability issues that may arise where policy has been violated and where a complaint reaches the Inspection Panel. This latter explanation is supported by the Bank's decision to clarify, in numerous locations of the revised Draft, that preparation and follow-through of the EA is the responsibility of the borrower, not the Bank. Clearly, with the creation of the Inspection Panel, which did not exist as of the drafting of the original OD 4.01, the Bank theoretically exposes itself to being held accountable for statements in its Operational Directives, Operational Procedures or Operational Policy.

The proceeding sections compare and contrast OD 4.01⁷³ with the draft version of OP 4.01, BP 4.01 and GP 4.01,⁷⁴ using the

71. *Id.*

72. *Id.*

73. Operational Directive 4.01 (1991), *supra* note 47.

74. Draft OP 4.01: Environmental Assessment (World Bank, Oct. 1995) [hereinafter Draft OP 4.01 (1995)]. The structure of this comparison and analysis follows the division headings of the Operational Di-

headings of the original OD 4.01 as a frame of reference:

- (A) Purpose and Nature of Environmental Assessments (EAs);
- (B) Types of Environmental Analysis;
- (C) Institutional Aspects; and
- (D) EA Procedures.

The overall substantive environmental impact protections which the new procedures purport to advance also will be commented upon.

A. *Purpose and Nature of Environmental Assessments (EAs)*

Subsection 1 of the revised OP appears to sacrifice clarity as to the specific timing for preparing the EA. The revised version establishes that EAs are undertaken to improve decision making for projects that are *under consideration* for Bank financing,⁷⁵ but provides little additional detail as to when the EA should be undertaken. The revised procedures do state that "the Bank favors preventive measures over mitigatory or compensatory measures, whenever feasible,"⁷⁶ thereby reaffirming that the EA should be undertaken prior to the execution of the project, and that the "EA is initiated *as early as possible* in project processing and is integrated closely with the economic, financial, institutional, social, and engineering analyses of a proposed project."⁷⁷ The original OD 4.01, by contrast, specified that the "EA is carried out during project preparation, before appraisal, and is closely linked to the feasibility study,"⁷⁸ and further, that "[a]ll environmental consequences should be recognized early in the project cycle and taken into account in project selection, siting, planning, and design."⁷⁹ These statements in OD 4.01 were in keeping with international standards which establish that preliminary EA studies

rective 4.01 (1991), *supra* note 47, and also is founded, and expands upon a preliminary draft of suggested revisions to the World Bank Environmental Assessment Procedures, prepared by Dana Clark and David Hunter, Center for International Environmental Law (September, 1995) (on file with the *Fordham Envtl. L.J.*).

75. Draft OP 4.01 (1995), *supra* note 74, para. 1 (emphasis added).

76. *Id.* para. 2.

77. *Id.* para. 3 (emphasis added).

78. Operational Directive 4.01 (1991), *supra* note 47, para. 1.

79. *Id.* para. 2.

should be conducted at *the same time as* the feasibility study.⁸⁰

Clarity as well as transparency are significantly gained, however, regarding the scope of the EA through OP 4.01's expansive definition of the term "environmentally sound and sustainable": "Environmental concerns encompass the natural environment (air, water, and land); human ecology and health and safety; and sociocultural issues such as cultural heritage, indigenous peoples, new land settlement, involuntary resettlement, and induced development."⁸¹

OP 4.01 contains a direct, although not particularly specific, statement on the process by which the EA will advance the goal of sustainable development: "Natural and social conditions need to be considered in an integrated way."⁸² OD 4.01, while it did not state the goals of sustainable development quite as elegantly or succinctly, did include considerable detail as to the purposes of the EA,⁸³ thereby providing practical and needed information for EA preparers and reviewers.

80. ECONOMIC & SOC. COMM'N ASIA & PAC., ENVIRONMENTAL IMPACT ASSESSMENT: GUIDELINES FOR PLANNERS AND DECISION MAKERS (1985); see RAYMOND F. MIKESSELL & LARRY WILLIAMS, INTERNATIONAL BANKS AND THE ENVIRONMENT 48 (1994).

81. Draft OP 4.01 (1995), *supra* note 74, at 1.

82. *Id.*

83. Operational Directive 4.01, para. 2 stated:

By calling attention to environmental issues early, EAs (a) allow project designers, implementing agencies, and borrower and Bank staff to address environmental issues in a timely and cost-effective fashion; (b) reduce the need for project conditionality because appropriate steps can be taken in advance or incorporated into project design, or alternatives to the proposed project can be considered; and (c) help avoid costs and delays in implementation due to unanticipated environmental problems. EAs also provide a formal mechanism for interagency coordination on environmental issues and for addressing the concerns of affected groups and local nongovernmental organizations (NGOs). In addition, the EA process plays an important role in building environmental management capability in the country.

Operational Directive 4.01 (1991), *supra* note 47.

B. *Types of Environmental Analyses*

While OD 4.01 provided detailed information defining the character and distinct parameters of project-specific EAs and regional and sectoral EAs, and then gave additional specifications for the content of EAS in its Annexes, the revised version presents a brief definition of three principal types of EAs in OP 4.01 and then delegates the explanation of general EA parameters exclusively to the GP 4.01 Annexes.⁸⁴ At first glance, this appears to be a more streamlined approach. However, upon closer review, one can see that this is not a mere reformatting of information to improve clarity.

First, considerable detail and clarity has been lost in the revised Draft OP 4.01 regarding: (a) under what circumstances the regional or sectoral EAs are appropriate and even preferred; (b) the distinct advantages of these EAs over project-specific EAs; and (c) the scope of regional and sectoral EAs. Dana Clark and David Hunter of the Center for International Environmental Law (CIEL) have commented that “[r]eplacing a well-articulated paragraph that explains objectives of the policy and the type of activities which are appropriate . . . with an abstract and less-detailed sentence presents serious issues.”⁸⁵

Second, delegating all detail of the contents of the EA to the GP Annexes has two negative effects. One effect is that of removing any mandatory force which the original text carried, because the GP section and its Annexes are *advisory* only, while inclusion in the OP or BP sections would have indicated a mandatory procedure. OD 4.01 specified important elements that “[p]roject-specific EAs should normally cover”⁸⁶ and “[sectoral EAs] are particularly suitable for reviewing,”⁸⁷ and in so doing forcefully suggested the proper content of specific EAs. The information in the Annexes of the revised draft, by contrast, is presented as a suggested checklist of potential issues for an EA, rendering all issues mere potential topics for consideration, with none of any

84. Compare *id.* paras. 7-10, with Draft OP 4.01 (1995), *supra* note 74, para. 4.

85. Clark & Hunter, *supra* note 74, at 5.

86. Operational Directive 4.01 (1991), *supra* note 47, para. 4.

87. *Id.* para. 5.

higher importance, and with no single element required. The second effect is that it appears to reduce the importance of any particular element of the EA, which formally was emphasized up front, as an integrated part of the definition of the EA types and then re-emphasized in checklist format in the Annexes.

The draft revised OP 4.01 has reformatted and added a new topic heading for EAs of Special Project Types, including Sector Investment Lending; Financial Intermediary Lending; Emergency Recovery Projects; and Loan Guarantee Projects.⁸⁸ The subsection on Global Issues that appeared in the original OD 4.01 has been deleted in the revised OP 4.01. The only vestige of this former subsection appears in the GP, Annex A, in the Checklist of Potential Issues for an EA in the "global externalities" listing.⁸⁹ The Global Issues section served to raise awareness as to the existence of international environmental guidelines, encouraged their consideration, but made clear that the Bank uses its own guidelines.⁹⁰ While deleting this section as it was written was not a great loss, clarity would have been gained if it had been strengthened rather than deleted. A revised section on Global Issues could have stated something to the effect that the Bank seeks to integrate international standards into its own procedures "with the view to minimizing possible adverse impacts on global environmental quality."⁹¹

Sector Investment Lending and Financial Intermediary Lending, formerly merged into one subsection, has now been divided into two distinct subsections.⁹² Dividing these two types of projects into two separate paragraphs improves clarity as to defining the project types. Clarity is also gained, while transparency and potential Bank accountability is reduced, however, by the addition of the following statements. First, footnote eleven in the Sectoral Investment Lending subsection states that "the imple-

88. See Draft OP 4.01 (1995), *supra* note 74, para. 7-10.

89. Compare *id.*, with Operational Directive 4.01 (1991), *supra* note 47, paras. 9-11.

90. See Operational Directive 4.01 (1991), *supra* note 47, para. 11.

91. This quote appeared in the original Operational Directive 4.01, para. 11, but was buried and thereby weakened in context.

92. Compare Operational Directive 4.01 (1991), *supra* note 47, para. 9, with Draft OP 4.01 (1995), *supra* note 74, paras. 7-8.

menting institution remains ultimately responsible for ensuring that subprojects meet Bank requirements,"⁹³ which squarely removes the Bank from accountability for inadequately processed environmental reviews of subprojects. Second, under the Financial Intermediary Lending subsection, the Bank also removes itself from accountability for the quality and content of the subproject EAs: "the Bank expects the financial intermediary to ensure that an appropriate EA is carried out for each subproject."⁹⁴ Clark has noted, and the author of this article agrees, that these statements may be "an attempt to eliminate Inspection Panel review of failures to follow Bank policies on subprojects."⁹⁵

Additionally, a powerful statement of overall sustainable development goals in relation to EAs and sector and financial intermediary lending that appeared in the original OD 4.01 has been omitted from the revised draft with no alternative statement of goals replacing it: "The aim [of the Bank] should be to help establish satisfactory environmental review systems in the appropriate agencies, rather than to focus only on those investments against which the Bank happens to disburse."⁹⁶ The former statement indicated a strength of conviction that is compromised by its absence in the revised text.

Clarity is lost in the revised subsection on Emergency Recovery Projects. While the original OD 4.01 explained: "Because emergency recovery projects need to be processed rapidly, and seek mainly to restore existing facilities, they would not normally require a full EA,"⁹⁷ the revised version merely provides this conclusory statement: "For an emergency recovery project, there may not be time to prepare an EA report."⁹⁸ The revision opens up the possibility that it will be acceptable for a full EA not to be prepared under emergency conditions other than those that seek to restore existing facilities.⁹⁹ Clarity would be improved if the re-

93. Draft OP 4.01 (1995), *supra* note 74, at 6 n.11.

94. *Id.* para. 8.

95. Clark & Hunter, *supra* note 74, at 3.

96. Operational Directive 4.01 (1991), *supra* note 47, para. 9.

97. *Id.* para. 10.

98. Draft OP 4.01 (1995), *supra* note 74, para. 9.

99. Clark characterizes this change as "seem[ingly] more dismissive of the need for an EA for Emergency Recovery Projects." Clark &

vision instead had defined under what types of emergency recovery circumstances the EA will be excused.

The revised Draft adds a short subsection on Loan Guarantee Projects, making explicit the requirement of an EA for such projects. A footnote to this subsection notes, however, that the type of EA required carries distinct rules.¹⁰⁰ Since the overriding goal of the EA is to ensure environmentally sustainable development, concern will be raised if such rules are more lax for EAs for projects which are directly funded by the Bank.¹⁰¹

C. Institutional Aspects

The original OD 4.01 contained two subsections under the Institutional Aspects heading: "Strengthening Environmental Capabilities" and "Environmental Advisory Panels."¹⁰² The revised OP 4.01 consists of one brief paragraph entitled "Institutional Capacity."¹⁰³

The "Strengthening Environmental Capabilities" section originally opened with a policy statement: "The ultimate successes of EA depends upon the capability and understanding of environmental matters of the government agencies concerned,"¹⁰⁴ and then provided practical details on institution-building. Mandatory language was used throughout this subsection, including the following statements: "as part of the EA process, it is *necessary* to identify relevant environmental agencies and their capability for carrying out required EA activities. Projects with potentially major impacts normally *require* the strengthening of several environmental functions."¹⁰⁵

Hunter, *supra* note 74, at 4.

100. Draft OP 4.01 (1995), *supra* note 74, at 8 n.15, refers the reader to OP/BP 14.25, *Loan Guarantees* for specific EA requirements, which will be drafted at a future time.

101. Clark & Hunter note that creating an alternative tier of EA rules is a substantial change from current practice. See Clark & Hunter, *supra* note 74, at 4.

102. See Operational Directive 4.01 (1991), *supra* note 47, paras. 12-13.

103. See Draft OP 4.01 (1995), *supra* note 74, para. 11.

104. Operational Directive 4.01 (1991), *supra* note 47, para. 12.

105. *Id.* (emphasis added).

The revised Draft OP 4.01 section contains no policy statement. The affirmative role delineated for the Bank in the original OD has been changed to a more passive and only "as necessary" role. The formerly mandatory language has been changed to advisory, whereby the Bank now "encourages" certain capacity-building measures.¹⁰⁶ The practical details on institution-building also have been omitted from the revised Draft OP.

The subsection on Environmental Advisory Panels and in fact, any reference to the benefits of including independent experts in the EA process, has been omitted from the revised Draft. In OD 4.01, the Bank recommended that for "major, highly risky, or contentious projects with serious and multi-dimensional environmental concerns, the borrower should normally engage an advisory panel of independent, internationally recognized, environmental specialists. . . ." ¹⁰⁷ Additionally, the Bank recommended "for projects with potentially major adverse environmental impacts . . . the borrower should retain independent EA experts not affiliated with the project."¹⁰⁸ The omission of these highly useful recommendations is conspicuous and does not advance sustainable development goals.¹⁰⁹

D. EA Procedures

The revised version's presentation of EA procedures presents significant changes to two major subsections. First, the repositioning, reformatting and revising of the section on Environmental Screening calls for close examination. Second, the sections on the Involvement of Affected Groups and Nongovernmental Organizations and on Disclosure of Information have been revised both in positive and in negative ways.

It is significant that the section on Environmental Screening has been moved up front to the OP section, as has the detailed information on determination of to which category a specific

106. Draft OP 4.01 (1995), *supra* note 74, para. 11.

107. Operational Directive 4.01 (1991), *supra* note 47, para. 13.

108. *Id.* para. 16.

109. "The deletion of this language represents a major step backward from a policy of encouraging review of projects by objective, outside experts." See Clark & Hunter, *supra* note 74, at 6.

project will be assigned.¹¹⁰ The assignment of the project into one of three categories — A, B or C¹¹¹ — is the defining step for determining the required scope of the EA and even whether an EA will be necessary at all.¹¹²

The revised OP 4.01 should be commended here for providing greater detail and improved transparency regarding: (a) *how* the Bank determines into which category a project is assigned; (b) the required *content* of the EA by category; and (c) the appropriateness of alternatives to EA.

The original OD 4.01 Annex E merely stated that “[b]est professional judgment is essential” for determining the categories, and left the process by which the categories were determined to the task manager and the regional environmental division.¹¹³ It gave only conclusory statements as to the character of the EA according to category, stating simply that a full EA was required for Category A projects; a full EA was not required for Category B projects, but environmental analysis was required; and neither an EA nor environmental analysis was required for Category C projects.¹¹⁴

The revised OP 4.01, by contrast, not only provides a clear definition of the three categories, but also expands upon the Bank’s

110. Compare Operational Directive 4.01 (1991), *supra* note 47, para. 17, with Draft OP 4.01 (1995), *supra* note 74, para. 6.

111. The three project categories, as described in the revised Draft OP 4.01 (1995), *supra* note 74, para. 6, are as follows:

Category A: [a project that] is likely to have significant adverse environmental impacts that may be sensitive, irreversible, diverse, comprehensive, broad, or precedent-setting.

Category B: [a project where the] impacts are site-specific in nature and do not significantly affect human populations or alter environmentally important areas, including wetlands, native forests, grasslands, and other major natural habitats . . . [where] [f]ew of the impacts are irreversible, and in most cases mitigatory measures can be designed more easily than those for Category A projects.

Category C: [a project that] is unlikely to have adverse environmental impacts or its impacts are likely to be negligible, insignificant or minimal.

112. No EA is required for a category C project.

113. Operational Directive 4.01 (1991), *supra* note 47, Annex E.

114. *Id.* Annex E, para. 1.

standards for content and analysis.¹¹⁵ Most notably, the revised draft makes explicit two requirements: (a) the “without project situation” alternative must be considered for those Category A projects which have the potential to cause more harm than good, and (b) affected people and local NGOs must be consulted for *all* Category A projects.¹¹⁶

The paragraph discussing alternatives to EA, formerly its own subsection under the rubric of “Types of EA,” has been moved in the revised draft to the subsection discussing Category B EAs. It is now clear that the “alternatives to EA” is a subpart of the Category B analysis, and is not appropriate for Category A or Category C projects.

One additional change to the environmental screening section, however, appears to reduce rather than improve clarity and transparency. The original OD 4.01 Annex E explicitly stated that the EA category was “assigned by the task manager (TM), with the concurrence of the Regional Environment Division

115. Relevant excerpts of Draft OP 4.01 (1995), *supra* note 74, para. 6 state as follows:

EA for a Category A project examines the project’s potential negative and positive environmental impacts, compares them with those of feasible alternatives (including, as appropriate, the ‘without project’ situation), and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance. Category A EA always involves consultations with project-affected people and local nongovernmental organizations (NGOs). . . .

EA for a Category B project may vary from project to project, but it is narrower in scope than Category A EA. Like Category A EA, it examines the project’s potential negative and positive environmental impacts and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance. As appropriate, the results of the Category B EA may be documented in a separate report tailored to the particular environmental issues of the proposed project, but it may only be necessary to describe them in the project documentation.

116. *Id.* (emphasis added).

(RED).¹¹⁷ The revised OP 4.01 states rather cryptically that “[t]he Bank classifies the proposed project.” Does this change to the text actually remove or reduce the involvement either of the TM or the RED, or does it perhaps simply reduce clarity as to accountability?

Several changes have been made to the sections on the Involvement of Affected Groups and Nongovernmental Organizations and on Disclosure of Information.

First, the policy statements that provided guidance to borrowers as to why public consultation and public disclosure are important have been omitted from the revised Draft OP 4.01.¹¹⁸ In contrast, the one policy statement that remains includes mandatory language that was lacking in the original. The revised Draft states that “the borrower is *required* to consult project-affected groups and local NGOs about the project’s environmental aspects,”¹¹⁹ a positive change from the original version which stated that the Bank “*expect[ed]*”¹²⁰ the borrower to take such views into account. However, the strength of conviction that was conveyed in the original version by the statement that the bor-

117. Operational Directive 4.01 (1991), *supra* note 47, Annex E.

118. OD 4.01 stated the following:

Regarding Public Consultation:

This process is important in order to understand both the nature and extent of any social or environmental impact and the acceptability of proposed mitigatory measures, particularly to affected groups. Consultations do not reduce the decision authority of the borrower, but are a valuable way to improve decision making, to obtain feedback on the EA process and draft report, and to increase community cooperation in implementing the recommendations of the EA.

Operational Directive 4.01 (1991), *supra* note 47, para. 19.

Regarding Public Disclosure:

In order for meaningful consultations to take place between the borrower and affected groups and local NGOs, it is necessary that the borrower provide relevant information prior to consultations.

Id. para. 21.

119. Draft OP 4.01 (1995), *supra* note 74, para. 12 (emphasis added).

120. Operational Directive 4.01 (1991), *supra* note 47, para. 19 (emphasis added).

rower was expected to take the views of the public “*fully* into account in project design and implementation, and in particular in the preparation of EAs,”¹²¹ has been considerably diluted by the omission of the word “*fully*” in the revised Draft.¹²²

Second, while the original OD 4.01 did not restrict the need for consultations as to any particular Category of projects, the revised draft clarifies that “for Category A projects, the borrower consults such groups at least twice.”¹²³ Additionally, this clarification results in some ambiguity in the revised OP 4.01, because the first sentence of the relevant paragraph is a generalized statement requiring public consultation “in preparing a project for Bank financing,”¹²⁴ which presumably applies to *any* project for Bank financing. If, however, the second sentence of the paragraph, specifically addressing Category A projects is meant to modify the first sentence, and further, if the remainder of the paragraph is meant to apply only to Category A projects, then such a change would be cause for serious concern. This would result in a significant reduction in the standards of transparency of EA reports other than Category A reports.

Third, the revised Draft achieves greater clarity on the issue of the timing, both for public consultation and for the release of the EA report to the public, but more specific guidelines are needed. OP 4.01 states that “for [public] consultations [to be] meaningful, the Bank expects [a summary of the EA’s conclusions] to be provided in a timely manner. . . .”¹²⁵ BP 4.01 states that “[f]or all Category A projects and for Category B projects that will require a separate EA report . . . *before* the Bank proceeds to project appraisal . . . the EA report must be made available in some public place accessible to affected groups and local NGOs and must be officially submitted to the Bank. . . .”¹²⁶ Precisely how long in advance the report must be made public re-

121. *Id.* para. 19 (emphasis added).

122. *Compare id.*, with Draft OP 4.01 (1995), *supra* note 74, para. 12.

123. Draft OP 4.01 (1995), *supra* note 74, para. 12.

124. *Id.*

125. *Id.*

126. Draft BP 4.01: Bank Procedures (World Bank, Oct. 1995), para. 7.

mains unanswered. And the term "in a timely manner" as used above is vague. Instead, the Bank could consider integrating the wording of the Pelosi Amendment¹²⁷ into the revised OP and BP texts, requiring that the Bank abstain from approving or rejecting any Category A or Category B project that fails to make an EA summary available to the public at least 120 days prior to the date for consideration of approval.¹²⁸

CONCLUSION

In summary, the newly revised draft environmental procedures of the World Bank and the recently created Inspection Panel are cause both for optimism and concern. Together they may exert a significant role in promoting sustainable development practices, if clarity and transparency in the procedures genuinely are enhanced and if the Panel is allowed to act independently. Alternatively, they may become an example of grandstanding by the Bank and serve the Bank's distinct and undeniably unsustainable definition of sustainable development.

127. 22 U.S.C. § 262m-7 (1994).

128. *Id.*

