
ARTICLES

THE DEMISE OF ACCOUNTABILITY AT THE WORLD BANK?

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I. INTRODUCTION

Recent trends at the World Bank are precipitating a shift from rules-based accountability to people affected by Bank projects to a more flexible and discretionary approach to addressing social and environmental risks and impacts. These trends, evident in both safeguard policies and accountability processes, are predominantly a response to changes in the development finance landscape in which the Bank, once the centerpiece, now competes with a range of prominent new actors. As the Bank strives to recast itself as an attractive lender to governments and public-private partnerships, there are emerging signs that it will sacrifice its system of accountability to project-affected people that it has built - albeit on wobbly foundations, and imperfectly - over the past three decades.

While the Bank has consistently refused to accept that it has obligations under international human rights law,¹ since 1980 it has led the evolution of parallel global standards meant to protect people and the environment from development-induced harm.² The Bank

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1. See, e.g., Ana Palacio, *The Way Forward: Human Rights and the World Bank*, WORLD BANK (Oct. 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html> (noting that the World Bank has never affirmed that the organization has legal obligations to support human rights); Philip Alston, *The two words that scare the World Bank*, WASH. POST, Nov. 7, 2014, https://www.washingtonpost.com/opinions/philip-alston-the-world-bank-treats-human-rights-as-unmentionable/2014/11/07/9091dafa-65da-11e4-9fdc-d43b053ecb4d_story.html (stating that the World Bank is an outlier for failing to embrace human rights law as a major consideration in its work).

2. GLORIA DAVIS, A HISTORY OF THE SOCIAL DEVELOPMENT NETWORK IN THE WORLD BANK, 1973-2010, 3 (2002) (noting that the World Bank adopted OMS 2.33, the first policy intended to assist people displaced by development projects).

has also been at the forefront of creating a transnational accountability mechanism to investigate complaints of harm by project-affected people when these standards have not been met.³ Thus, despite the many weaknesses of the World Bank's accountability system, not least its foundation and evolution outside international human rights law and its regular failure to provide material redress on the ground, it is profoundly important infrastructure for the promotion of a rights-based approach to development. It has, in effect, conferred a set of entitlements, if not "rights" per se, on people affected by Bank-financed development projects through a suite of binding safeguard policies and provided them with recourse to claim those entitlements through an independent grievance mechanism, the Inspection Panel.

The Bank's accountability system, encompassing its safeguard policies and the Inspection Panel, has been emulated in some form and to varying extents by all other traditional multilateral development finance institutions and some bilateral aid agencies. The system has also spread, somewhat tentatively, into the world of private finance, through the World Bank's private-sector lending arm, the International Finance Corporation (IFC), and from there, to the Equator Principles, a set of voluntary standards for private financial institutions.⁴

This gradual and somewhat oscillating evolution in development finance accountability is now facing a serious threat: the emergence of new global rivals, including the New Development Bank headquartered in Shanghai and led by Brazil, Russia, India, China and South Africa (the BRICS nations)⁵ and the Asia Infrastructure Investment Bank based in Beijing and led by its largest shareholder, China.⁶ The prevailing assumption is that the new development finance actors will buck the trend towards social and environmental

3. GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE 15 (C. Daniel et al. eds, 2016) (assessing and detailing the independent accountability mechanism of the World Bank).

4. EQUATOR PRINCIPLES FINANCIAL INSTITUTIONS, THE EQUATOR PRINCIPLES JUNE 2013 (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.

5. NEW DEVELOPMENT BANK (BRICS), <http://ndbbrics.org/> (last visited June 1, 2016).

6. ASIAN INFRASTRUCTURE INVESTMENT BANK, <http://www.aiib.org/> (last visited June 1, 2016).

accountability and place fewer requirements on borrowers, making them more attractive lenders than the World Bank and established regional development banks, such as the Asian Development Bank (ADB).⁷ Thus, unless the Western-dominated banks reform fast, they will be elbowed by the new players into the margins of the development finance scene. This would in turn result in a diminution of the geopolitical influence that the United States and other Western shareholders wield through the governance structure of the World Bank and regional development banks.

To be sure, the ascendancy of the new development banks is one among several factors precipitating the shifts in safeguards and accountability at the World Bank. Others relate more to institutional dynamics, such as shifts in the balance of power on the board of directors towards traditionally borrowing country members (colloquially known as “Part 2” countries), changes in management approaches and personnel and a backlash to a series of critical findings by the Inspection Panel that led to a deterioration in its relationships with the Bank’s management and board.

The confluence of these factors has had two distinct impacts on the World Bank’s accountability system. First, the Bank has proposed a new Environmental and Social Framework to replace its existing safeguard policies.⁸ The proposed framework is a marked departure from the previous set of policies. Clear requirements on the Bank and borrowers to ensure compliance in current policies are more flexible and negotiable under the proposal; project appraisal requirements are significantly reduced to expedite approvals; and greater emphasis is placed on borrowers’ (and less on the Bank’s) responsibility for assessing risk, implementing safeguards, and monitoring progress.⁹ Second, in recent years, the Inspection Panel

7. Inclusive Development International, *IDI submits comments to Asian Infrastructure Investment Bank on Draft Safeguards* (Oct. 30, 2015), <http://www.inclusivedevelopment.net/idi-submits-comments-on-aiib-draft-environmental-and-social-framework/> (noting that IDI had serious reservations about the inadequacy of the consultation process).

8. *Review and Update of the World Bank Safeguard Policies*, WORLD BANK, <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> (last visited June 1, 2016) [hereinafter *Update Safeguard Policies*].

9. World Bank, *Review and Update of the World Bank Safeguard Policies: Environmental and Social Framework (Proposed Second Draft) Consultation*

has arguably circumvented its mandate by giving the Bank additional space to seek negotiated agreements with government clients to deal with grievances of project affected people, thereby avoiding investigations of alleged harm due to policy violations. This shift away from the Panel's original mandate could portend an erosion of the system of accountability that recognizes clear policy entitlements of project-affected people and provides recourse to claim those entitlements through an independent investigation.

The changes in both the safeguard policies and at the Inspection Panel are similarly justified as being more pragmatic and outcomes-oriented. This Article examines the trend away from clear policy entitlements and protections for project-affected people towards negotiated risk management, redress in the case of harms, and analyzes what it means in practice for the protection of human rights in cases of displacement.

II. SAFEGUARDING HUMAN RIGHTS: WHAT ROLE FOR THE WORLD BANK?

A. THE EVOLUTION OF SAFEGUARD POLICIES AT THE WORLD BANK

The World Bank's adoption of its first safeguard policy in 1980 followed a decade of rapid expansion of the Bank's portfolio and, alongside this, a burgeoning recognition that many of its projects, especially big infrastructure such as hydropower dams, were having adverse environmental and social impacts.¹⁰ During the 1970s, under the leadership of Robert McNamara, the Bank had shifted its focus to poverty alleviation, bringing a human dimension to the growth economics that underpinned its development agenda.¹¹ The Bank thus became more susceptible to public criticism that its projects were causing harm to the very people it was purporting to serve.

Paper (July 1, 2015), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/consultation_paper_for_es_framework_second_draft_for_consultation_july_1_2015.pdf.

10. DAVIS, *supra* note 2, at 1, 3 (recounting the history of the World Bank).

11. SHAHID YUSUF ET. AL, DEVELOPMENT ECONOMICS THROUGH THE DECADES: A CRITICAL LOOK AT 30 YEARS OF THE WORLD DEVELOPMENT REPORT 21-22 (2009).

Towards the end of the decade, social movements began mobilizing to protest against harmful World Bank projects.¹² Against this backdrop, the Bank's first sociologist, Michael Cernea, brought to the Bank the enlightened perspective that "putting people first" is the crux of any development project – a concept he later described as "revolutionary" at the technology-oriented Bank of the 1970s.¹³

The violent forced eviction of some 60,000 people to make way for the Bank-financed Sobradinho Dam in Brazil¹⁴ and the Bank's embarrassing lack of preparedness to cope with the situation, provided the final institutional impetus for the adoption of an operational policy on involuntary resettlement.¹⁵ Over the following years the Bank adopted a suite of policies on issues including environmental assessment and indigenous peoples as part of its Operation Manual Statement.¹⁶ This set of policies and their successors came to be known as "environmental and social safeguards."

While the Bank's policies were not grounded in international human rights law, they were a response to accusations of Bank complicity in what amounted to serious human rights violations,

12. Alnoor Ebrahim & Steve Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society 2* (Harvard Bus. Sch. Working Paper No. 08-027, 2007), http://www.hbs.edu/faculty/Publication%20Files/08-027_18c99232-358f-456e-b619-3056cb59e915.pdf (describing the tactics opponents used to protest the Bank).

13. Judith Freidenberg, *Michael M. Cernea-Judith Freidenberg: Oral History Interview for the Society for Applied Anthropology*, U. KY. LIBR. SOC'Y FOR APPLIED ANTHROPOLOGY ORAL HIST. PROJECT, Jun. 30, 2003, at 7-8, <https://www.sfaa.net/files/5613/9613/2881/oral-history-Cernea-Freidenberg.pdf> ("The title of the book, *Putting People First*, means putting people first in projects. In the late '70's, when I tentatively started work on that book, this was a revolutionary concept in the Bank.").

14. Sasha Chavkin et al., *How The World Bank Broke Its Promise To Protect The Poor*, HUFFINGTON POST, Apr. 16, 2015, <http://projects.huffingtonpost.com/worldbank-evicted-abandoned>.

15. WORLD BANK, SOCIAL DEVELOPMENT DEPARTMENT INVOLUNTARY RESETTLEMENT PORTFOLIO REVIEW: PHASE I. INVENTORY OF BANK-FINANCED PROJECTS TRIGGERING THE INVOLUNTARY RESETTLEMENT POLICY (1990-2010) vii (2010) (listing the objectives of the review).

16. WORLD BANK, THE WORLD BANK'S SAFEGUARD POLICIES PROPOSED REVIEW AND UPDATE APPROACH PAPER ¶ 9 (2012) [hereinafter WORLD BANK, APPROACH PAPER] (noting the the term "environmental" was interpreted broadly, to include both natural and social conditions).

including forced evictions.¹⁷ At the time that the original policy on involuntary resettlement was adopted and even at the adoption of its second iteration in 1990,¹⁸ not much progress had been made in establishing international human rights standards on evictions and development-induced displacement. It was not until 1997 that the United Nations Committee on Economic, Social and Cultural Rights (CESCR) adopted its General Comment No. 7 on forced evictions and the right to adequate housing.¹⁹ The General Comment, which elaborates on relevant obligations under the International Covenant on Economic, Social and Cultural Rights,²⁰ established important principles, such as the need to justify the circumstances under which evictions may be carried out²¹ and a set of procedural and substantive protections before, during, and after an eviction can take place.²² However, as an international law document covering a broader set of circumstances than development-induced involuntary resettlement, it did not provide the practical guidance necessary in development practice. As other development institutions, including regional development banks and the IFC, adopted their own standards on resettlement, the World Bank's resettlement policy has generally been more influential than human rights standards.²³

17. Sasha Chavkin et al., *How The World Bank Broke Its Promise To Protect The Poor*, HUFFINGTON POST, Apr. 16, 2015, <http://projects.huffingtonpost.com/worldbank-evicted-abandoned> (noting specific violations of rights by the bank by displacing people).

18. WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL OD 4.30 (1990) [hereinafter OPERATIONAL MANUAL].

19. U.N. CESCR, 16th Sess., at 113, U.N. Doc. E/1998/22 (1997) [hereinafter CESCR General Comment 7].

20. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, UN Doc. A/6316, 993 U.N.T.S. 3.

21. CESCR General Comment 7, *supra* note 19, at ¶¶ 10, 12 (“it is incumbent on the relevant authorities to ensure that [the] evictions are carried out in a manner by a law which is compatible with the Covenant”).

22. CESCR General Comment 7, *supra* note 19, at ¶¶ at 14-17 (listing appropriate legal remedies and procedures).

23. *Cf.* INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARD 5: LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT (2015), http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES (setting out procedures similar to those of the World Bank); ASIAN DEVELOPMENT BANK, SAFEGUARD POLICY STATEMENT (2009), <http://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf> (setting out procedures similar to those of the World Bank).

The Basic Principles and Guidelines on Development-based Evictions and Displacement developed by the UN Special Rapporteur on Adequate Housing and presented to the Human Rights Council in 2007, made an important and thorough contribution to the elaboration of human rights standards.²⁴ These were influenced by the resettlement policies of the World Bank, the ADB and other institutions, but integrate stronger principles grounded in human rights law and discourse. The Basic Principles affirm, for example, that given their “adverse impact on a wide range of internationally recognized human rights,” evictions should only occur in “exceptional circumstances” and be “undertaken solely for the purpose of promoting the general welfare.”²⁵ In turn, these and other provisions of the Basic Principles and Guidelines are now used in comparative analyses by advocates promoting the harmonization of Bank policies with human rights norms.²⁶

The World Bank’s current resettlement policy, when effectively applied, is an important safeguard against human rights violations, especially for people without recognized legal rights to land and housing. However, the policy falls below human rights standards in several important respects. For example, the current policy does not prohibit forced evictions as defined in international law documents;²⁷ it does not require that the activity causing the resettlement genuinely promotes the general welfare;²⁸ and it does not require that the magnitude of displacement is reasonable and proportionate to the public good that the project will achieve.²⁹ Although an objective of

24. Basic Principles and Guidelines on Dev.-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, ¶ 3, U.N. Doc. A/HRC/4/18 (2007) [hereinafter Annex 1] (“The present guidelines address the human rights implications of development-linked evictions and related displacement in urban and/or rural areas.”).

25. *Id.* at ¶ 21.

26. *See e.g.*, NATALIE BUGALSKI & DAVID PRED, REFORMING THE WORLD BANK POLICY ON INVOLUNTARY RESETTLEMENT: SUBMISSION TO THE WORLD BANK SAFEGUARDS REVIEW APRIL 2013 (2013), <http://www.inclusive-development.net/wp-content/uploads/2013/04/Reforming-the-World-Bank-Policy-on-Involuntary-Resettlement.pdf>.

27. Annex 1, *supra* note 24, at ¶ 4.

28. *Id.* at ¶ 21 (noting that any eviction must be reasonable and proportional).

29. *Id.* at ¶ 21 (noting that Article 11(1) of the ICESCR guarantees the right to an adequate standard of living, including adequate housing).

the policy is to treat resettlement as a development opportunity, its requirements take a restoration or “do no harm” approach, and thus can only be said to (partly) align with an obligation to respect human rights and not the obligation to fulfill. For example, there is no requirement to ensure that resettled people, including those previously living in rudimentary shelters, have access to adequate housing as defined by the CESC. ³⁰

Moreover, the use of the language of “social risks” and “sustainability” rather than human rights, affects the perception, and therefore the implementation, of the policies in practice. Governments tend to view their obligation to apply the policy as purely a contractual one, vis-à-vis the World Bank, that exists to reduce project risks, rather than as part of the fulfillment of their normative responsibility to their citizens. Resettlement processes emanating from this contractual obligation to the Bank, as opposed to an obligation to the people, often fail to recognize and respect the agency of those being displaced are often disempowering and devoid of meaningful consultation and participation in decision-making. ³¹ Instead of using Bank-financed projects as an opportunity to strengthen their institutional capacity so that they can duplicate good practices to fulfill their human rights obligations across the board, governments are leery of setting precedents on resettlement and compensation and raising the expectations of those affected by non-Bank-financed projects. And most pertinent to the issues raised in this paper, the failure to ground the policy in human rights law and fully integrate human rights standards into policy language means that requirements and entitlements can be both strengthened and diluted in response to the political vagaries influencing the Bank. The Bank does not use its policy to affirm respect for human rights as the non-negotiable minimum floor for the treatment of project-affected people.

30. U.N. CESC, 6th Sess., at 114, ¶1, U.N. Doc. E/1992/23 (1991) [hereinafter CESC General Comment 4] (guaranteeing an adequate standard of living, including adequate housing).

31. See BUGALSKI & PRED, *supra* note 26, at ¶ 55 (noting that in twelve of fifteen complaints submitted to the Inspection Panel between 2001 and 2013 that raised non-compliance with OP 4.12, inadequate access to information and consultation formed part of the complaint).

B. THE BANK'S BOLD PROPOSAL: A NEW FRAMEWORK FOR
ADDRESSING ENVIRONMENTAL AND SOCIAL RISKS

In 2012, the Bank launched a review of its full suite of safeguard policies³² with the objective of strengthening their effectiveness.³³ World Bank President Jim Kim said in answer to a question posed at a public event that the Bank has “no intention of diluting the safeguards,”³⁴ a comment seized upon by civil society groups in their advocacy thereafter.³⁵

The Bank confirmed upfront that the new policies, like the current ones, would only cover traditional investment loans and not all financing instruments, such as Development Policy Loans (DPLs) and Program for Results (PforR) financing.³⁶ Therefore, despite the fact that between 2009 and 2012 alternative loan modalities amounted to one third of the Bank's financial commitments,³⁷ they will remain largely immune from the Bank's accountability system under the proposed framework.³⁸

At the time of writing, public consultations are underway on the second draft of the Bank's proposed new “Environmental and Social Framework.”³⁹ The framework comprises a vision for sustainable

32. See *Update Safeguard Policies*, *supra* note 8 (reviewing new safeguard policies).

33. WORLD BANK, APPROACH PAPER, *supra* note 16, at ¶ 22.

34. International Monetary Fund, Transcript of a Civil Society Organizations Town Hall with IMF MD and World Bank President (Oct. 11, 2012), <http://www.imf.org/external/np/tr/2012/tr101112b.htm>.

35. See *e.g.*, World Bank, *World Bank Safeguards: Overview of CSO Concerns*, <https://consultations.worldbank.org/Data/hub/files/meetings/OnePageSynthesisofCSOInitialCommentsPaper.pdf> (urging the World Bank to “ensure full implementation of Mr. Kim's commitment that the safeguard review will not lead to dilution of existing safeguards”).

36. See WORLD BANK, APPROACH PAPER, *supra* note 16, at ¶29 (focusing on investment lending).

37. *Id.* at ¶20 (noting that investment lending made up 66% of the Bank's financial commitments).

38. While a complaint regarding a DPL can be filed with the Inspection Panel in theory, the opportunity to do so is extremely restricted by the both the operational policy governing DPLs and the way DPL approvals and disbursements are structured that provides a very short window of opportunity to file a complaint.

39. World Bank, World Bank Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing (Second Draft for Consultation) (July 1, 2015), <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard->

development, an Environmental and Social Policy and Procedure that contain mandatory requirements on the Bank,⁴⁰ and ten “Environmental and Social Standards” (ESSs) on specific issues that set out the requirements on the Borrower.⁴¹

When it unveiled the proposal, the Bank made a number of assertions about its merits. It stated that the framework incorporates “more explicit requirements . . . making the responsibility of the Bank and the Borrower clearer” and “increasing accountability.”⁴² It also asserted that it allows for “less front-loading during project preparation, with more investment in effective monitoring and supervision for the realization of *agreed project commitments*” and focuses on “outcomes rather than procedural compliance.”⁴³

There is an inherent contradiction in these claimed features of the framework. On one hand, the Bank asserts that requirements and responsibilities are clearer and that accountability is strengthened. On the other hand, the Bank is moving decidedly away from a policy compliance approach – specifically by relying instead on “project commitments” agreed to by the Bank and the Borrower on a project-by-project basis. The focus is on achieving outcomes rather than ensuring compliance with policy requirements. The underlying assumption is that instead of insisting on the implementation of protections and measures contained in the safeguard policies to ensure people are not harmed, better outcomes will be produced through a flexible approach that gives broader discretion to Bank staff and the Borrower to negotiate and agree on measures in the given case. The phrase “less front-loading” implies that the Borrower will not have to prepare detailed plans and corresponding budgets to

policies/en/materials/clean_second_draft_es_framework_final_draft_for_consultation_july_1_2015.pdf [hereinafter Policy].

40. World Bank, Environmental and Social Procedure (Deliberative Working Draft) (July 1, 2015) [hereinafter Procedure].

41. World Bank, Environmental and Social Standard 1. Assessment and Management of Environmental and Social Risks and Impacts *in* Policy, *supra* note 39, at 23-49 [hereinafter ESS1].

42. World Bank, *Review and Update of the World Bank Safeguard Policies: Proposed Environmental and Social Framework Background Paper* ¶ 20 (Sept. 2, 2014), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/documents/code_background_paper_september_2014.pdf [hereinafter *Background Paper*].

43. *Id.*

address social and environmental risks *before* the Bank's board of directors considers and approves the project.

In order to assess whether the Bank's claimed virtues of the proposed framework increased accountability and better outcomes are likely to hold true in practice, this Article will put the framework to the test by applying it to a typical Bank project that causes displacement.

C. PUTTING THE BANK'S PROPOSAL TO THE TEST: APPLYING THE FRAMEWORK TO PHYSICAL AND ECONOMIC DISPLACEMENT

The most visible Bank-financed projects that cause large-scale displacement are infrastructure projects, including hydropower dams.⁴⁴ Dams cause physical and economic displacement of at least two groups of people: those whose land and productive resources are compulsorily acquired, destroyed or blocked during dam construction, including due to submersion of land to form a reservoir and those who live downstream (or upstream) of the dam, whose livelihoods are affected, usually because of changes to the river ecosystem and impacts on fisheries, riverbank agriculture or their small-scale irrigation systems.⁴⁵ The Bank's history is littered with controversial hydropower projects that have had devastating impacts on people who were displaced. Examples include the Chixoy Dam in Guatemala, the Sardar Sarovar Dam in India, the Nam Theun II Dam in Laos, and the Bujagali Dam in Uganda.⁴⁶ The World Bank's

44. World Bank, *Social Development Department Involuntary Resettlement Portfolio Review Phase I. Inventory of Bank-financed Projects Triggering the Involuntary Resettlement Policy (1990–2010)* 15 (2012), <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/517941425483120301/involuntary-resettlement-portfolio-review-phase1.pdf> (noting that water projects make up 12% of projects resulting in resettlement).

45. Michael M. Cernea, *Hydropower Dams and Social Impacts: A Sociological Perspective*, WORLD BANK, Jan. 1997, at 2-3 (highlighting the sociological impact of dam construction).

46. See, e.g., *Irrigation Project Narmada River Development (Gujarat) Sardar and Power*, WORLD BANK, <http://www.worldbank.org/projects/P009829/irrigation-project-narmada-river-development-gujarat-sardar-sarovar-dam-power?lang=en> (last visited June 1, 2016); Meriem Gray, *Nam Theun 2 Multipurpose Development Project Overview and Update* (2012), WORLD BANK, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/07/31/000356161_20120731015314/Rendered/PDF/715390WP0P07640ing0Paper0July02012.pdf; *UG Private Power Generation (Bujagali) Project*, WORLD BANK,

investments in hydropower slowed somewhat during the 1990s and 2000s, but the Bank has recently announced that it is getting back in the business of financing mega dams.⁴⁷ It is therefore vital that the Bank's safeguards framework is up to the task of dealing with the serious risks of harm and human rights violations associated with the physical and economic displacement caused by these projects.⁴⁸

In the absence of effective mitigation and support measures, the impact of physical and economic displacement on poor households and communities is devastating: displacement and loss of productive resources have led to impoverishment, food insecurity, diminished access to educational and health facilities, and the breakdown of social networks and cultures.⁴⁹ Land seizures and forced evictions have often been accompanied by corruption, intimidation, violence, and destruction of personal property, leading to physical harm and psychological trauma.⁵⁰ A failure of the Bank's proposed framework to safeguard against these harms in connection with its projects would make the Bank complicit in this raft of gross human rights violations.

The application of the Environmental and Social Framework during a typical project cycle would comprise of a series of phases, beginning with the identification of risks and impacts and ending with an evaluation of environmental and social performance.⁵¹ Below, each of these phases is critiqued for its likely effectiveness in

<http://www.worldbank.org/projects/P089659/ug-private-power-generation-bujagali-project?lang=en> (last visited June 1, 2016).

47. Howard Schneider, *World Bank turns to hydropower to square development with climate change*, WASH. POST., May 8, 2013 (claiming that the Bank sees now sees a reversion to large-scale hydropower projects as key in the balance between economic development and taming carbon use).

48. *Ten Reasons Why Climate Initiatives Should Not Include Large Hydropower Projects: A Civil Society Manifesto for the Support of Real Climate Solutions*, INT'L RIVERS (Dec. 3, 2015), <http://www.internationalrivers.org/node/9204> (noting that large hydropower projects also cause a host of negative environmental impacts and that due to the range of adverse and irreversible impacts of large dams, many civil society groups oppose their inclusion in power initiatives to address climate change).

49. See generally RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES (Michael M. Cernea & Christopher McDowell eds. 2000), <http://documents.worldbank.org/curated/en/2000/03/437761/risks-reconstruction-experiences-resettlers-refugees>.

50. See generally *id.*

51. Policy, *supra* note 39.

preventing human rights violations and other harms to communities that would be physically and economically displaced by the construction and operation of a hypothetical mega dam.

1. Social and Environmental Assessment and Due Diligence

Under the framework, in preparing for the hydropower project, the Borrower must first identify the risks and impacts of the project through an environmental and social assessment.⁵² Through this process, the Borrower would be expected to assess and measure the range of project impacts. The assessment is to be based on social baseline data at “an appropriate level of detail sufficient to inform characterization and mitigation of impacts.”⁵³ Following the identification of risks and impacts, the social and environmental assessment phase also includes the proposal of risk avoidance, minimization, and mitigation measures,⁵⁴ which are explained below. The specific tools and methods of assessment that the Borrower would be expected to apply are to be agreed upon with the Bank and should reflect the nature and scale of the project and its potential adverse impacts.⁵⁵

ESS1 on Environmental and Social Assessment specifically directs the Borrower to take into account impacts relating to involuntary taking of land and impacts associated with land and natural resource tenure and use, including impacts on food security.⁵⁶ If these requirements were applied properly and thoroughly, the Borrower would identify the range of displacement impacts both for people who will be physically and economically displaced due to land acquisition for the dam and reservoir and people whose livelihoods and food security will be affected by changes in the river ecosystem downstream. For a hydropower project, these impacts are likely to be significant, complex, and affect a large population. A mega-dam may also have significant transboundary downstream impacts.⁵⁷ Thus the assessment of displacement impacts would be

52. *Id.* at ¶ 15; ESS1, *supra* note 41, at ¶ 21.

53. ESS1, *supra* note 41, at ¶ 22.

54. *Id.* at ¶ 25.

55. *Id.* at annex 1, ¶ 6.

56. *Id.* at ¶ 26(b).

57. Andrew B. Wyatt and Ian G. Baird, *Transboundary Impact Assessment in the Sesan River Basin: The Case of the Yali Falls Dam*, 23(3) INT'L J. WATER RES.

highly complex. Because of the magnitude and scale of displacement caused by large dams, and the high cost of mitigating and compensating for those impacts, Borrowers may be incentivized to define project impacts narrowly and undercount affected people, especially those affected downstream.

The Bank is required under the Policy to conduct due diligence, as appropriate to the project's nature and scale and proportionate to the level of impacts.⁵⁸ The Bank's due diligence responsibilities for verifying the Borrower's assessment of social and environmental impacts are brief and flexible.⁵⁹ Most strikingly, there is a heavy reliance on the information provided by the Borrower.⁶⁰ Under the draft Procedure, the Bank's due diligence includes site visits by a social specialist if a project is classified by the Bank as high or substantial risk, which a mega dam almost certainly would.⁶¹ However, the Bank is not explicitly required to confirm the accuracy or rigor of the Borrower's assessment by, for example, actively seeking a range of views from a variety of sources, including project-affected people.⁶² The Bank is not compelled to seek independent third-party verification of the information provided by the Borrower, such as baseline data on project-affected people.⁶³ Nor is the Bank required to verify as part of its due diligence that the Borrower meaningfully engaged project-affected people in the assessment process, though it retains "the right to participate in consultation activities" should it choose.⁶⁴ While the Bank is to review the "capacity and commitment" of the Borrower,⁶⁵ there is no explicit requirement on the Bank to conduct human rights due diligence, to assess, for example, the risk of human rights violations during the

DEV. 427, 428, 431, and 435 (2007).

58. Policy, *supra* note 39, at ¶ 29.

59. *Id.* at ¶ 29-31.

60. *Id.* at ¶ 30.

61. Procedure, *supra* note 40, at ¶ 35.

62. See Policy, *supra* note 39, at ¶¶ 29-30.

63. *C.f.*, World Bank, BP 4.12 - Involuntary Resettlement (December 2001, revised April 2013), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:22941226~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y~isCURL:Y~isCURL:Y,00.html> [hereinafter BP4.12] (discussing the importance of baseline data in current World Bank Procedure).

64. Policy, *supra* note 39, at ¶ 50.

65. Procedure, *supra* note 40, at ¶ 15.

resettlement process.⁶⁶

In the context of large-scale projects such as mega-dams with complex and significant displacement impacts affecting large numbers of people, the due diligence requirements on the Bank are extremely weak. If the Bank were to satisfy only the minimum requirements and rely on the Borrower's assessment there would be an acute risk that Bank-financed projects would result in serious human rights violations. This is especially true for cases in which the project would be implemented in weak governance or authoritarian environments, not uncommon amongst the Bank's clients. In past cases, a host of problems have occurred at the assessment phase, including a vast underestimation of numbers of affected people,⁶⁷ a failure to adequately capture the contextual political economy and analyze the implications for the project⁶⁸ and the marginalization of project-affected people from decision-making processes despite the facade of a consultative process.⁶⁹ The Bank's thin due diligence requirements in the proposed framework suggest that the Bank is not deriving lessons from these cases, in which weaknesses in assessment at the front-end have led to problems in the implementation of safeguards, and serious harms to project affected people.⁷⁰

66. International Finance Corporation, *CAO Audit of IFC Investment in Corporation Dinant S.A. de C.V., Honduras*, 58 (Dec. 20, 2013) [hereinafter *CAO Audit of IFC Investment in Dinant*] (discussing that some of these omissions, mirrored in the IFC's due diligence policy, have been noted as weaknesses by the IFC's grievance mechanism, the CAO, and have contributed to problems in environmental and social performance).

67. See, e.g., Ian G. Baird et. al, *The People and Their River, the World Bank and its Dam: Revisiting the Xe Bang Fai River in Laos*, 46(5) DEV. & CHANGE 1080, 1088 (2015).

68. See, e.g., Shalmali Guttal & Bruce Shoemaker, *Manipulating Consent: The World Bank and Public Consultation in the Nam Theun 2 Hydroelectric Project*, 10 WATERSHED 18, 18 (2004); BUGALSKI & PRED, *supra* note 26 (describing other types of projects that have caused displacement); Laura Hurtado Paz y Paz & Liza Grandia, *Multi-Ethnic Communal and Collective Forms of Tenure in Post-War Guatemala: Lessons from the Peten*, Paper Presentation Before the Annual World Bank Conference on Land and Poverty (Apr. 8-11, 2013), at 4, 8, 14, and 17.

69. See, e.g., Letter from Inclusive Development International (IDI), WBIP Request, ¶ 40 (Sept. 24, 2012), [http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Request%20for%20Inspection%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Request%20for%20Inspection%20(English).pdf) (addressing the frequent problems of non-compliance with OP 4.12 and inadequate access to information and consultation).

70. See, e.g., Guttal & Shoemaker, *supra* note 68, at 18; BUGALSKI & PRED,

While the framework directs the Bank to carry out due diligence proportionate to the level of impact, it vests considerable discretion in Bank staff to decide on specific due diligence processes in each case. In terms of accountability, the vague and flexible requirements provide few hooks on which to make a case that the Bank failed to comply with its policy and procedure in a complaint to the Inspection Panel should harms ensue (discussed further below).

2. Mitigation Measures

Under the Policy, the Bank must require the Borrower to “prepare and implement projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank.”⁷¹ This key provision epitomizes the tension in the proposed framework between incorporating clear “explicit requirements” on the one hand and increasing flexibility and focusing on “outcomes rather than procedural compliance” on the other.⁷² The mandatory nature of ESS requirements is broadly qualified by the broadly unfettered discretion of Bank staff in determining how and when those requirements are to be met.

The Borrower, with the Bank’s assistance, must identify measures to address the risks and impacts identified by applying a “mitigation hierarchy,” which favors avoidance where feasible, then minimization to the extent possible, and finally compensation or “offsetting” measures for “residual impacts.”⁷³

In the case of a hydropower dam, for the displacement of communities that will occur due to land acquired for construction of the dam and the reservoir, the mitigation measures would need to incorporate the requirements of ESS5 on Involuntary Resettlement, unless one of the alternative approaches or loopholes apply.

First, the framework heavily promotes the use of the Borrower’s environmental and social framework, the country’s own laws and regulations, in place of the ESSs. According to an information note released by the Bank, “it is anticipated that much of the

supra note 26 (describing other types of projects that have caused displacement); Hurtado & Grandia, *supra* note 68, at 4, 8, 14, and 17.

71. Policy, *supra* note 39, at ¶ 16.

72. *Background Paper*, *supra* note 42, at ¶ 20.

73. ESS1, *supra* note 41, at ¶ 25.

environmental and social assessment will be conducted pursuant to national requirements.”⁷⁴ The Policy states that the Bank will support the use of the Borrower’s framework provided that it is “likely to be able to address the risks and impacts of the project, and enable the project to achieve objectives materially consistent with the ESSs.”⁷⁵ This sets a lower bar than the Bank’s current policy on piloting Borrower systems, which requires equivalence to a set of operational principles corresponding to the Bank’s safeguard policies.⁷⁶ Where, after a review of the Borrower’s framework, the Bank agrees to use it, in whole or part, the Bank and Borrower agree on measures to address any gaps.⁷⁷

In the case of displacement, Borrowers may be very keen to use their own expropriation laws and resettlement policies, if any, to govern the project in lieu of ESS5. However, in many Bank client countries, the legal and regulatory framework on eviction, resettlement, and economic displacement is weak or incomplete. Rarely will they achieve objectives materially consistent with ESS5.⁷⁸ For example, households and communities without title are often not adequately protected by domestic laws, and in many jurisdictions, residents of informal settlements, or “squatters,” can be legally subject to forced eviction.⁷⁹

74. World Bank, *Environmental and Social Framework: Setting Standards for Sustainable Development, Information Note 1: Environmental and Social Risk Classification*, ¶ 11, https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/information_note_1_es_risk_classification_final_for_disclosure_october_7.pdf.

75. Policy, *supra* note 39, at ¶ 23.

76. See OPERATIONAL MANUAL, *supra* note 18, at OP 4.00 – Piloting the Use of Borrow Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects (2014).

77. Policy, *supra* note 39, at ¶ 26.

78. See, e.g., INDEPENDENT EVALUATION GROUP (IEG), WORLD BANK GROUP, SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD: AN INDEPENDENT EVALUATION OF WORLD BANK GROUP EXPERIENCE 86 (2010) [hereinafter SAFEGUARDS & SUSTAINABILITY] (stating that the social safeguard policies, including on resettlement, are highly conflicting with national laws in use in country systems pilot countries).

79. Raquel Rolnik, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Human Rights Council, U.N. Doc. A/HRC/22/46/Add.1, ¶¶ 30, 34 (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-46_Add1_en.pdf.

The concept of strengthening and then using borrower frameworks to address social and environmental impacts, such as displacement, is desirable from the perspectives of both development and human rights. However, notably the Procedure makes clear that gap-filing measures are to be project-specific, and thus there does not appear to be an intention of strengthening the Borrower's framework across the board.⁸⁰

Issues such as resettling communities without formal land rights are often controversial and politically fraught on the ground. Despite commitments made upfront to the Bank by governments in order to obtain development financing and use its own legal framework, it is far from assured that promised gap-filing measures to augment domestic frameworks to reflect Bank standards or respect displaced people's human rights will actually be adopted. Yet the Bank's role and responsibility in ensuring this occurs after the project is approved is weak: the Procedure simply states that Bank staff will monitor the application of the Borrower's framework to the project in accordance with the Bank's review and the agreed project-specific measures for the duration of the project.⁸¹ As discussed below, the Bank has little leverage to ensure reforms after the project has been approved.

Ironically, the Bank may be setting itself up for situations in which it is forced to meddle in the political affairs of its client, something that it loathes to do.⁸² It is foreseeable that after a project is approved

80. Procedure, *supra* note 40, at ¶ 43. *But see* World Bank, *Analytical Background Papers: Use of Country Systems for Environmental Safeguards* ¶ 9 (Feb. 22, 2011), <http://siteresources.worldbank.org/EXTENVSTRATEGY/Resources/6975692-1289855310673/20110222-Use-of-Country-Systems.pdf> [hereinafter *Use of Country Systems*] (explaining that the analytical work to identify gaps could prove valuable in highlighting areas that need to be strengthened).

81. Procedure, *supra* note 40, at ¶ 47.

82. World Bank, International Bank for Reconstruction and Development (IBRD) Articles of Agreement, Art. IV, Sec. 10 (Feb. 16, 1989), <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> [hereinafter IBRD] (prohibiting the Bank from interfering in the political affairs of any country); World Bank, International Development Association (IDA), Articles of Agreement, Art. V, Sec. 6, <https://www.worldbank.org/ida/articles-agreement/IDA-articles-of-agreement.pdf> [hereinafter IDA] (prohibiting the Bank from interfering in the political affairs of any country); *see, e.g.*, ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND

and underway, the implementation and enforcement of laws and policies turns out to be weak or laws that were assessed as adequate to meet the objectives prior to project approval are amended during the course of project implementation.⁸³ It is unclear how the Bank anticipates that it will intervene in such circumstances to insist on the application of domestic laws (as opposed to the Bank's own standards). The Borrower may be more prone to defensiveness in response to attempts by the Bank to raise concerns about the failure of the government to apply its own laws. When the use of Borrower frameworks goes badly, and affected people bring a complaint to the Inspection Panel, it would be difficult for the Panel to avoid wading into an adjudication of compliance with domestic legal frameworks that were applied in place of the ESSs, as part of its investigation of the Bank's supervision of the project.⁸⁴

It is much safer territory for the Bank to insist upon compliance with Bank standards for the project that it is financing, as agreed in the project contract. The Bank's inclination to avoid challenging Borrowers on the application of their domestic laws and take a hands off approach to problems that arise with the use of Borrower frameworks is evident in the South Africa Eskcom case, in which the Bank refused to develop a remedial action plan despite critical findings of the Inspection Panel.⁸⁵ In its response to the Panel's investigation report, the Bank stated:

HUMAN RIGHTS 181-84 (2010) (recognizing that the meaning of this prohibition is hotly debated).

83. *Use of Country Systems*, *supra* note 80, at ¶ 15 (discussing a pilot project in Lao PDR in which the assessment was amended during implementation).

84. See World Bank, Chairperson of The Inspection Panel and Senior Vice President and General Counsel of The World Bank, *Joint Statement on the Use of Country Systems: Mexico Decentralized Infrastructure Reform and Development Project* (June 8, 2014), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/JointStatementUseCountrySystems.pdf> [hereinafter *Joint Statement*] (stating that the collaborative operational framework for the project created with the borrower would guide the borrower's performance and the Bank's supervision).

85. INT'L BANK FOR RECONSTRUCTION AND DEV. [IBRD], MANAGEMENT REPORT AND RECOMMENDATION IN RESPONSE TO THE INSPECTION PANEL INVESTIGATION REPORT, ¶ 88, INSP/64977-ZA (Mar. 2, 2012), [http://ewebapps.worldbank.org/apps/ip/PanelCases/65-Management%20Report%20and%20Recommendations%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/65-Management%20Report%20and%20Recommendations%20(English).pdf), [hereinafter MANAGEMENT REPORT AND RECOMMENDATION].

Management has seriously considered the issues raised by the Requesters and continues to be of the view that any impacts . . . can be and are being effectively addressed by the responsible South African authorities through the country's legal and regulatory system. Hence, an Action Plan to address such issues would replicate the mitigation measures that the appropriate authorities have already put in place pursuant to South Africa's regulatory requirements.⁸⁶

The Eskom case is illustrative of the way in which the Bank seeks to distance itself from the responsibility to protect project-affected people from harms through the use of borrower systems.

While the World Bank should work to strengthen weak national legal frameworks and institutional capacity on land acquisition and resettlement wherever possible, safeguard policies should continue to apply to Bank-financed projects. When a country's system does provide sufficiently strong protections to project-affected people, applying the ESSs should, in any case, not pose a problem or present any inconsistencies. The requirements of ESS5, like the current involuntary resettlement policy, while not perfect, are based on extensive sociological studies of the experiences of resettlement and are aimed at avoiding the manifestation of identified impoverishment risks of physical and economic displacement.⁸⁷ Based on these sociological studies, the policy sets out the range of measures necessary to meet the objective of ensuring that the livelihoods and living standards of affected people are restored.⁸⁸ If the Borrower's framework is strong enough to achieve the objective of restoration, they will contain requirements that are consistent with Bank standards. Conversely, if the Borrower framework does not provide for such measures, it is unlikely to be effective at achieving the

86. *Id.* at ¶ xxviii.

87. *See* OPERATIONAL MANUAL, *supra* note 18, at OP 4.12 (stating that the Bank's Involuntary Resettlement Policy is meant to address and mitigate the following "impoverishment risks": production systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost).

88. *Id.*

requisite objectives without major gap filling, which “is almost the same as just applying Bank systems.”⁸⁹ In other words, a Borrower with an adequate country system on resettlement will not be duplicating efforts in meeting both its own legal framework and the Bank’s standards because they will complement and reinforce each other.

Another concerning loophole in the draft ESF relates to subprojects. If the Bank and a Borrower government structure a project so that it is implemented on the ground through several subprojects, they may be able to evade the ESSs. Only subprojects classified as “High Risk,” for which the Procedure sets a very high bar,⁹⁰ need to comply with the ESSs.⁹¹ Subprojects classified as having a “substantial” or lower environmental and social risk only need to comply with national regulations (unless the Bank deems otherwise), which, as noted above, in the case of land expropriation and resettlement are often weak.⁹² According to the draft Procedure, Substantial Risk subprojects could include, for example, one that has large-scale impacts, requiring substantial investment and time and some complex and/or unproven mitigation measures.⁹³ A project can be classified as Substantial Risk, if there are concerns that the adverse impacts “may give rise to significant social conflict or harm or significant risks to human security.”⁹⁴ There may also be potential for transboundary impacts.⁹⁵ Despite the substantial risk of harm, in the case of subprojects, no gap analysis between the national law and the ESSs or measures to address those gaps are required. This is a significant dilution of the current policies,⁹⁶ which could have wide-reaching implications, including by incentivizing the Bank and Borrower to design projects in such a way as to require implementation through subprojects and thereby avoid application of the Bank’s environmental and social standards altogether.

89. *Use of Country Systems*, *supra* note 80, at ¶ 35(c).

90. Procedure, *supra* note 40, at ¶ 24.

91. Policy, *supra* note 39, at ¶ 35(a).

92. *Id.* at ¶ 35(b) (stating that the Bank may require compliance with the ESSs in undefined circumstances).

93. Procedure, *supra* note 40, at ¶¶ 25(a)-(c).

94. *Id.* at ¶ 25(b).

95. *Id.* at ¶ 25(f).

96. See OPERATIONAL MANUAL, *supra* note 18, at OP 4.12, ¶ 29.

A third loophole is written into the mitigation hierarchy itself. For impacts that cannot be avoided or mitigated, the Borrower is required to “compensate for or offset them, where technically and financially feasible.”⁹⁷ A footnote explains that “[f]inancial feasibility is based on relevant financial considerations, including relative magnitude of the incremental cost of adopting such measures and actions compared to the project’s investment, operating, and maintenance costs, and on whether this incremental cost could make the project nonviable for the Borrower.”⁹⁸ Conceivably, compensation of fisher communities for adverse impacts of a dam to their livelihoods could be enormous, given the potential scale and depth of disruption to their incomes, food source, and way of life. For example, in the case of the Nam Theun 2 dam in Laos, the downstream impacts were estimated to affect the livelihoods and food systems of some 110,000 people.⁹⁹ The mitigation hierarchy and footnote appear to suggest that the Borrower could argue that the payment of such compensation would make the project unviable in order to repudiate its responsibility to these project affected people.¹⁰⁰ In other words, on its face, the policy allows for these costs to be externalized from the project and placed on shoulders of downstream fisher folk. The appropriate course of action from a human rights and development perspective would rather be for such costs to be factored into the project budget and economic analysis. If, after factoring in these costs, the project is not economically viable, then the project should be redesigned or abandoned.

Finally, the Bank is also authorized to waive operational policies “in response to clearly delineated individual circumstances, so as to allow staff to proceed with processing or implementing steps that are pending.”¹⁰¹ The possibility of waiving provisions of the

97. ESS1, *supra* note 41, at Objectives.

98. *Id.* at 27 n. 22.

99. TANYA LEE, TIME TO RE-ASSESS GREATER MEKONG SUBREGION: ENERGY SECTOR INVESTMENTS 5 (2015).

100. ESS1, *supra* note 41, at Objectives and n. 3.

101. See WORLD BANK, BANK POLICY: OPERATIONAL POLICY WAIVERS ¶ 2 (2014), http://siteresources.worldbank.org/OPSMANUAL/112526-1124459412562/23552954/Policy_OperationalPolicyWaivers_Final_April_2014.pdf [hereinafter OPERATIONAL POLICY WAIVERS].

Environmental and Social Framework is explicitly identified in the Procedure.¹⁰² The stated purpose of the waiver policy is to “enable the Bank to balance the need for operational flexibility, responsiveness and risk management on the one hand, and the need for strong corporate governance, oversight and accountability on the other.”¹⁰³

For a project that does not escape the application of ESS5 on Involuntary Resettlement, through the use of borrower frameworks, subprojects, loopholes or waivers, a range of fairly strong protections apply for people who will be displaced as a result of land acquisition or restrictions on land use. In some respects, ESS5 improves upon the current involuntary resettlement policy.¹⁰⁴ Forced evictions are prohibited,¹⁰⁵ including of informal settlers, who are conferred important entitlements upon resettlement that include “arrangements to allow them to obtain adequate housing with security of tenure.”¹⁰⁶ However, ESS5 requirements to restore or improve livelihoods of people who are economically displaced remain thin and fail to incorporate obvious measures, such as a range of support measures that take into account the skill-base and capacities of affected persons.¹⁰⁷ Nonetheless, the standards, if met in practice, would provide important protections, including compensation, resettlement with security of tenure and a degree of livelihood support to eligible

102. See Procedure, *supra* note 40, at ¶¶ 7(g) and (h).

103. See OPERATIONAL POLICY WAIVERS, *supra* note 101, at ¶1.

104. In other important respects, weaknesses remain. For example, the Borrower is still not required to demonstrate that the project is justified taking into account both its intended development benefits as well as the foreseeable social and environmental risks, including displacement impacts. International human rights law standards require that evictions, including involuntary resettlement, are only undertaken for the promotion of the general welfare and are reasonable and proportionate to the benefits that will ensue. See Human Rights Commission [HRC], Basic Principles and Guidelines on Development-Based Evictions and Displacement, ¶ 21, A/HRC/4/18, http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf. The Framework pre-supposes that the project development rationale justifies the displacement, regardless of its magnitude and impacts.

105. See Environmental and Social Standard 5. Land Acquisition, Restrictions on Land Use and Involuntary Resettlement ¶ 31 *in* Policy, *supra* note 39 [hereinafter ESS5].

106. See ESS5, *supra* note 105, at ¶ 29.

107. See ESS5, *supra* note 105, ¶ 35(c), Annex 1 ¶ 27 (explaining measures to provide income-earning opportunities).

affected persons.¹⁰⁸

However, these protections do not apply to people who will be economically displaced by the “downstream” impacts of a hydropower dam, such as fisher folk. ESS5 does not cover these project-affected people since they are not directly affected by land acquisition or restrictions on land use, but rather by changes in the river’s ecosystem.¹⁰⁹ These types of impacts are, in theory, to be covered by the general social assessment process under ESS1.¹¹⁰ Thus, instead of applying the relatively strong measures and protections of ESS5, it is left to the Borrower to identify the type and scope of downstream impacts to be covered, assess their magnitude, and then design mitigation measures by applying the vague mitigation hierarchy. Even if this were to be done effectively, the mitigation hierarchy requires *compensation* for adverse impacts, rather than *restoration* like ESS5.¹¹¹ Despite the fact that the experience of economic displacement caused by a project’s “downstream” impact can be just as damaging as that caused by direct land acquisition, the level of protection under the framework is highly differentiated. One basic tenet of the Bank’s involuntary resettlement policy, based on volumes of empirical research, is that compensation alone does not prevent impoverishment of displaced households.¹¹² It is therefore foreseeable that future Bank-financed hydropower projects, an area of renewed interest at the Bank, will not sufficiently protect from impoverishment the potentially large

108. In her capacity as Legal Director of Inclusive Development International, the author prepared detailed submissions to the World Bank safeguards review, including alternative language on ESS5, which would bring it into compliance with international human rights standards. The submission was endorsed by a number of organizations. See Letter from World Bank Safeguards Review Team to World Bank Safeguards Team (Feb. 16, 2015), <http://www.inclusivedevelopment.net/wp-content/uploads/2015/03/Joint-Safeguards-Submission-on-Involuntary-Resettlement-and-Land-.pdf>.

109. See ESS5, *supra* note 105, at ¶ 4. See also OPERATIONAL MANUAL, *supra* note 18, at OP 4.12 (finding that downstream impacts are also not covered by the current involuntary resettlement policy).

110. See ESS5, *supra* note 105, at ¶ 5.

111. See *id.* at ¶ 33.

112. See Michael Cernea, *Compensation and Investment in Resettlement: Theory, Practice, Pitfalls, and Needed Policy Reform in CAN COMPENSATION PREVENT IMPOVERISHMENT?* (Michael Cernea & Hari Mohan Mathur eds., 2008) [hereinafter Cernea, *Compensation & Investment in Resettlement*].

populations of affected communities living downstream.

3. *Reduced “front-loading”: The Environmental and Social Commitment Plan*

Based on the social and environmental assessment, the Borrower and Bank agree on an Environmental and Social Commitment Plan (ESCP), which forms part of the legal agreement.¹¹³ The Policy describes the ESCP as setting out the “measures and actions required for the project to achieve compliance with the ESSs over a specified timeframe.”¹¹⁴ An annexed document describes the ESCP concept in more detail, explaining that they will differ from project to project, in some cases capturing all relevant obligations of the Borrower, and in others, referring to other plans or plans to be prepared in the future, such as a resettlement plan.¹¹⁵

The ESCP concept is a marked departure from current policy in which the Borrower, with the Bank’s assistance, is required to prepare a draft resettlement plan that complies with the Involuntary Resettlement policy as a condition of appraisal of projects whenever there is a known magnitude of displacement.¹¹⁶ This requirement is essential to appraising the ability and commitment of the Borrower to mitigating adverse impacts of displacement, especially for projects like large-scale dams that will have such wide-ranging and complex impacts on people’s lives and livelihoods and where the risk of impoverishment is high. It is also necessary in order to integrate the projected costs of mitigating these impacts into the overall project budget, so as to avoid under resourcing during implementation. The costs of mitigation in the case of significant and complex

113. See Policy, *supra* note 39, at ¶ 45.

114. See *id.*

115. See ESS1, *supra* note 41, at Annex 2 ¶ 7.

116. See OPERATIONAL MANUAL, *supra* note 18, at OP 4.12 (requiring that “[a]s a condition of appraisal of projects involving resettlement, the borrower provides the Bank with the relevant draft resettlement instrument which conforms to this policy, and makes it available at a place accessible to displaced persons and local NGOs, in a form, manner, and language that are understandable to them”); see also *id.* at Annex A ¶¶ 23-25 (determining that projects that are expected to cause displacement but the precise impacts cannot be defined at early stages, the Borrower is required to prepare a resettlement framework setting out principles and criteria to guide the development of full plans as soon as necessary information becomes available).

displacement impacts caused by a mega-dam are likely to be high and need to be factored into the project budget during project appraisal. Yet, the requirement for pre-approval of resettlement plans has been removed in favor of reduced “front-loading” to make project approval easier, quicker, and less costly.

The draft Policy states that the Bank will only approve projects for support if they are “expected to meet the requirements of the ESSs in a manner and within a timeframe acceptable to the Bank.”¹¹⁷ This decision hinges on the ESCP. The Bank must require the Borrower, in its legal agreement, to refrain from commencing activities that may cause harm, such as evictions and resettlement, until relevant plans, measures or actions have been completed in accordance with the ESCP.¹¹⁸ However, after the project has been approved and the loan agreement signed, the Bank loses the vast majority of its leverage to ensure displacement does not occur without a comprehensive resettlement plan, supported by an adequate budget. The main legal remedy available to the Bank for non-compliance by the Borrower is suspension of disbursements - a blunt tool and one that the Bank rarely uses.¹¹⁹

The reduction in “front-loading,” promoted as more efficient, therefore has serious practical implications for enforcement of safeguards and the protection of human rights. It is foreseeable that the consequence will be an increase in problematic projects causing serious harms to people and the environment, ultimately resulting in significant unexpected delays, suspensions, and increased costs for the Bank.

4. Implementation, Monitoring, and Supervision

From this point onwards, the focus is on achieving the outputs agreed in the ESCP. Once a project is approved, the Borrower implements the measures and actions in the ESCP in accordance with the stipulated timeframes.¹²⁰ The Bank’s responsibility is to monitor the “environmental and social performance of the project in accordance with the requirements of the legal agreement, including

117. See Policy, *supra* note 39, at ¶ 7.

118. See *id.* at ¶17.

119. See OPERATIONAL MANUAL, *supra* note 18, at OP 8.60, ¶ 37.

120. See ESS1, *supra* note 41, at 40.

the ESCP.”¹²¹ The Policy provisions and procedures that describe the Bank’s monitoring role do not mention the ESS requirements or objectives; the Bank’s role is to monitor the implementation of the ESCP only.¹²²

Recall that the Bank asserts that to counter “less front-loading” there will be “more investment in effective monitoring and supervision.”¹²³ Increased investment in supervision is badly needed. In 2010, the Bank’s Independent Evaluation Group (IEG) identified the lack of adequate monitoring and supervision as a long-standing problem, noting that safeguards activities such as resettlement were regularly treated as an “add on,” marginal to the main operation (eg. construction of the dam).¹²⁴ In March 2015, the Bank released an internal Involuntary Resettlement Portfolio Review that revealed fundamental failures in implementation and supervision of resettlement, including a major absence of data in Bank documentation of who was displaced and what happened to them.¹²⁵

Yet, instead of strengthening the Bank’s monitoring and supervision measures for resettlement, compared to current requirements, under the framework, the Bank’s responsibilities are vague and flexible. Whereas current policy recognizes the “importance of close and frequent supervision to good resettlement outcomes” and includes detailed requirements upon the Bank to conduct robust supervision from the beginning of project implementation through completion;¹²⁶ the framework contains little detail about the Bank’s monitoring role. The extent of monitoring will be “proportionate to the potential environmental and social risks

121. See Policy, *supra* note 39, at ¶ 53.

122. See *id.* at ¶¶ 53-56. See also Procedure, *supra* note 40, at ¶54.

123. See *Background Paper*, *supra* note 42, at ¶ 20.

124. See SAFEGUARDS & SUSTAINABILITY, *supra* note 78, at 28-31.

125. See generally WORLD BANK, SOCIAL DEVELOPMENT DEPARTMENT INVOLUNTARY RESETTLEMENT PORTFOLIO REVIEW: PHASE I. INVENTORY OF BANK-FINANCED PROJECTS TRIGGERING THE INVOLUNTARY RESETTLEMENT POLICY (1990-2010) (2012) <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/517941425483120301/involuntary-resettlement-portfolio-review-phase1.pdf> [hereinafter PHASE I]; WORLD BANK, WORLD BANK INVOLUNTARY RESETTLEMENT PORTFOLIO REVIEW: PHASE II: RESETTLEMENT IMPLEMENTATION (2014), <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/3/96781425483120443/involuntary-resettlement-portfolio-review-phase2.pdf> [hereinafter PHASE II].

126. See Policy, *supra* note 39, at ¶ 46; Cf. OPERATIONAL MANUAL, *supra* note 18, at OP 4.12, ¶ 24; OPERATIONAL MANUAL, *supra* note 18, at BP 4.12, ¶¶ 13, 14.

and impacts”¹²⁷ and may be limited to reviewing reports provided by the Borrower.¹²⁸

The assertion by the Bank that the increased resource efficiencies at the front-end would allow more investment in effective monitoring and supervision is not supported by the text of the proposed framework. In the absence of strong monitoring and supervision of the implementation of safeguard measures, including through processes that are independent from the Borrower’s own reporting of the situation, it is difficult to see how the Bank will achieve better outcomes under the proposed framework.

5. Evaluation

At the back-end of the safeguards process is the evaluation of social and environmental performance. In the case of displacement caused by land acquisition for a hydropower project, this should include an evaluation of whether the objectives of ESS5 have been met. The evaluation should measure and assess, *inter alia*, whether people who were displaced were sufficiently assisted in their efforts to improve, or at least restore, their livelihoods and living standards to pre-displacement levels and whether the living conditions of poor and vulnerable persons who were physically displaced were improved, through provision of adequate housing, access to services and facilities, and security of tenure.¹²⁹ For people whose livelihoods were affected due to downstream impacts of the dam, in line with the objectives of ESS1 and the mitigation hierarchy, the evaluation should assess whether the impacts were sufficiently mitigated or compensated.

One might expect that the proposed framework would place a heavy emphasis on evaluation given the shift in focus to outcomes. But the Policy pays scant attention to evaluation; it states only that, “[a] project will not be considered complete until the measures and actions set out in the legal agreement (including the ESCP) have been implemented.”¹³⁰ Notably, this requires an evaluation of outputs

127. See Policy, *supra* note 39, at ¶ 53.

128. See *id.* at ¶¶ 53,54; see also OPERATIONAL MANUAL, *supra* note 18, at OP 10.00, ¶¶ 21, 40; ESS1, *supra* note 41, at ¶ 51; Procedure, *supra* note 40, at ¶ 54 (listing other review activities that the Bank may undertake as appropriate).

129. See ESS5, *supra* note 105, at Objectives.

130. See Policy, *supra* note 39, at ¶ 53.

– the *completion of measures and actions* - rather than outcomes: whether ESS *objectives have been achieved*.

In terms of the Borrower's responsibilities, ESS5 does states that, in the case of physical displacement, "the Borrower's plan will be considered completed when the adverse impacts of resettlement have been addressed in a manner that is consistent with the objectives," which is to be based on an external completion audit.¹³¹ While ESS5 thus requires an evaluation of outcomes by the Borrower, at least for those displaced by land acquisition, the *Bank* is obliged only to verify that the measures and actions in the ESCP have been executed. The Policy does not require Bank staff to evaluate whether or not the ESCP was sufficient to meet the objectives of the ESSs and the impacts of any shortcomings for the living standards and livelihoods of displaced communities. The broad discretion vested in Bank staff also extends to dealing with problems and gaps encountered in the Borrower's environmental and social performance: in such cases, "the Bank will determine whether further measures and actions . . . will be required."¹³²

D. THE VERDICT: WILL THE BANK'S PROPOSAL INCREASE ACCOUNTABILITY AND LEAD TO BETTER OUTCOMES?

While the Bank claims that the framework will strengthen outcomes and accountability, it has not presented any evidence that increased flexibility and discretion will effectively do either. Despite the fairly strong standards on land acquisition and involuntary resettlement, the proposed framework provides considerable space to negotiate alternatives. Instead of the current "rules-based" system that requires compliance with policies to achieve their objectives, the proposed framework, in effect, promotes the idea of negotiated agreements between the Bank and the Borrower on a case-by-case basis on the entitlements and protections to be afforded to project-affected people. The standards are better characterized in this proposal as guidance to shape these agreements in the form of the ESCP. Moreover, the Bank's responsibility for ensuring effective implementation of safeguards is reduced, and a heavier burden - and reliance - is placed on the Borrower to carry out and report on agreed

131. See ESS5, *supra* note 105, at ¶ 24.

132. See Policy, *supra* note 39, at ¶ 53.

outputs.

The promotion of Borrower frameworks, the reduction of front-end planning requirements, and the flexible nature of the Bank's responsibilities throughout the project cycle, are all ostensibly sensible improvements to the safeguards policies. However, these characteristics make the effectiveness of the framework in protecting people and the environment from harm heavily dependent on the political will and commitment to the safeguards of both government borrowers and Bank staff. Unfortunately, the evidence does not bode well for these crucial factors.¹³³ Among the Bank's biggest clients are some of the worst violators of human rights.¹³⁴ And by the Bank's own account, it has a troubling track record on ensuring safeguards implementation in its projects and an organizational culture and incentive structure that devalues social and environmental safeguards, an issue returned to later in this Article.¹³⁵

The Bank is shying away from insisting on the application of a set of safeguard policies that provide clear entitlements and important protections for project affected people, who are often vulnerable and marginalized. These entitlements and protections are essential to empowering affected people in political economy contexts that are hostile to their rights and interests. Although the Borrower is supposed to meaningfully engage project affected people throughout the project cycle,¹³⁶ in reality, communities may have little agency in the negotiations that take place between the Bank and the Borrower about the measures, including corrective measures, to ensure that they do not suffer enduring harms due to displacement or other project impacts.

133. See Sasha Chavkin et al., *How The World Bank Broke Its Promise To The Poor* (Apr. 15, 2015, 8:01 PM), <http://projects.huffingtonpost.com/worldbank-evicted-abandoned> (stating extensive reporting by the International Consortium of Journalists (ICIJ) and the Huffington Post on displacement caused by World Bank Group-financed projects).

134. See *id.* (listing China, India, Ethiopia, Nigeria as examples).

135. See SAFEGUARDS & SUSTAINABILITY, *supra* note 78; PHASE I, *supra* note 125; PHASE II, *supra* note 125; see also Press Release, World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems (Mar. 4, 2015), <http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems>.

136. See Policy, *supra* note 39.

In the event that affected persons seek redress and accountability through the Inspection Panel, they may have a harder case to make under the framework in terms of the Bank's failure to comply with its responsibilities. The flexible due diligence, monitoring, and supervision requirements of the Bank mean that there are fewer sharp hooks against which the Inspection Panel can assess compliance. The ambiguous nature of the Bank's responsibilities mean that a more conservative or reticent Panel could read narrowly the Bank's responsibilities, sticking strictly to the letter of the Policy in its compliance assessments, while a more bold Panel could infer that the imprecision of the Policy compels it to apply its own judgments as to the reasonableness of the Bank's actions and decisions in the circumstances. For example, a "strong" Panel could theoretically make findings of non-compliance if it concludes in a particular case that the Bank did not reasonably assure itself through its due diligence that "the project is capable of being developed and implemented in accordance with the ESSs."¹³⁷ A similar approach has been taken by the IFC's accountability mechanism, the Compliance Advisor Ombudsman (CAO), to deal with vague due diligence requirements in IFC's policy.¹³⁸ However, as experienced by the CAO, this could foreseeably set up a "strong" Panel for contestation with Bank management, which may defend its efforts and accuse the Panel of overreach.

Criticism of the draft framework and its shift away from detailed responsibilities and requirements has come from unusual quarters: in a press release, the ADB's Independent Evaluation Department (IED) advocated for "the continued use of a requirements-based safeguards system . . . rather than a switch to an aspirational one" as proposed by the World Bank.¹³⁹ It warned that the "more flexible

137. *See id.* at ¶ 29.

138. For example, in considering the adequacy of the IFC's efforts in regards to its investment in Corporacion Dinant in Honduras, the CAO assessed "whether IFC teams exercised reasonable professional judgment and care in the application of relevant policies and procedures based on contemporaneously available sources of information" and whether the IFC had a "reasonable basis on which to decide whether the project could be expected to meet the Performance Standards over a reasonable period of time." *See CAO Audit of IFC Investment in Dinant, supra* note 66, at 5, 30.

139. News Release, Asian Development Bank, ADB's Social and Environmental Safeguards, with Improvements, can be a Benchmark (Nov. 11,

approach to its safeguard policy . . . could dilute the strength of social and environmental protections.”¹⁴⁰

III. A “CITIZEN-DRIVEN ACCOUNTABILITY MECHANISM”: AN INCONGRUOUS COMPONENT OF A BUSINESS-DRIVEN BANK

Like all governance systems, the adoption of safeguard policies alone is not enough to ensure their enforcement. The World Bank Inspection Panel plays a vital role in investigating compliance with safeguards and bolstering the Bank’s accountability under the policies.

The Bank’s board of directors established the Inspection Panel in 1993, following “another wave of international protest” and a high-level independent review of the controversial Sardar Sarovar hydropower project in India’s Narmada Valley.¹⁴¹ The review, known as the Morse Commission, exposed the Bank’s extensive failure to adhere to its resettlement and other safeguard policies.¹⁴² The board was forced to acknowledge that the policies lose their mandatory nature, and thus their effectiveness, in the absence of an oversight body.¹⁴³ Civil society organizations pushed for an independent appeals mechanism, a proposal ultimately backed by the U.S. Congress, which threatened to make it a condition of fund replenishment of the Bank’s International Development

2014), <http://www.adb.org/news/adb-s-social-and-environmental-safeguards-improvements-can-be-benchmark>.

140. *See id.*

141. See Jonathan Fox, *Introduction: Framing the Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL xiii (Dana Clark et al. eds., 2003).

142. See Bradford Morse et al., REPORT OF THE INDEPENDENT REVIEW, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE (1992), <http://ielrc.org/Content/c9202.pdf>; see also WORLD BANK, EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT 14, 16 (1992), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1992/09/22/00009265_3961003221227/Rendered/PDF/multi0page.pdf [hereinafter the WAPENHANS REPORT] (finding that the Bank was not enforcing almost 80% of financial conditions in loan agreements and described a “pervasive,” “cultural of approval” of loans).

143. See Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 7-8 (Dana Clark et al eds., 2003).

Association.¹⁴⁴

The “precedent-setting” public accountability mechanism established in response to this pressure was mandated to receive and investigate complaints of harm or anticipated harm from project-affected people that arise from the Bank’s failure to comply with its policies.¹⁴⁵ Although the Inspection Panel is only empowered to investigate policy violations by the Bank and not the Borrower,¹⁴⁶ the current policies and procedures place integrated responsibilities for achieving requirements and objectives on both actors, making separation of accountabilities somewhat superficial.¹⁴⁷ This inability to separate culpability for harms has important implications, both for the use of Panel findings in community advocacy (ie. citizen-State relations) and for Bank-Borrower relations.

Traditionally, the Panel registers the complaint, called a “request for inspection” soon after receiving it and sends it to Bank management for a response.¹⁴⁸ Management’s response may contain a denial of wrongdoing; an assertion that failures are exclusively attributable to the Borrower or other external factors; an admission of non-compliance and an explanation of how it intends to rectify it; or an admission of serious failures on its part as well as the Borrower’s.¹⁴⁹ In practice, Management has tended to submit

144. See David Hunter & Lori Udall, *The World Bank’s New Inspection Panel: Will it Increase the Bank’s Accountability?*, <http://www.ciel.org/wp-content/uploads/1994/04/issue1.pdf>.

145. See Jonathan Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279-318, 279 (2000); World Bank, *The World Bank Inspection Panel*, ¶¶ 12, 14(a), Res. IBRD 93-10/IDA 93-6 (Sept. 22, 1993), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf> [hereinafter Resolution No. IBRD 93-10/IDA 93-6].

146. See Resolution No. IBRD 93-10/IDA 93-6, *supra* note 145, at ¶¶ 12, 14(a); see also World Bank Group, *Clarification of the Board’s Second Review of the Inspection Panel* ¶ 13 (Apr. 20, 1999), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf> [hereinafter 1999 Clarification].

147. See OPERATIONAL MANUAL, *supra* note 18, at OP 4.12, 36, 63 (giving an example of an integrated approach to responsibilities).

148. See WORLD BANK, *THE INSPECTION PANEL AT THE WORLD BANK* ¶ 28 (2014) <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf> [hereinafter INSPECTION PANEL OPERATING PROCEDURES].

149. 1999 Clarification, *supra* note 146, at ¶ 3.

defensive responses, although this is not always the case.¹⁵⁰

After reviewing the information, the three-member Panel submits its determination on the eligibility of the complaint to the Board.¹⁵¹ For a complaint to be eligible it must, *inter alia*, plausibly assert that the harm is related to a Bank-financed project and the Bank's failure to comply with its policies, and demonstrate a previous, unsuccessful, good faith effort to resolve the grievance directly with Bank management.¹⁵²

If the Panel recommends a full investigation, the Board authorizes the investigation without substantive discussion of the merits of the claims.¹⁵³ The Panel then proceeds to undertake a full investigation into whether there has been a serious failure of the Bank to observe its operational policies and procedures and whether these have caused or contributed to material adverse effects on the complainants.¹⁵⁴

If the Panel finds that the Bank has violated its policies and this failure has contributed to the harms, Management must prepare a report to the Board setting out proposed remedial actions.¹⁵⁵ It must also develop an action plan in conjunction with the Borrower and in consultation with the complainants.¹⁵⁶ The Panel has no power to assess the adequacy of the action plan or to monitor its implementation.¹⁵⁷ Its substantive role effectively ends with its presentation of its investigation report to the Board.

150. See C. DANIEL, K. GENOVESE ET AL., GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE. ANNEX 15: THE INSPECTION PANEL OF THE WORLD BANK (2016) (affirming that the Bank has often failed "to improve its policies [and] practices in response to cases").

151. See INSPECTION PANEL OPERATING PROCEDURES, *supra* note 148, at ¶ 3.2 (2014) (explaining the process in which the Panel submits its Notice of Registration to the Board and Management and the Borrower and the Management must approve or disapprove the eligibility to investigate).

152. 1999 Clarification, *supra* note 146, at ¶ 9.

153. *Id.*

154. *Id.* at ¶ 13.

155. See Resolution No. IBRD 93-10/IDA 93-6, *supra* note 145, at ¶ 23, <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf> (confirming Management must submit a report of recommendations and responses regarding the Bank's violation of its policies to the Executive Directors).

156. 1999 Clarification, *supra* note 146, at ¶ 15.

157. *Id.* at ¶ 16.

The Panel's inability to formally influence remedial action, as well as other limitations of and challenges to the Panel's mandate, has given rise to criticism of the Panel's effectiveness in securing the right to remedy for complainants. Jonathon Fox lamented in 2000 that some "nation-states and Bank management have managed to prevent it from having a significant impact most of the time."¹⁵⁸ Namita Wahi observed in 2006 that only eleven of the twenty-eight complaints filed had resulted in a constructive change in the project or in the institution more broadly.¹⁵⁹

Yet in some cases, the Panel process has resulted in decidedly significant outcomes for complainants, if not full redress, as well as some degree of institutional accountability. For example, the Panel's investigation into the Mumbai Urban Transport Project, set to displace 120,000 urban dwellers, led to critical findings and uncovered dismissive attitudes towards social safeguards at the Bank, which had contributed to the community's grievances.¹⁶⁰ In response to the Panel's findings, the Bank suspended project disbursements until a number of improvements were made to the resettlement process and outcomes.¹⁶¹

In another successful case, the Panel found that the Bank failed to comply with its policies and procedures in designing and implementing forest sector reforms in the Democratic Republic of Congo leading to harm of Pygmy communities that relied on forest resources.¹⁶² In response, the Bank developed a "Pygmy

158. Fox, *supra* note 145, at 289.

159. Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS L. REV. 331, 360 (2006).

160. WORLD BANK, INSPECTION PANEL REPORT, NO. 34725 xiv, 5-6 (2005), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/01/09/000160016_20060109131551/Rendered/PDF/34725.pdf.

161. Renu Modi, *The Best and the Worst of the World Bank: Involuntary Resettlement and the Mumbai Urban Transport Project (MUTP)*, 54(3) Development (2011), https://www.academia.edu/3789659/The_Best_and_the_Worst_of_the_World_Bank_Involuntary_Resettlement_and_the_Mumbai_Urban_Transport_Project_MUTP_India_September_2011_Development_54_3_pp.400_6.

162. See WORLD BANK, INSPECTION PANEL REPORT, NO. 40746 –ZR 144-46 (2007), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FINALINVREPwhole.pdf> (finding the Bank failed to reach its policy of poverty reduction because the Panel found evidence that "promised benefits to communities from concessions, such as schools, clinics, and other facilities, have

Development Strategy,” which in consultation with communities, identified and analyzed factors that threaten Pygmy cultural identity and contribute to their impoverishment and marginalization, and proposed a set of actions to mitigate them in future programming.¹⁶³ It also began triggering the Indigenous Peoples Policy for relevant projects in the DRC.¹⁶⁴

One of the most remarkable impacts of a Panel investigation on Bank and Borrower accountability emerged from a complaint from a group of urban dwellers regarding the Cambodia Land Management and Administration Project (LMAP). Representatives of some 20,000 Phnom Penh residents had been unduly denied title *en masse* despite legitimate legal claims and were also denied the protections of the involuntary resettlement policy when they were subjected to forced eviction.¹⁶⁵ Following its investigation, the Panel concluded that the Bank was complicit, through its omissions, in the “grave harm” experienced by the complainants.¹⁶⁶ The Panel’s strong findings, and advocacy on the part of the complainants, ultimately resulted in the Bank suspending loans to Cambodia across its entire country portfolio, an unprecedented act of accountability to project-affected people. Bank management, which had been uncharacteristically non-defensive in its response to the complaint, committed to reengaging

not materialized”); *see also* Press Release, Global Witness, World Bank Logging Plans for DR Congo Slammed by their own Internal Inspection Panel (Jan. 18, 2008), <https://www.globalwitness.org/en/archive/world-bank-logging-plans-dr-congo-slammed-their-own-internal-inspection-panel/> (listing the Bank’s failure to “identify the presence of Pygmy communities in project-affected areas” and “identify the cultural property and spiritual value of forest areas to Pygmy peoples”).

163. WORLD BANK, PROGRESS REPORT TO THE BOARD OF EXECUTIVE DIRECTORS ON THE IMPLEMENTATION OF THE MANAGEMENT’S ACTION PLAN IN RESPONSE TO THE DEMOCRATIC REPUBLIC OF CONGO INSPECTION PANEL INVESTIGATION REPORT ON TRANSITIONAL SUPPORT FOR ECONOMIC RECOVERY PROJECT AND THE EMERGENCY SOCIAL AND ECONOMIC REUNIFICATION PROJECT (2009), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/DRC_Forests_First_Progress_Report.pdf.

164. *Id.*

165. Full disclosure: the complaint was prepared by the author during her tenure as legal officer at the Centre on Housing Rights and Evictions.

166. WORLD BANK, INSPECTION PANEL REPORT, NO. 58016-KH vi (2010), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/12/01/000334955_20101201025955/Rendered/PDF/580160INVR0INS1se0nly1910BOX353791.pdf.

with the Cambodian government only when a resolution for the complainants was found.¹⁶⁷ The Cambodian government - which for years had been stubbornly recalcitrant vis-à-vis its contractual obligations to the Bank under LMAP and had been systemically manipulating the land titling program to the benefit of elites - suddenly reversed direction. The government halted the evictions and granted title to most of the households shortly after the World Bank's decision to suspend loans was made public.¹⁶⁸

This marked a significant victory both for the Cambodian complainants and the Inspection Panel. In combination with several other factors, the Panel process had played a fundamental role in obtaining effective remedies for ordinary Cambodian families, who now had secure tenure to their land and homes. This was no small feat in a country where powerful actors routinely violate the law with impunity and trample on the rights of poor and marginalized people, who have no access to justice through domestic courts and tribunals.¹⁶⁹ Moreover, the case stands out as a rare example of the World Bank President standing firm behind the Bank's safeguard policies - and their mandatory nature - in the face of pushback from a difficult client. The President's decision stood in stark contrast to the notorious "culture of approval" at the World Bank, in which "pressure to lend overwhelms all other considerations."¹⁷⁰

However, even the comparatively successful LMAP case remains only a partial victory in terms of redress. At the time of writing, some four years after the Panel's findings were published, the Cambodian government still has not properly compensated and restored the living standards of the thousands of families that had

167. Mark Tran, *World Bank suspends new lending to Cambodia over eviction of landowners*, THE GUARDIAN, Aug. 10, 2011, <http://www.theguardian.com/global-development/2011/aug/10/world-bank-suspends-cambodia-lending>.

168. Royal Government of Cambodia, Sub decree No. 183 (August 11, 2011). Khouth Sopak Chakrya, *Lakeside Deal Brokered*, PHNOM PENH POST, Aug. 16, 2011, <http://www.phnompenhpost.com/national/lakeside-deal-brokered>.

169. Natalie Bugalski & David Pred, *Accountability Squandered?: World Bank Should Wait for Justice in Cambodia, Bretton Woods Project*, BRETTON WOODS PROJECT, June 22, 2012, <http://www.brettonwoodsproject.org/2012/06/art-570766/>.

170. David Hunter & Lori Udall, *The World Bank's New Inspection Panel: Will It Increase the Bank's Accountability?*, 1 CIEL BRIEF (1994), <http://www.ciel.org/wp-content/uploads/1994/04/issue1.pdf>.

already been displaced from their homes. The Bank's suspension remains in effect.¹⁷¹

While the Inspection Panel, as the first of its kind in transnational accountability was “a remarkable advancement in international law,”¹⁷² its structural deficiencies as well as its incongruity in a business-oriented Bank mean that, even operating at its best, it is usually unable to fully secure effective remedies for human rights violations. The Panel is acutely aware of its deficiencies and the elusiveness of substantive outcomes. This self-consciousness has become more pronounced over the years, as grievance mechanisms of other development agencies, including the IFC's CAO and the ADB's Accountability Mechanism, have been established and vested with broader powers than the Inspection Panel. The Panel's former Chair, Eimi Watanabe, described the Panel as the “Ford Model T of accountability mechanisms.”¹⁷³

A. THE INSPECTION PANEL'S CHANGING APPROACH

Between the mid-2000s and early 2010s, the Panel released several highly critical investigation reports that provoked tensions with management and staff. For example, in the Albania Coastal Zone Management case, in which the Panel found the Bank complicit in the demolition of homes and forced evictions,¹⁷⁴ Bank management publicly expressed regret at its “series of errors,” suspended the project, and executed a remedial action plan.¹⁷⁵

171. *But see* Zsombor Peter, *World Bank Looks to End Funding Freeze*, CAMBODIA DAILY, Nov. 16, 2015, <https://www.cambodiadaily.com/news/world-bank-looks-to-end-funding-freeze-100353/> (describing that although the Bank decided to withhold loans to Cambodia because the Cambodian government has not compensated hundreds of evicted families, it may resume lending money to Cambodia for the Mekong Integrated Water Resource Management Project to help the government manage water resources).

172. Hunter & Udall, *supra* note 170.

173. WORLD BANK, INSPECTION PANEL ANNUAL REPORT 8 (2013), <http://ewebapps.worldbank.org/apps/ip/IPPublications/AnnualReport2013-2014f.pdf>.

174. WORLD BANK, ALBANIA: INTEGRATED COASTAL ZONE MANAGEMENT AND CLEAN-UP PROJECT, REP. NO. 46596-AL, ¶ 243 (2008) [hereinafter ALBANIA INSPECTION REPORT] [http://ewebapps.worldbank.org/apps/ip/PanelCases/47-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/47-Investigation%20Report%20(English).pdf).

175. Press Release, World Bank, World Bank Board of Executive Directors Reviews Independent Inspection Panel Report on Coastal Zone Management

However, the Panel's report had sent shockwaves through Bank management and staff, which were affronted by the scrutiny and criticism: the Panel's investigation had uncovered serious indiscretions, including dishonest representations made by Bank management to the Board, and its report noted that Bank staff had lied to the Panel to obfuscate previous transgressions.¹⁷⁶ In other cases, Bank management was extremely defensive and challenged the legitimacy of the Panel's findings. For example, in the South Africa Eskom Investment case, the Panel validated many of the concerns of potential harms from a coal-fired power plant raised in the complaint.¹⁷⁷ Bank management rejected most of the Panel's findings and refused to provide a remedial action plan.¹⁷⁸

By the time Watanabe became Chairperson of the Inspection Panel in May 2013, the relationship between the Panel and management, as well as the Board, had deteriorated badly.¹⁷⁹ Watanabe decided that during her tenure she would attempt to dissolve these tensions. Among other changes that she introduced,¹⁸⁰ Watanabe presided over revisions of the Panel's Operating Procedures. The most

Project in Albania (Feb. 17, 2009).

176. ALBANIA INSPECTION REPORT, *supra* note 174, at xv-xxvi.

177. WORLD BANK, SOUTH AFRICA: ESKOM INVESTMENT SUPPORT PROJECT, REP. NO. 64977-ZA ¶ 359 (2011) http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Eskom_IPN_Investigation_Report_11.21.11.pdf [hereinafter SOUTH AFRICA PANEL REPORT].

178. *See* MANAGEMENT REPORT AND RECOMMENDATION, *supra* note 85, at paras. 15-16 (2012) (describing the Bank's denial of the Panel's findings that it violated its bank policy and caused any harm to civilians); *see also* World Bank Fails to Correct Missteps in Eskom Coal Project in South Africa, BANK INFO. CTR. (June 4, 2012), <http://www.bankinformationcenter.org/world-bank-fails-to-correct-missteps-in-eskom-coal-project-in-south-africa>

(stating Management "refused to provide project-specific progress reports to the Board and will keep the Board informed about the project and eventual problems only in the context of more general reports about lending to South Africa").

179. Personal communications with Inspection Panel secretariat staff.

180. *See* Letter from Edward S. Ayensu et al., to Eimi Watanabe, Former Chair, World Bank Inspection Panel (explaining that after Watanabe ushered in controversial changes to the Panel's secretariat, including the introduction in 2014 of fixed term limits for the Executive Secretary, allowing appointees to be selected from the cadre of Bank staff, and, after their five-year term, to resume employment at the Bank, seven former Panel members sent a letter to Watanabe expressing their concern that allowing the executive secretary to rotate in and out of the Bank, "has the potential to destroy the essential independence of the Secretariat," which "go[es] hand in hand" with the "integrity and impartiality of the Panel").

controversial revision was the introduction of a new process, known as the “early solutions approach,” which allows the Panel to postpone registration of a complaint to give management additional time to resolve the issues raised and thereby avoid an investigation.¹⁸¹

Over the preceding five years, there had been numerous cases in which the Panel had stretched its standard operating procedures in order to avoid conducting an investigation even though the eligibility criteria of the complaints were met. In many of these cases, the Panel deferred either its registration of the complaint or its recommendation to the board on whether or not to investigate, in order to provide management with more time to attempt to address the grievances.¹⁸² In several cases, the Panel’s final recommendation

181. See INSPECTION PANEL OPERATION PROCEDURES, *supra* note 148.

182. See, e.g., WORLD BANK, INSPECTION FINAL REPORT AND RECOMMENDATION, No. 56278-YE ¶¶ 21, 23, 41 (2010), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/YEMEN_WHOLE_FINAL_ELIG_REPORT.pdf (stating the Panel’s decision to defer its recommendation to investigate into the issues raised in the Request for Inspection); see WORLD BANK, FOREWARD TO THE REPORT AND RECOMMENDATION, No. 58011-LR ¶ 115 (2011), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/03/31/000333038_20110401000026/Rendered/PDF/580110IPR0REV11Disclosed03124120111.pdf (noting that after analyzing alleged concerns about whether the World Bank has violated its Operational Policies and Procedures, the Panel still deferred its recommendation to investigate); see also WORLD BANK, REPORT AND RECOMMENDATION, No. 64964-KZ ¶¶ 39, 67 (2011), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/10/25/000386194_20111025021218/Rendered/PDF/649640INVRO0P090INSP0INSPOR201100007.pdf (citing the Panel’s decision to reject a recommendation for investigation even though the complaints met the eligibility criteria); WORLD BANK GROUP, REPORT AND RECOMMENDATION, No. 35471 ¶ 56 (2006), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/03/22/000012009_20060322095527/Rendered/PDF/354710rev0pdf.pdf (finding the Panel’s decision to refrain from investigating as it waits for further development on the complaints); WORLD BANK, REPORT AND RECOMMENDATION, No. 28383-ME ¶¶ 51-53 (2004), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/04/09/000012009_20040409165151/Rendered/PDF/283830m.pdf (denying the request for an investigation due to the Panel’s concern of a “rather lengthy process” that might not be appropriate to resolve the situation); WORLD BANK, FINAL REPORT AND RECOMMENDATION, No. 76416-LB ¶¶ 51-53 (2013), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/04/12/000445729_20130412101920/Rendered/PDF/764160IPR0P1030IPN0REQUEST0RQ010009.pdf (confirming the Panel’s rejection of an investigation after it analyzed whether the World Bank violated its Operational Policies and Procedures); Liberia: Development Forestry Sector Management

to the Board was that it should not carry out an investigation, even though complainants' grievances may not have been adequately addressed.¹⁸³ The change to the Operating Procedures formalized the practice of pre-registration deferrals.¹⁸⁴

The introduction of the early solutions approach was partly a response to the perceived success of formal dispute resolution functions at other accountability mechanisms, including the CAO.¹⁸⁵ Watanabe evidently saw value in these less confrontational methods for handling problematic Bank projects. But in her endeavor to reform the Panel's processes, she was hamstrung by the Board resolution establishing the Panel, which confines it to the exercise of investigative and adjudicative powers.¹⁸⁶ In the absence of a political appetite at the Board to open the resolution to amendment, she turned to the Panel's Operating Procedures, which were within her powers to revise. The result is a misguided attempt to incorporate a half-baked "dispute-resolution" process into the Panel's mandate.

1. The Panel's New "early solutions approach"

In introducing the 'early solutions' process, the Panel explains:

The Panel at times receives complaints on issues that are narrowly focused and less contentious, and there may be an interest on the part of all key stakeholders to seek opportunities for early solutions. To this end, the Panel has developed a new approach, consistent with the Resolution establishing the Panel and its Clarifications. The objective is, in specific cases, to provide an additional opportunity for Management and the

Project; Kazakhstan: South-West Roads; Romania: Mine Closure and Social Mitigation Project, Mexico: Indigenous and Community Biodiversity Project; Lebanon: Greater Beirut Water Supply Project.

183. See, e.g., Responses to Questions from the Requesters and the Inspection Panel in Yemen: Institutional Reform Development Policy Grant (Sept. 2010), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/YEMEN_WHOLE_FINAL_ELIG_REPORT.pdf; WORLD BANK INSPECTION PANEL, LIBERIA: DEVELOPMENT FORESTRY SECTOR MANAGEMENT PROJECT, REPORT AND RECOMMENDATION (2010).

184. Several civil society organizations raised concerns regarding proposed amendments during the consultation process, but these were not addressed in the final version. See Joint Civil Society Comments and Inclusive Development International Comments, <http://ewebapps.worldbank.org/apps/ip/Pages/Updated%20Operating%20Procedures%20-%20Public%20Comments.aspx>.

185. INSPECTION PANEL ANNUAL REPORT, *supra* note 173, at 7.

186. Resolution IBRD 93-10/IDA 93-6, *supra* note 145, at ¶ 12.

Requesters to address the concerns about alleged harm raised in a Request for Inspection by postponing the Panel's decision on registration of the Request (which otherwise meets the criteria for registration).¹⁸⁷

According to the Operating Procedures, in cases in which the issues of alleged harm are clearly defined, focused, limited in scope and appear to be amenable to resolution in the interests of the complainants, based on time-bound measures proposed by management, the complainants would be offered the opportunity of having registration of their complaint postponed.¹⁸⁸

If the early solutions process is initiated upon the consent of the complainants, the Panel asks both parties to keep it updated on progress.¹⁸⁹ Within three months, the Panel reviews the situation.¹⁹⁰ If the complainants inform the Panel in writing that they are satisfied, the Panel will not register the complaint and close the case.¹⁹¹ In other cases, the Panel may visit the project area to have direct discussions with the complainants and other parties to inform its decision on whether or not to register the complaint.¹⁹² Notably, the Operating Procedures are silent on what happens if the complainants inform the Panel in writing or otherwise that they are *not* satisfied and want the complaint to be registered.¹⁹³

Proponents of the early solutions approach argue that it is eminently practical and can achieve rapid outcomes on the ground, avoiding a resource-intensive investigation, which often takes more than a year. Watanabe has defended the approach as empowering for complainants, claiming that they “are in the driver’s seat” at all times, and that if they ask the Panel to register their complaint, the Panel would do so.¹⁹⁴

Despite the ostensible pragmatism of the approach from a bird’s eye view, the reality on the ground in many cases is that extreme power imbalances between the relevant parties expose the process to

187. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 148, at ¶ 2.

188. *Id.*

189. *Id.* at ¶ 5(c).

190. *Id.* at ¶ 8.

191. *Id.*

192. *Id.*

193. INSPECTION PANEL OPERATING PROCEDURES, *supra* note 148, at Annex 1.

194. Commitment made to the author during civil society consultation on draft Operating Procedures on March 13, 2014.

manipulation and abuse. To the extent that the CAO Ombudsman or similar dispute resolution functions are successful, they rely on a number of crucial procedural protections, such as neutral professional facilitators guiding the process to ensure that communities are able to make free and informed choices in the absence of duress.¹⁹⁵ Even with these features, “dispute resolution,” a misleading notion in cases in which the “parties” to the process are the perpetrators and the victims of human rights violations, is extremely challenging and only rarely results in satisfactory outcomes for communities. The Inspection Panel’s early solutions approach has none of these features, but rather throws the ball back to World Bank staff, the subjects of the complaint, who remain incentivized to maintain good relations with their client (the government) and get on with business. The Panel, which has no expertise in dispute resolution, provides little oversight throughout the process.

Thus, the problems with the early solutions approach are two-fold: on a substantive level, it provides the Bank with an avenue to avoid adherence to its safeguard policies and thus extinguishes the attendant entitlements of project-affected people; and on a process level, it does not incorporate essential protections to ensure fairness in contexts in which the risk of abuse of power is acute. In other words, the early solutions approach does not reflect a rights-based approach to achieving effective remedies.¹⁹⁶

195. *How We Work: Ombudsman*, COMPLIANCE ADVISOR OMBUDSMAN, <http://www.cao-ombudsman.org/howwework/ombudsman/> (last visited June 1, 2016).

196. See, e.g., United Nations Human Rights Commission, *Guiding Principles on Business and Human Rights*, ¶ 31 (Geneva: United Nations, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (listing different guiding principles to ensure the effectiveness criteria for non-judicial grievance mechanisms); see United Nations, General Assembly, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31 (21 March 2011), <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (affirming principle 31 as the effectiveness criteria for non-judicial grievance mechanisms).

2. *Piloting the New Approach to Address Forced Evictions in Lagos, Nigeria*

The early solutions process was first piloted in the case of a complaint submitted in September 2013 regarding the Nigerian Lagos Metropolitan Development and Governance Project.¹⁹⁷ The case involved the forced eviction of a slum community in the Badia area of Lagos State.¹⁹⁸ The complaint alleged that the Bank's failure to ensure compliance with its safeguard policies caused "further impoverishment and insecurity of the Badia residents" as a result of evictions that occurred "without prior consultation, notice, compensation or resettlement."¹⁹⁹ The Bank's involuntary resettlement policy was triggered because the project had an infrastructure component that would foreseeably result in evictions. The Bank and government had agreed that all city-wide upgrading programs, regardless of the source of financing, would be carried out in accordance with the principles of the involuntary resettlement policy.²⁰⁰ However, when homes were demolished in March 2012 and February 2013 none of the policy principles were met.²⁰¹ As a result, some nine thousand of the project's intended beneficiaries were forcibly evicted and left destitute.²⁰²

The evicted community's representatives had attempted to resolve the issue with World Bank representatives prior to filing the complaint with the Panel. This step is required for a complaint to be eligible for investigation. Following the first eviction in 2012, the Bank had worked with the Lagos State authorities to develop a retroactive resettlement action plan that, according to the

197. See Eimi Watanabe, Chairperson, Notice of Receipt of Request, Request for Inspection: Nigeria: Lagos Metropolitan Development and Governance Project (P071340), IPN Request RQ 13/09, 1 (Nov. 11, 2013), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Nigeria_LMDGP_NoticeofReceipt_Nov11_2013.pdf [hereinafter Lagos: Notice of Receipt of Request for Inspection] (explaining that the Panel postponed its decision on registration of Nigeria's Request to give Requesters and Management additional time to address alleged concerns and for the Panel to consider the Request with its new "Pilot approach to support early solutions in the Inspection Panel process").

198. *Id.* at 2.

199. *Id.*

200. *Id.* at 2.

201. *Id.* at 2-3.

202. *Id.*

complainants, had provided “minimal financial assistance” to the victims of the first demolitions, with the sums being insufficient to offset the harms suffered.²⁰³ Evidently the action plan did not incorporate the required elements of the involuntary resettlement policy to ensure that the livelihoods and living standards of affected people would be, at a minimum, restored.²⁰⁴ Victims of the second demolitions did not receive any compensation or assistance before the complaint was filed, though the preparation of a resettlement action plan was in process.²⁰⁵

Upon receiving the complaint, the Panel decided that this case might be appropriate for piloting the early solutions approach. It justified this decision by explaining that the “key concern” of the complainants “was to ensure that Resettlement Action Plan(s) . . . would be finalized, funded and properly implemented to address the concerns of the affected people in Lagos, in accordance with the Bank Policy on Involuntary Resettlement.”²⁰⁶ The Panel offered the complainants the opportunity to use the early solutions approach, based on “several actions and commitments by the Bank and the authorities.”²⁰⁷ The complainants indicated their conditional interest pending a written statement of the commitments and the disclosure of a number of other pertinent documents. Although not all of these documents were disclosed, the Panel initiated the early solutions pilot in November 2013.²⁰⁸

While it is true that the evicted households were in a desperate situation and in urgent need of compensation, it is striking that the Panel selected this case to pilot the alternative approach. Despite claims by the Panel to the contrary,²⁰⁹ the harms – resulting from

203. Lagos: Notice of Receipt of Request for Inspection, *supra* note 197 at 3.

204. See OPERATIONAL MANUAL, *supra* note 18, at OP 4.12, ¶ 2.

205. Lagos: Notice of Receipt of Request for Inspection, *supra* note 197, at 2.

206. *Id.* at 3.

207. *Id.*

208. *Id.* at 3, Annex III: Email from SERAC’s Attorney working on the Request to the Inspection Panel’s Executive Secretary (November 7, 2013), Annexes available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration%20-%20Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration%20-%20Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf).

209. World Bank Inspection Panel, Memorandum to the Executive Directors: Notice of Non-Registration, para. 11 (July 16, 2014) [hereinafter Notice of Non-Registration].

massive forced evictions of some nine thousand people – were in no way “clearly defined, focused [or] limited in scope” as required by the Operating Procedures. The Request described the harm suffered in the aftermath of the forced evictions as follows:

... many of the evictees have been forced to sleep outside, become squatters, or live in distant places far removed from their employment thereby further impoverishing an already poor and vulnerable population. Women, children, the sick and the disabled, among others, have suffered and are still suffering untold hardships. They have been forced to live in unacceptable conditions with no access to basic amenities and sanitation.²¹⁰

It was also a matter of contention whether the management’s plan could deliver a resolution that was truly in the interests of the complainants, as envisaged by the Operating Procedures. Under the legal agreement between the Bank and Borrower, the affected people were entitled to a package of measures, including resettlement assistance, that would achieve the key objective of the involuntary resettlement policy: to improve, or at minimum restore, their livelihood and living standards to pre-displacement levels.²¹¹ In contrast, the substance of management’s proposed course of action was the payment of compensation (for lost assets and a period of rent) at almost the same rates as under the 2012 resettlement action plan, which was described in the complaint as insufficient to offset the harms.²¹² Moreover, the plan was to be implemented under World Bank supervision in a context of stark power asymmetries: the powerful Lagos State Government versus an evicted and destitute slum community.

210. World Bank Inspection Panel, Request for Inspection in the Matter of the Lagos Metropolitan Development and Governance Project, ¶ 3(d) (Sept. 30, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration%20-%20Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration%20-%20Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf) [hereinafter Request for Inspection in the Matter of Lagos].

211. Notice of Non-Registration, *supra* note 209, at ¶ 27(i); OPERATIONAL MANUAL, *supra* note 18, at OP 4.12.

212. Lagos: Notice of Receipt of Request for Inspection, *supra* note 197, at Annex 1: Actions proposed by Bank Management, ¶¶ 8(b), 11. Although livelihood support was also promised, no firm plans were presented by Management or later in the “Reviewed Resettlement Action Plan” finalized in November 2013.

Bank management had already commenced a series of actions aimed at addressing the situation prior to the complaint being filed with the Panel. It claimed that it had intended to continue these actions when the community representatives filed the complaint, which expressed frustration with the slow pace, lack of transparency and the substance of the measures being taken.²¹³ It is unclear why Management could not have continued its efforts, altering them to take into account the concerns expressed in the complaint, at the same time as the Panel proceeded with its mandated role of assessing the complaint's eligibility and if warranted, carrying out an investigation. This would have fallen squarely into the standard procedures as set out in the Board's resolution establishing the Panel and subsequent clarification, under which the Management can respond to a complaint by admitting non-compliance and providing an explanation of how it intends to rectify it.²¹⁴ This would have allowed the Panel, through its normal functions, to assess the various actions of Management, including its supervisory efforts to rectify problems that emerged, and the adequacy of the retroactive resettlement action plan vis-à-vis Bank policy. Under this scenario, Management, aware that the Panel would be scrutinizing its remedial efforts and reporting to the Board, may have been more incentivized to remedy harms in line with its safeguard policies. In turn, the Bank could have used the impending investigation and the potential for a more favorable public investigation report to encourage the Lagos government to implement measures that were more likely to achieve the objective of the involuntary resettlement policy. Through its traditional function, the Panel could have played an important role in securing effective remedies and holding the Bank accountable to its operational policies.

Both the Panel and Bank management claim that, had the Panel registered the complaint, the Bank's resources would have been diverted from its remedial efforts into defending the allegations against it.²¹⁵ In this author's view, the appropriate response to the Bank's tendency towards defensiveness is not to remove scrutiny and

213. *Id.* at ¶ 13; Request for Inspection in the Matter of Lagos, *supra* note 210, at ¶¶ 5-7.

214. 1999 Clarification, *supra* note 146, at ¶ 3.

215. For example, the Policy Session on the Early Solutions Pilot, October 10, 2014, CSO Forum at the World Bank/IMF Annual Meetings.

accountability. It is unclear why the World Bank would not be capable of both providing a constructive written response to the allegations in the complaint, while at the same time continuing efforts on the ground to address legitimate grievances, even as the Inspection Panel goes about its work.

As it played out in the Lagos pilot, things became more complicated than the Panel had apparently anticipated. The Panel assured the complainants repeatedly that they “have the right at any time to indicate that they are not satisfied and would like the Panel to register” their complaint and that the Panel would do so.²¹⁶ However, several months after the process commenced, the complainants were split. Two of the original three complainants sent a letter to the Panel expressing their “deep dissatisfaction with the inadequate Resettlement Action Plan and flawed Inspection Panel Pilot Process” and requesting the case to be registered.²¹⁷ A supporting letter from new legal representatives provided detailed and, in this author’s view, convincing reasons for this dissatisfaction.²¹⁸ The lawyer’s letter was accompanied by a letter of support from forty-one affected people.²¹⁹ The non-governmental organization originally representing the complainants, however, told Watanabe by email that the community was satisfied with the process, despite outstanding commitments under the action plan.²²⁰ Attached to this email was a letter from the third complainant and five other community members who had been enlisted as representatives to liaise with the government committee implementing the action plan. In this letter, addressed to Lagos State authorities, the signatories disassociated themselves from the other group of dissatisfied community members.²²¹ In the letter, they apologized to the Lagos State government “for any embarrassment that such an unwarranted and

216. Lagos: Notice of Receipt of Request for Inspection, *supra* note 197, at 4, Annex III; Sascha Chavkin, et al., *How the World Bank Broke its Promise to Protect the Poor*, HUFFINGTON POST, Apr. 15, 2015, <http://projects.huffingtonpost.com/projects/worldbank-evicted-abandoned>.

217. Notice of Non-Registration, *supra* note 209, at ¶ 24, Annex III.

218. *Id.* at Annex III.

219. AMNESTY INTERNATIONAL, THE WORLD BANK INSPECTION PANEL’S EARLY SOLUTIONS PILOT APPROACH: THE CASE OF BADIA EAST, NIGERIA (2014), <https://www.amnesty.org/download/Documents/4000/afr440182014en.pdf>.

220. Notice of Non-Registration, *supra* note 209, Annex IV.

221. *Id.* at ¶¶ 24 -25, Annex IV.

needless petition might have caused.”²²²

Divisions among large and diverse affected communities and their representatives are neither unusual nor surprising given the varied interests and the enormous strain induced by their situation. Community divisions are all the more likely when community members face pressure from government authorities, which may have occurred in this case. However, the early solutions approach, unlike the normal Panel process, relies upon sustained unity - in this case ten months had passed since the complaint was filed²²³ - without the provision of a supportive and structured process for community organization, empowerment and decision-making.

To deal with the dilemma that it faced by the conflicting community accounts and requests, the Panel should have been guided by its original mandate and powers. The Board resolution establishing the Panel entitles “any two or more” project-affected people “who share common interests or concerns” to submit a complaint to the Bank’s accountability mechanism in order to seek a remedy.²²⁴ Since at least two individuals – forty-one community members plus two of the original complainants – who were forcibly evicted in connection with the project in Lagos wanted the complaint to be registered consistent with the resolution, the Panel should have acquiesced to this request. Yet, in its explanation of its deliberations, the Panel did not refer to the resolution or to the entitlement of two or more affected persons to access the accountability mechanism. Instead, in justifying its decision not to register the complaint, the Panel relied on the fact that the majority (six out of eight) of the community representatives enlisted for the government compensation process had expressed their satisfaction.²²⁵ There was no evidence that these individuals were authorized by the complainants or the broader affected community to make decisions

222. *Id.* at Annex IV.

223. Three months after the initiation of the early solutions process, the Panel deferred its decision to give management more time to make progress on implementation of the action plan. *See* World Bank Inspection Panel, *Nigeria: Lagos Metropolitan Development and Governance Project, Pilot Approach to Support Early Solutions, Interim Note* (Mar. 20, 2014).

224. Resolution No. IBRD 93-10/IDA 93-6, *supra* note 145, at ¶ 12; 1999 Clarification, *supra* note 146.

225. Notice of Non-Registration, *supra* note 209, at ¶ 31.

on behalf of the community for the purposes of the Inspection Panel complaint.

In its notice of non-registration, the Inspection Panel noted that 85% of affected people had received their payments and that a firm action plan was in place to complete the remainder.²²⁶ The Panel thus concluded that management had “taken adequate measures to address the remaining concerns.”²²⁷

The Panel’s judgment that the monetary payments were adequate to address the complainants’ grievances warrants scrutiny. It is well established in literature on forced displacement of poor households that compensation alone does not prevent impoverishment.²²⁸ This is reflected in the Bank’s involuntary resettlement policy, which requires that displaced persons without legally recognized land rights are given, in addition to compensation for lost assets and income, resettlement and livelihood assistance, and other support as necessary to ensure, at a minimum, restoration of living standards and livelihoods.²²⁹ Human rights standards require the State to take all appropriate measures to ensure access to adequate housing for evictees, who, under no circumstances, should be made homeless or vulnerable to human rights violations.²³⁰

Yet, in the case of the Badia community, the best that evictees could hope to get at the close of the early solutions approach was compensation.²³¹ In the Panel’s notice to the Board that it would not register the complaint, the Panel notes that “without a proper baseline it is very difficult to assess whether or not the payments received are fair and sufficient to restore the livelihoods of affected people as mandated in Bank Policy.”²³² The Panel continues:

226. *Id.* at ¶ 33.

227. *Id.* at ¶ 31.

228. *See, e.g.*, CAN COMPENSATION PREVENT IMPOVERISHMENT? (Michael Cernea & Hai Mohan Mathur eds., 2008).

229. OPERATIONAL MANUAL, *supra* note 18, at OP 4.12, ¶¶ 15, 16, Objectives.

230. CESC General Comment 7, *supra* note 19, at ¶ 17.

231. LAGOS STATE GOVERNMENT TECHNICAL COMMITTEE ON BADIA EAST, REVIEWED RESETTLEMENT ACTION PLAN (RRAP) FOR DISPLACED PERSONS IN BADIA EAST 4 (2013), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/02/17/000333037_20140217122455/Rendered/PDF/RP3420V50AFR0R00Box382149B00PUBLIC0.pdf [hereinafter PLAN ON BADIA EAST].

232. Notice of Non-Registration, *supra* note 145, at ¶ 27(g).

Many of the affected people interviewed by the Panel in Badia East complained that payments were totally insufficient for them to restore their previous livelihoods. On the other hand, the Bank engaged two independent experts specifically to determine proper compensation amounts based on current market rates.²³³

However, it should not have been difficult for the Panel to assess whether the payments were sufficient to restore livelihoods. The resettlement action plan did not seek to provide compensation for lost livelihoods²³⁴ and therefore, the “independent experts” hired by the Bank could only have been assessing current market rates *for lost assets and rental payments*. The Panel should have pointed to the basic tenet of the Involuntary Resettlement Policy that compensation alone, even if it includes lost income, will not restore the livelihoods of such indigent displaced people.²³⁵ Moreover, it is disappointing that the Panel appeared to cast doubt on the affected people’s testimonies about the insufficiency of the payments, especially when their description of their experience is consistent with the empirical research on displacement worldwide.

According to the letter from the new legal representatives received by the Panel one week before it closed the case, many affected people remained in a precarious situation without adequate housing and in fear of further forced eviction after receiving the inadequate payments.²³⁶ Yet, the Panel did not highlight the fact that effective and durable remedies in line with OP 4.12 were clearly not being provided or underscore the ongoing human rights concerns and the danger that this presented to the lives of thousands of displaced people. Instead, the Panel praised an “effective” process that facilitated the provision of cash to the majority of households in “urgent need for immediate relief.”²³⁷ The case therefore represents a dangerous setback in terms of respect for the principles of the safeguard policies and what the Inspection Panel is willing to accept as adequate treatment of project-affected people.

233. *Id.*

234. PLAN ON BADIA EAST, *supra* note 231.

235. See Cernea, *Compensation & Investment in Resettlement*, *supra* note 112.

236. Notice of Non-Registration, *supra* note 209, at Annex III: Memorandum in Support of Request for Registration of IPN Request RQ 13/09, Obuba & Obuba Legal Practitioners 4 (July 11, 2014).

237. Notice of Non-Registration, *supra* note 209, at ¶ 33.

The letter from the new legal representatives described the early solutions approach as a process that “failed, at all significant moments, to offset the tremendous inequality of bargaining power between affected persons and the Lagos State Government.”²³⁸ The letter refers to the failure to disclose to affected people documentation necessary for informed participation and fair negotiations. It also describes the “observer” role of Bank management at various meetings, at which affected people felt “alone in negotiations with the Lagos State Government.”²³⁹ Payments – referred to by the authorities as “financial assistance” rather than compensation – were reportedly presented as a “take it or leave it” offer, with attempts by the affected community to negotiate better terms rejected by authorities.²⁴⁰ Moreover, the amount offered reportedly dropped after the initiation of the pilot process, and became conditional on the affected persons waiving their right to pursue any further claims.²⁴¹

In the Panel’s press release on the conclusion of the case, it stated, “the Pilot proved to be both efficient and effective in redressing the grievances of affected people by focusing Bank efforts on solving the critical needs of thousands of evictees, while maintaining consistency with the Resolution that established the Inspection Panel.”²⁴² Yet, there was evidence before it that the pilot resulted in a negotiated agreement between the Bank and the Lagos government that fell well short of policy requirements, a process that marginalized the affected people and failed to genuinely redress the harms they had suffered.

A sample of affected people was interviewed by NGOs one year after the Panel closed the case to better understand the outcomes of the pilot. Of the seventy-three people interviewed, 94% said that the compensation that they received was not enough to restore their pre-demolition situation, and shockingly, almost one-third of respondents

238. *Id.*

239. *Id.*

240. *Id.* See also AMNESTY INTERNATIONAL, *supra* note 219, at 5.

241. See AMNESTY INTERNATIONAL, *supra* note 219, at 5.

242. News Release, The World Bank Inspection Panel, Panel Concludes its First Pilot (Sept. 3, 2014), <http://ewebapps.worldbank.org/apps/ip/PanelCases/91%20-%20Panel's%20Press%20Release%20on%20the%20first%20Pilot%20for%20Early%20Solutions.pdf>.

said that they were still homeless.²⁴³ The disregard of the safeguard policies coupled with the absence of procedural protections resulted in a manifestly inequitable grievance redress process and a deep regression in the Panel's ability to contribute an effective remedy for grave human rights violations of project-affected people. Moreover, because the Panel did not carry out an investigation of the case, the issues that arose in the design and implementation of the project and the actions and omissions of the Bank were not assessed vis-à-vis Bank policies and placed on the public record to promote institutional accountability. Such an approach threatens to undermine fundamental components of the Bank's system of accountability.

IV. CONCLUSION: TURNING TIDES IN THE BANK'S ACCOUNTABILITY SYSTEM

While the World Bank's system of accountability to project-affected people has had important internal champions, it has never been wholeheartedly accepted and embraced by the institution. In addition to the natural antipathy to processes that place additional burdens on one's work and expose it to scrutiny and criticism, the essence of this discord at the Bank is rooted in three aspects of its organizational culture. One aspect stems from a prevailing belief among many of the Bank's economists, engineers and development practitioners in an essentially utilitarian (as opposed to a rights-based) approach to development.²⁴⁴ The general attitude among Bank staff that this author has repeatedly encountered is that while adverse social and environmental impacts are undesirable, measures to avoid or mitigate them, or to remedy harms that do occur, should not stand in the way of pursuing a broader economic development agenda.²⁴⁵

243. Natalie Bugalski, *An Evaluation of the Inspection Panel's Early Solutions Pilot in Lagos, Nigeria*, in INCLUSIVE DEVELOPMENT INTERNATIONAL (IDI) AND THE CENTRE FOR RESEARCH AND MULTINATIONAL CORPORATIONS (SOMO) (2016).

244. See generally World Bank, *Human Rights and Economics: Tensions and Positive* Commissioned by the Nordic Trust Fund, <http://go.worldbank.org/PKPTI6FU40> (discussing the tensions (and possible points of convergence) between utilitarian welfare economic theory, which focuses on aggregate outcomes (and dominates the school of thought on development at the World Bank), and human rights theory, which emphasizes disaggregate impacts, just processes and accountability).

245. For example, personal communications with Bank staff regarding the

According to this view, social safeguards should guide but not prescribe project design and implementation; and the fulfillment of safeguard objectives should be aspirational, not mandatory.

Another, more cynical aspect of the Bank's culture - given that it is a public institution with a poverty alleviation mandate - is that it incentivizes project approvals and increased business in much the same way as that of a private sector bank.²⁴⁶ Resource and time intensive accountability to a relatively small group of project-affected people frustrates this "culture of approval." The debilitating impact of the pressure to process loans and disburse funds rapidly is evident in the marginalization of environmental and social specialist staff, who are not rewarded for good performance and are often discouraged from bringing problems to the attention of project managers.²⁴⁷

Also sitting uncomfortably with the Bank's accountability system is the aversion at the Bank to delving into anything considered "political." Insisting on the application of social safeguards, such as the involuntary resettlement policy, often means confronting entrenched power structures. To the extent that safeguard policies and the Inspection Panel's (traditional) process promote a rights-based approach to development, their application in some countries evokes a level of government-citizen contestation as power balances, ever so slightly, shift. Much of the Bank operational staff is decidedly uncomfortable in this arena.

Given this disharmony with dominant aspects of the Bank's culture, it is unsurprising that there has always been internal pushback to the accountability system. Competing opinions and forces in the Bank over time have had the effect of strengthening the system in some respects and weakening it in others since its

President's decision to suspend lending to Cambodia in order to secure a remedy for Boeung Kak Lake evictees.

246. This "culture of approval" was first described in the 1992 Wapenhans Report and has been the subject of commentary ever since. *See* WAPENHANS REPORT, *supra* note 142. *See, e.g.,* Ebrahim & Herz, *supra* note 12.

247. *See* WORLD BANK INDEPENDENT EVALUATION GROUP, SAFEGUARDS AND SUSTAINABILITY POLICIES IN A CHANGING WORLD 38 (2010); Anna Yukhananov, *World Bank Review Shows Flaws in Social, Environmental Safeguards Process*, REUTERS, July 15, 2014, <http://www.reuters.com/article/2014/07/15/us-worldbank-safeguards-idUSKBN0FK1RZ20140715>.

inception.

In the current environment in which the Bank is undergoing an existential crisis of sorts, the resistance to accountability has found renewed force. This has manifested in a transformation of the Bank's decades old approach to safeguarding people and the environment from development-induced harms through compliance with policies into a nebulous system in which rules and remedies are negotiated with clients on a case-by-case basis. Both the changes in the safeguard policies and at the Inspection Panel are justified by the rhetoric of expediency and improved outcomes, but in effect, both allow for the avoidance of compliance with policy requirements and the attendant respect for the entitlements of people adversely affected by World Bank projects. They allow the Bank to get on with its business of financing "development" in a manner that unchains it from the resource-intensive, complex, and often messy, burden of ensuring that there is no collateral damage to the poor. This is a striking move for a public institution mandated to fight poverty. Absent decisive action by the Bank's Board to reverse these trends, this period may mark the demise of accountability at the World Bank.