

**DEFERRING ACCOUNTABILITY:
DELAYS AT THE WORLD BANK'S INSPECTION PANEL**

**Allard K. Lowenstein International Human Rights Clinic
Yale Law School
March 2017**

Table of Contents

I. SUMMARY	1
II. METHODOLOGY	4
III. BACKGROUND.....	5
A. GENESIS OF THE INSPECTION PANEL.....	5
1. <i>The Narmada Projects</i>	5
2. <i>The Creation of the Panel</i>	7
B. THE PANEL'S ROLE	8
C. THE PANEL AND OTHER BANK ACTORS	11
D. HUMAN RIGHTS GUIDELINES FOR ACCOUNTABILITY MECHANISMS	14
IV. SINDHULI, NEPAL	17
A. BACKGROUND ON THE SINDHULI CASE	18
B. MANAGEMENT'S ATTEMPTS AT FINDING SOLUTIONS DURING DELAY.....	22
C. AFTERMATH AND INVESTIGATION REPORT	25
D. CONCLUSION.....	27
V. CODIFYING PANEL DELAY AND CREATING SPACE FOR MANAGEMENT ACTION	29
A. REVIEW OF THE PANEL'S OPERATING PROCEDURES	29
1. <i>Footnote 7 Procedure</i>	30
2. <i>The Pilot Program</i>	31
B. DELAY AND FAILURE TO REGISTER UNDER FOOTNOTE 7: THE UZBEKISTAN CASE.....	32
1. <i>Background</i>	33
2. <i>Decision to delay investigation</i>	34
3. <i>Recommendation not to investigate</i>	35
4. <i>Conclusion</i>	38
C. THE PILOT IN PRACTICE: THE BADIA EAST COMPLAINT	38
1. <i>Background</i>	39
2. <i>Recommendation to Implement the Pilot</i>	41
3. <i>Denial of the Renewed Request for Registration</i>	42
4. <i>Conclusion</i>	43
D. THE PILOT CONTINUES: PARAGUAY	43
VI. CONCLUSION: PROCEDURES AND PRACTICES UNDERMINING THE LEGITIMACY OF THE PANEL	46

I. SUMMARY

This report assesses the World Bank Inspection Panel's recent incorporation of delay into its complaints process and the impact such delay has had on its efficacy as an accountability mechanism. The Inspection Panel (Panel) is the independent accountability mechanism housed within the World Bank (Bank), an institution which broadly aims to reduce poverty and encourage development around the world.¹ The Panel was established in 1993 in response to demands for accountability from the Bank regarding the negative impacts of Bank projects on the communities that the Bank's funding was intended to help. As the first accountability mechanism adopted by an international financial institution, the Panel was groundbreaking. People affected by Bank-funded, public projects were now able to file a complaint with the Panel to raise their concerns about harm that they suffered as a result of Bank projects.

Since the Panel's establishment, numerous other international financial institutions have developed their own accountability mechanisms. These other accountability mechanisms and the past two decades of the Panel's experience have exposed limitations in the original design of the Panel's complaints process. One significant limitation is the structural dependency of the Panel on other Bank actors; a successful Panel investigation requires the cooperation of both the Bank's Board of Directors (the leadership of the Bank) and Bank Management (Bank staff working at the Bank's headquarters and in local offices, with responsibility for specific Bank projects). The Panel's mandate is also limited. It may only review Bank projects for compliance with the Bank's operational policies and procedures which aim to foster environmental and social protections for affected communities. Unlike other mechanisms, the Panel does not have a dispute resolution function.

Over the course of the Panel's history, Bank Management and the Panel have occasionally disagreed about the extent and proper interpretation of the Panel's mandate, as well as the Panel's proper role within the World Bank structure. The Panel has the stated goal of ensuring that Bank staff adequately comply with Bank policies and procedures and provide affected communities an avenue to raise complaints when they believe the Bank has not so complied. That goal may be at odds with Bank Management's desire to complete projects quickly and efficiently. Under the complaints process set forth in the two identical Board resolutions establishing the Panel (Resolution),² there are clearly articulated timelines to ensure the efficient handling of complaints.³ Over time, the Panel has revised its procedures to encourage informal resolution outside of the formal processes. In recent years, the Panel has at times departed from its default timelines, delaying its handling of some of the complaints in

¹ *What We Do*, THE WORLD BANK, <http://www.worldbank.org/en/about/what-we-do> (last updated 2015); *Organization*, THE WORLD BANK, <http://www.worldbank.org/en/about/leadership> (last updated 2014).

² The Panel was officially created by two resolutions of the International Bank for Reconstruction Development (IBRD) and the International Development Agency (IDA) on September 22, 1993 (Resolution IBRD 93–10 and Resolution IDA 93–6). The resolutions are referred to jointly as “the Resolution” given their identical content. See *Panel Mandate and Bank Policies*, WORLD BANK (2014), <http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx>.

³ World Bank, *Resolution Establishing the Inspection Panel* para. 43 (1993), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf> [hereinafter *Panel Resolution*].

order to give Bank Management extra time to address the concerns raised by affected communities

Although eventually codified, the Panel's deviations from its standard procedures were developed *ad hoc* in a changing political environment at the Bank, in which Bank Management regularly contested the Panel's recommendations arising out of its investigations. Initially aiming to ease tension between Management and the Panel and to foster cooperation with Management during the compliance review process, the Panel began allowing for a period of delay during which Management could attempt to resolve problems with the Requesters (the name given to the individuals or groups who are filing a complaint to the Panel).

In April 2014, the Panel modified its Operating Procedures, which expand on the Resolution's explanation of the Panel's role and its complaints process. Among the changes was the inclusion of a provision that provided for the use of a delay period during the complaints process if issues seemed amenable to early resolution.⁴ The 2014 revisions to the Operating Procedures codified two forms of delay, one that had already been used by the Panel in eight cases,⁵ and another that was entirely new. Under the former, referred to in this report as the Footnote 7 procedure, the Panel registers the complaint but delays its decision to investigate until a specified period of time has passed. The second form of delay, known as the Pilot for Early Solutions (Pilot Program), delays for a period of time both registration and the Panel's decision on whether to investigate.

The negative consequences of these adaptations put the legitimacy and independence of the Panel in jeopardy. Their dangers are reflected in three case studies in Nepal, Uzbekistan and Nigeria. Drawing on these case studies, this report illustrates how the Panel's alterations to its ordinary procedural timeline have adversely affected the Panel's legitimacy. For example, in Nepal, the Panel registered the complaint and decided it would investigate, but at the same time announced that it would delay the start date of the investigation for a number of months. Both in Nepal and in other cases, the Panel incorporated delay periods into its complaints process even though such delay deviated from its previous Operating Procedures. The latter two cases demonstrate the shortfalls of the procedures codified in the revised Operation Procedures. The Footnote 7 delay was used in the Uzbekistan case, and the Pilot Program has been used in the Nigerian case.

The Panel justifies these delays by claiming they give Bank Management time to work with affected people to develop solutions to problems earlier than they might be possible in the course of the Panel's ordinary process. Though the Panel may intend to provide Bank

⁴ See the original Resolution, *supra* note 3, and compare it with the updated Operating Procedures. World Bank, *The Inspection Panel at the World Bank: Operating Procedures* (2014), [http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014 Updated Operating Procedures.pdf](http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf) [hereinafter *Updated Operating Procedures*].

⁵ The Panel Secretariat provided the Lowenstein Clinic with this information in an email dated May 4, 2015. The Panel has previously deferred its recommendation as to whether an investigation was required into the claims raised by the Requesters in 8 cases. These cases included: Uzbekistan (2013) - Second Rural Enterprise Support Project; Chile (2010) - Quilleco Hydropower Project; Cambodia (2009) - Land Management and Administration Project; Congo, Democratic Republic of (2009) - Private Sector Development and Competitiveness Project - deferred twice; Brazil (2006) - Parana Biodiversity Project; Ghana/Nigeria (2006) - West African Gas Pipeline Project; Romania (2006) - Mine Closure and Social Mitigation Project; and Mexico (2004) - Indigenous and Community Biodiversity Project (COINBIO).

Management time to resolve disputes through different methods, actual progress toward dispute resolution has been tentative and incomplete, hindered by the limited scope of the Panel's mandate. Rather than providing a period in which affected communities and Bank Management can work out their disputes, the unsupervised delay periods threaten to allow maintenance of the status quo to take priority over the interests of affected communities.

The Panel does not play a mediator or dispute resolution role during this period of delay, but instead merely affords more time for Management to address the issues raised by Requesters. However, under the Panel's standard procedures, before registering the complaint, the Requesters must show that they have already attempted to work with Management to resolve their issues.⁶ If affected people turn to the Panel after these efforts, it indicates that their efforts to work with Management have failed. The Panel's provision of more time to Management, without any effort to itself resolve the complaint, is problematic given that Requesters are complaining to the Panel precisely because they have failed to resolve problems directly with Bank Management. In the absence of professional mediation or dispute resolution, or third-party monitoring of Management actions during the delay period, delays—as seen in the cases discussed below—have prolonged affected communities' existing frustrations with Bank Management rather than providing early solutions.

Further, in multiple cases, delays have had the effect of undermining the Panel's compliance function. Under the Pilot Program, if the Panel decides at the end of the delay period that Management has “successfully addressed” the concerns raised by the complaint,⁷ it can choose not to even register the request. In these cases, the Bank does not benefit from the in-depth review, official record, and lessons learned usually provided in Panel reports. Such institutional learning is important, especially given that it is part of the Panel's accountability functions to provide “independent and impartial assessment of claims about harm and related non-compliance with Bank policies,” which should contribute towards institutional learning and help to “improve development effectiveness of World Bank Operations.”⁸

Each of the forms of delay undermines the Panel's ability to serve as an effective accountability mechanism. When the Panel chooses to employ delay periods that deviate from the standard timeframe for its complaints procedure, it undermines its legitimacy and fails to act predictably or transparently. The Panel can and should live up to international accountability standards, and to its original promise of holding the Bank accountable for respecting its commitments to safeguard people and environments affected by its projects.

This report aims to shed light on troubling trends arising from the Panel's incorporation of delay into its complaints process. It argues that reform of the Panel is necessary to strengthen its ability to ensure such accountability and to further affected communities' ability to raise concerns about projects and see problems resolved. Reform of the Panel must take into account the Panel's role in the broader context of its tri-partite relationship with the Board (which decides whether to act on the Panel's recommendations) and Bank Management (who are the key actors in the project). All three players perform important roles in ensuring that the Panel can effectively perform its role as an accountability mechanism.

⁶ *Panel Resolution*, *supra* note 3, at para. 13.

⁷ *Updated Operating Procedures*, *supra* note 4, at 25.

⁸ *Id.* at 6.

II. METHODOLOGY

The authors of this report are Kristine Beckerle, Elizabeth Chan, Anna Diakun, and Andrew Walchuk of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School.⁹ The team was supervised by Professor Muneer Ahmad and Professor Hope Metcalf, director of the Lowenstein Clinic. Although the idea for the project arose out of the Clinic's contact with non-governmental organizations (NGOs) active in the field, the Clinic maintained full independence over the research design, implementation, and drafting of the report.¹⁰ The majority of the report was written in 2015, at the time research was conducted.

In preparing this report, the Clinic conducted: (1) desk research on the Inspection Panel, including on specific Panel cases (including review of official Bank documents connected to cases, such as Requests for Inspection, Bank Action Plans, and Panel Reports and other documents related to the cases); (2) phone and in-person interviews with academics, consultants, journalists, NGO representatives, Bank Management officials, former and current Inspection Panel members, as well as members of the Panel Secretariat; and (3) a field visit to Nepal, where the Clinic carried out interviews in both Kathmandu and Sindhuli, the district in Nepal where a Bank-funded project is located. The Struggle Committee, a group that represents the community that filed a complaint with the Panel, assisted the Clinic with arranging the interviews in Sindhuli. The Clinic arranged meetings in Kathmandu for itself.

In total, the Clinic interviewed 22 individuals by phone or in person who had general knowledge of the Panel and its processes. This included Bank staff members in DC and Nepal, officials at the Asian Development Bank in Kathmandu, journalists who had covered case-related events, and two local groups (the Lawyers Association for Human Rights of Nepalese Indigenous Peoples and the Nepal Federation of Indigenous Nationalities) involved in the case in Nepal. Despite repeated requests to meet, the Clinic was unable to interview Nepalese government officials charged with implementation of the Nepal project. In Sindhuli, the Clinic held meetings with approximately 100 members of the affected community, including members of the Struggle Community, journalists and political groups who were involved in, or had an interest in, the case.

⁹ *Allard K. Lowenstein International Human Rights Clinic*, YALE LAW SCHOOL, <https://law.yale.edu/centers-workshops/orville-h-schell-jr-center-international-human-rights/lowenstein-clinic>.

¹⁰ The issue of Inspection Panel procedural reform was first brought to the Clinic's attention by Accountability Counsel, which assisted the Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) with making a complaint to the Inspection Panel regarding the construction of a high voltage power line in Sindhuli, Nepal.

III. BACKGROUND

Following years of public pressure regarding the detrimental impact of a number of Bank-funded projects, the Bank created the Inspection Panel in 1993. The Panel was the first accountability mechanism ever established by an international financial institution. Since its inception, the Panel has inspired the creation of a number of similar mechanisms at different international financial institutions. Within the Bank, the Panel has been the source of considerable debate for much of its first two decades of existence. Bank Management, Board members, and the Panel itself have at times had differing views on what accountability entailed and the scope of the Panel's authority. This section briefly outlines the genesis of the Panel, its evolution over the past twenty years, its default procedure for handling complaints, and the international standards that ought to guide its work.

A. Genesis of the Inspection Panel

The Panel was established in part in response to an accountability gap arising from international organizations' (including international financial institutions) immunity from suit for the conduct of their operations.¹¹ Because of this immunity, individuals and groups who are affected by international organizations' operations may have "no effective access to official fora [such as the local courts] in which to file complaints and seek appropriate remedies."¹² Civil society and other actors advocated the development of a voluntarily adopted accountability mechanism at the Bank, and subsequently at other international financial institutions, in order to overcome the immunity barrier. Commentators have described the establishment of the Panel in 1993 as a watershed moment, an "extraordinary development that further underpinned the transparency and accountability of [multilateral development banks]."¹³ By giving private individuals and groups the ability to "participate in the decision-making process of [the World Bank]," the Panel "fundamentally altered the relationship between international organizations on the one hand and private individuals and groups on the other."¹⁴

In addition to the need to bridge this general accountability gap, specific circumstances within the Bank in the early 1990s triggered the establishment of the Panel, as described below.

1. *The Narmada Projects*

Most observers point to a group of controversial Bank projects in India as the immediate catalyst for the creation of an accountability mechanism.¹⁵ In the mid-1980s, the Bank approved

¹¹ Eisuke Suzuki and Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 Mich. J. Int'l L. 177, 182 (2005).

¹² *Id.*

¹³ *Id.* at 187.

¹⁴ *Id.* at 188.

¹⁵ See, e.g., IBRAHIM SHIHATA, THE WORLD BANK INSPECTION PANEL: IN PRACTICE 5 (2000); MAARTJE VAN PUTTEN, POLICING THE BANKS: ACCOUNTABILITY MECHANISMS FOR THE FINANCIAL SECTOR 66 (2008).

financial support for the construction of a dam and series of canals on the Narmada River.¹⁶ The Bank's approval of financing was instrumental in advancing the project.¹⁷ The projects, proposed by the Indian government, had not undergone an environmental impact analysis—as required by Indian law—and faced stiff domestic opposition. Beyond the uncertain environmental impacts, the dam project alone would require the resettlement of more than 120,000 people.¹⁸ The canals project required similarly large-scale resettlement.

In March 1991, responding to mounting criticism from local and international NGOs, the Bank President James Wolfensohn, asked Bradford Morse, a former U.S. Congressman and United Nations Development Program official, to chair an independent commission to investigate the projects.¹⁹ The Commission's stated objective was to conduct an assessment of the resettlement and environmental impacts of the projects, as measured against the Bank's operational directives and guidelines.²⁰ The review process was designed not to include any mediation or adjudication function, but instead only to offer findings as to whether the Bank had complied with its own policies and procedures.²¹

In June 1992, the Commission issued its report finding that the Bank did not comply with its internal policies and procedures in approving the projects, failed to fully incorporate those policies into the project loan agreements, and neglected to ensure the local government's compliance with provisions of the loan agreements. The Commission concluded that it would be “irresponsible” for it to try to “patch together” recommendations on how to better implement the project and instead recommended that the Bank “step back” from the Narmada projects.²² As Commission member Thomas Berger noted, “little can be achieved while construction continues.”²³

Despite the Morse Commission's recommendation, Bank Management in India presented an Action Plan proposing that the projects move forward with assurances from the government of India that it was taking measures to address the identified problems.²⁴ Morse and Berger were immediately critical, arguing that acceptance of the Action Plan failed to address the problems highlighted in the Commission's findings, which had found clear violations of Bank policies, and called on the Bank to pause its involvement in response to these violations.²⁵ Nonetheless, the Bank Board voted to continue financing the projects.²⁶

¹⁶ Balakrishnan Rajagopal, *Limits of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: The Indian Supreme Court and the Narmada Valley Struggle*, 18 LEIDEN J. INT'L L. 345, 355 (2005).

¹⁷ Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 3 (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003).

¹⁸ Ibrahim F.I. Shihata, *Historical, Legal and Operational Aspects*, in THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 10 (Gudmundur Alfredsson & Rolf Ring, eds. 2001).

¹⁹ VAN PUTTEN, *supra* note 15, at 69.

²⁰ Thomas R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 AM. U. INT'L L. REV. 33, 37 (1993).

²¹ SHIHATA, *supra* note 15, at 6.

²² BRADFORD MORSE & THOMAS R. BERGER, SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW (1992).

²³ Berger, *supra* note 20, at 45.

²⁴ JASON KIRK, INDIA AND THE WORLD BANK: THE POLITICS OF AID AND INFLUENCE 37 (2011).

²⁵ Letter from B. Morse and T.R. Berger to World Bank President Lewis T. Preston, October 13, 1992.

²⁶ Clark, *supra* note 17.

Meanwhile, pressure from international NGOs was mounting. Just before the Bank's annual meeting in 1992, a number of NGOs took out full-page ads in the *New York Times*, *Washington Post*, and *Financial Times* demanding that the Bank withdraw from the Narmada Projects. The advertisements warned that continued involvement in Narmada would result in a concerted effort by NGOs to end U.S. funding of the Bank.²⁷ However, in early 1993, when it became clear that conditions of the Action Plan had not been met, the Indian government canceled the remaining balance on the loan and decided to move forward on the projects without Bank assistance.²⁸

2. *The Creation of the Panel*

In response to the criticism ignited by the Narmada projects, four executive directors of the Bank circulated an internal proposal for a new accountability mechanism.²⁹ Given the public concern about the lack of accountability, the directors noted that, "an independent 'inhouse' evaluation unit could help avoid the repetition of painful recent experiences."³⁰ In particular, "[a]n independent unit could provide the Board with a much needed objective assessment of [Bank projects] without relying on information from outside sources, whose objectivity is often difficult to assess."³¹ The Bank President subsequently requested a staff review of the proposal, which found no apparent need for a permanent unit, recommending instead an *ad hoc* process.³²

Civil society organizations continued to apply pressure to governments funding the Bank, particularly in the United States. In 1993, the U.S. House of Representatives Committee on Banking, Finance, and Urban Affairs was scheduled to vote on the replenishment of funds to the Bank's International Development Agency (IDA). In May of that year, the House Subcommittee on International Development, Finance, Trade and Monetary Policy, chaired by Congressman Barney Frank, convened a hearing on the replenishment and invited a number of Bank critics to speak.³³ Advocates of Bank reform advanced two primary proposals to prevent future violations like those that occurred in Narmada. The first proposal recommended the appointment of a Bank Ombudsman,³⁴ who would have the power to investigate and respond to complaints related to implementation of Bank policies.³⁵ The second proposal envisioned an independent appeals commission that could receive complaints from any individual affected by Bank projects.³⁶ Following the hearings, the Congressional subcommittee incorporated the proposal for an

²⁷ VAN PUTTEN, *supra* note 15, at 73.

²⁸ Clark, *supra* note 17, at 5.

²⁹ Shihata, *supra* note 18, at 17.

³⁰ Clark, *supra* note 17, at 8.

³¹ *Id.*

³² Shihata, *supra* note 18, at 17.

³³ *Id.*

³⁴ Daniel Bradlow, "The Case for a World Bank Ombudsman," *Hearings on Appropriations for International Financial Institutions* 134, US House of Representatives Committee on Banking, Finance, Trade and Monetary Policy (May 1993).

³⁵ *Id.*

³⁶ David Hunter and Lori Udall, "Proposal for an Independent Appeals Commission for the World Bank," *Hearings on Appropriations for International Financial Institutions* 235, US House of Representatives Committee on Banking, Finance, Trade and Monetary Policy (May 1993).

independent appeals commission into its comments on the draft bill for replenishing Bank funds.³⁷

The Bank quickly responded, revisiting the possibility of creating an inspection function in order to ensure funds from the United States did not stop flowing. In June 1993, a Bank staff report recommended establishing a permanent independent board of three inspectors that would receive and investigate complaints from affected parties.³⁸ In September 1993, the Board adopted a pair of resolutions officially establishing the Panel. It was not the commission that some advocates had envisioned, as the Panel lacked (and still lacks) any binding power over Bank financing that would enable it to end involvement in projects that involve violations. However, unlike some of the Bank's earlier designs for an accountability mechanism that envisioned an *ad hoc* process directed by Management, the Panel was ultimately formed as "an impartial fact-finding body, independent from the Bank Management and staff."³⁹ Acknowledging the Bank's progress, but still wary of the uncertainty surrounding the Panel, Congressman Frank amended the replenishment bill to provide funds for two years rather than the usual three.⁴⁰ The funds for the third year would be withheld until there was evidence of further progress.⁴¹

B. The Panel's Role

As designed, the Panel is theoretically independent of Bank Management and reports directly to the Board.⁴² It is comprised of three members, who are appointed by the Board for a five-year, non-renewable term.⁴³ The Panel is supported by a permanent secretariat, which provides operational and administrative support.⁴⁴ For fact-finding and investigation purposes, the Panel may engage independent, internationally-recognized experts, whose assistance is to ensure that the Panel provides an "objective and professional assessment of the issues under review."⁴⁵

According to the Panel's Operating Procedures, the Panel has two accountability functions.⁴⁶ First is to provide "a forum for people, including those who are often poor and vulnerable, to seek recourse for harm which they believe result from Bank-supported operations."⁴⁷ Second is to provide "an independent and impartial assessment of claims about harm and related non-compliance with Bank policies as a check-and-balance for the Board and other concerned stakeholders."⁴⁸ This latter function is intended to "contribute[] towards

³⁷ Shihata, *supra* note 18, at 14.

³⁸ *Id.*, at 25.

³⁹ *About Us*, WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx>.

⁴⁰ Clark, *supra* note 17, at 9.

⁴¹ *Id.*

⁴² *Meet the Panel*, WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/MeetthePanel.aspx>.

⁴³ The World Bank explains that members of the Panel are "selected on the basis of their ability to deal thoroughly with the complaints brought to them, their integrity and independence from [World] Bank Management, and their exposure to developmental issues and living conditions in developing countries." *About Us*, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Updated Operating Procedures*, *supra* note 4, at 6.

⁴⁷ *Id.*

⁴⁸ *Id.*

institutional learning and help[] to improve development effectiveness of World Bank operations.”⁴⁹

People who believe they have been or are likely to be adversely affected by Bank-financed projects can file a complaint with the Panel.⁵⁰ The Panel assesses the complaint and may decide to investigate the complaint and recommend any actions it considers appropriate. However, the Panel’s review is limited to Bank action; the Panel may not review the action or inaction of the borrower government.⁵¹

The Panel can only look into injuries that result from the failure of the Bank to follow its operational policies and procedures.⁵² In the 1970s and 1980s, the Bank began to establish environmental and social safeguard policies to “prevent and mitigate undue harm to people and their environment in the development process.”⁵³ These policies provide guidelines to the Bank in identifying, preparing and implementing programs and projects.⁵⁴ Since the initial creation of the safeguard policies, the Bank has undertaken various reviews and codified them into the operational policies applicable to all projects.⁵⁵ A 2010 study, sponsored by the Bank, found that the safeguard policies were effective in mitigating adverse impacts of high-risk projects, but that the Bank nonetheless paid inadequate attention to social and environmental outcomes. It recommended a strengthening of supervision and monitoring of Bank-financed projects.⁵⁶ In response, the Bank initiated a two-year review of the safeguards, including broad consultation with civil society organizations. The World Bank approved its new Environmental and Social Framework in 2016.⁵⁷ The Panel will be responsible for investigating compliance with these new

⁴⁹ *Id.*

⁵⁰ The Panel describes itself as “an independent complaints mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project”. *About Us*, *supra* note 39.

⁵¹ *Panel Resolution*, *supra* note 3, at para. 12.

⁵² These policies and procedures consist of three different kinds of internal bank documents: (1) Operational Policies (OP), (2) Bank Procedures (BP), and (3) Operational Directives (OD). The Bank describes Operational Policies as “short, focused statements of policy that are based on the Bank’s Articles of Agreement, the General Conditions, and policies approved by the Bank’s Executive Directors. OPs set out the mandatory policy requirements for the conduct of Bank operations.” *Operational Manual: Definitions*, WORLD BANK (2013), <http://go.worldbank.org/STEW78SF30>. Bank Procedures set out procedural guidelines for staff implementing the OP. Operational Directives were the precursor to the current policy statements, but were phased out in 1992.

Laurence Boisson de Chazournes, *Compliance with Operational Standards*, in *THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE* 70 (Gudmundur Alfredsson and Rolf Ring, eds. 2001). As clarified by former Bank General Counsel, Ibrahim Shihata, not all of the standards set forth in OPs and BPs are expressed in binding terms, but to the extent that they are, they bind all Bank staff. SHIHATA, *supra* note 15, at 42.

⁵³ *Safeguard Policies*, WORLD BANK (2012), <http://go.worldbank.org/WT10DE7T0>.

⁵⁴ *Id.*

⁵⁵ *Operational Manual: Table A1 - Environmental and Social Safeguard Policies*, WORLD BANK (2013), <http://go.worldbank.org/YFA8D3WJS0>.

⁵⁶ Independent Evaluation Group, *World Bank Group Effectively Addresses Large-Scale Social and Environmental Risks but Must Increase Attention to Outcomes* (2010), http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/safeguards_pr.pdf.

⁵⁷ World Bank, *World Bank Board Approves New Environmental and Social Framework* (Aug. 4, 2016), <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>.

safeguard standards once they go into effect, estimated for 2018, though the old framework still govern projects already underway.⁵⁸

The Panel articulated its complaint procedure, drawn from the text of the Resolution, in the Operating Procedures that it drafted and adopted in 1994.⁵⁹ There are three phases in the complaints process: (1) registration phase – after the Panel receives a request for inspection, it will decide whether it meets the basic requirements to register the complaint; (2) eligibility phase – if registered, the Panel will assess the request for inspection and recommend to the Board whether to investigate the complaint; and (3) investigation phase – if the Board authorizes the investigation, the Panel conducts fact-finding in the project area and on completion of its investigation, submits a report to the Board.⁶⁰

Complaints to the Panel must be submitted by two or more people affected by a project.⁶¹ The individuals that file a complaint are referred to as “Requesters” and the complaint is formally called a “request for inspection.”⁶² The Requesters can make the complaint directly or through a representative. In their request for inspection, they must describe how they believe their rights or interests may have been or may be adversely affected by a Bank project.⁶³ The Requesters should also describe adverse actions or omissions by the Bank in relation to the design, appraisal and/or implementation of a Bank-financed project. Although the Requesters are not required to mention specific Bank operational policies or procedures, they can elaborate on particular obligations that the Bank has failed to fulfill (particularly in relation to the Bank’s safeguard policies).⁶⁴

A request for inspection must meet the eligibility criteria for inspection.⁶⁵ Specifically, the Requesters must show that the alleged violation of the Bank’s policies and procedures is “serious,” and that the Bank’s action or omission has impacted affected communities in a materially adverse way.⁶⁶ The Requesters must also have made some attempt to resolve the problem with Bank Management directly.⁶⁷ The request for inspection must describe the steps taken by the affected communities to resolve the problem with Bank staff and explain why the Bank’s response was inadequate.

In 1996 and again in 1999, the Board undertook two major reviews of the Panel, issuing what it referred to as “Clarifications” of the Resolution. The 1996 Clarification emphasized that Panel review was limited to the “design, appraisal, and/or implementation of projects,” as well as clarifying other eligibility criteria.⁶⁸ According to the Board, the 1999 Clarifications were designed to “reinforce[] the independence of the Inspection Panel in determining whether a

⁵⁸ *Id.*

⁵⁹ *Operating Procedure*, WORLD BANK (2011), <http://go.worldbank.org/C6MIJ7MIP0>.

⁶⁰ *Updated Operating Procedures*, *supra* note 4, at 8.

⁶¹ *Id.* at 10.

⁶² This report uses the two terms “complaint” and “request for inspection” interchangeably. *Id.* at 9.

⁶³ *Id.* at 10.

⁶⁴ *Id.*

⁶⁵ *Id.* at 15.

⁶⁶ *Id.*

⁶⁷ *Id.* at 16.

⁶⁸ World Bank, *Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution* (1996), <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ReviewResolution1966.pdf>.

Request meets the relevant eligibility criteria and warrants a full investigation.”⁶⁹ The Board began to focus more intensely on preventing Bank Management from undermining the Panel.⁷⁰ Specifically, commentators on the Inspection Panel observed a troubling pattern of “bank management denying that anything is wrong in a project, denying that the policies have been violated, and seeking to undermine panel investigations.”⁷¹ Seeking to bolster the Panel’s independence, the Board required, for example, that Management refrain from contacting the Board regarding a complaint, including with recommendations for action, until the Panel had completed its normal complaint procedure.⁷²

The texts setting forth the Panel’s role and procedures remained unchanged until April 2014, when the Panel issued its updated Operating Procedures. The following section will discuss the tensions between the Panel and the World Bank and the circumstances that led to the updating of the Panel’s Operating Procedures. As this report will demonstrate, the Panel had already begun deviating from the 1994 Operating Procedures, and the 2014 update incorporated major changes to the timeline set forth in the Resolution. These changes included two kinds of delay periods that slow the Panel’s response to complaints and threaten the Panel independence that the 1999 Clarification sought to ensure.⁷³

C. The Panel and Other Bank Actors

Within the Bank, the Panel’s role has long been contentious.⁷⁴ Its operation has been the subject of sustained criticism by civil society organizations as well. During the Panel’s first few years of operation, hostility from some members of the Board and Bank Management led the Panel to undergo a process of adaptation from within.⁷⁵ While these attempts at adapting may have been undertaken to allow the Panel to work most effectively in a difficult political climate, they have led to uncertainty about Panel procedure and its role in the tripartite relationship involving the Board, Bank Management, and the Panel itself.

The hostility toward the Panel is perhaps best exemplified by the Board’s reaction to the Panel’s first investigation, in 1994, of the Arun III Dam Project in Nepal. The Panel’s report was highly critical of the project and ultimately led to its cancellation. It took almost five years for the Board to authorize the Panel to undertake another full investigation without limiting the Panel’s proposed terms of reference.⁷⁶ Borrower countries, at risk of having projects in their countries investigated, worked together to block Panel recommendations for investigation into

⁶⁹ *The Inspection Panel at 15 Years*, WORLD BANK 28 (2009), <http://ewebapps.worldbank.org/apps/ip/IPPublications/InspectionPanelAt15yearsEnglish.pdf>.

⁷⁰ Clark, *supra* note 17, at 18.

⁷¹ *Id.*

⁷² The 1999 Clarification provides (emphasis added): “[Management] will not communicate with the Board on matters associated with the request for inspection, including any steps it intends to take to address its failures, if any, to the Panel.” *1999 Clarification of the Board’s Second Review of the Inspection Panel*, WORLD BANK (1999), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>.

⁷³ See *infra* Part V.

⁷⁴ Clark, *supra* note 17, at 11.

⁷⁵ *Id.* at 12; see also Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279, 301 (2000).

⁷⁶ Clark, *supra* note 17, at 12.

particular projects.⁷⁷ During this five-year period, the Board denied authorization for three of the five investigations recommended by the Panel.⁷⁸ The Panel responded to the Board's reluctance to investigate by making the initial admissibility phase of the Panel process more robust, often adding in a field visit and "mini-investigation" before issuing its first report to the Board.⁷⁹ The Panel adopted this process informally, rather than by an official change in policy.⁸⁰

As the subject of Panel investigations, Bank Management has maintained a tense relationship with the Panel. While the 1996 and 1999 Clarifications sought to reinforce the independence of the Panel and set forth requirements for Management's response, Bank Management continues to resist the Panel's intervention much as it did when the Panel was first established. Management has frequently contested the Panel's findings at each step of the complaint process, denying responsibility for identified problems and pre-emptively proposing action plans in the hope of avoiding an investigation.⁸¹ As recently as October 2014, a World Bank Practice Manager described the problem in this way: "When a request is registered, the whole psychology of the Bank and bureaucracy is very different. It's one of defensiveness. The immediate reaction is not to ask who was affected, but how are we going to respond?"⁸²

The Albania Coastal Zone Management Project marked a pivotal moment in the relationship between the Panel and Bank Management.⁸³ In two separate complaints, the Requesters alleged that their homes had been demolished, they had been displaced, and there had been no resettlement plan in place to mitigate any of these harms, all in violation of Bank

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ *Id.* ("As it became less and less likely that the board would approve full investigations, the Inspection Panel adapted by packing a 'mini-investigation' into the preliminary stage of its analysis into whether a claim is eligible, which often includes a field visit and a prima facie determination of policy violations. The panel began including commentary on potential policy violations and harm in its initial report to the board containing the panel's recommendation regarding an investigation.").

⁸¹ *Id.* at 13 ("Meanwhile, bank management also resented the panel's scrutiny and strongly resisted being held accountable. Management responses to the Inspection Panel claims tended to deny policy violations and deny responsibility for problems identified in the claim (usually blaming the borrowing government for the problems instead). Management responses also tended to challenge the eligibility of claimants and propose 'action plans' as alternatives to panel investigations. Management's action plan approach was frustrating to claimants and their advocates because rather than addressing the problems identified through an investigation, the action plans were designed to derail panel investigations and to instead convince the board to allow management to solve the problems. According to an attorney in the World Bank's legal department, 'The effect of remedial action plans forwarded by Management shortly before the Board's consideration of the Panel's recommendation seemed thus to be that Management through them was successfully subverting the Panel process, as no inspections were authorized following the submission of such plans.'") (internal citations omitted).

⁸² Ian Bannon, *Responding to People's Grievances by Piloting an Early Solutions Approach: A Case Study from East Badia, Lagos, Nigeria*, WORLD BANK (2014), <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=183&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx>.

⁸³ See, e.g., *The Environmental and Social Safeguard Policies of The World Bank and the Evolving Role of the Inspection Panel*, in *THE WORLD BANK AND SUSTAINABLE DEVELOPMENT: LEGAL ESSAYS* 69 (David Freestone ed., 2012) [hereinafter "LEGAL ESSAYS"].

policies.⁸⁴ The Panel's investigation found that there had in fact been a number of policy violations during project implementation.⁸⁵ Bank Management responded decisively to the Panel report. They disciplined many members of senior staff and the Bank decided to pay the costs of court cases that were brought against the government of Albania.⁸⁶ Additionally, the Panel's findings prompted Bank Management to carry out a review of over a thousand other Bank projects.⁸⁷ Finally, the Board issued two guidance documents to be used by Bank staff in order to avoid similar problems in future projects involving involuntary resettlement and land use planning.⁸⁸ According to Professor David Hunter, following this case, the Panel witnessed a surge in tensions with Bank Management.⁸⁹

Against this backdrop, the Panel has attempted to assess its efficacy and find ways of having greater impact in accord with the mandate of the Resolution. These efforts have led to institutional adaptations or improvisations that seek to work within the scope of the Resolution while nonetheless allowing flexibility in Panel behavior. Most recently, the Panel's Operating Procedures went through an internal review process that began in 2011.⁹⁰ The review was prompted by difficulties arising from its singular function as a compliance body that has been present since the creation of the Panel.⁹¹ According to Hunter, the review sought to adjust Panel procedure so as to encourage Management's cooperation with the Panel and to yield better "development outcomes."⁹²

This most recent review process resulted in revisions to the Operating Procedures that formalize changes in Panel procedure that aim at creating space for resolution of disputes between Management and affected communities. Specifically, the revisions codified two forms of delay, included in Footnote 7 of the updated Operating Procedures and in an annex outlining the "Pilot Program,"⁹³ intended to facilitate early settlement of Panel complaints. These procedural changes were implemented during a period where the accountability mechanisms of other international financial institutions were considering how they could perform both compliance and dispute resolution functions. In the course of the review process that led to these

⁸⁴ Dilek Barlas & Tatiana Tassoni, *Improving Service Delivery Through Voice and Accountability: The Experience of the World Bank Inspection Panel*, in *IMPROVING DELIVERY IN DEVELOPMENT: THE ROLE OF VOICE, SOCIAL CONTRACT AND ACCOUNTABILITY* 492 (Jan Wouters, Alberto Ninio, Teresa Doherty & Hassane Cisse eds., 2015).

⁸⁵ The final report stated that: "The Panel found that . . . the Bank failed to comply with its Policy on Involuntary Resettlement. The Project . . . harbored a critical risk that could have been avoided with an appropriate contractual framework and adequate supervision. The Panel found that Management failed to supervise the Project, as required under the Bank's Policy on supervision. The Panel also concluded that the Management Response was particularly unhelpful and non-informative, and at times in total conflict with factual information that had long been known to Management." *The Inspection Panel at 15 Years*, *supra* note 69, at 151.

⁸⁶ LEGAL ESSAYS, *supra* note 83, at 71.

⁸⁷ Barlas & Tassoni, *supra* note 84.

⁸⁸ *Id.* at 493.

⁸⁹ Interview with David Hunter, Mar. 13, 2015 (interview notes on file with authors).

⁹⁰ *Id.*

⁹¹ Interview with Richard Bissell, former Inspection Panel member, Dec. 3, 2014 (interview notes on file with authors).

⁹² Interview with David Hunter, *supra* note 89.

⁹³ Described in more detail in Section IV, *infra*.

changes, some Panel officials and civil society representatives had begun to suggest the addition of dispute resolution to the Panel's mandate and procedures.⁹⁴

However, Footnote 7 and the Pilot Program did not incorporate many of the protections included in a dispute resolution process, including the involvement of professional mediators and monitoring during and after a negotiation process. The Panel was confined by its mandate, and may not have been able to add these functions into its Operating Procedures without the Board revising its founding Resolution. As a result, Footnote 7 and the Pilot Program fail to provide a true opportunity for dispute resolution sufficient to help Requesters find adequate solutions, and they undermine the original function of the Panel: to ensure the Bank's compliance with its operational policies and procedures.⁹⁵

D. Human Rights Guidelines for Accountability Mechanisms

The World Bank has historically avoided using human rights language to describe Bank projects or Bank obligations. Bank members have defended avoidance of human rights language by pointing to the Bank's founding Articles of Agreement, which characterize the Bank as a purely economic, not political, institution.⁹⁶ In the past, the Bank argued that human rights were an inherently political issue, and therefore fell outside the scope of the Bank's work.⁹⁷

In 1998, the Bank's position began to soften. That year, the Bank published a document describing its understanding of its own role in promoting human rights and development. The 1998 document noted that "sustainable development is impossible without human rights" and that "creating the conditions for attainment of human rights is a central and irreducible goal of development."⁹⁸ The World Bank's website currently has an entire page devoted to human rights, acknowledging that many areas of Bank activity have human rights dimensions, that human rights are actionable legal obligations, and that the Bank has a role in supporting member states in fulfilling their human rights obligations.⁹⁹ Despite this progress, neither the 1998 document nor the current Bank website goes so far as to declare human rights promotion to be a legal obligation of the Bank.

The Bank does, however, have certain international legal obligations with respect to human rights. The Bank is a specialized agency of the UN. While specialized agencies of the UN, including the World Bank, are legally independent and not directly accountable to the UN, these agencies are "in relationship" with the UN through Article 57 and 63 of the Charter. Specialized agencies must, at a minimum, respect the purposes for these agencies set forth in Article 55 of the Charter, including the "universal respect for, and observance of, human rights."¹⁰⁰

⁹⁴ Interview with David Hunter, *supra* note 89.

⁹⁵ *Id.*

⁹⁶ John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331, 335-36 (2000).

⁹⁷ Human Rights Watch, *Abuse-Free Development* (2013), http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf.

⁹⁸ World Bank, *Development and Human Rights: The Role of the World Bank* (1998) <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/08DHR.pdf>.

⁹⁹ *Human Rights*, WORLD BANK (2012), <http://go.worldbank.org/72L95K8TN0>.

¹⁰⁰ U.N. Charter, arts. 55, 59; *see also id.* art. 1(3).

The right to a remedy is an important component of international human rights law.¹⁰¹ U.N. agencies, including the World Bank, have immunity from suit,¹⁰² but they must nonetheless provide some form of redress. Under the Convention on Privileges and Immunities of Specialized Agencies, a specialized agency must make available appropriate modes of settlement for disputes arising out of contracts, disputes of a private character to which the specialized agency is a party, and disputes involving any official of a specialized agency.¹⁰³ Granted, individuals and groups affected by World Bank operations may have “no effective access to official fora [such as the local courts] in which to file complaints and seek appropriate remedies,”¹⁰⁴ but the Convention reflects the norm under international law for access to remedy.

While the Convention on Privileges and Immunities does not specifically address human rights, there has since been increasing recognition that the responsibility to respect certain human rights—including the right to a remedy—goes beyond states, and extends to international organizations, businesses and non-state actors. The World Bank’s Inspection Panel was an important first step in providing affected communities access to a mechanism in which they could air any grievances they might have about Bank-funded projects. International law does not yet clearly define how the Inspection Panel, as a non-state grievance mechanism, must operate, but non-binding principles offer guidance as to how the Panel might best protect the interests of affected communities it seeks to serve.

The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), adopted by the UN Human Rights Council in 2011, are an authoritative set of global standards for addressing the adverse impacts on human rights linked to business.¹⁰⁵ The Guiding Principles were not directly aimed at development institutions, but as an institution that provides loans to governments in order to promote business and development, the Principles provide a helpful framework for understanding what features that accountability mechanisms, including the Panel, should have in order to protect the interests of individuals and groups with grievances caused by development. The UN Special Rapporteur on the Right to Adequate Housing has also specifically called on the Bank to incorporate the Guiding Principles on Business and Human Rights into its work.¹⁰⁶ The Principles define a grievance mechanism as “any routinized, State-based or non-State based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.”¹⁰⁷ The Inspection

¹⁰¹ See, e.g., Universal Declaration of Human Rights, art. 8, Dec. 10, 1948, G.A. Res. 217 (III) A; International Covenant on Civil and Political Rights, art. 2, Dec. 10, 1966, 999 U.N.T.S. 171.

¹⁰² Convention on the Privileges and Immunities of the Specialized Agencies, art. III, § 4, Nov. 21, 1947, 33 U.N.T.S. 261.

¹⁰³ Convention on Privileges and Immunities of Specialized Agencies, *supra* note 102, at art. IX, § 31.

¹⁰⁴ Suzuki & Nanwani, *supra* note 11.

¹⁰⁵ For further discussion about the history and development of the UN Guiding Principles on Business and Human Rights, see The Kenan Institute for Ethics at Duke University, *The U.N. Guiding Principles on Business and Human Rights: Analysis and Implementation* 4-6 (2012), <https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf>.

¹⁰⁶ United Nations Human Rights Council, *Report by the Special Rapporteur on Adequate Housing* para. 12, UN/A/HRC/22/46/Add.3 (2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.46.Add.3_English.pdf.

¹⁰⁷ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* 27 (2011),

Panel, in making its complaints process available to communities adversely affected by Bank-funded projects, acts as a non-state grievance mechanism.

The UN Guiding Principles explain that a grievance mechanism “can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.”¹⁰⁸ Poorly designed or poorly implemented accountability mechanisms “can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.”¹⁰⁹ The Guiding Principles set out eight criteria for an effective non-judicial grievance mechanism.¹¹⁰ Three are of particular relevance to the Panel. The Panel should be: (1) legitimate, in that affected people must trust the mechanism in order to have the confidence to use it; (2) predictable, in that the mechanism must provide a clear procedure with a reliable timeframe, stipulate the outcomes available, and make clear the means for monitoring implementation of solutions; and (3) transparent, in that the mechanism must keep parties informed about its progress and provide sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.¹¹¹ The three case studies discussed below provide a glimpse of the effect that recent procedural changes have had upon the legitimacy, predictability, and transparency of the Panel.

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 33-34.

¹¹¹ *Id.*

IV. SINDHULI, NEPAL

In 2013, a group of people affected by an electricity project in the Sindhuli region of Nepal, the Khimti-Dhalkebar 220 kV Transmission Line Project, submitted a complaint to the Panel explaining that they had not been consulted in the project's design or been given adequate information about compensation for land or about the health impacts of the line. They also alleged that police had beaten members of the community protesting construction. In its eligibility report, the Panel found that the complaint was both eligible for investigation and that an investigation should take place, but nonetheless decided to delay its investigation for six months, despite requests from the community to begin investigation immediately.¹¹² This delay differed from the other procedures described in this report insofar as the Panel made a recommendation for investigation, but delayed the investigation nonetheless. The Panel said the six-month period was necessary to provide Bank Management time to implement an Action Plan that it had developed to address these issues prior to investigation.¹¹³ While Bank Management did hold meetings in Sindhuli after the Panel complaint was raised, affected communities claimed Bank Management continued to fail to adequately respond to community concerns, and that the community saw no substantive change in Bank Management's behavior during the six months.

The Panel's final report on Sindhuli was released to the public in July 2015, nearly two years after the complaint was submitted. Before the issuance of the Panel report, the Lowenstein Clinic visited Sindhuli and interviewed affected communities about the complaint process, as well as Bank and NGO staff in Kathmandu. The Clinic found that the Sindhuli case was plagued by a lack of procedural clarity for affected communities and a lack of meaningful attention to Requester concerns during the delay period, which undermined the Panel's legitimacy and independence in the eyes of the communities it is meant to serve.

The Sindhuli case demonstrates various issues of general concern, including lack of transparency, uncertainty about timing, and procedural confusion that are common across the three delay procedures described in this report. In addition, the delay practice used by the Panel in the Sindhuli case—registering the request for inspection, declaring its intention to formally

¹¹² Inspection Panel, *Report and Recommendation on Request for Inspection, Nepal: Power Development Project (PO43311)*, paras. 94-104 (Oct. 24, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Eligibility Report and Recommendation \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Eligibility%20Report%20and%20Recommendation%20(English).pdf) [hereinafter *Nepal Eligibility Report*].

¹¹³ *Id.* at para. 104. Specifically, paragraph 104 reads:

“In light of the observations above, the Panel recommends that an investigation be carried out focusing on: (i) issues of compliance with World Bank operational policies and procedures under the Project that relate to alleged loss of livelihoods, or potential future losses, for vulnerable communities, including indigenous groups, and (ii) issues of compliance with respect to the study of alternatives and alignment of the transmission line and allegations that certain harms were not adequately considered. In order to take into account the implementation of the proposed actions set forth in Annex 1.6 of the Management Response during its investigation, the Panel recommends commencing its investigation after April 30, 2014. If the Board of Executive Directors concurs with the following, the Inspection Panel will advise the Requesters and Management accordingly.”

investigate, but delaying the investigation—continues to be available to the Panel despite not being codified in the updated Operating Procedures.¹¹⁴

A. Background on the Sindhuli Case

On May 22, 2003, the Board approved funding for the Nepal Power Development Project. The project included construction of the Khimti-Dhalkebar 220 kV Transmission Line, a high-tension transmission line that covers four districts of central Nepal. The Nepal Electricity Authority (NEA) started building the power line in 2007, ostensibly in compliance with Bank safeguard policies. In Sindhuli, one of the four affected districts, the project's 30-meter wide transmission corridor will cover the ground of, and the airspace above, residential and urban areas, as well as four schools.¹¹⁵

Many in the community resisted construction of the power line, organized by a coalition of community leaders that called themselves the Struggle Committee. The Struggle Committee's opposition efforts including filing two petitions with the Supreme Court of Nepal in January 2013 and April 2013 respectively,¹¹⁶ and filing a complaint with the National Human Rights Commission in April 2013.¹¹⁷ On March 24, 2013, the Nepali government announced a compensation package for some of the people whose land was affected.¹¹⁸ Many residents

¹¹⁴ Interview with the Inspection Panel's Secretariat (Dilek Barlas, Executive Secretary; Serge Selwan, Senior Operations Officer; Mishka Zaman, Senior Operations Officer; John Garrison, Senior Civil Society Specialist; and Birgit Kuba, Junior Professional Officer), on March 12, 2015 in Washington, D.C.

¹¹⁵ *Efforts to Resume Works for World Bank Funded High Voltage Power Transmission Line Construction Raise Tensions in Central Nepal*, FOREST PEOPLES PROGRAMME (Jan. 26, 2014), <http://www.forestpeoples.org/topics/world-bank/news/2014/01/efforts-resume-works-world-bank-funded-high-voltage-power-transmissio> [hereinafter *FPP Report*].

¹¹⁶ In January 2013, LAHURNIP filed the first writ petition to the Supreme Court of Nepal requesting an interim order to stop construction of the transmission line. On April 18, 2013, LAHURNIP filed the second writ petition to the Supreme Court of Nepal addressing "land acquisition to road project associated with the Khimti-Dhalkebar Transmission Line." Accountability Counsel, *Nepal: Documents*, <http://www.accountabilitycounsel.org/communities/current-cases/high-voltage-power-line-nepal/nepal-documents>. See also LAHURNIP, *Nepal's Supreme Court Issues Show-cause Order to the Government on Land Acquisition in Sindhuli Related to Construction of Khimti-Dhalkebar 220 KV Transmission Lines* (April 18, 2013), <http://www.lahurnip.org/details.php?id=134>.

¹¹⁷ The Requesters filed a complaint with the National Human Rights Commission in response to a visit on April 11, 2013, where police and project personnel visited the Sindhuli communities bearing batons (but no firearms). The Requesters wanted to avoid further violent responses from the police. Letter from Surendraswor Moktan, Chairperson of Struggle Committee, et al. to Peter Lallas, Executive Secretary, Inspection Panel, 11 (July 10, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Request%20for%20Inspection%20(English).pdf) [hereinafter *Nepal Inspection Request*].

¹¹⁸ World Bank, *Management Response to Request for Inspection Panel Review of the Nepal: Power Development Project (PO43311)* 63 (Sept. 11, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Management Response \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Management%20Response%20(English).pdf) [hereinafter *Nepal Management Response*] ("The Government announced in a local newspaper: (i) the list of 150 land parcels affected by the transmission line construction in the Sindhuli District; (ii) the names of the owners of the 159 land parcels that would receive a new compensation and development package to address the impacts. The new compensation and development package included: (i) Building a village road along the [Right of Way]; (ii) Acquiring the land of the entire [Right of Way] for the purpose of the road construction, including with a 100% compensation of the land value; and (iii) electricity supply without any load-shedding to Kamalamai Municipality.").

rejected this package as inadequate.¹¹⁹ In addition, they argued that their complaints were not merely based on disagreement with the amount of compensation offered, but also on fear of the health effects of the line and a lack of consultation preceding its construction.

The Nepali government continued constructing the line. Frustrated by the government's failure to take their complaints seriously and to respond to their concerns, those opposing the line turned to the World Bank. On February 18, 2013, the affected peoples of Sindhuli, with the help of the Lawyer's Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the Nepal Federation of Indigenous Nationalities (NEFIN),¹²⁰ Nepali NGOs, as well as Accountability Counsel, an international NGO, sent a letter of concern about the project to the Bank President.¹²¹ In that letter, the affected communities asked the Bank to consider alternatives for the transmission line in Sindhuli. The letter cited the lack of information given and consultation with indigenous and local people, inaccurate estimates regarding the number of people affected, and violations of the rights of indigenous people, and ultimately requested that funding be cut off until these problems were corrected.¹²² The letter also "referenced incidences of state-sanctioned violence against project opponents, citing personal safety as a major concern for local people."¹²³

In response to the letter, on March 15, 2013, local Bank and NEA staff met in Kathmandu with the Struggle Committee, LAHURNIP, and Accountability Counsel (which joined by phone).¹²⁴ The Struggle Committee members in attendance reported that the NEA and Bank refused all of their requests for changes to the power line.¹²⁵ However, after the meeting, Bank Management and the NEA agreed to stop any construction activities until outstanding issues were resolved, as well as to expedite the preparation work on the compensation

¹¹⁹ According to the Request, "[m]ost Complainants were not offered compensation or informed about any mitigation measures, including those whose land is within 15 meters of the transmission line and close to towers. However, in some cases where towers were built directly on community members' land, a small amount of compensation was offered. Others found out through the *National Daily* newspaper on March 24, 2013, that compensation would be offered, but have yet to receive compensation." *Nepal Inspection Request*, *supra* note 117, at 8-9 (internal citations omitted).

¹²⁰ NEPAL FEDERATION OF INDIGENOUS NATIONALITIES (NEFIN), <http://www.nefin.org.np> ("NEFIN was formed in 1991 as an autonomous and politically non-partisan, national level umbrella organisation of indigenous peoples/nationalities. NEFIN currently consists of 48 indigenous member organisations widely distributed across Nepal. NEFIN is a member of the United Nation's Working Group on Indigenous Populations.")

¹²¹ *Nepal Inspection Request*, *supra* note 117, at 27.

¹²² Letter from Surya Pakhrin, Shankar Limbu & Surendra Swar Moktan, to Jim Yong Kim, President, World Bank, regarding an "Appeal to Consider Alternatives for the Nepal Power Development Project in Sindhuli District," (Feb. 18, 2013), http://www.forestpeoples.org/sites/fpp/files/news/2013/03/LAHURNIP_letter_WorldBank_February2013_NepalPowerDevelopmentProject.pdf. See also *Nepal Management Response*, *supra* note 118, at 30.

¹²³ *Id.*

¹²⁴ Interview with Ukta Thapa & Gokul Bhujel, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015); Lawyers' Association for Human Rights of Nepalese Indigenous Peoples, *Indigenous and Local Communities Call on World Bank to Seek Alternatives for Construction of Khimti-Dhalkebar 220 KV Transmission Line* (March 15, 2013) <http://www.lahurnip.org/details.php?id=127>.

¹²⁵ Interview with Ukta Thapa & Gokul Bhujel, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015); see also Inspection Panel, *Notice of Registration, Request for Inspection, Nepal Power Development Project (PO43311)* 6 (Jul. 24, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Notice of Registration \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Notice%20of%20Registration%20(English).pdf) [hereinafter *Nepal Notice of Registration*].

packages.¹²⁶ On April 1, 2013, affected communities informed the Bank that the NEA was again trying to construct a tower in Sindhuli. They claimed the NEA was using security forces to ensure protestors did not stop construction.¹²⁷ The use of police to stop construction was a particularly sensitive issue for the community, as they alleged that on November 11, 2012, the police had responded brutally to peaceful protests and severely injured ten women.¹²⁸

On April 4-6, 2013, Bank staff visited Sindhuli to discuss the project with local leaders.¹²⁹ In June 2013, the Bank and NEA adopted an Action Plan to try to resolve the Sindhuli issues.¹³⁰ The NEA portion of the Action Plan contained the follow action points for Nepali authorities: (1) complete outstanding compensation and disbursements; (2) hire a communication/social specialist; (3) appoint community liaison officers for key communities; (4) update the Vulnerable Communities Development Plan and the Abbreviated Resettlement Action Plan; (5) complete implementation of the updated Vulnerable Communities and Abbreviated Resettlement plans; (6) strengthen the current project Grievance Redress Mechanism (GRM); (7) continue consulting with affected communities to reach conclusion on the right of way of the disputed stretch of land; (8) develop and disseminate new communications materials at three particular sites, including Sindhuli; and (9) complete physical works.¹³¹ The Bank portion of the Action Plan contained the following action points for Management: (1) develop a project frequently asked questions/information pamphlet, and support the NEA with developing other communication materials; (2) support the NEA in strengthening its project GRM; (3) support creating a roster of mediators (to help with addressing problems that may arise in the future); (4) disclose safeguard documents; and (5) continue the safeguard capacity building of NEA.¹³²

Weeks following adoption of the Action Plan, the community remained unsatisfied with the Bank's response.¹³³ Affected communities were shocked when project officials and construction workers, backed by armed police, resumed construction for the transmission line.¹³⁴ The Struggle Committee obstructed project officials, workers, and the police. The Struggle Committee said that the resumption of work without first consulting them violated the NEA and Bank's Action Plan.¹³⁵

Dissatisfied with responses from Bank Management and the NEA, the community turned to the Panel.¹³⁶ On July 10, 2013, LAHURNIP and Accountability Counsel helped 103 individuals from three villages in Sindhuli district file an official complaint with the Panel.¹³⁷ In the complaint, residents claimed that they were not given information about the project, were not

¹²⁶ *Nepal Management Response*, *supra* note 118, at 62-63.

¹²⁷ *Id.*

¹²⁸ *Nepal Inspection Request*, *supra* note 117, at 11.

¹²⁹ *Nepal Management Response*, *supra* note 118, at 62-63.

¹³⁰ *Nepal Management Response*, *supra* note 118, at 64.

¹³¹ *Id.* at 75-76.

¹³² *Id.* at 77.

¹³³ *FPP Report*, *supra* note 115.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Nepal Inspection Request*, *supra* note 117, at 1-2.

consulted, and had not been resettled, all in violation of Bank policy.¹³⁸ In their opinion, the amount of compensation offered to those living within the transmission corridor, or “right of way” (ROW)¹³⁹ was insufficient, and the boundaries of the ROW did not include all the houses that would be affected by the line.¹⁴⁰ Residents also claimed that the Nepali government and Bank had failed to adequately assess alternative routes for the transmission line, and that the current route would clear a wide swathe of populated land, displacing already poverty-stricken communities and disrupting religious, historical, and cultural sites.¹⁴¹ Residents wanted the NEA and Bank to consider alternatives that would divert the power line away from inhabited areas, including their homes, schools, and heavily travelled roads.¹⁴²

The Complaint alleged the following specific violations of Bank policies, guidelines and directives:

- (i) Operational Policy 4.01 Environmental Assessment: the complaint alleged that Bank Management had failed to ensure that the borrower consulted properly with people affected by the project, and disclose the requisite information to the Requesters.¹⁴³
- (ii) Operational Directive 4.20 Indigenous People: the complaint alleged that there was a failure to appropriately identify indigenous peoples that were adversely impacted by the project, and thus the specific needs, preferences and rights of indigenous peoples were not taken into account.¹⁴⁴ The complaint also alleged that Bank Management failed to ensure that indigenous peoples were consulted for the project, and also failed to ensure their informed participation in the project.¹⁴⁵
- (iii) Indigenous Peoples Development Program: the complaint pointed out that Operational Directive 4.20 required Bank Management to ensure that the borrower prepare an Indigenous Peoples Development Plan in relation to the Sindhuli project, however the Government of Nepal did not prepare this plan.¹⁴⁶
- (iv) Operational Policy/Bank Procedure 4.12 Involuntary Resettlement: the complaint was particularly concerned about the Bank’s failure to ensure that viable alternatives to involuntary resettlement (such as realignment of the line) had been considered.¹⁴⁷
- (v) Environmental, Health, and Safety Guidelines for Electric Power Transmission and Distribution: the complaint alleges that, contrary to the guidelines, no study appeared

¹³⁸ Interview with Min Bahadur Shrestha, NEFIN President, Sindhuli, Nepal (Jan. 16, 2015); *FPP Report*, *supra* note 115.

¹³⁹ Residents have claimed that they have not received clear information about what activities are permitted under and near the power lines in the ROW, and are concerned that their agriculture-based livelihoods will be curtailed. Furthermore, commercial banks are refusing to mortgage any land under the right of way. Shankar Limbu & Komala Ramachandra, *Disempowered Development: Violating Rights in Nepal for Electricity Transmission*, BRETTON WOODS PROJECT (Mar. 31, 2014), <http://www.BrettonWoodsProject.org/2014/03/Disempowered-Development>.

¹⁴⁰ *Nepal Management Response*, *supra* note 118, at v.

¹⁴¹ *FPP Report*, *supra* note 115.

¹⁴² Limbu & Ramachandra, *supra* note 139.

¹⁴³ *Nepal Inspection Request*, *supra* note 117, at 12-13.

¹⁴⁴ *Id.* at 14.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 15.

¹⁴⁷ *Id.* at 18-19.

to have been conducted regarding the health risks of exposure to electric and magnetic fields arising from the transmission line project.¹⁴⁸

- (vi) Operational Policy Note 11.03 Management of Cultural Property: the complaint alleged that the Bank Management had failed to “assist in the protection and enhancement of cultural properties” in Sindhuli.¹⁴⁹ Specifically, there had been a failure to properly consider alternative routes for the transmission line, which would have avoided damage to cultural properties in Sindhuli.¹⁵⁰

The Panel registered the complaint on July 24, 2013, and sent a notice of registration to the Requesters.¹⁵¹ The Panel then organized a visit to Nepal from September 30 to October 4, 2013 to determine if the request was eligible for a full investigation. During the visit, Panel Member Zeinab Elbakri and two Secretariat members met with staff in the Bank Kathmandu office, government officials from the Ministry of Energy, Ministry of Finance, and NEA, and Requesters in Sindhuli.¹⁵²

B. Management’s Attempts at Finding Solutions During Delay

On October 18, 2013, Bank Management sent the Panel a revised action plan for addressing the concerns raised in the complaint.¹⁵³ This revised Action Plan included plans for information dissemination, consultation with the Sindhuli community, updated resettlement and vulnerable community development, and compensation. Bank Management also offered to extend its supervisory role during implementation of the Action Plan, despite the fact that the official Bank funding period had ended.¹⁵⁴ The Panel told the community they could not disclose the written Action Plan at that time, but asked for feedback in two days.¹⁵⁵

The Requesters reported feeling pressured to agree to the Action Plan. The Panel had informed the Requesters that the Bank might simply withdraw its participation in the project and the government of Nepal could forcibly acquire land for the project if the community did not agree.¹⁵⁶ In an October 23, 2013 letter written to the Panel on behalf of the community, the Requesters expressed willingness, in principle, to engage with the Bank through an Action Plan, but requested that it be given a written copy of the Action Plan in Nepali and more time to discuss the Plan’s components before moving forward. LAHURNIP also asked that Bank Management allow it to participate in further developing the Action Plan, including its timeframe for implementation. Finally, LAHURNIP requested that the Panel still begin investigation immediately.¹⁵⁷ LAHURNIP was not informed of the Panel’s plan for a delay.¹⁵⁸

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *Id.* at 24.

¹⁵⁰ *Id.*

¹⁵¹ *Nepal Notice of Registration*, *supra* note 125.

¹⁵² *Nepal Eligibility Report*, *supra* note 112, at para. 48.

¹⁵³ Letter from Shankar Limbu to Inspection Panel, Urgent Request for Consultation on Action Plan and Investigation, Oct. 23, 2013, Sent by Shankar Limbu of LAHURNIP on behalf of Sindhuli Requesters.

¹⁵⁴ Limbu & Ramachandra, *supra* note 139.

¹⁵⁵ Telephone Interview with Komala Ramachandra, Accountability Counsel (Nov. 18, 2014).

¹⁵⁶ *Id.*

¹⁵⁷ Letter from Shankar Limbu to Inspection Panel, *supra* note 153.

¹⁵⁸ Interview with Ukta Thapa & Gokul Bhujel, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

On October 24, 2013, the Panel found the Sindhuli complaint eligible for an investigation.¹⁵⁹ However, instead of recommending a full investigation immediately, it decided to break from its normal procedure and recommend to the Bank Board a delayed start of the investigation, in order to give Management time to implement its revised Action Plan.¹⁶⁰ The Panel did not address the Requesters' previously stated concerns about Management's inadequate efforts that had marked pre-complaint discussions between the community and Bank Management—discussions that had failed to result in progress.

By delaying the start of an investigation, the Panel departed from its standard procedures. It was unclear to the affected communities how the complaints process would now work. In its eligibility report, the Panel considered that delaying investigation was appropriate to provide Bank staff time to extend their participation in the project and to implement the Action Plan.¹⁶¹ The report noted the Bank's "declared commitment" to supervise the Action Plan after closure of the Project.¹⁶² When asked about the delay, the Struggle Committee noted that the Panel had not communicated with them directly, nor sufficiently explained the reasons for the delayed investigation.¹⁶³

Interviewees reported mixed views about the effectiveness of the delay period in resolving the concerns raised by the Requesters. During the delay, Bank Management and NEA staff visited Sindhuli on March 17-20, 2014, holding a series of meetings with different sections of community.¹⁶⁴ One community member noted that this was a positive development, as he had not personally seen Bank Management visit his community before the Panel had registered the complaint and chosen to delay.¹⁶⁵ Others reported that the Bank's visit featured many of the same problems that had plagued the project in the past—lack of notice, transparency or true consultation.¹⁶⁶ Some of those interviewed for this report noted some changes in Bank Management and NEA behavior during the period of delay, such as increased email communication with Management. However, it is unclear that the delay itself led to these developments rather than the pending investigation. In fact, a simultaneous Panel investigation may have given Management more incentive to take the community's concerns seriously while implementing the Action Plan.

In contrast, most community members reported seeing no change in the behavior of the Bank Management and NEA during the six months of delay.¹⁶⁷ The Struggle Committee reported that the affected people continued to feel excluded.¹⁶⁸ Most community members interviewed for

¹⁵⁹ *Nepal Eligibility Report*, *supra* note 112.

¹⁶⁰ *Id.* at para. 104.

¹⁶¹ *Id.*

¹⁶² *Id.* at para. 102.

¹⁶³ Interview with Ukta Thapa, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

¹⁶⁴ World Bank, *Update on the Management Action Plan for the Nepal: Power Development Project (P043311)* 12-17 (June 22, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Update-Management Action Plan \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Update-Management%20Action%20Plan%20(English).pdf) [hereinafter *Nepal Action Plan Update*].

¹⁶⁵ Interview with Men's Focus Group, Sindhuli, Nepal (Jan. 14, 2015).

¹⁶⁶ Interview with Ukta Thapa, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

¹⁶⁷ Interview with Focus Group, Sindhuli, Nepal (Jan. 15, 2015); Interview with Sindhuli UML (Marxist & Leninist Party) political party, Sindhuli, Nepal (Jan. 14, 2015); Interview with Indigenous People Focus Group, Sindhuli, Nepal (Jan. 14, 2015).

¹⁶⁸ Interview with Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

this report had not been provided with a copy of the Action Plan or other information.¹⁶⁹ Indeed, despite requests, neither World Bank Management nor the Panel provided a Nepali translation of the full action plan.¹⁷⁰ In the view of community members, the NEA did not appear committed to implementing the Action Plan. For example, according to a former NEA employee, the NEA hired a communications officer, who was supposed to gather information from the community to share with the Bank. The officer did submit reports to the NEA, but the NEA did not transmit those reports to the Bank.¹⁷¹ At the same time, the NEA instructed the officer not to go into the community to discuss the project, alleging concern for his safety. When the officer did raise community concerns, his NEA supervisors reportedly did not take those concerns seriously.¹⁷²

Bank Management and the NEA declined to provide information about their activity during the delay period. When interviewed for this report to find out what steps Management had taken during the delay period, members of Bank Management declined to speak about the Panel process until the release of the Panel's final report.¹⁷³ When contacted for this report to find out what steps the NEA had taken during the delay period, NEA officials involved in the project would not agree to a meeting. Further, the NEA reportedly cautioned former employees from participating in interviews for the report authors.¹⁷⁴

The accounts of implementation of the Action Plan during the delay period differ: Bank Management and country officials claimed compliance with the terms while community members perceived several shortcomings. For example, the Action Plan required that construction be halted until project issues were resolved.¹⁷⁵ In late January 2014, an unannounced NEA team escorted by heavily armed security forces entered an area where community members had been protesting and obstructing construction of a tower for the transmission line.¹⁷⁶ Two weeks later, the Struggle Committee, LAHURNIP and Accountability Counsel sent a letter to Bank Management, copying the Panel, noting that this was against promises (including that construction would be temporarily halted) made in the Action Plan. The letter listed a number of other failures to implement the Action Plan according to the established timeline.¹⁷⁷ However, on June 22, 2014, Bank Management claimed that most of the activities outlined in the Action Plan had been completed, and that the Bank was continuing to monitor the government's implementation of the Plan.¹⁷⁸

¹⁶⁹ Interview with Indigenous People Focus Group, Sindhuli, Nepal (Jan. 14, 2015); Limbu & Ramachandra, *supra* note 139.

¹⁷⁰ Letter to Inspection Panel, Urgent Request for Consultation on Action Plan and Investigation, Oct. 23, 2013, Sent by Shankar Limbu of LAHURNIP on behalf of Sindhuli Requesters.

¹⁷¹ Interview with former NEA employee, Nepal (Jan. 15, 2015).

¹⁷² *Id.*

¹⁷³ Interview with Jie Tang, Bank Management Interview, Kathmandu, Nepal (Jan. 19, 2015).

¹⁷⁴ Interview with former NEA employee, Nepal (Jan. 15, 2015).

¹⁷⁵ *Nepal Management Response*, *supra* note 117, at 75.

¹⁷⁶ In late January 2014, a project consultant called on Thulitaar residents to collect compensation for their land and informed them of planned resumption of construction works the following day. The Struggle Committee denounced the repeated calls from the project officials for collection of compensation while other tasks planned under the action plan had not yet been implemented. *FPP Report*, *supra* note 115; Limbu & Ramachandra, *supra* note 139.

¹⁷⁷ Letter from Ukta Thapa Magar, Acting Chairperson of Struggle Committee, Shankar Limbu, LAHURNIP and Komala Ramachandra, Accountability Counsel to Johannes Zutt, Nepal Country Director, World Bank (Feb. 3, 2014).

¹⁷⁸ *Nepal Action Plan Update*, *supra* note 164, at 4-5.

In July 2014, in accordance with the delay terms stated in the eligibility report, a Panel team arrived in Sindhuli to complete a full investigation. In its June 2014 investigation plan, the Panel noted that it would be reviewing implementation of the Action Plan and the extent to which it had addressed specific violations of Bank policy raised in the initial complaint.¹⁷⁹ Panel Members brought three external consultants with them during the visit, to focus on indigenous peoples, environmental and resettlement issues.¹⁸⁰

During the July 2014 visit, the Panel met with members of the affected community. Some members of the community expressed gratitude that the Panel had listened to their stories, contrasting the Panel with Bank Management visits in which, they felt, that Bank staff were simply trying to convince them that their concerns were unfounded.¹⁸¹ One community member reported his belief that the Panel's report would accurately depict their situation, because they had listened to their concerns.¹⁸² Others were unable to distinguish between the Panel and Bank Management.¹⁸³

C. Aftermath and Investigation Report

The Panel submitted its Investigation Report to the Board on February 12, 2015.¹⁸⁴ On March 24, 2015, Bank Management held a meeting with community members in Sindhuli to discuss the findings of the Investigation Report.¹⁸⁵ According to community members, Panel members verbally informed them that the Panel report had found some mistakes in the project process, that the Bank was committed to fixing those mistakes, and that the Panel's report would be public in about two months. Community members remained unsatisfied with the steps the Bank proposed taking to remedy the harms that had resulted from improper project

¹⁷⁹ *Nepal Investigation Plan*, *supra* note **Error! Bookmark not defined.**, at 3.

¹⁸⁰ *Id.*

¹⁸¹ Interview with Women's Focus Group, Sindhuli, Nepal (Jan. 14, 2015); Interview with Men's Focus Group, Sindhuli, Nepal (Jan. 14, 2015); Site Visit and Interview with Affected Family, Sindhuli, Nepal (Jan. 14, 2015); Site Visit and Interview with Man in Khaniyakharka, Sindhuli, Nepal (Jan. 16, 2015); Interview with Ukta Thapa, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015); Interview with Swiss Sindhuli School Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

¹⁸² Interview with Swiss Sindhuli School Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

¹⁸³ Interview with Woman in Khaniyakharka, Sindhuli, Nepal (Jan. 16, 2015); Interview with Group of Affected People in Khorkhola, Sindhuli, Nepal (Jan. 15, 2015); Interview with Women's Focus Group, Sindhuli, Nepal (Jan. 14, 2015).

¹⁸⁴ Inspection Panel, *Nepal: Power Development Project (P043311) Investigation Report* (February 12, 2015), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Investigation Report-Nepal Power Development Project.pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Investigation%20Report-Nepal%20Power%20Development%20Project.pdf) [hereinafter *Nepal Investigation Report*].

¹⁸⁵ World Bank, *Management Report and Recommendation in Response to the Inspection Panel Investigation Report: Nepal: Power Development Project (Loan No. P043311)* (March 30, 2015), [http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Management Report and Recommendation - Nepal Power Development Project.pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Management%20Report%20and%20Recommendation%20-%20Nepal%20Power%20Development%20Project.pdf) [hereinafter *Nepal Management Investigation Response*].

implementation.¹⁸⁶ The report became publicly available several months later, on July 13, 2015.¹⁸⁷

In summary, in its Investigation Report, the Panel found that: (i) Bank Management's assessment of alternative routes for the transmission line was too "limited and restrictive"; (ii) while the Nepal Power Development Project Policy Framework highlighted in adequate detail the studies that were needed to assess the environmental and social impacts of the Nepal project, it did not adequately assess whether there was actual capacity (in particular as regards the capacity of the NEA) to undertake those studies; (iii) Bank Management complied with the relevant Bank policies in its assessment of the health impacts of the project — the Panel noted that there were no risks to public health from exposure to low frequency electromagnetic fields by reference to the relevant international scientific standards; (iv) on resettlement and compensation issues, Bank Management had failed to provide prompt and effective compensation to eligible individuals because there had been significant delays between compensation payments and confusion about when payment installments would be released; and further, there had been significant delays and inconsistencies in the provision of resettlement and rehabilitation assistance to displaced households in the right of way;¹⁸⁸ and (v) Bank Management did not ensure adequate, timely and meaningful consultations with affected peoples during project preparation and implementation, as required by the relevant Bank policies (though the Panel did note that the precarious security situation in Sindhuli made it difficult for Management to undertake such consultation).¹⁸⁹

In its conclusion, the Panel found that the Bank had been "confronted with many issues arising from the security situation in Nepal, in addition to the specific characteristics of the project and the project area."¹⁹⁰ The Panel also found that "the instances of policy non-compliance identified by the Panel seem to result primarily as a consequence of reduced engagement of the Bank, together with the weak capacity of the NEA."¹⁹¹

On March 30, 2015, Bank Management sent a response to the Board.¹⁹² Bank Management expressed its appreciation for the Panel's review of the project, but highlighted other actors and circumstances that had led to the identified instances of noncompliance. Management emphasized that "political developments and instability in Nepal over the lifetime of the Project [had] substantially affected implementation and supervision of the Project, as well as the Project's ability to engage with [affected peoples] and resolve Project related concerns."¹⁹³ On July 13, 2015, the World Bank's Board of Executive Directors discussed and made public

¹⁸⁶ At the meeting, the Bank presented new actions they promised to take to try and resolve outstanding issues, including disclosing project documents to the community, more prompt disbursement of compensation, an update of the resettlement plan, a reinvigoration of the NEA's environmental department in order to better conduct an environmental impact assessment, and the need to ensure community members have access to a grievance mechanism.

¹⁸⁷ World Bank, *World Bank Board Discusses Nepal Inspection Panel Case*, (July 13, 2015), <http://www.worldbank.org/en/news/press-release/2015/07/13/board-discusses-nepal-inspection-panel>.

¹⁸⁸ *Nepal Investigation Report*, *supra* note 184, at para. 28.

¹⁸⁹ *Id.* at paras. 25-31.

¹⁹⁰ *Id.* at para. 32.

¹⁹¹ *Id.*

¹⁹² *Nepal Management Investigation Response*, *supra* note 185.

¹⁹³ *Id.* at para. 24.

both the Panel's Investigation Report and Management's Response.¹⁹⁴ After acknowledging the Panel's findings, the Board stated in a press release that it "welcomed the Bank's intention to continue engaging with the Nepalese authorities to support implementation of the Management Action Plan, with a view of amicably resolving the outstanding issues. It also emphasized the need to take into account and disseminate development lessons."

The Investigation Report makes only a brief reference to the fact that any delay was implemented,¹⁹⁵ while Management and the Board failed to discuss it altogether. Given that the primary findings of noncompliance were in the early stages of the project, and in many cases irremediable, it is unclear why the Panel saw it necessary to delay an investigation. There is nothing in the Investigation Report to indicate that the six-month delay resulted in any benefits for the community or the ultimate investigation. Instead, the Panel failed to adhere to the procedure and timeline that Requesters expected, and significantly delayed the publication of important information about the project.

D. Conclusion

As chronicled above, the Panel's decision to delay its investigation in favor of continued actions by Bank Management did not lead to solutions for the community. Instead, it contributed to further disillusionment among community members. There was no Panel involvement during the six months between the Panel's eligibility report and its visit to conduct a full investigation. During these six months, neither the community nor the NGOs representing them could communicate with the Panel regarding the substance of the complaint, although they could communicate with the Panel about process related issues. Most affected people interviewed for this report felt that Bank Management did not respond well to the concerns they raised during these six months and that Bank Management put adequate pressure on the NEA to change its behavior. The affected communities, as well as the NGOs that served them, were disappointed in the Panel delay, feeling that they were not given a voice in determining how the process would move forward, that the delay did not serve their interests, and that the Panel, in choosing to delay, failed to fill its role to robustly guard and monitor the Bank's compliance with its safeguard policies.

The delay also adversely affected the ability of affected communities to make use of domestic remedies. LAHURNIP filed a complaint about the project in Nepali courts. When the case reached the Supreme Court, LAHURNIP planned to use the Panel's report as further evidence of project irregularities. LAHURNIP asked for three postponements of the Supreme Court hearing, and each was granted. When LAHURNIP had exhausted its requests for postponement, the Panel's report was still not publically available.¹⁹⁶

More broadly, some community members believed that an earlier release of the Panel's final Investigation Report would have pressured the NEA and Bank to take more actions to

¹⁹⁴ World Bank, *World Bank Board Discusses Nepal Inspection Panel Case* (July 13, 2015), <http://www.worldbank.org/en/news/press-release/2015/07/13/board-discusses-nepal-inspection-panel>.

¹⁹⁵ *Nepal Investigation Report*, *supra* note 184, at para. 46.

¹⁹⁶ Interview with Bhim Rai, LAHURNIP, Kathmandu, Nepal (Jan. 17, 2015) (and email Jan. 23, 2015 with dates).

respond to community concerns.¹⁹⁷ A member of the Struggle Committee stated, “If a full investigation had taken place after the first meeting, that would have been better.”¹⁹⁸ A lawyer for LAHURNIP, Shankar Limbu, stressed that his organization would have used the report in their advocacy with the Nepali government and Bank Management.¹⁹⁹

Almost four years after Sindhuli community leaders filed their complaint before the Panel, the conflict persists. From the beginning, communities requested dialogue and meaningful consultation about the Project and its impacts. However, even after the Panel’s finding that the Bank had violated its Environmental and Social Safeguards in the Project, Bank Management and the NEA have failed to provide affected communities meaningful consultation that is required to bring the Project back into safeguards compliance. In July 2016, community members – through their representatives LAHURNIP and Accountability Counsel – wrote directly to Jim Yong Kim, President of the Bank, to complain that “[i]n the absence of Bank leadership, Nepalese authorities, including the Project implementing agency, the Nepal Electricity Authority (NEA), are acting with impunity.”²⁰⁰ In the letter, communities reiterated their demand for a facilitated dialogue with the NEA to meaningfully discuss their concerns about the project and its impacts, and have their concerns addressed. However, as of March 2017, despite numerous requests and repeated following up by communities, the requested dialogue had reportedly still not taken place. In light of these developments, the Panel’s resort to informal resolution with Bank Management appears especially misplaced. Instead, the Sindhuli case underscores the Panel’s critical function and the need for independent and swift complaint mechanisms for affected communities.

¹⁹⁷ Interview with Focus Group at Swiss Sindhuli School, Sindhuli, Nepal (Jan. 15, 2015); Interview with Mr. Ukta, Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015); Interview with Min Bahadur Shrestha, NEFIN President, Sindhuli, Nepal (Jan. 16, 2015).

¹⁹⁸ Interview with Struggle Committee Focus Group, Sindhuli, Nepal (Jan. 15, 2015).

¹⁹⁹ Telephone Interview with Shankar Limbu, LAHURNIP (Oct. 8, 2014); Interview with Shankar Limbu, New York, New York (Dec. 5, 2014).

²⁰⁰ Letter, LAHURNIP and Accountability Counsel, to Jim Yong Kim, President, World Bank Group, July 7, 2016 (citing local authorities’ use of force against peaceful protestors and the unlawful detention of community leaders).

V. CODIFYING PANEL DELAY AND CREATING SPACE FOR MANAGEMENT ACTION

As the Sindhuli case study illustrates, the Panel's failure to adhere to the procedural timeline set out in the Resolution has led to considerable confusion and diminished trust among affected communities. The Panel's revised Operating Procedures, which were finalized in April 2014, further depart from the mandated timeline.

From 2011 to 2014, the Panel undertook a review process that ultimately codified the Panel's power to delay registration and/or investigation of a request for inspection. This section begins by explaining that review process, and the two forms of delay that were codified in the updated Operating Procedures, namely, the Footnote 7 procedure and the Pilot Program. It is followed by two cases studies, one from Uzbekistan and the other from Nigeria, which illustrate how each of the codified forms of delay have operated in practice.

Based on Panel documents and interviews with various stakeholders involved with the review process, it appears that the Panel had undertaken the review, at least in part, to explore possibilities for helping to resolve community concerns rather than merely providing findings of compliance. Resolving these concerns early in the Panel process could help to avoid the costly and sometimes contentious investigation stage.

A. Review of the Panel's Operating Procedures

In 2011, the Panel undertook a review of its Operating Procedures, which had not changed since the Panel's establishment in 1994.²⁰¹ The purpose of the review was to "make the Panel more accessible, user-friendly, and effective in responding to grievances and concerns raised by project affected people, while staying within the ambit of the Panel's governing framework."²⁰² At the outset of the review, the Panel was mindful of finding solutions that would improve relations with Bank Management. Panel members later wrote of their desire to "reverse the chronic adversarial relationship" between the Panel and Management.²⁰³ They believed that an emphasis on improved relations with Management would "produc[e] better results."²⁰⁴

The review process involved two phases. Phase I, undertaken from June to December 2011, was an internal analysis of the existing Panel framework, which consisted of discussions and consultations with internal and external stakeholders, including comments from former Requesters, civil society organizations, former Panel experts, former Panel members, the Independent Accountability Mechanism, Bank Management, senior Bank Management, and Bank staff). Phase II, completed by March 2014, focused on drafting, additional consultations and finalizing the updated Operating Procedures.²⁰⁵

²⁰¹ *Updated Operating Procedures*, *supra* note 4.

²⁰² *Id.*

²⁰³ Inspection Panel, *Annual Report 2013-2014*, 8 (2014), <http://ewebapps.worldbank.org/apps/ip/IPPublications/AnnualReport2013-2014f.pdf>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

The review process revealed some of the challenges facing the Panel in improving its relationship with Bank Management.²⁰⁶ The Resolution limited the Panel's role to compliance review, but many Management officials were pushing for an early dispute resolution process that would help to avoid an investigation and the possibility of a negative report.²⁰⁷ As one Management official stated:

“[W]henever you have a [Panel] case, it's pretty much like a lawsuit. You want to defend yourself; you want to say you are clean. And that doesn't give you an incentive to want to solve the problem. At the institutional level, this needs to be figured out so that we don't have to take the legal approach [i.e., proceed to investigation].”²⁰⁸

In conversations with the review's external consultants, other Management officials expressed concerns about the Panel structure, namely, that any Panel involvement in dispute resolution would potentially lead to a “conflict of interest” for the independent Panel.²⁰⁹

After the Phase II consultation, the Panel produced a draft version of the Operating Procedures. The draft was presented for public comments from November 14, 2013 to January 15, 2014 and finalized in April 2014. The resulting Operating Procedures codified two forms of delay: the Footnote 7 procedure and the Pilot Program.

1. Footnote 7 Procedure

Footnote 7 to the revised Operating Procedures articulates a process whereby the Panel can defer its recommendation on whether to investigate matters raised by a Request for Inspection.²¹⁰ Under the Footnote 7 procedure, the Panel formally registers a complaint but defers decision on whether to conduct a full investigation. The updated Operating Procedures explain that Footnote 7 codifies past Panel practice, and is meant to “provide additional time for Bank Management and Requesters to seek a resolution of the matters raised, taking into account specific remedial actions presented by Bank Management.”²¹¹ The deferral of recommendation articulated in Footnote 7 was actually initiated in 2006, during Edith Brown Weiss's leadership of the Panel.²¹² The Panel premised the new deferral on a belief that registration would spur Management into action, leading them to seek solutions with Requesters and avoid an investigation.²¹³ The deferral was later described as an opportunity to “give peace a chance,” a telling indication of the adversarial nature of most Panel investigations.²¹⁴

²⁰⁶ See Inspection Panel, *Annual Report 2013-2014*, *supra* note 203.

²⁰⁷ Inspection Panel, *Comments from Bank Management on Update of Inspection Panel Operating Procedures* (2014), <http://ewebapps.worldbank.org/apps/ip/Documents/CommentsSeniorManagement.pdf>.

²⁰⁸ *Id.* at 6.

²⁰⁹ Jean Aden, *Summary of Targeted Discussions with Bank Management* 3 (2014), <http://ewebapps.worldbank.org/apps/ip/Documents/SummaryTargettedDiscussionBankManagement.pdf>.

²¹⁰ *Updated Operating Procedures*, *supra* note 4, at 17 n.7.

²¹¹ *Id.*

²¹² *The Inspection Panel at 15 Years*, *supra* note 69, at 54.

²¹³ *Id.* at 52 (“The theory behind this approach is that once a Request has been filed and the eligibility phase has begun, Bank Management has a strong incentive to explore if problems can be addressed and overcome promptly, thus avoiding the need for a full investigation.”).

²¹⁴ Inspection Panel, *Annual Report 2010-2011*, ix (2011), <http://ewebapps.worldbank.org/apps/ip/IPPublications/InspectionPanelAnnualReport2010-2011.pdf>; Peter L. Lallas,

2. *The Pilot Program*

The Pilot Program allows the Panel to postpone making a decision on whether to register a request for inspection.²¹⁵ The purpose of this postponement is to give an additional opportunity to Bank Management to resolve a conflict with the affected communities directly.²¹⁶ The Pilot Program differs from both the Footnote 7 procedure and the procedure used in the Nepal case in two important ways. First, the Panel does not register the complaint before the delay period begins, and will never register the complaint if the delay period is deemed successful. Second, the Pilot Program formally requires Requesters to consent to delay. While the Panel might consult with Requesters in either a Footnote 7 or Nepal-type delay, this consultation is not required by its operating procedures, nor is it required that the Panel follow Requesters' choice in the matter, as evidenced by the facts of the Nepal case.

The Panel's decision to initiate the Pilot happens "on a case-by-case basis, and in light of its initial interactions with Requester and Bank Management."²¹⁷ The Operating Procedures provide that in order for the Panel to recommend diversion of a complaint to the Pilot Program, three factors should be present. First, the issues of alleged harm presented in the Request should be clearly defined, focused, limited in scope, and appear to be amenable to early resolution. Second, Bank Management should have informed the Panel of measures already initiated or planned to address the alleged harm. Bank Management should provide an anticipated timeframe for implementing these measures. The issues raised by the Requesters must also fall within Bank Management's ability to address at this stage of the project (that is, beginning from the time the request for inspection is made). Third, as highlighted above, the Requesters must consent to the adoption of the Pilot.²¹⁸

According to the Operating Procedures, the Pilot Program should operate in the following sequence:²¹⁹ (1) the Requesters submit a request for inspection; (2) the Panel meets with Bank Management within a few days of receiving a request to inform Management of the content of the request; (3) if the Panel considers that the case is well-suited for resolution under the Pilot Program, and Bank Management indicates its preference for this approach, the Panel will consult with the Requesters immediately; (4) if the Requesters also accept the Pilot Program approach, Bank Management must convey information on proposed steps and/or measures and an anticipated timeframe to address the concerns raised in the Request for Inspection promptly—normally within two weeks; (5) the Panel will inform the Requesters that it will postpone its decision on registration awaiting further information on the progress of Bank Management's

International Investment Agreements and Activities: Giving Affected People Greater Voice and Rights of Recourse 34 (July 14, 2009), http://asiansil-jp.org/wp/wp-content/uploads/2012/07/peter_lallas.pdf (draft paper for the 2nd Biennial Conference of the Asian Society of International Law).

²¹⁵ The Pilot Program is set out and explained in Annex 1 of the Updated Operating Procedures. *Updated Operating Procedures*, *supra* note 4, at 24-25.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

efforts to address the Requesters' concerns; and (6) the Panel must also inform the Board that it is postponing its decision on registration.

In an interview with the Panel Secretariat,²²⁰ Dilek Barlas, Executive Secretary of the Panel Secretariat, explained that in practice, cases with "pretty defined" issues are more likely to be amenable to early solution under the Pilot Program. Ms. Barlas also said that whether the Panel would proceed with the Pilot Program would depend in large part on whether Bank Management intended to resolve the issues at this early stage, and whether it had the leverage with the borrower government to carry out an appropriate action plan. Serge Selwan, Senior Operations Officer of the Panel Secretariat, elaborated that in specific cases, although Bank Management may wish to resolve an issue through the Pilot Program process, it may lack the necessary leverage with the borrower government. He elaborated that it was possible that the borrower government would have other suggestions for how to resolve the issues in question.²²¹ Since its adoption, the Pilot Program has been used in two cases, the first of which is described in detail below. The Pilot Program was supposed to have been reviewed by the end of 2015, when the Panel was to assess the results and effectiveness of the Pilot.²²² However, at the time of this report's publication, the review had been postponed.²²³

B. Delay and Failure to Register Under Footnote 7: The Uzbekistan Case

Footnote 7 of the updated Panel Operating Procedures codified one method of past Panel delay practice. In such a case, the Panel formally registers a complaint but decides to defer its decision on whether to conduct a full investigation into the complaint's allegations. In 2013, about a year before Footnote 7 was codified, the Inspection Panel chose to adopt this delay process for a complaint related to an agricultural industry project in Uzbekistan, the Second Rural Enterprise Support Project (RESP-II).

RESP-II was designed to heighten the productivity, sustainability, and profitability of the agricultural industry in Uzbekistan.²²⁴ The World Bank approved funding for the project in 2008. The initial loan was for USD 68 million, and a subsequent loan for USD 40 million was added to support the scaling up of the project in 2012.²²⁵ One year after the additional loan was approved, the Inspection Panel received a complaint alleging that the project contributed to the perpetuation

²²⁰ Interview with the Inspection Panel's Secretariat (Dilek Barlas (Executive Secretary), Serge Selwan (Senior Operations Officer), Mishka Zaman (Senior Operations Officer), John Garrison (Senior Civil Society Specialist), and Birgit Kuba (Junior Professional Officer)) on March 12, 2015 in Washington DC.

²²¹ *Id.*

²²² *Updated Operating Procedures*, *supra* note 4, at 25.

²²³ The evaluation has been postponed until the Pilot has been applied in a third complaint, which has not yet occurred. GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE annex 15 (C. Daniel, K. Genovese, M. van Huijstee & S. Singh eds., 2016), http://grievancemechanisms.org/attachments/annex-15-the-inspection-panel-of-the-world-bank/at_download/file.

²²⁴ Inspection Panel, *Eligibility Report and Recommendation: Republic of Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for Second Rural Enterprise Support Project (P126962)* (Dec. 9, 2013),

http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/PanelReport_Uzbekistan_SRESP_Dec9_2013.pdf [hereinafter *Uzbekistan Investigation Recommendation*].

²²⁵ *Id.* at 23.

of forced and child labor in Uzbekistan. Consistent with its standard practice, the Panel registered the complaint, and in its eligibility report for the complaint, the Panel found that a “plausible link” existed between RESP-II and harm caused by forced and child labor. However, in a deviation from standard practice, the Panel decided to delay its investigation recommendation for twelve months to give Management time to work with the government to make progress toward resolving these problems.²²⁶ This decision was in part based on “important actions already taken and further commitments and intentions on the part of Government and its partners,” as described in Management’s Response to the Request.²²⁷ Management affirmed its intention to develop the proposed program of third-party monitoring of child and forced labor, committed to “strengthening project level provisions against the use of forced and child labor,” and declared its intention to continue its talks with the government on adherence to national labor laws.²²⁸ These positive developments prompted the Panel to give Management additional time to resolve the issues itself.

One year later, the Panel’s review revealed that Management had not accomplished all the goals previously set, nor resolved all of the concerns raised by the complaint. Instead of investigating these failings, the Panel concluded that since some progress had been made, and since the Panel again received assurances of future progress, no full investigation was warranted. This decision meant that even though the twelve-month period given to Management to problem-solve had elapsed without complete resolution of the problems, the Requesters were nonetheless denied the benefits of a full investigation. By deferring to Management’s assurances of some progress instead of launching a full investigation, the Panel undermined its own independence and function as an accountability mechanism.

1. Background

On September 4, 2013, representatives from three Uzbek human rights organizations (the Human Rights Society of Uzbekistan (“Ezgulik”), the Association of Human Rights in Central Asia, and the Uzbek-German Forum for Human Rights) filed a request for investigation with the Panel. The organizations filed on behalf of farmers, children, their parents, university students, public-sector workers, and private-sector workers affected by the project.²²⁹ Before filing a complaint, the Requesters stated that they had raised their concerns to Bank Management on six separate occasions. In each instance, they found the Bank’s response unsatisfactory.²³⁰

The Requesters alleged violations of World Bank Operational Policy 4.01, regarding environmental assessment, and Operational Policy 3.60, on monitoring and evaluation.²³¹ Specifically, the Requesters claimed that the Bank had failed to adequately identify the problem of forced labor in the Social Assessment carried out for the project.²³² In Uzbekistan, authorities

²²⁶ *Id.* at 23.

²²⁷ *Id.*

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 2.

²³⁰ *Id.*

²³¹ Letter from Inoyatova Vasila Akhmedjanova, Nadezhda Ataeva & Umida Niyazova, Requesters, to Executive Secretary of the Inspection Panel, *Request for Inspection of the Rural Enterprise Support Project—Phase II* (Sept. 4, 2013), <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=92> [hereinafter *Uzbekistan Request for Inspection*].

²³² *Uzbekistan Inspection Recommendation*, *supra* 224, at 2.

commonly withhold wages or issue fines if farmers' contributions to the cotton harvest do not meet expectations.²³³ The Requesters claimed that the omission in the Social Assessment prevented the Bank from taking the affirmative steps necessary to ensure that the project did not contribute to the already pervasive problems of child and forced labor in Uzbekistan.²³⁴ Affected communities also claimed that the project negatively impacted the provision of public services such as education and health.²³⁵ They argued that systemic use of forced labor hindered the quality and delivery of educational and health services and that the effect on "youth and the next generation cannot be overstated."²³⁶ Finally, they alleged that because the monitoring system that had been implemented was focused on farms and agribusiness, it was not geared to be able to identify whether Bank funds were being used to support state-sponsored forced labor in violation of its obligations under Operational Policy 13.60.²³⁷

2. Decision to delay investigation

The Panel registered the complaint on September 23, 2013, and received Management's response on November 6, 2013.²³⁸ Although Management admitted that there were "shortcomings" in the project's Social Assessment²³⁹ and that its implementation of third-party social monitoring had been "delayed,"²⁴⁰ it steadfastly denied responsibility for "any harm that may have stemmed from the incidents cited in the Request."²⁴¹ Management pledged to make a number of changes in project implementation, including by amending project documents and agreements to reflect a commitment to comply with laws regarding forced labor in addition to child labor.²⁴² Management also affirmed its intention to introduce a project level grievance redress mechanism²⁴³ and implement the third-party social monitoring program.²⁴⁴ Management assured the Panel that it would "continue to encourage the Government to adhere to national labor laws, while strengthening project level provisions against the use of forced and child labor."²⁴⁵

On December 9, 2013, after assessing the claims in the complaint and Management's response to the claims, the Panel issued its eligibility report. The Panel found that the request satisfied all six technical eligibility criteria,²⁴⁶ including that the Requesters had brought their concerns to Bank Management's attention before filing a complaint. In its eligibility report, the Panel relied on several factors to determine whether or not to conduct a full investigation, including both the Bank's role in perpetuating forced labor and steps Management had already taken or pledged to take to remedy the complainants' concerns.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 4.

²³⁶ *Id.* at 4-5.

²³⁷ *Uzbekistan Request for Inspection*, *supra* note 231, at 7.

²³⁸ *Uzbekistan Investigation Recommendation*, *supra* note 224, at 3.

²³⁹ *Id.* at 8.

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.* at 7.

²⁴² *Id.* at 9-10.

²⁴³ *Id.* at 10.

²⁴⁴ *Id.* at 9.

²⁴⁵ *Id.* at 22.

²⁴⁶ *Id.* at 11.

In its eligibility report, the Panel found that it was plausible that the project was contributing to forced and child labor in Uzbekistan. Both Bank Management and the Requesters agreed that the issues of child labor, forced labor, inadequate provision of services, low pay, and poor working conditions were “serious” issues.²⁴⁷ However, Bank Management claimed that these problems stemmed from government policies and that they were not a result of the Bank project. The Panel disagreed with Management, noting, “as long as Bank financing is supporting in some measure cotton production and there is a residual possibility that there can be child/forced labor on farms receiving project support (since they do not allegedly have a choice of whether to accept child or forced labor), then it is plausible that the Project can contribute to perpetuating the harm of child and forced labor.”²⁴⁸ Further, the Panel found that “in the early years of the project, there may have been insufficient due diligence in addressing the concerns about harm and related issues of policy compliance raised in the Request within the framework of Bank policies, including at the time of Project approval.”²⁴⁹

In addition to considering whether the project was violating Bank policy, the Panel considered the remedial actions that Management had taken or had pledged to take in the future. Ultimately, the Panel, in its eligibility report, recommended to the Bank Board that the Panel delay a decision on whether or not to conduct a full investigation for one year. The recommendation was made in light of the “significant positive trends” that had developed in the realm of child labor, the efforts of Bank Management to increase monitoring of the situation, and the “important potential for further positive developments.”²⁵⁰ The Board accepted the Panel’s recommendation, despite the fact that the Panel had found it plausible that the project was perpetuating forced and child labor.

3. Recommendation not to investigate

During the year-long delay period, the Panel remained in “periodic contact” with “all relevant stakeholders,” including Bank Management and the Requesters.²⁵¹ During this time, the Panel also met with relevant stakeholders and conducted document review.²⁵²

On November 5, 2014, a month before the Panel issued its final report and recommendation, Bank Management issued a Progress Report. Bank Management listed a number of achievements, including:

- (1) Updating all pertinent RESP-II documents so that they were in compliance with national and international law relating to forced and child labor.²⁵³

²⁴⁷ *Id.* at 16-17.

²⁴⁸ *Id.* at 18.

²⁴⁹ *Id.* at 21.

²⁵⁰ *Id.* at 23.

²⁵¹ Inspection Panel, *Final Eligibility Report: Republic of Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for the Second Rural Enterprise Support Project (P126962)* 3 (Dec. 19, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/89 - Final Eligibility Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Final%20Eligibility%20Report%20(English).pdf) [hereinafter *Uzbekistan Final Eligibility Report*].

²⁵² *Id.*

²⁵³ *Id.*; World Bank, *Progress Report to the Board of Executive Directors on the Implementation of the Management Actions in Response to the Request for Inspection* 6 (Nov. 5, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Management Progress Report.pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Management%20Progress%20Report.pdf).

- (2) Revising farmer training modules so that it was made explicit that forced and child labor was prohibited.
- (3) Taking steps towards, but not completing, the process of developing and implementing a system for third-party monitoring.²⁵⁴
- (4) Signing an agreement with the International Labor Organization (ILO) on third-party monitoring of child and forced labor beginning in 2015 for at least two years.²⁵⁵
- (5) Hiring an international firm to design both national and international feedback mechanisms.
- (6) Increasing supervision during the 2014 harvest season.²⁵⁶
- (7) Making progress on discussions with the government of Uzbekistan, resulting in amendments being made to the Criminal Code regarding labor rights and other improvements.²⁵⁷

After reviewing Bank Management's Progress Report, the Panel visited Uzbekistan in December 2014 to make its own assessments. While it found that child labor had not been an issue during the 2014 harvest, the children had been replaced with adult forced laborers.²⁵⁸ Further, the Panel noted that a plan for independent third-party monitoring—a primary feature of the Action Plan that had been developed by Bank Management—had not yet been implemented. Nevertheless, the Panel was “satisfied by the clear trajectory and specific medium-term efforts” by Bank Management and others.²⁵⁹

Ultimately, the Panel recommended against a full investigation. In its December 2014 report, the Panel cited three factors that had led it to this decision. First, the Panel referenced Bank Management's commitment to continue to work with the government to advocate for policies that would reduce child and forced labor. Second, the Panel noted the progress that had been made over the previous year by the combined efforts of Bank Management and the government. Finally, the Panel favorably noted that Bank Management had pledged to report regularly to the Board about these issues and the status of the project. In coming to its decision, the Panel referenced paragraph 5 of the 1999 Clarifications, noting that after “satisfy[ing] itself” that “the Bank's compliance or evidence of intention to comply is adequate,” a full investigation was not warranted.²⁶⁰

In its initial Eligibility Report and Recommendation, the Panel had asserted that after the 12-month period expired, it would take into account two factors when making its final determination whether to investigate: (1) “positive result of the proposed third-party monitoring of child and forced labor in Project-financed activities”; and (2) “progress in the dialogue between the Bank and Government on the concerns characterizing the current system of cotton production.”²⁶¹ Yet, the proposed third-party monitoring system was never implemented—much less than yielding a “positive result,” the metric the Panel had set out for assessing Bank

²⁵⁴ *Id.*

²⁵⁵ *Id.* at iv.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 10.

²⁵⁸ *Uzbekistan Final Eligibility Report*, *supra* note 251, at 10.

²⁵⁹ *Id.* at 8.

²⁶⁰ *Id.*

²⁶¹ *Uzbekistan Investigation Recommendation*, *supra* note 224, at 23.

Management's progress a year before. Given that the year of delay was already intended as Bank Management's second chance to carry out the project in compliance with Bank policies, this outcome is especially troubling. Here, the Panel appeared to be giving Bank Management yet another chance to compensate for its shortcomings early on in the project, and failed to ensure future projects benefitted from the lessons that may have been learned had a full Panel investigation been carried out.

The Panel's recommendation against investigation was strongly criticized. Umida Niyazova, the director of the Uzbek-German Forum for Human Rights, one of the organizations that filed the complaint, called the decision "shocking."²⁶² In her view, "[t]o millions of victims of forced labor in Uzbekistan, the bank has said that despite recognizing the relationship between their plight and its loans, it is not worth investigating. Disturbingly, the bank's decision is also a message to the Uzbek government that it can continue its forced labor system."²⁶³ Human Rights Watch also noted that many of Bank Management's proposed actions had not been implemented and that "[t]he Inspection Panel and the [B]oard ha[d] effectively sent a message to the Uzbek government that as long as it pays lip service to addressing the issue, it can continue to force millions of people to work in the cotton fields."²⁶⁴

Shortly after the Panel announced its recommendation not to investigate, the U.S. Executive Director released the U.S. position on the Panel's recommendation. Although the United States did not oppose the recommendation, it "would have preferred that the Panel defer its recommendation on a full investigation."²⁶⁵ A deferral was warranted given that key components of the promises made in Management's initial response to the Request had not yet been carried out, including the implementation of the promised third-party monitoring program.²⁶⁶ Because the success of this program, as well as the feedback mechanism that Management had proposed, relied in part on external factors, more time was needed to see if these programs would be effective.²⁶⁷

Dissatisfied with the Panel's decision, the U.S. paper commented that "[t]his case highlights the need for the Board to consider modernizing and updating the Inspection Panel process itself."²⁶⁸ That said, the United States stated that it welcomed "Management's proactive effort to put forward a serious action plan aimed at mitigating the risk of child and/or forced labor in Bank-funded projects in Uzbekistan's agricultural sector, and the positive commitments

²⁶² *World Bank: No Probe of Link to Abuses in Uzbekistan*, HUMAN RIGHTS WATCH (Feb. 2, 2015), <http://www.hrw.org/news/2015/02/02/world-bank-no-probe-link-abuses-uzbekistan>.

²⁶³ *Id.*

²⁶⁴ Jessica Evans, *Dispatches: Wrong Message to Uzbekistan on Forced Labor*, HUMAN RIGHTS WATCH (Jan. 28, 2015), <http://www.hrw.org/news/2015/01/28/dispatches-wrong-message-uzbekistan-forced-labor>.

²⁶⁵ *U.S. Position on The World Bank Inspection Panel's Report and Recommendation Rural Enterprise Support Project Phase II and Additional Financing for the Second Rural Enterprise Support Project*, TREASURY DEPT. 1 (Jan. 23, 2015), [https://www.treasury.gov/resource-center/international/development-banks/Documents/US Position on WB Inspection Panel Recommendation on the Second Rural Enterprise Support Project for Uzbekistan.pdf](https://www.treasury.gov/resource-center/international/development-banks/Documents/US%20Position%20on%20WB%20Inspection%20Panel%20Recommendation%20on%20the%20Second%20Rural%20Enterprise%20Support%20Project%20for%20Uzbekistan.pdf).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 2.

made by the [Government of Uzbekistan] in this regard.”²⁶⁹ The U.S. paper further noted that it expected Bank Management to fully implement its action plan.²⁷⁰

4. Conclusion

The Uzbekistan case highlights a number of the difficulties that can arise from a Panel decision to incorporate delay into its normal procedures. Unlike the Nepal process, the delay incorporated in Uzbekistan and codified in Footnote 7 allows the Panel to introduce delay into the process even before it decides whether it will investigate, and thus can serve to block the complaint. In cases such as this, Requesters are left waiting for extended periods of time before they are informed whether or not their complaint will yield a full investigation.

In Uzbekistan, the Panel ultimately decided not to conduct an investigation. Critically, this decision was made even though Management had failed to implement all of the plans that had merited it a one-year delay period. Even while acknowledging that problems with project implementation still existed, the Panel declined to investigate, abdicating its duty as an accountability mechanism.

C. The Pilot in Practice: The Badia East Complaint

In September 2013, three members of the Badia East community in Lagos, Nigeria, represented by the Social and Economic Rights Action Center (SERAC), a Nigerian NGO, submitted a complaint to the Panel requesting intervention after a series of evictions and destruction of homes by the Lagos State Government (LSG).²⁷¹ Shortly after the complaint was submitted, on October 31, 2013, local Bank Management presented an Action Plan stating that it was already working with the LSG to provide compensation.²⁷²

Rather than registering the complaint and opening an investigation, the Panel recommended to the Requesters that the complaint be handled under the Pilot Program. For the affected community, the subsequent process was marked by confusion, missed deadlines, and lack of access to necessary information. Nonetheless, by July 2014, the Panel found that the Requesters’ concerns had been addressed and declined to register the complaint, despite the protestations of two of the original requesters.²⁷³ This inaugural implementation of the Pilot has

²⁶⁹ *Id.* at 1.

²⁷⁰ *Id.*

²⁷¹ Inspection Panel, *Notice of Non-Registration and Panel’s Observations of the First Pilot to Support Early Solutions, Nigeria: Lagos Metropolitan Development and Governance Project (P071340)* (July 16, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice of Non-Registration \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice%20of%20Non-Registration%20(English).pdf) [hereinafter *Nigeria Notice of Non-Registration*].

²⁷² *Id.* at 3; see also World Bank, *Actions Considered by Bank Management, Nigeria: Lagos Metropolitan Development and Governance Project (P071340)* para. 11 (Oct. 29, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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) (Annex II).

²⁷³ *Notice of Non-Registration*, *supra* note 271.

faced significant criticism from Amnesty International, Accountability Counsel, and a number of other international NGOs.²⁷⁴

1. Background

The Bank project at issue in the complaint was the Lagos Metropolitan Development and Guidance Project (LMDGP), a USD 200 million loan awarded in 2006 to fund improvements in infrastructure, public governance, and urban policy.²⁷⁵ Under the project, the Lagos State Government was to focus on “slum upgrades” in nine main geographic areas. One of these communities was Badia East.²⁷⁶ In compliance with Bank Safeguard policies, the LMDGP included a Resettlement Policy Framework (RPF), which stipulated the LSG’s responsibility for adequately compensating, and resettling individuals affected by the upgrades.²⁷⁷ The project closed on September 30, 2013, the day that the complaint was submitted.

SERAC filed the request for registration on behalf of three Badia East community members. The complaint alleges violations of Bank Operational Policy 4.12 on Involuntary Resettlement, Operational Manual 4.12 on Involuntary Resettlement, and the LMDGP Resettlement Policy Framework that was incorporated into the Policy Agreement between the Bank and the Lagos State.²⁷⁸ It further set forth two primary grievances. First, it alleged that on March 6, 2012, over 100 homes in Badia East were destroyed to make way for a drainage canal financed by the LMDGP. The LSG did not prepare a Resettlement Action Plan (RAP) prior to the demolitions and initially did nothing to assist those evicted from their homes, both in violation of the RPF.²⁷⁹ After SERAC notified Bank Management and met repeatedly with LMDGP officials, the Nigerian Government submitted a retroactive RAP in December 2012, over nine months after the evictions. The complaint noted that the 2012 RAP was “insufficient to

²⁷⁴ See Letter from Natalie Bridgeman Fields, Accountability Counsel, et al. to Jim Yong Kim, President, World Bank, and Eimi Watanabe, Chairman, Inspection Panel (Aug 27, 2014),

[http://ewebapps.worldbank.org/apps/ip/PanelCases/91 - CSO letter on the first Pilot for Early Solutions.pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-CSO%20letter%20on%20the%20first%20Pilot%20for%20Early%20Solutions.pdf)

²⁷⁵ *Nigeria Receives US\$200 Million for the Lagos Metropolitan Development and Governance Project*, WORLD BANK (July 6, 2006),

<http://web.worldbank.org/external/default/main?pagePK=34370&piPK=34424&theSitePK=4607&menuPK=34463&contentMDK=20985064>.

²⁷⁶ Amnesty International, *At the Mercy of the Government: Violation of the Right to an Effective Remedy in Badia East, Lagos State, Nigeria* 7 (Aug. 19, 2014),

<https://www.amnesty.org/download/Documents/4000/afr440172014en.pdf> [hereinafter *At the Mercy of the Government*].

²⁷⁷ Inspection Panel, *Notice of Receipt of Request, Nigeria: Lagos Metropolitan Development and Governance Project (P071340)* 6 (Nov 11, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice of Receipt of a Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice%20of%20Receipt%20of%20a%20Request%20for%20Inspection%20(English).pdf) [hereinafter *Nigeria Notice of Receipt*].

²⁷⁸ Letter from the Social and Economic Rights Action Center (SERAC), Counsel of record for members of the Badia community, Lagos, to the Executive Secretary of the Inspection Panel, *Request for Inspection of the Lagos Metropolitan Development and Governance Project* (Sept. 30, 2013),

[http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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 *Nigeria Request for Inspection*].

²⁷⁹ *Id.*

offset the harms suffered,” and criticized Bank Management for not ensuring that the RAP was prepared prior to eviction, as required by Bank policies.²⁸⁰

The second and more pressing allegation was that on February 23, 2013, the LSG demolished hundreds of structures, displacing an estimated 9,000 residents of East Badia.²⁸¹ Although the demolitions and evictions were not explicitly related to a LMDGP project, the LSG had promised in its project agreement to carry out *all* of its city-wide upgrading programs in accordance with the LMDGP safeguards.²⁸² Amnesty International and SERAC have described these events in an in-depth report, focusing primarily on the disregard that the LSG had shown for residents.²⁸³

In the days and months following the 2013 forced evictions, SERAC met with Bank Management and LSG officials responsible for the project. In May 2013, Management informed SERAC of discussions it had commenced with LSG officials, but explained that the government needed more time to work out a solution.²⁸⁴ SERAC warned of the need for immediate solutions and threatened to file a complaint with the Panel.²⁸⁵ A few weeks later, SERAC also submitted a list of affected households and destroyed properties to Bank Management. In June, the LSG formed a Technical Committee to address the evictions.²⁸⁶ SERAC was not involved in the first meetings, but the Committee later requested the participation of eight community representatives selected by the residents of Badia East in order to ensure community participation.²⁸⁷

Shortly thereafter, a Bank official publicly promised a RAP for the 2013 demolitions with compensation beginning “by the end of August [2013].”²⁸⁸ Once community representatives were selected in August, the Technical Committee met with them five times to work on finalizing the database of affected persons. In mid-September, the Committee proposed an “entitlement matrix” specifying payments to different categories of property owners. The community representatives, after consulting with the community, rejected the payments as insufficient. A few days later, the Committee revised the numbers upward.²⁸⁹ On September 30, 2013, when no RAP had materialized, SERAC submitted its complaint to the Panel. At the time of submission, SERAC noted that “no relief or emergency aid measures ha[d] been undertaken to mitigate the present and extreme suffering of thousands of affected persons.”²⁹⁰

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Nigeria Notice of Receipt*, *supra* note 277.

²⁸³ Amnesty International, *If You Love Your Life, Move Out! Forced Eviction in Badia East, Lagos State, Nigeria* (2013), http://www.amnestyusa.org/sites/default/files/nigeria_forced_evictions_embargoed_until_aug_12.pdf.

²⁸⁴ *Nigeria Request for Inspection*, *supra* note 278.

²⁸⁵ Letter from Felix Morka, SERAC, to Marie Francoise Marie-Nelly, World Bank Country Director for Nigeria, *Final Notice Prior to Filing Inspection Panel Request* (May 24, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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).

²⁸⁶ Letter from Marie Francoise Marie-Nelly, World Bank Country Director for Nigeria, to Netsanet Belay, Africa Programme Director, Amnesty International (June 28, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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)

²⁸⁷ *At the Mercy of the Government*, *supra* note 276, at 8.

²⁸⁸ *Nigeria Request for Inspection*, *supra* note 278.

²⁸⁹ *At the Mercy of the Government*, *supra* note 276, at 11.

²⁹⁰ *Nigeria Request for Inspection*, *supra* note 278.

2. Recommendation to Implement the Pilot

After receiving the complaint, the Panel met with Bank Management, who presented actions Bank Management and local authorities were committed to taking in order to address the community's concerns.²⁹¹ Bank Management noted that the LSG had submitted a non-publicized draft RAP to Management on September 30, 2013. Furthermore, in October 2013, Bank Management had created an Action Plan (not to be confused with the RAP) that set specific dates for the LSG to complete a final RAP and to begin paying affected persons compensation.²⁹² Following that meeting, the Panel met with Requesters and proposed the Pilot approach, provided that all parties consented.²⁹³

At this point, the communication between the Panel, Bank Management, and the Requesters became confused. A series of emails from early November 2013 between SERAC and the Panel show that SERAC conditioned acceptance of the Pilot approach on receipt of (1) the 2012 RAP, (2) the revised 2013 RAP, and (3) a timeline for the proposed grievance mechanism that would enable affected persons overlooked by the RAP to request compensation.²⁹⁴ The Panel forwarded these requests on to Bank Management. Noting that Management "acknowledged the requests," the Panel treated the Pilot as underway, rather than viewing receipt as a condition for it to begin.²⁹⁵ Once the communication with Bank Management was initiated, SERAC agreed to proceed with the Pilot even though the conditions had not been met.²⁹⁶ Bank Management, however, seemed confused about the Pilot policy, refusing to provide information to SERAC in late November on the basis that a Panel request had been filed.²⁹⁷

Communication instead shifted to that between the community representatives and the LSG's Technical Committee. On November 20, 2013, the Technical Committee notified the community representatives and SERAC that they had revised the "entitlement matrix" downward.²⁹⁸ Amnesty International has documented that the final compensation amounts were over 30% less than the originally agreed to amounts.²⁹⁹ The Committee sent the final draft of the RAP to Bank Management one week later, but it still was not made public.³⁰⁰

²⁹¹ *Nigeria Notice of Receipt*, *supra* note 277.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Nigeria Notice of Non-Registration*, *supra* note 271.

²⁹⁵ *Id.*

²⁹⁶ Interview with Megan Chapman (Dec. 10, 2014).

²⁹⁷ Email from Marie Françoise Marie-Nelly to Megan Chapman (Nov. 29, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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)

²⁹⁸ Email from Megan Chapman to M. F. Marie-Nelly, (Nov. 22, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).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)

²⁹⁹ *At the Mercy of the Government*, *supra* note 276, at 9.

³⁰⁰ *Id.*

On December 9, 2013, the community representatives offered conditional acceptance of the revised amounts, with “hope of upward review.”³⁰¹ The LSG rejected the conditional acceptance, and on December 20, the community representatives and LSG agreed, without conditions, to a RAP finalizing compensation amounts, structure of payments, and a grievance mechanism for overlooked affected persons.³⁰² This RAP was made public on February 21, 2014 through a newspaper, and compensation was initiated. Compensation continued through June 2014, at which point Bank Management began making plans to complete implementation of the RAP and resolve outstanding issues.³⁰³

3. Denial of the Renewed Request for Registration

On June 25, 2014, two of the three original Requesters and one of the eight community representatives wrote to the Panel to request immediate registration of the original complaint, express their dissatisfaction with the Pilot, and to inform the Panel that SERAC no longer represented them.³⁰⁴ The new attorney for the Requesters cited various flaws in the RAP:

- (1) The RAP took months to complete, and more than 16 months after displacement, implementation was still ongoing.
- (2) It was a compensation-only plan. There was no provision for resettlement of the displaced, as would be required by Bank policies.
- (3) The provided financial assistance was inadequate to offset the harms suffered in the months before the RAP’s completion.
- (4) The RAP did not provide “meaningful livelihood support” for the displaced.
- (5) The RAP, though dated November 20, 2013, was not widely available until February 2014 when implementation began. This robbed affected persons of proper consultation.

The attorney also highlighted the significant decreases in promised compensation that the LSG announced shortly after the Pilot had been initiated.³⁰⁵ Just days later, on July 10, 2014, SERAC wrote the Panel contradicting the renewed request for registration. The organization expressed its satisfaction with the RAP and the Pilot, attaching a letter of support signed by six of the community representatives and one of the original Requesters.³⁰⁶

³⁰¹ Letter from Community Representatives to Chairman, Lagos State Government Technical Committee on Badia East (Dec. 9, 2013), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration-Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf)

³⁰² *At the Mercy of the Government*, *supra* note 276, at 9.

³⁰³ *Nigeria Notice of Non-Registration*, *supra* note 271, at 5-7.

³⁰⁴ Letter from Requesters to Executive Secretary, Inspection Panel (June 25, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration-Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf) (Annex III).

³⁰⁵ Letter from Kalu K. Obuba, Esq., to Eimi Watanabe, Inspection Panel (July 11, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration-Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf).

³⁰⁶ Email from Felix Morka, SERAC, to Eimi Watanabe, World Bank Inspection Panel (July 10, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes to the Notice of Non-Registration - Request for Inspection, Management Action Plan, related documents \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Annexes%20to%20the%20Notice%20of%20Non-Registration-Request%20for%20Inspection,%20Management%20Action%20Plan,%20related%20documents%20(English).pdf).

On July 16, 2014, the Panel officially denied the request for Registration, claiming that “[w]hile the Panel’s Pilot process notes that the Panel will register the Request if the Requesters are not satisfied with the process, in this particular instance, after ascertaining that the majority of the community representatives expressed their satisfaction in writing and Management has taken adequate measures to address the remaining concerns . . . , the Panel has decided not to register the Request.”³⁰⁷

The focus on the consent of the “community representatives” instead of the Requesters is particularly troublesome. The community representatives were selected by the community to participate in the Technical Committee before the Complaint was even filed. They had no clear tie to the Panel process. Meanwhile, the Requesters had been promised at the outset of the Pilot that they would be able to rescind consent to the Pilot Program and request registration at any point. The Panel offered no explanation for its choice to prioritize the community representatives over the Requesters. The Panel did, however, emphasize the need for “clearly defined and accepted procedures for consultation and representation, and a willingness of all stakeholders to abide by the established process.”³⁰⁸

4. Conclusion

The success of the first instance of the Pilot Program in Nigeria was hindered by a lack of clarity between the Requesters, the Panel, and Bank Management regarding how the overall process was meant to proceed, particularly in relation to the question of consent and the extent of Panel interaction with Requesters during the delay period. Requesters’ conditions on consent to the Pilot Program were not met before the Pilot Program was initiated, and a request that a full investigation be conducted following the delay was not heeded. Even after a delay period plagued by these issues, the Panel chose not to conduct a full investigation into the concerns raised by the initial request and during the Pilot Program. The Nigeria case again highlights the lack of effective dispute resolution built into Panel delay periods—the Panel did not mediate the dispute, actively monitor Bank actions during the delay and, at certain points, Bank Management was reticent to even communicate with the Requesters about their concerns. Further, as in Uzbekistan, the Bank did not benefit from a full Panel report chronicling how and which Bank policies had been violated. Later projects thus cannot benefit from the difficulties experienced by the Bank in Nigeria, or learn lessons on how to better avoid harming communities during the implementation of similar projects in the future.

D. The Pilot Continues: Paraguay

The lessons of Nigeria greatly informed the Panel’s decisions in its second implementation of the Pilot Program, in the Sustainable Agriculture and Rural Development Project in Paraguay (PRODERS).³⁰⁹ On July 22, 2014, the Requesters, local indigenous NGOs, filed a complaint alleging that they had been deprived of adequate consultation in the project.

³⁰⁷ *Nigeria Notice of Non-Registration*, *supra* note 271.

³⁰⁸ *Id.*

³⁰⁹ Inspection Panel, *Notice of Non-Registration, Paraguay: Sustainable Agriculture and Rural Development Project (P088799)* (Mar 11, 2015), [http://ewebapps.worldbank.org/apps/ip/PanelCases/95-Notice of Non-Registration\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/95-Notice%20of%20Non-Registration(English).pdf).

Seeing the issue as discrete and quickly remediable, the Inspection Panel consulted with both the Requesters and Management about the possibility of implementing the Pilot Program.³¹⁰ Both parties consented, with the Requesters indicating that they desired “a quick and simple solution to [their] just demands and in the shortest time possible.”³¹¹ After negotiations between the Requesters and Management, Management produced a revised version of its Action Plan that satisfied the demands of the Requesters, at which point they “formally agreed” to go forward with the Pilot.³¹² On December 18, 2014, the Panel issued a “Notice of Receipt of Request and Initiation of the Pilot Approach to Support Early Solutions,” in which the Panel reflected on the “lessons learned” from the implementation of the Pilot in Badia East.³¹³ Specifically, the Panel identified five lessons related to: (1) ensuring the adequacy of representation, given that the affected parties in the Paraguay case had submitted their request for inspection directly to the Panel; (2) ensuring that the requesters were well-informed and thoroughly engaged in the complaints process; (3) committing to maintaining open and frequent communications with the Requesters, and specifically deciding to communicate with them every four weeks or more often, if required; (4) ensuring that all stakeholders, including Requesters, Bank Management, and Government authorities were willing to abide by this established process; and (5) ensuring that the Action Plan includes clearly defined milestones and a timeline for achieving the list of actions provided in order to guarantee the existence of clear and shared expectations by all stakeholders.³¹⁴

On February 2, 2015, less than three months later, Management determined that the implementation of the Pilot Program was complete and had been successful.³¹⁵ The Panel confirmed with the Requesters that an NGO had been hired as the long-term service provider to enable participation and consultation, and that this process was operating to their satisfaction.³¹⁶ From March 1-4, 2015, an Inspection Panel team traveled to Paraguay to meet with the Requesters and confirm these reports.³¹⁷

In its concluding observations, the Panel remarked that the adherence to the lessons learned from the first implementation of the Pilot helped bring about a successful result in which “no issues regarding the Panel’s process and the implementation of the Action Plan arose.”³¹⁸ Further, the Panel noted “the significance of a field visit to meet the Requesters in person, assess the Pilot’s results on the ground, and ensure the satisfaction of the Requesters before making a determination on the case.”³¹⁹ Ultimately, the Panel determined that “the Pilot approach was an

³¹⁰ Inspection Panel, *Notice of Receipt of Request and Initiation of the Pilot Approach to Support Early Solution, Paraguay: Sustainable Agriculture and Rural Development Project (P088799)* 1, 4 (December 18, 2014), [http://ewebapps.worldbank.org/apps/ip/PanelCases/Notice of Receipt of Request and Initiation of the Pilot Approach to Support Early Solutions \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/Notice%20of%20Receipt%20of%20Request%20and%20Initiation%20of%20the%20Pilot%20Approach%20to%20Support%20Early%20Solutions%20(English).pdf).

³¹¹ *Id.* at 4.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 4-5.

³¹⁵ Gonzalo Castro de la Mata, *Memorandum to the Executive Directors, International Bank for Reconstruction and Development: Notice of Non-Registration and Panel’s Observations of the Second Pilot to Support Early Solution 1* (Mar. 11, 2015), <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=100>.

³¹⁶ *Id.* at 1, 4.

³¹⁷ *Id.* at 5.

³¹⁸ *Id.*

³¹⁹ *Id.* at 5-6.

appropriate instrument to handle this case as it led to a rapid and effective resolution of the issues raised.”³²⁰

In an interview with members of the Panel Secretariat, the importance of the field visit and the close and frequent contact with the Requesters was again emphasized.³²¹ Further, they remarked that the fact that the issues in the Paraguay complaint were “narrow and defined” made it much simpler than the cases in Uzbekistan or Nigeria, making it more amenable to success under the Pilot Program.³²² Finally, while the Secretariat stated that these lessons learned would be applied to other deferral models, they stressed that each case is very different and that they have ranging degrees of complexity.³²³

³²⁰ *Id.* at 1.

³²¹ Interview with Inspection Panel Secretariat, Apr. 23, 2015.

³²² *Id.*

³²³ *Id.*

VI. CONCLUSION: PROCEDURES AND PRACTICES UNDERMINING THE LEGITIMACY OF THE PANEL

The Inspection Panel, as originally envisioned, serves a critical function. It is designed to ensure the integrity of Bank standards, protect communities from harm, and allow Bank officials to learn from previous projects to improve Bank function. Further, reports from the Inspection Panel serve a secondary, if unofficial, role: they provide recognition of community concerns at an international level. The Inspection Panel itself, however, does not have the ability to provide concrete remedies to communities.

The Inspection Panel has attempted to create a flexible and pragmatic process to better help communities find early solutions to their concerns. The three procedural innovations discussed in this report, however, all incorporate some means of delaying the Panel's resolution of an issue, either through the uncodified process highlighted in the Nepal case study, the newly codified Footnote 7 procedure, or the recently adopted Pilot program. The Codification of two of the three delay procedures is a step forward in terms of transparency, but the revised April 2014 Operating Procedures do not make public all available mechanisms of Panel delay, nor do they address the potential harms of delay.

In the Nepal, Uzbekistan, and Nigeria case studies, none of the three methods of delay met their stated purpose—to allow Management to solve problems at an early stage and lessen the need for Inspection Panel investigation. Instead, the delays undermined the Panel's ability to ensure Bank accountability for failure to comply with the safeguard policies. Delay did not lead to concrete solutions for affected communities in the three case studies. While the delay is meant to give Management and the affected communities more time to resolve outstanding concerns, the Panel does not manage or monitor any intervention process or dispute resolution that occurs. Since the Inspection Panel requires that affected people try and fail to solve problems with Management before filing a complaint, in any case deemed eligible for inspection, communications with Management have already failed to produce solutions. Yet, during the delay period, the power imbalance between affected parties and Bank Management continues. The Panel's lack of involvement has the potential to leave Management as the mediator in a dispute to which it is itself a party.

In fact, developments in the Nepal case, since the initial drafting of this report, illustrate that these harmful power imbalances can be entrenched through delay. Construction of the Bank-funded power line was completed in January 2017.³²⁴ To complete Project construction, the Bank's client, the Government of Nepal, deployed armed paramilitary forces in the disputed area.³²⁵ Communities complained to Bank Management, Board members, and the Panel about police violence, intimidation, and coercion while the NEA completed the project in 2016.³²⁶ Yet,

³²⁴ Rajkumar Karki, *First Phase Complete – Khimti Dhalkebar transmission line*, THE KATHMANDU POST (Jan. 18, 2017), <http://kathmandupost.ekantipur.com/news/2017-01-18/first-phase-complete.html>.

³²⁵ *Id.*

³²⁶ In April 2016, community members who were peacefully protesting the project were physically dragged and beaten with long bamboo sticks, on their back, legs, and arms. In the process, police injured several elderly residents and women. In the April 2016 events, and then again in July 2016, police arrested and detained community members while they were peacefully protesting the Project. During both the April 2016 and July 2016 incidents, community members report that local authorities detained them overnight, without charges and threatened them with criminal

Bank Management has publicly and repeatedly stated that community members had provided their continued consent for the Project.³²⁷ To the contrary, at the end of the Project, the many of the community members that brought the initial Panel complaint remain opposed to the way the Project was implemented, and are still waiting for the Bank, and its client, to meaningfully address their concerns about the Project and its impacts.³²⁸

Delay also undermines the Panel's ability to ensure accountability at the Bank, as well as its legitimacy in the eyes of the communities it is meant to serve. The Panel does not have clear standards guiding when it will adopt a delay procedure or what delay procedure will be used in what circumstances. The lack of procedural clarity undermines affected communities' ability to predict how and when the Inspection Panel will intervene after a complaint has been filed. As highlighted in the Nepal case, delay can also lead to confusion amongst affected people, and undermine domestic advocacy efforts hoping to make use of an Inspection Panel report. In both Nigeria and Uzbekistan, after the delay period had ended, the Panel ultimately decided not to conduct a full investigation, avoiding its primary compliance function. The Board, and the World Bank writ large, thus never benefitted from the Panel's findings and the lessons that might have been learned from both cases on how to better ensure compliance with safeguard policies in future projects.

The Inspection Panel, unable to institute a proper dispute resolution mechanism because of its institutional constraints, has instead resorted to delay procedures to allow Management to settle issues unilaterally. This diminishes the perception of Panel independence, and as seen in Nepal, can leave communities vulnerable to further harm. The shortcomings of this piecemeal and incomplete system have made it a threat to the legitimacy and authority of the Inspection Panel. Any true dispute resolution function that is instituted must be (1) transparent to Requesters, and (2) effective in actually finding solutions through constructive dialogue. Current Panel practice does neither.

sanctions. Both times they were released the following day, but only after they agreed to sign a document giving their assurances that they would no longer obstruct the Project. Letter, LAHURNIP and Accountability Counsel, to Jim Yong Kim, President, World Bank Group, July 7, 2016, <http://www.accountabilitycounsel.org/news-article/open-letter-to-world-bank-president-kim-development-at-gunpoint/>.

³²⁷ In August 2016, the bank claimed that "In April 2016, the affected community in Sindhuli agreed . . . that the Nepal Electricity Authority (NEA) could resume the construction work for the disputed section of the Khimti–Dhalkebar Transmission Line." Despite community objections, a subsequent December 2016 report did not revise its representation that communities had consented to the project. World Bank, First Progress Report on Management's Action Plan in Response to the Inspection Panel Investigation Report (INSP/93722-NP) on the Nepal Power Development Project (August 5, 2016), <http://ewebapps.worldbank.org/apps/ip/PanelCases/87-FirstManagementProgressReport.pdf>; World Bank, Overview of Status of Implementation of Management Action Plans Prepared in Response to Inspection Panel Investigation Reports (Dec. 2016), <http://ewebapps.worldbank.org/apps/ip/Documents/TrackingManagementActionPlan-14Dec2016.pdf>.

³²⁸ After the August 2016 Bank report, community members wrote a letter to Bank Management, and then subsequently a letter to the Bank's Board, raising their concerns about misrepresentations in the Bank's report and their continued desire for meaningful consultation through a facilitated dialogue. Letter, Struggle Committee, to World Bank Board of Directors, August 21, 2016, <http://www.accountabilitycounsel.org/wp-content/uploads/2016/08/8.21.2016-LT-to-WB-Board-from-Sindhuli-Nepal.pdf>.

To increase transparency, the Bank could add a formal independent dispute resolution function to the Panel. This would provide procedural safeguards for Requesters during the period of delay, increase Requesters' awareness of options for various Panel processes moving forward and, ideally, include provisions for professional mediation and monitoring.

To increase effectiveness, the Bank should incorporate best practices from other accountability mechanisms. Other multilateral financial institutions have adopted dispute resolution functions into their accountability mechanisms. Best practice includes separating the bodies doing compliance review and dispute resolution, ensuring that specialists trained in negotiation skills conduct the dispute resolution and working closely with a variety of stakeholders to ensure that no party was coerced to reach any agreement.³²⁹

The Bank could achieve both of these goals – increased transparency and effectiveness – through a number of potential approaches, among them creating a dispute resolution function within the existing Panel or creating a new body, distinct from the Inspection Panel.³³⁰ Whatever path the Bank chooses to take, action is needed to avoid disillusioning affected communities and tarnishing the Panel's reputation.

³²⁹ The Compliance Advisor Ombudsman (CAO) at the International Finance Corporation, for example, has an Ombudsman function that specifically focuses on dispute resolution. The Ombudsman office has specialist staff trained in negotiation methods. When a complaint has been filed, the Ombudsman office partners with neutral third-party facilitators, assesses various interests and works with parties to craft a solution. The Ombudsman office explicitly states it will not support agreements that may be coercive to a party and, if a collaborative solution is not possible, will transfer the case to CAO Compliance. *CAO Dispute Resolution (Ombudsman)*, COMPLIANCE ADVISOR OMBUDSMAN (Apr. 22, 2015), <http://www.cao-ombudsman.org/howwework/ombudsman>.

³³⁰ In 2015, the Bank established the Grievance Redress Service (GRS) to “make the Bank more accessible for project affected communities and to help ensure faster and better resolution of project-related complaints.” However, the GRS is operated by Bank Management and is thus distinct from the independent dispute resolution mechanism proposed here. *Grievance Redress Service*, WORLD BANK, <http://www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service#1>.