

**THE WORLD BANK INSPECTION PANEL
AND INTERNATIONAL HUMAN RIGHTS LAW**

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EXECUTIVE SUMMARY

On August 4, 2016, the World Bank adopted a new Environmental and Social Framework (“Framework” or “ESF”) - a set of environmental and social policies governing the conduct of the Bank and the borrower country (“Borrower”) in their operations.

International human rights law and standards were extensively discussed during the consultation and drafting of the new Framework. In response the Bank decided to make explicit reference to human rights in the “Vision Statement”, which explains both the Bank’s and the Borrower’s obligations under the new Framework. The Vision Statement provides that “the World Bank’s activities support the realization of human rights expressed in the Universal Declaration of Human Rights”.

At a time when the absolute immunities and privileges of international financial institutions are increasingly being challenged, the task of ensuring the accountability of the World Bank has become fundamentally important to safeguard its mission and effectiveness. One central element in strengthening the accountability of the Bank to its shareholder states and to the communities affected by its activities is to ensure that the Bank does not violate or facilitate the violation of international human rights standards. The World Bank Inspection Panel (“Panel”) is a key institutional player that helps to strengthen and bolster the accountability and legitimacy of the Bank in this respect.

This report examines how the Panel has engaged in human rights-related claims through its past casework and how it can support the Bank’s efforts in realizing the Vision Statement included in the ESF. An analysis of the Panel’s past cases indicates a fairly consistent practice of referring to international law and human rights standards in order to ensure that individuals’ rights are protected and the development objectives of Bank-funded projects are achieved. In this sense the Panel has encouraged, and has been part of, a robust system of accountability that is both responsive to the needs of particular communities and protective of the Bank’s interests. The report concludes by arguing that the new Framework presents important opportunities for the Panel to further consolidate and develop this practice.

The report is structured in four parts:

Part I starts by situating the Panel within the context of the Bank’s institutional framework and the body of international human rights law.

Part II examines the Panel’s interaction with international human rights law through an in-depth analysis of relevant cases considered by the Panel during the period of 2002-2016. These cases cover a broad range of sectors and are used to distill overarching conclusions about the Panel’s engagement with human rights. Three ways in which the Panel’s practice contributes to the protection of human rights are identified: (1) the Panel progressively interprets Bank policies and procedures incorporating human rights, with a particular emphasis on human rights due diligence and supervision; (2) the Panel refers to international human rights law and the work of specialized human rights bodies; (3) the Panel adopts a socially and environmentally sustainable definition of development, including respect for human rights standards as critical to the effectiveness of Bank projects.

Part III defends the practice of the Panel arising from its operational independence, its jurisdiction,

and the Bank's own practice of engaging with human rights standards.

Part IV considers the changes brought by the newly adopted Framework and their implications for the Panel's continued engagement with human rights. It argues that the Framework provides greater opportunities, and creates a greater need, for further engagement with human rights derived from: (1) the Vision Statement's explicit reference to international human rights law (2) the embedded human rights content of the new Standards and (3) the Bank's broader policy framework, especially the due diligence and supervision obligations of the Bank.

INTRODUCTION

This report analyzes the Panel’s previous engagement with international human rights law and the ways in which it may be further developed under the new Environmental and Social Framework (“Framework” or “ESF”) adopted on August 4, 2016.

This analysis shows that the Panel’s engagement with international human rights law is not only permissible, but also normatively and practically necessary to preserve the effectiveness of the Bank’s mission. The existence of the Panel supports the Bank’s development of a robust system of due diligence, risk assessment and monitoring that is protective of individual rights.

This approach is essential in today’s changing global landscape, where the immunities and the legal accountability of international financial institutions like the World Bank are increasingly under scrutiny, especially in relation to alleged human rights abuses.¹ In this respect, recent legal challenges brought before national and international courts have shown that the availability and adequacy of internal accountability mechanisms is a relevant consideration for courts to uphold the immunities of international organizations.² With increased public demand for external accountability, including to individuals and communities, the existence of a strong internal mechanism that ensures a high level of accountability to fundamental human rights standards is critical for upholding an international organization’s immunities in the long term.

The World Bank Inspection Panel (“Panel”), tasked to review the Bank’s compliance with its policies and procedures, is an example of such an internal accountability mechanism.³ The Panel provides a direct platform on which individuals and communities who have been or may be harmed by Bank-financed projects may seek redress. In many instances, requesters frame their claims before the Panel as human rights violations, and often reference international law relevant to the Bank’s policies. The Panel has generally been careful to limit its findings to instances of compliance or non-compliance with the Bank’s internal policies and procedures.⁴ At the same time, the Panel has made several references international law and human rights standards as part of the Bank’s obligations in its investigations.⁵ This report seeks to carefully explore these instances and further provide a thorough analysis of the opportunities brought by the new Environmental and Social Framework.

PART I. CONCEPTUALIZING THE PANEL AND ITS HUMAN RIGHTS RELATED FUNCTIONS

1.1 The Panel and the Bank

The World Bank Inspection Panel (“Panel”) was established on September 22, 1993 by two identical resolutions of the International Bank for Reconstruction and Development (IBRD) and International Development Agency (IDA), the constituent organs of the World Bank (“Bank”).⁶ The Bank is an international financial institution that provides development assistance through the provision of loans and technical assistance to middle- and low-income countries in pursuit of its twin goals of ending extreme poverty and promoting shared prosperity.⁷

The Bank established the “independent Inspection Panel”⁸ to both ensure the accountability of Bank Management (“Management”) to the Board of Executive Directors (“Board”) and respond to pressure from civil society to ensure the accountability of the Bank to the communities in which it operated and financed projects.⁹

The Panel was the first body of its kind among international financial institutions, a new construct that has been described as contributing to the development of international law.¹⁰ It was envisioned as an accountability mechanism that would investigate the Bank’s compliance with its own policies and as a forum through which locally affected persons could obtain redress for harms resulting from violations of the Bank’s internal policies and procedures.¹¹ In its findings of compliance and harm, the Panel functions as an accountability mechanism with quasi-judicial features, although the extent of its judicial character remains debated.¹²

In many instances, requesters frame their claims before the Panel on human rights grounds and, in some cases, highlight how the Bank’s act or omission violates their rights under international law along with the Bank’s policies and procedures. In this context, a question arises as to whether, and to what extent the Panel has considered human rights-related claims and can draw on international law, particularly international human rights law, in its practices. Indeed, the report of an independent review of a controversial Bank-funded project in western India commissioned in 1991 by the President of the World Bank prior to the establishment of the Panel, also explicitly referred to international law sources and standards in making its findings of compliance and harm.¹³ As discussed below, the Panel’s practice highlights the continued importance of international law in its investigatory role, and the new Environmental and Social Framework (“Framework” or “ESF”) provides a renewed and strengthened basis for the Panel’s engagement with human rights within its mandate.

1.2 International Human Rights Law

The Universal Declaration of Human Rights (“Universal Declaration”) was the first major international instrument to set forth internationally recognized human rights. It provides “a common standard of achievement for all peoples and nations”¹⁵ and includes civil and political¹⁵ as well as economic, social and cultural rights¹⁶. The Universal Declaration is of particular import here

not only because some of its provisions are considered to be customary international law,¹⁷ but also because the Vision Statement of the ESF, as will be discussed in more detail in Part IV, references it explicitly.¹⁹

Other sources of international human rights law relevant to the Panel's work include the treaties to which the Borrower is a party.¹⁹ Notably, all members of the World Bank have ratified one or more, and frequently several, of the ten core UN human rights treaties²⁰ and eight core International Labour Organization ("ILO") conventions,²¹ in addition to various international environmental agreements.

1.3 The World Bank Inspection Panel's Mandate

The 1993 Resolution of the Executive Directors, as modified by Clarifications adopted in 1996 and 1999, establishes the Panel and sets out its composition, scope of powers, and investigative process.²² The Panel enables affected communities to hold the Bank accountable by providing a forum for complaints, serving as a fact-finding body in conducting investigations, and ensuring an independent assessment of harm and compliance.

The Panel provides a forum for individuals to assert violations of Bank policies and obtain redress for harms they have faced as a result of projects financed by the Bank. Private individuals or communities ("Requesters") may submit written requests for inspection, claiming that:

"their rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal, and/or implementation of a project financed by the Bank".²³

Such acts or omissions include situations where "the Bank is alleged to have failed in its follow-up of the borrower's obligations under loan agreements with respect to such policies and procedures".²⁴ As part of its determination of eligibility, the Panel has the power to determine the standard of causal connection between the Bank's actions and the harm suffered, which delineates the scope of the Bank's responsibilities.²⁵ While the Panel does not have the power to review complaints of human rights violations, which are the responsibility of other parties like the borrower or other international human rights bodies, the Panel may address complaints where the Bank's acts or omissions have caused harm within the context of Bank policies and procedures.

1.4 Key Functions of the World Bank Inspection Panel

The Panel plays an important role in protecting human rights. The first way it fulfils this role is by performing an awareness-raising function. By issuing reports, which are accessible online to the wider community, the Panel provides a platform through which complainants may have their grievances brought to the attention of international audiences. For example, while the Panel makes no assessment of the veracity of allegations of human rights violations, it refers to such assertions in its cases,²⁶ and in doing so, invites future relief by competent international and national actors.

Second, the Panel actively protects the rights or confidentiality and freedom from reprisal for all

individuals that bring forward a request. The Panel has established a high standard of protection to ensure the security and confidentiality of the Requesters against governmental reprisals and retaliation. For example, in the *Brazil-Paraná Biodiversity Project*, the Panel held that the pressure the requesters faced from the Bank and project partners to avoid filing a request for inspection threatened the *integrity* of the Panel's process, underscoring the importance of confidentiality and protection against reprisal.²⁷ Furthermore, the Panel recently published *Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process*, as a resource to assist communities throughout their interactions with the Panel.²⁸ By imposing these high standards of protection, the Panel enables individuals to bring their complaints, and not only recognizes the dignity and inherent rights of the individuals, but also indirectly protects the substantive rights implicated.

Third, the Panel has developed an inclusive and active civil engagement framework. The Panel enjoys a significant degree of discretion and independence in shaping its own work, and adopting rules governing the exercise of its investigatory function.²⁹ In the exercise of this discretion, the Panel has adopted an inclusive procedural framework that ensures active engagement with specialized international bodies, NGOs, and local communities.³⁰ In addition, the Panel's Operating Procedures set out the Panel's "Investigation Methodology", and state that the Panel may consider the opinions of other development organizations, civil society representatives or independent experts, in addition to any other relevant methods the Panel considers appropriate to the specific investigation.³¹

Finally, the Panel may initiate a problem-solving approach aimed at supporting the development of early solutions. Under the newly adopted Pilot Approach, the Panel is required to verify that the Request meets the basic requirements for Registration, but may, based on an agreement from both the Requesters and Management, seek an opportunity to resolve the concerns without undertaking a formal investigation.³² Notably, adopting this approach does not prevent the Panel from acknowledging the harm suffered by the affected individuals or from making a preliminary assessment of the Bank policies which may have been contravened.³³ This pilot approach thus allows the Panel to acknowledge the complaints brought by individuals, to draw new and important lessons for the Bank in its attempts to maintain compliance with its policies, and to achieve earlier resolutions of frequently raised human-rights related problems.³⁴ A full assessment of the implications of this relatively new approach will have to be observed over time.

Having acknowledged the Panel's broader role in the protection of human rights, the following sections will focus more specifically on the manner in which the Panel engages with human rights concerns and invokes international human rights principles and standards in its investigative function.

PART II. READING THE PANEL'S REPORTS

Before exploring the Panel's role under the new Framework (Part IV), it is important to understand how the Bank's policies relate to human rights (2.1), and how the Panel has interpreted these policies in its cases (2.2). The current safeguards and operating policies of the Bank are important because these are expected to run in parallel to the new ESF for about seven years.³⁵ At the same time, they provide a point of comparison for the changes brought by the ESF and the Panel's role in this new policy context.

2.1 The Bank's policies and related human rights obligations

Human rights are relevant to the Bank's obligations under the present operational policies and procedures in three respects:

First, human rights considerations are relevant when the Panel assesses whether the Bank has complied with its operational policies and procedures since many of the Bank's policies incorporate international human rights standards. The General Counsel involved in the creation of the Panel has described the Bank's operational policies as incorporating and promoting human rights, notably, respect for dignity, transparency, accountability, consultation, participation, and non-discrimination.³⁶ These embedded human rights obligations are clearly illustrated by OP 4.10 on indigenous peoples which explicitly states that the policy contributes to the Bank's mission of poverty reduction by ensuring that the development process fully respects the dignity and human rights of indigenous peoples.³⁷ Other Bank policies, even when they do not explicitly use the term 'human rights', incorporate important human rights principles and standards, such as OP 4.12 on involuntary resettlement, requiring the Bank to ensure the borrower respect rights to consultation, compensation, access to effective redress mechanisms, and adequate housing.³⁸

Second, human rights violations may be relevant considerations for the Bank insofar as they create economic concerns bearing on the success of the project such as the creditworthiness of the borrower, the ability of the borrower to keep its commitments under the loan agreement, or the ability of the Bank to supervise via implementation.³⁹ The Bank itself has recognized that an extensive violation of human rights may be of "such pervasive proportions that it imposes itself as an issue in the Bank's decisions"⁴⁰ an issue the Bank must consider as a part of its due diligence obligations. For example, public consultation with affected communities and NGOs is recognized as an important factor in the successful design and implementation of a project in OPs 4.01 (environmental assessment), 4.10 (indigenous people) and 4.12 (involuntary resettlement).⁴¹ Pre-existing human rights violations, such as widespread suppression of free speech or torture and intimidation, may consequently become relevant considerations for the Bank where it impedes both the borrower's obligation to ensure the open and informed consultation required by the Safeguards and the Bank's own ability to supervise the implementation of the project in line with such Safeguards.⁴²

Consequently, there is a need for the Bank to consider human rights concerns as part of its due diligence obligations throughout the project cycle. When a project is identified for Bank approval

and funding as an investment-lending project, the Bank has its own due diligence obligations, separate from the borrower, under OP/BP 10.00.⁴³ OP 10.00 provides that in order to support the Bank's mission of sustainable development and poverty reduction, the Bank must consider economic, environmental and social considerations, *and related risks* in proposed projects.⁴⁴ This due diligence obligation, which requires the Bank to continually assess and mitigate risks to the success of the project in the identification, appraisal, and implementation phases of the project cycle, requires that the Bank consider human rights issues where they surface as social, environmental or related risks within the meaning of OP/BP 10.0.⁴⁵ In addition to OP 10.00, which provides the general conditions for risk assessment in investment projects, the Bank's due diligence obligations may also be drawn from the Operational Manual, which comprises the full set of Bank policies and procedures. The Operational Manual includes not only the operational policies and procedures and the ten current safeguards, but also Bank directives and other guidance documents such as the Bank's Access to Information Policy and the Bank's Framework for the Management of Risk in Operations. Therefore, human rights considerations, beyond those captured within the environmental and social safeguards themselves are also relevant project appraisal and implementation risks. The Panel may look to these guidance documents and other policies to determine whether human rights considerations manifest as relevant risks the Bank ought to have considered as part of its due diligence obligations.

There are several operational policies which require the Bank to take the borrower country's domestic law in project appraisal and implementation under OP/BP 10.00 into account. OP 4.01 for example requires that the environmental assessment consider "the country's overall policy framework, [and] national legislation...related to the environment and social aspects..." and to "identify matters pertaining to the project's consistency with national legislation or international environmental treaties and agreements". This imposes an obligation on the Bank in the context of its operational policies and procedures to consider the human rights-related obligations raised by the domestic frameworks of the borrower country.

In conclusion, it is important to note that human rights concerns are relevant to the Bank only when they fall within the scope of the Bank's mandate. There may be situations in which human rights concerns arise but where no obligation on the Bank is created, such as where these rights have not been internalized within the Bank's operating policies and procedures, where the concerns do not surface as relevant risks which the Bank must consider as a part of due diligence, or where they do not affect the economic viability and sustainable development goals of the project.

The next section will examine how the Panel has given effect to the Bank's human rights-related obligations through its practice and interpretative methods.

2.2 Investigation Reports: Cases Analysis

The Panel's engagement with international human rights law is most visible in its investigation reports. Through its reports, the Panel formulates definitive findings on the Bank's compliance with the applicable policies and procedures. The Panel acts independently in making these findings and its investigation reports are not subject to review or appeal by any other Bank body. As an additional guarantee of independence, the Bank and the Panel make the investigation reports publicly available

in a timely manner after the Board's consideration.⁴⁶

Seven Panel Investigation Reports issued between 2002-2016 are examined below. These cases were selected on the basis that the claims brought were characterized by a strong human rights dimension. The analysis delineates the different ways in which human rights arguments are dealt with by the Panel and reveals that the Panel's practice contributes to the protection and development of international human rights law in three ways:

- (1) The Panel contributes to protecting human rights by progressively interpreting the Bank's policies and procedures which incorporate human rights-related standards, and applying a high level of scrutiny to the Bank's due diligence obligations including risk assessment and project supervision;⁴⁷
- (2) The Panel contributes to the development and protection of human rights by interpreting the Bank's policies in light of relevant international law standards;
- (3) The Panel contributes to the protection of human rights by requiring that the Bank consider human rights violations which could impede the achievement of the project's sustainable development objectives and the Bank's broader mission.

1) Chad-Cameroon: Petroleum and Pipeline Project (2002)

The investigation of the *Chad-Cameroon: Petroleum and Pipeline Project*, an energy infrastructure development project to drill oil wells and construction of an export pipeline, was one of the earliest cases to implicate numerous human rights issues.⁴⁸ It concerned the investigation of the largest petroleum-sector development project on the African continent which included both infrastructure development and good governance capacity building.⁴⁹ The requestors alleged that the defective project design and implementation constituted an irreversible "threat to local communities, their cultural property and environment",⁵⁰ essentially linked to the Bank's compliance with its core obligations under the Environmental Assessment (OD 4.01) and Poverty Reduction (OD 4.15) policies.⁵¹ Equally importantly, the requestors alleged the Bank's project failed to comply more generally with its obligations on "proper governance and human rights", within the context of its overall policy framework.⁵²

In its investigation, the Panel found the requestors' allegations to be well-founded and highlighted significant instances of non-compliance by the Bank, especially during the initial project design phase.

Examining the Bank's obligations under the OD 4.01 on Environmental Assessment,⁵³ the Panel found the environmental impact assessment and the correlating plan non-compliant with the policy in multiple instances. It highlighted, in particular, the serious social harm caused by the limited spatial and regional focus of the impact assessment, the lack of cumulative effect considerations,⁵⁴ the limited social supportive data on public health,⁵⁵ the failure to involve independent international experts, the lack of consideration of project alternatives, and the absence of institutional governmental capacity to manage the project in an environmentally and socially sound manner.⁵⁶ According to the Panel:

"The scale of the now proposed development will impact on the lives of all the people living in the Region as a whole."⁵⁷

Moreover, the Panel found Management's actions when consulting with affected communities prior to 1997 to be incompatible with the Bank's policies (OD 4.01, para. 19), holding that consultation in the presence of armed forces did not satisfy the essence of the right to consultation:

*"... it is evident that, at least prior to 1997, the consultations were conducted in the presence of security forces, which is incompatible with Bank's policy requirements. As the Panel has said on previous occasions, full and informed consultation is impossible if those consulted perceive that they could be penalized for expressing their opposition to, or honest opinions about, a Bank financed project."*⁵⁸

As to the allegations on "proper governance and human rights", the Panel disagreed with the argument of Bank Management,⁵⁹ and held that, while not attempting to assess the human rights situation in Chad, it:

*"[...] felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies."*⁶⁰

In doing so, it reported that requestors felt harassed by the local authorities when expressing their freedom of speech, and that the requestors' representative had reportedly been subject to torture by the local authorities.⁶¹ The Panel held that the government's large-scale repression of individuals expressing their opinions in opposition to the Bank-financed project raised important questions of compliance with the Bank's policies generally, and more specifically with the Bank's policies on informed and open consultation.⁶² Further, the Panel declared that these policies may not be read in complete isolation from the provisions of core universal human rights instruments, such as the UN Declaration of Human Rights:

*"Nonetheless the Panel takes issue with Management's narrow view, and draws attention in this connection to the United Nations Declaration of Human Rights adopted in December 1948, three years after the Bank's Articles of Agreement cited above entered into effect."*⁶³

The case of *Chad-Cameroon* contains strong and explicit references to issues of governance and human rights. It presents one of the clearest instances of the Panel interpreting the Bank's obligations to include scope for the consideration of human rights risks, especially where the latter has had an impact on the Bank's compliance with its own obligations. The case also highlights the important role the Panel plays in seeking to protect the security and integrity of requestors. This effort is also evident in its work on reprisal and retaliation risks.⁶⁴

Key observations:

The *Chad-Cameroon: Petroleum and Pipeline* investigation analysis indicates the three main ways in which the Panel engages with international human rights law. First, the Panel adopts a progressive reading of the Bank's human rights-related substantive and due diligence obligations, pointing to the potential impact of the project on: "[...] the lives of all the people living in the Region [...]"⁶⁵ Second, the Panel interprets the Bank's policies as a whole in the light of core international human rights standards and emphasizes the importance of these standards, especially those contained in the Universal Declaration of Human Rights, in all Bank-financed operations.⁶⁶ Third, the Panel requires that the Bank take human rights violations into account where they are of such magnitude that they

impede the implementation of the project in compliance with Bank policies and the sustainable achievement of the Bank's development goals.

2) Honduras: Land Administration Project (2007)

The *Honduras: Land Administration Project (2007)* investigation clarifies the relevance of prior existing human rights violations in the borrowing country to the Bank's compliance with its own policy obligations.⁶⁷ In this case, the requestors, members of Garífuna indigenous community, claimed that the Bank-financed land titling project could lead to irreversible loss of their ethnic land rights, which they had for years claimed before national and international human rights courts.⁶⁸

In examining the request, the Panel based its non-compliance findings on the Bank's obligations under the Indigenous Peoples (OD 4.20)⁶⁹ and Project Appraisal (OMS 2.20)⁷⁰ policy frameworks.

The Panel found that, contrary to the text and objectives of the Indigenous Peoples policy, the Bank did not ensure proper representation and consultation of the Garífuna community during project implementation.⁷¹ Moreover, despite the fact that the Panel found that the established legal redress mechanism formally complied with the requirements of the Indigenous Peoples Policy,⁷² it held that the titling of Garífuna ethnic lands before the establishment of the new legal and regulatory framework was contrary to the objectives of the policy⁷³ to ensure that:

“the development process fosters full respect for their dignity, human rights, and cultural uniqueness [...] and to ensure that indigenous peoples do not suffer adverse effects during the development process.”⁷⁴

In doing so, the Panel underscored the importance of pre-existing and ongoing human rights conflicts in relation to the recovery of collective property rights by the Garífuna community, and the litigation history of the victims before the Inter-American Commission on Human Rights.⁷⁵ The Panel found that the deficiencies of the Bank-financed project may have put an additional burden on the Garífuna peoples in claiming and realizing their rights over their ancestral lands and substantially jeopardized the likelihood of success of the ongoing attempt to ensure the peaceful enjoyment of their property rights.⁷⁶

As to the Bank's policy on project appraisal (OMS 2.20), the Panel held, contrary to Management's view, that the Bank failed to take into consideration the ILO No.169 Indigenous and Tribal Peoples Convention in the early stages of project design.⁷⁷

In restating the relevance of the Convention in the context of the project appraisal, the Panel undertook a three-step analysis of the Bank's policy framework. First, it rejected Management's claim that the Bank's policy referred to international agreements “essentially of an environmental nature” and held instead that the text of the policy had a broader scope, including the health and well-being of people.⁷⁸ Second, the Panel noted that the Bank's policy on indigenous peoples broadly reflected the spirit and provisions of the ILO Convention No. 169.⁷⁹ Third, the Panel repeatedly emphasized that the borrower had signed and ratified the ILO Convention No. 169 making it part of the national legal framework which the Bank should have taken into account pursuant to its project appraisal obligations.⁸⁰

The Panel concluded that the state's ratification of the ILO Convention was relevant and expressed

its concern that the Bank had not adequately considered whether the proposed project plan and its implementation would be consistent with the Convention.⁸¹ The Panel went further to note that, in any event, the relevant Bank policies already incorporated the Convention standards and added (in a footnote) that both the Bank and the ILO are specialized agencies of the UN, which would constitute, in the Panel's view, an additional reason for adopting a consistent interpretation with the ILO Convention No. 169.⁸²

Key observations:

The *Honduras: Land Administration Project (2007)* again illustrates the core ways in which the Panel contributes to the protection of the human rights of affected communities. First the Panel ensures the implementation of the Bank's due diligence requirements to further the Bank's development goals. As such, the Panel's purposive reading of the Bank's policy obligations and the corresponding indigenous peoples' rights to consultation, representation and access to effective redress mechanisms, progressively develops the Bank's standard of protection. Second, the Panel repeatedly references the applicable international human rights obligations contained in the ILO Convention No. 169, making their relevance hard to deny. Finally, the Panel highlights the need for the Bank to identify and mitigate pre-existing human rights risks for the satisfactory fulfillment of the project's development mission.

3) Democratic Republic of Congo: Transitional Support for Economic Recovery Grant Project (2007)

The Democratic Republic of Congo: Transitional Support for Economic Recovery Grant Project (2007) involved non-compliance with Bank policy during the project's early design phase.⁸³

The requestors complained that a Bank project supporting reform of the forestry sector in Congo posed irremediable harm to the Pygmy indigenous people and local communities, seriously undermining their right to the use of ancestral lands and forests, adversely affecting their cultural property, and endangering world heritage-protected rain forest resources.⁸⁴ The requestors claimed non-compliance with the Bank's policies on Indigenous Peoples (OD 4.20)⁸⁵, Cultural Property (OPN 11.03)⁸⁶, Poverty Reduction (OD 4.15)⁸⁷ and Environmental Assessment (OP 4.01).

In its findings, the Panel found that Management failed to trigger the Indigenous Peoples policy, which led to major subsequent implementation problems.⁸⁸ The Panel emphasized that this initial failure impeded respect for indigenous peoples' rights to consultation, participation and information⁸⁹ and further hampered the adoption of appropriate guarantees to protect their collective land rights during the adoption of the new legal framework.⁹⁰

"The lack of disclosure to the local people, in particular the Pygmy people, of information regarding forest reform and their legal rights – to the extent this has occurred – means that legal reforms and policy initiatives supported by the Bank may not as a practical matter be applied in the many remote areas where these people live."⁹¹

Additionally, the Panel pointed to the socio-economic and political inequality of indigenous peoples reported by the African Commission of Human and Peoples' Rights,⁹² as well as to the massive illegal

exploitation of the country's natural resources in the context of internal armed conflict, a practice condemned by the UN.⁹³

In analyzing the cultural property rights of the indigenous people, the Panel noted that the UN's definition of cultural property was adopted by OPN 11.03⁹⁴ and emphasized that in projects that *prima facie* entail the risk of damaging cultural property, the Bank has an obligation to determine what is known about the cultural aspects of the proposed project site, draw the government's attention to it, and consult the appropriate stakeholders.⁹⁵ The Panel further noted that in that particular case, the forest held both material and spiritual significance to the indigenous Pygmy community and was "indispensable to maintaining their life and culture".⁹⁶ It held that the case required an in-depth consultation with the Pygmy people⁹⁷ and that the Bank had failed to identify appropriate measures to avoid harming areas that might be deemed cultural property:

*"The Panel finds, however, that Project documents at design and appraisal did not identify the cultural property and spiritual value of forest areas to the Pygmy People, or identify appropriate measures to avoid impacts to areas that might fall within the definition of cultural property under Bank policy. This did not comply with OP 11.03 on Cultural Property."*⁹⁸

Regarding OD 4.15 on Poverty Reduction, the Panel found that the project fell short of achieving the objective of "sustainable poverty reduction" by failing to improve the poor's living conditions, or their access to health, nutrition and education.⁹⁹ Instead, the Panel found that the previously identified policy failures meant that the project risked causing adverse, poverty-enhancing, results:

*"The Panel finds that there is a possibility that the Project, in its present form, may not contribute much to alleviating poverty of the forest people, because of the risks mentioned above, and may instead contribute to adverse impacts on poverty to the extent that unsustainable logging-related practices are encouraged."*¹⁰⁰

The Panel also found significant failures by Management in thoroughly complying with the Environmental Assessment policy (OP 4.01).¹⁰¹ The Panel indicated that the Bank improperly classified the particular project component as a category B project even though the risk to the Indigenous community should have prompted the Bank to categorize it as a category A (higher risk) project.¹⁰² Further, it noted the complete absence of any assessment of environmental risks in the second project component, which was later dropped by the Bank shortly before the request for inspection.¹⁰³ It is interesting to note that the Panel indicated that a decision to bring this component of the project into compliance would have been preferable, given that it was necessary to ensure that the requestor's "rights and interests in the forest are recognized and protected."¹⁰⁴

Finally, the Panel assessed the Bank's compliance with the borrower's international obligations under paragraph 3 of the Environmental Assessment policy (OP 4.01), finding that Management had failed to ensure that the project would not affect two core international environmental agreements signed and ratified by the Congo, which were of great importance to the project:¹⁰⁵

"Had the Bank performed a policy-consistent EA, it would have found that the obligations of DRC under at least two international environmental agreements pertained to the project: the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and the

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).”

Key observations:

The *Congo: Transitional Support Project* illustrates the three ways in which the Panel interprets the Bank’s early project design obligations to ensure protection of core human rights covered by the Bank’s policies. First, the Panel’s use of purposive interpretation techniques indicates that the Bank’s policies are read in light of their sustainable development goals and human rights-enhancing ends. The case also provides an early example of the Panel reviewing the applicable international obligations of the borrower and calling on Bank Management to take them into account as part of its due diligence obligations during the initial stages of project design and impact assessment. Lastly, the case indicates the Panel’s commitment to the sustainable development goals of the Bank’s operations and the latter’s close connection to the claimants’ rights. This approach is confirmed by the Panel’s final remark, emphasizing that the ultimate goal of the Bank’s action is “to ensure that the forests benefit the people in DRC [Democratic Republic of Congo] and that they be available for both present and future generations.”¹⁰⁶

4) Cambodia: Land Management and Administration Project (2010)

The Panel’s case on *Cambodia: Land Management and Administration Project (2010)*¹⁰⁷, which aims to improve land tenure security and promote the development of efficient land markets, further clarifies the sensitive question of the Bank’s compliance with its policies in country contexts with serious and widespread human rights violations and emphasizes the extremely important role of the Bank’s due diligence obligations during the project appraisal and supervision stages.

In its report, the Panel assessed the Bank’s compliance with its policies on Project Appraisal (OMS 2.20) and Supervision (OP/BP 13.05)¹⁰⁸ and Involuntary Resettlement (OD 4.30) in the light of the requestors’ four main allegations: (1) denial of their due process rights; (2) the Bank’s non-compliance with its own involuntary resettlement policy; (3) the negative impact of the project on the requestors’ customary property rights; and (4) continued forced evictions.¹⁰⁹

The Panel found that the Bank failed to comply with its project supervision obligations (OP/BP 13.05) by failing to give due consideration to the requestors’ complaints or to put in place an appropriate adjudication system, consequently causing significant harm to requestors’ property rights.¹¹⁰

Regarding the Bank’s policy on involuntary resettlement, the Panel found that the Bank formally complied with the requirement to put a Resettlement Policy Framework in place. Nevertheless, the Panel held that the general uncertainty and incoherence in the application of the Policy was inconsistent with the Bank’s policy framework on involuntary resettlement (OD 4.30) and project supervision as a whole (OP/BP 13.05).¹¹¹ The Panel then invoked international legal standards and stated that the resettlement process:

“in no way met the standards [...] reflected in widely accepted international standards (such as enshrined in relevant human rights instruments)”¹¹²

Moreover, the Panel held that the flaws in the land titling design process substantially weakened the requestors’ capacity to claim and formalize their pre-existing customary land rights, contrary to the

Bank's project appraisal¹¹³ and supervision obligations,¹¹⁴ noting that:

*“The Panel finds that design flaws in the Project led to the arbitrary exclusion of lands from the titling process and that this denied residents, especially the poor and vulnerable, the opportunity to claim and formalize their pre-existing rights through the adjudication process under [the project].”*¹¹⁵

Moreover:

“The Panel finds that Management did not adequately follow up Project commitments to strengthen public awareness and community participation, ensure legal protection to residents exposed to the risk of eviction, and provide adequate access to dispute resolution mechanisms. This was not in compliance with OP/BP 13.05.”¹¹⁶

Finally, with regard to the claim of forced evictions, the Panel found again that irregularities in the project's design and implementation contravened Bank obligations both under its project appraisal and supervision policies,¹¹⁷ noting that:

“Forced evictions is one of the main issues related to human rights violations in Cambodia, affecting thousands of families across the country in urban and rural areas, predominantly people living in poverty.”¹¹⁸

It further stressed that the project was inconsistent with the borrower's international human rights commitments on adequate housing:

“In 1992, Cambodia ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) which establishes the right to adequate housing. The Committee monitoring the implementation of this Covenant has expressed concerns over forced evictions and their prima facie incompatibility with the requirements of this international human rights treaty.”¹¹⁹

The Panel also pointed to numerous World Bank studies, NGOs reports¹²⁰ and Independent UN experts on “grave breach[es] of human rights” in the context of forced evictions in the country.¹²¹ The Panel found the Bank to be non-compliant with its generic monitoring and evaluation obligations in the context of the project supervision framework (OP/BP 13.5 and OMS 2.20)¹²² as the Management had failed to take account of the widespread and continuous human rights violations during the first six years of the project's implementation.

Key observations:

In the *Cambodia: Land Management and Administration Project* (2010) investigation, the Panel first adopted a detailed reading of the Bank's due diligence obligations, emphasizing the risks raised by the particular human rights irregularities to the Bank-financed operations. It also highlighted the onerous responsibilities of the Bank in project design and supervision arising from such risks. Second, the Panel's findings were informed by “widely accepted international standards” on housing such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the conclusions of specialized human rights monitoring bodies. Finally, the Panel's approach illustrates the importance of a careful due diligence assessment of the borrower's human rights situation and early resolution of identified risks as necessary to ensure the efficiency of Bank-financed projects and the achievement of the Bank's development mission.

5) Ethiopia: Promoting Basic Services Phase III Project (2014)

The *Ethiopia: Promoting Basic Services Phase III Project* investigation report deals with the significant risks created by the relationship between Bank-financed and nationally financed projects which contribute to expanding access and improving the quality of basic services, where the latter is linked to allegations of human rights abuses.¹²³ The investigation also highlights the importance of undertaking thorough human rights risk assessments and information-gathering and appropriate mitigation measures at the early stages of project design as a part of the Bank's due diligence obligations.

In its report, the Panel assessed the claims of the requestors, representatives of the Anuak indigenous community, regarding the indirect contribution of the Bank's project (PBS III) to the irregularities of the Government's 'Villagization Programme' (CDP), which included loss of ancestral land rights and forced eviction in areas unsuited for a decent standard of living.¹²⁴ The Bank-financed project was the third operation supported by the Bank and other development partners aimed at providing basic education, health, water, sanitation and water supply services through block grants. During the same period, a government-funded program—the 'Commune Development Program' (CDP), relocated individuals in the country's developing regions, also covered by the Bank-financed PBS program on basic services delivery.¹²⁵

It is important to note that the Bank's PBS program was designed from the outset in response to the borrower's high political instability and human rights abuses reported in the aftermath of the 2005 parliamentary elections.¹²⁶ The PBS program was specifically designed as an innovative investment instrument, providing budget support for block grants. This was intended to allow for a more transparent control of resources and a lower risk of the diversion of funds.¹²⁷ Reflecting this sentiment, the World Bank Independent Evaluation Group reported that:

“responding to concerns that the PBS program could release funds for the government to exercise control over the population, or that the government could steer funding away from opposition regions towards those it considered loyal, the Bank needed to build tests of additionality and transparent and fair allocation into its operation.”¹²⁸

In its investigation, the Panel examined the Bank's compliance under the Project Appraisal policy (OMS 2.20) along with the Banks' risk assessment guidance note (ORAF),¹²⁹ Indigenous Peoples Policy (OP 4.10) and the Bank's Supervision obligations under Investment Project Financing Policy (OP/BP 10.00).

The Panel found that the Bank failed to carry out a complete and comprehensive assessment of the risks posed by the government-financed CDP program as was required by the ORAF guidance framework. This might have revealed the alleged human rights abuses in the very early stages of project preparation and the omission was found to be in non-compliance with the Bank's policy on project appraisal as a whole (OP/BP 10.00).¹³⁰ The Panel further held that the attempt to mitigate the effects of the omission through additional fund allocations and impact studies during the project implementation were insufficient to remedy the resultant harm:¹³¹

“Notwithstanding these developments, it is the view of the Panel that the lack of recognition and analysis during appraisal of the operational interface between PBS III and CDP, as required by

the ORAF [...], meant that the resulting risks were not adequately taken into account or properly managed and mitigated during PBS III implementation.”

The Panel also found that the Bank failed to comply with its Indigenous Peoples policy framework since neither the policy nor its ‘functional equivalent’ were sufficiently taken into account during the design of the project, to the detriment of the Anuak indigenous community.¹³²

“The Panel notes that livelihoods, well-being and access to basic services, which are closely tied to the Anuak’s access to land and natural resources was not taken into account in the design of PBS III, in non-compliance with OP 4.10.”

Finally, the Panel held that the Bank failed in its general project supervision obligations (OP/BP 10.00). In doing so, it again emphasized the operational link between the two projects and the grave impact the government-funded program had on the populations’ livelihood and food security, holding that further efforts at supervision were needed to ensure that basic services were actually delivered and results effectively achieved on the ground.¹³³

It is important to note that while the Panel explicitly refused to examine the requestors’ allegations of human rights abuses on the basis that such examinations would exceed its mandate, it nevertheless played a role in raising awareness by including the requestors’ testimonies collected during its investigation on involuntary taking of land, use of force, deprivation of liberty and physical harm during the government-funded relocation process.¹³⁴

“As mentioned earlier, the Panel noted at the eligibility stage that the “investigation will not seek to verify allegations of specific human rights abuses linked to [CDP] [...] as the Panel does not see this to be within its mandate. As a result, the investigation report does not include findings of facts and compliance on the first two issues of harm noted above. Nevertheless, in the course of the Panel’s review of documents and interviews in the field, the Panel came across information regarding those allegations. Given that these issues were raised in the Request for Inspection, the Panel records this information below, without attempting to verify them or otherwise.”¹³⁵

While the report does not reference international human rights law, it refers repeatedly to reports and findings of specialized international human rights specialized bodies to substantiate its findings, highlighting the importance of cooperation with such bodies in the Panel’s process. References include the UNICEF research study on the disadvantaged situation of Anuak women and children,¹³⁶ UNCHR reports on the situation of refugees,¹³⁷ the country’s encouraging progress under UN Millennium Development Goals¹³⁸ and Human Rights Watch reports on specific human rights abuses.¹³⁹

Key observations:

The *Ethiopia: Promoting Basic Services Phase III Project* investigation confirms a consistent approach on the Panel’s part in extensively interpreting the existing human rights dimension of the Bank’s policies. The Panel emphasizes in particular the importance of thorough observance of the Bank’s due diligence obligations in the early stages of project preparation in order to anticipate and mitigate the human rights risks linked to the project. While there is no direct reference in the report to external international law sources, the report highlights the Panel’s awareness-raising function in instances

where the examination of human rights claims falls beyond its mandate. By pointing to findings of alleged human rights violations, the Panel brings human rights into the spotlight, inviting action from specialized human rights bodies. Finally, the Panel's practice highlights the Bank's sustainable development mission and the importance of respect for basic human rights, such as the right to water and food, in achieving the Bank's development goals.

6) Uzbekistan: Second rural enterprise support project (2014)

In the *Uzbekistan: Second rural enterprise support project*¹⁴⁰ case, which involved a project that aimed to increase the productivity and sustainability of agriculture and profitability of agribusinesses, including cotton and wheat, in Uzbekistan, the requestors claimed that the Bank's funding was used to support agricultural holdings where child and forced labor were widespread. The Requesters alleged actions that were in violation of core human rights international conventions and the Bank's policies.¹⁴¹

In this case the Panel did not recommend a formal investigation.¹⁴² Nevertheless, the eligibility report is highly instructive since it presents the cooperative, rather than adversarial, dialogue between the Bank Management and the Panel, which were both equally committed to mitigating the alleged human rights violations on child and forced labor linked to the project.¹⁴³

Because the Panel had sufficient evidence of the Management's efforts to promptly remedy the violation, it refrained from reaching a decision on the Bank's compliance.¹⁴⁴ In doing so, the Panel noted that the Bank reached out to the ILO to monitor the use of forced and child labor, with the aim of ultimately eradicating it, and welcomed the Bank's external partnerships in monitoring human rights compliance in Bank-financed projects.¹⁴⁵

The importance of the report derives from the Management's express recognition of the need to identify and mitigate human rights risks during the project preparation and implementation phases, as well as of the value of international human rights law standards on the matter:

"Management indicated that Uzbekistan is a signatory of many ILO Conventions [138, 182, 105] and that Uzbekistan's domestic legislation includes a number of provisions prohibiting child and forced labor [...]"¹⁴⁶ and that "that the Bank has made "considerable progress in its dialogue with the Government of Uzbekistan and its development partners in addressing the systemic issues concerning child and forced labor in the cotton sector in Uzbekistan.""¹⁴⁷

Key observations:

The *Uzbekistan: Second rural enterprise support project* eligibility report stresses the importance of thorough human rights due diligence and a comprehensive assessment of international human rights standards in the early stages of project preparation. This case highlights Management's express acknowledgement of the gravity of reported human rights abuses and their relevance to the Bank-financed project.¹⁴⁸ Bank Management also expressly acknowledged the relevance of applicable international human rights law to the matter and the importance of cooperation with specialized local human rights actors to mitigate the concerns raised.¹⁴⁹ In this case, the role of international human rights standards and the reports of specialized monitoring bodies are especially important

given that the substantive content of the borrower's obligations, as applied to particular projects, may be less clear in practice.¹⁵⁰

7) Uganda: Transport Sector Development Project (2016)

The *Uganda: Transport Sector Development Project*¹⁵¹ investigation report deals with the question of social and human rights risks posed by Bank-financed projects to local communities. The requestors complained that the Bank-financed road development project posed a substantial threat to the security, well-being, health and basic human rights of project employees and the broader local population. More specifically, the requestors reported lack of participation, inadequate compensation, poor health and safety measures, fear of retaliation, child sexual abuse, teenage pregnancies by road workers, increased spread of sexually transmitted infections, sexual harassment of female employees and inadequate compensation for resettled people.¹⁵²

In its investigation, the Panel primarily examined the Bank's compliance with its obligations under the Environmental Assessment (OP/BP 4.01), Involuntary Resettlement (OP 4.12) and Investment Project Financing (OP/BP 10.00) policies.

The Panel started its examination with the project-specific concerns, finding that the Bank failed to comply with the Environmental Assessment policy (OP/BP 4.01). More specifically, the Panel found that the project lacked adequate environmental and social institutional capacities,¹⁵³ that the project-affected communities were not effectively consulted,¹⁵⁴ and that the project-specific impacts did not pay due consideration to the health and safety of the local communities and working conditions of project employees, as detailed under the Banks' Environmental Health and Safety Guidance (EHS).¹⁵⁵ As the above-mentioned irregularities were not mitigated in a timely manner and ultimately led to the cancellation of the project shortly after the Panel's registration of the request for inspection, the Panel found that the Bank also failed to comply with its supervision obligations under OP/BP 10.00.

"The Panel finds Management did not ensure the design or implementation of appropriate mitigation measures to protect the community and workers against construction impacts, thus seriously jeopardizing human health, safety, and livelihoods [...]"¹⁵⁶

The Panel also found multiple instances of non-compliance with the Bank's policy on involuntary resettlement (OP/BP 4.12), reporting that several areas were lacking: adequate data on project affected communities,¹⁵⁷ prior and full compensation of the relocated people,¹⁵⁸ adequate supervision of the Resettlement Action Plan¹⁵⁹ and a general redress mechanism.¹⁶⁰ In this context, the Panel pointed to the requestors' fear of reprisal if they raised issues of fair compensation and access to redress, stating that:

"The Panel [...] was informed about intimidation of members of the Bigodi Grievance Redress Committee and perceived apprehension among community members, some of whom were too fearful to speak with the Panel."¹⁶¹

The Panel then assessed the social implications of the project on local communities in detail, with a particular focus on the issues of gender-based violence and child protection, finding that the Bank had failed to uphold its social assessment and supervision obligations (under OP/BP 4.01 and OP/BP 10.00). The Panel found substantial evidence that confirmed the requestors' claims of sexual

harassment of women employees, child pregnancies, sexual abuse, child labor and the potential spread of sexually transmitted infections which were neither anticipated in the project design, nor efficiently mitigated during the project implementation phases, contrary to the Bank's due diligence obligations:

“Panel finds the lack of appropriate mitigation measures to address the social impacts related to gender-based violence and child protection resulted in serious harm to the community, and this is in non-compliance with OP/BP 4.01 on Environmental Assessment.”¹⁶²

Further:

“The Panel finds Management failure to detect the serious harm suffered by women and children of the community during supervision of Project implementation, or to propose measures for redressing such harm, in non-compliance with OP/BP 10.00 on Project Investment Financing.”¹⁶³

Although the Panel did not refer directly to the international law framework on the rights of women and children, its assessment was largely informed by the conclusions of international human rights bodies, such as UNICEF,¹⁶⁴ and the applicable UN Convention on the Rights of Children,¹⁶⁵ as well as the national legal framework reforms adopted in the light of these international commitments.¹⁶⁶

Given the gravity of the above irregularities and the Bank's passive response, the Panel felt compelled to find the Bank's overall project supervision non-compliant with its policies, stressing again the Bank's lack of appropriate complaint handling mechanisms and its tardy responses to repeated complaints by the requestors:

“The Panel finds Management's overall supervision of the Project, including its actions in response to the Request received in December 2014, in non-compliance with Bank Policy on Investment Project Financing OP/BP 10.00.”¹⁶⁷

Finally, consistent with its ‘lessons-learnt’ report,¹⁶⁸ the Panel stressed the importance of sound social impact assessment and adequate risk management in any successful Bank project, stressing that these are essential in achieving the Bank's sustainable development goals:

“The Panel would like to emphasize that any infrastructure project has the potential for inducing change which might entail negative, social consequences. Being aware of this, and having the requisite tools to anticipate, analyze adequately, and mitigate such negative impacts, are key elements for achieving the successful development outcomes the project is meant to deliver.”¹⁶⁹

Key observations:

The *Uganda: Transport Sector Development Project*¹⁷⁰ investigation underscores the important human rights risks that may be raised by the Bank's development operations and the need to adopt vigilant and timely mitigation measures in response. In its analysis, the Panel first adopted an extensive interpretation of the Bank's policies, with a particular emphasis on the Bank's due diligence obligations during project planning and implementation. The Panel also stressed the Bank's obligation to put in place appropriate safeguards against potential and actual human rights harms arising from the Bank's impact assessment and resettlement obligations. Second, the Panel's findings were informed by the international law framework and studies of specialized children's

rights bodies, including the UN Convention on the Rights of the Child and UNICEF reports on the situation of women and children.¹⁷¹ Third, the Panel highlighted the importance of carrying out a sound human rights assessment in achieving the Bank's development goals. In this, the Panel again stressed that the rights of the affected and most vulnerable groups lay at the core of any successful development action of the Bank.¹⁷²

2.3 Investigation Reports: Interim Conclusions

This brief analysis of a range of the Panel's reports engaging with human rights issues shows that the Panel's investigations contain a close reading of the Bank's policies and procedures. It is clear that the Panel's approach takes into account the human rights standards embedded in the Bank's policies and procedures as well as the international norms they reflect.

First, the Panel's practice helps to give effect to international human rights standards incorporated in the Bank's policies and procedures. In these instances, the Panel interprets the Bank's policy framework to contain implicit human rights standards and principles, such as the right to information, consultation, participation, the right to redress and grievance mechanisms and the right to sustainable development. Hence, the Panel's practice contributes to delineating the scope, objectives, and effective application of particular Bank obligations which incorporate international human rights standards, thereby promoting consideration of the human rights of communities that may be marginalized and adversely affected by the development process. Moreover, the Panel highlights the borrowing country's context and the human rights risks which may arise and further emphasizes their relevance to the Bank's due diligence obligations during project planning and implementation. By progressively interpreting and applying the Bank's due diligence obligations consistently with their sustainable development objectives, the Panel contributes to furthering of the Bank's development framework and its application to future operations.

Second, the analysis shows that the Panel consistently makes reference to the applicable international human rights framework and work of specialized human rights bodies. As noted above, in the *Chad-Cameroon Petroleum and Pipeline Project*, the Panel expressly pointed to the Universal Declaration of Human Rights and stated that it: “[...]felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies”¹⁷³ In the *Honduras: Land Administration Project (2007)* the Panel concluded that the ILO Convention's provisions were applicable to the Bank since the Bank's operational policy on project appraisal required it to ensure that its financed activities are consistent with the borrower's international agreements regarding the environment, as well as the health and well-being of its citizens¹⁷⁴ In the *Congo: Transitional Support for Economic Recovery Grant Project (2007)*, the Panel referred to the World Heritage Convention and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the potential of these instruments to help prevent project irregularities if detected and thoroughly taken into account at the early stages of project planning.¹⁷⁵ Similarly, in the *Cambodia: Land Management and Administration Project (2010)* the Panel emphasized that the wide-scale forced evictions signaled by monitoring bodies of the International Covenant on Economic Social and Cultural Rights should have been taken into

account by the Bank during the project design phase.¹⁷⁶

Third, the Panel's reports emphasize the importance of human rights compliance to the achievement of the Bank's development mission. In taking this view, the Panel internalizes human rights concerns as part of essential project-efficiency considerations. As seen above, the Panel expressly points to serious human rights abuses, where the latter are of such magnitude that they jeopardize the effective implementation or continuation of a Bank-financed project.¹⁷⁷ This approach is encapsulated by the Panel's statement in the *Ethiopia: Promotion of Basic Services Phase III* (2014), where it held that observation of accepted environmental and social safeguard principles is fundamental to the effective delivery of project results and the projects' successful outcomes.¹⁷⁸ The approach is also clear from the recent *Uganda: Transport Sector Development Project*, where the Panel explicitly held that a sound assessment of potential human rights risks and their timely mitigation is essential for the effectiveness of any present and future Bank development action and in particular for "*achieving successful development outcomes [a] project is meant to deliver.*"¹⁷⁹

Importantly, the analysis above reveals that the Panel is not unilaterally introducing human rights considerations into Bank procedures and practices. Instead, the Panel's engagement with human rights issues follows from the Bank's obligations and the nature of the investigation requests concerning Bank-financed projects. In all of these cases, the central issue of project irregularities, which impinged on the rights of individuals and groups, were not adequately taken into account as part of Bank due diligence obligations during the project design or implementation phases. Consequently, the Panel's task and responsibility is to point to these omissions and to indicate the remedial actions necessary to ensure that projects are socially and environmentally sustainable.

PART III. THE LEGAL BASIS FOR THE PANEL'S APPROACH

The analysis above demonstrated that the Panel has established itself as an increasingly effective internal accountability mechanism which holds the Bank to a high standard of accountability with respect to its internal human rights standards and indirectly in relation to the broader framework of international human rights law. At the same time, the Panel's approach still encounters significant limitations in its ability to ensure that "reasonable alternative means" of human rights protection are available, as discussed above in relation to the justification for upholding the World Bank's legal immunity.¹⁸⁰ For example, the Panel still cannot order remedies or monitor the redress actions adopted by the Board. Further, the Panel's references to international human rights frameworks are often scarce and made in passing. Keeping these legal and institutional constraints in mind, the Panel has nevertheless insisted that Bank projects must not contribute to human rights violations, which, as argued below, is a stance firmly rooted in the Panel's founding Resolution (3.1.) and within the Bank's legal and institutional framework (3.2).

3.1 The Panel's founding resolution

1) The quasi-independence of the Panel

With regard to its founding resolution and its structural position within the Bank, the Panel, while not a fully-independent body, enjoys a high degree of operational independence in exercising its functions.¹⁸¹

The Panel members are selected based on their independence from Bank Management, their experience in developmental issues, and their ability to deal fairly and thoroughly with the requests before them.¹⁸² Further, the Bank may not employ former panel members and former Bank employees cannot serve on the Panel until at least two years after their term of service.¹⁸³ Additionally, Bank Management has no control over the Panel's budget and cannot interfere with the Panel's findings of admissibility, eligibility, or its decision to investigate.¹⁸⁴ The Panel's quasi-independence has been historically affirmed by the Board's respect for the Panel's mandate, ensuring its institutional integrity and credibility.¹⁸⁵

This operational independence has allowed the Panel to incrementally develop its practice towards increased protection of affected individuals and their rights while interpreting the Bank's obligations in light of the projects' content and context. This power to independently interpret and apply the Bank's policies and procedures in the light of international human rights standards relevant to Bank operations enables the Panel to fulfil its mission as an effective accountability mechanism.

2) The ability of the Panel to reference international law

According to its founding Resolution, the Panel's subject-matter jurisdiction is limited to hearing requests alleging the Bank's failure to comply with its policies and procedures.¹⁸⁶ The resolution explicitly states that the Panel must 'consider all the relevant facts' in assessing Bank compliance.¹⁸⁷

As outlined above, the Panel has indicated that international human rights laws are among the facts that may be relevant to the Panel’s investigations in circumstances like those indicated in the cases discussed above.

One of the Bank’s former General Counsel, Ana Palacio, in her discussion of the significance of human rights to the work of the World Bank, stated that “there is a need for recognition of the role of human rights as legal principles, which may inform a broad range of activities, and which may enrich the quality and rationale of development interventions, and provide a normative baseline against which to assess development policies and programming.”¹⁸⁸

In practice the Panel has largely followed the approach proposed by Palacio. For example, the Panel has referred to treaties such as the Universal Declaration of Human Rights,¹⁸⁹ the ILO 169 convention¹⁹⁰ the International Covenant on Civil and Political Rights,¹⁹¹ and the International Covenant on Economic, Social and Cultural Rights.¹⁹² The fact that the Panel’s founding resolution is silent on the question of applicable international law in the investigation of complaints brought before it does not prevent the Panel from drawing on relevant sources of international law or referring to the output of competent international human rights bodies in the interpretation and application of the Bank’s policies and procedures.¹⁹³

3.2 The Bank’s legal and institutional framework

1) The relevance of the political prohibition

The “political prohibition” clause is contained in two specific provisions of the Bank’s Articles of Agreement. First, Article III Section 5(b) provides that “the Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”¹⁹⁴ Second, Article IV Section 10 of the Bank’s Articles of Agreement, titled “Political Activity Prohibited”, provides that “the Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decision by the political character of the member or members concerned.”¹⁹⁵

The precise meaning and implications of these phrases for the work of the Bank has been the subject of much debate. Over time, various General Counsels of the Bank have adopted different approaches particularly in response to the question of whether the ability or obligation of Bank management is affected if human rights considerations are taken account of in its work. While some, such as Anne Marie Leroy, have taken a more restrictive approach,¹⁹⁶ others such as Roberto Dañino adopted a more expansive understanding of the circumstances in which the Bank should take human rights considerations into account.¹⁹⁷ While the key terms “development”, “political” and “economic” are not defined in the Articles of Agreement,¹⁹⁸ the Bank acknowledged early on that it “cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of a borrower”¹⁹⁹ and General Counsel Ibrahim Shihata noted that the Bank played a significant role in promoting various economic and social rights “within the limits of its mandate”.²⁰⁰

Amidst the shifting understanding of the political prohibition clause and the various stances adopted by successive General Counsels, the Bank has significantly expanded the scope of its work. Its activities now encompasses issues of legal and judicial reform, education, gender equality, governance and anti-corruption,²⁰¹ which clearly entail many human rights issues. This evolution of the Bank's work has been accompanied by a changing interpretation of the political prohibition clause, initially as an absolute prohibition,²⁰² to a more flexible and functional interpretation whereby human rights considerations may be taken into account where they have an impact on the economic efficiency of development action, and so long as the Bank does not engage in partisan politics.²⁰³ Bank officials, including General Counsel, have also gradually recognized that the concept of development itself has a “strong human rights dimension”.²⁰⁴

While there is broad agreement that the Bank is not and should not be a generalized enforcer of the human rights obligations of borrower states, the Bank must clearly take account of human rights concerns which are either embedded in its policies or affect the viability and development objectives of its activities; additionally its activities must not be complicit in or contribute to human rights abuses. Further support for this interpretation of the political prohibition clause's scope is provided by the fact that the clause itself refers to the achievement of the development goals of the Bank. The text of the political prohibition states that economic considerations “shall be weighed impartially in order to achieve the purposes stated in Article I”, and Article I refers to the Bank's development mission.²⁰⁵

Moreover, the Bank's Articles of Agreement state, in a section titled ‘Relationship to Other International Organizations, that the Bank shall cooperate with any international organizations having specialized responsibilities in related fields.²⁰⁶ The Articles further state that where the decisions of the Bank relate to matters directly within the competence of any international specialized organization, the Bank shall consider the views and recommendations of such bodies.²⁰⁷ Given that the Bank must do so, the Panel should also consider the relevant work of human rights bodies, as it has done in practice.

To conclude, given the scope of the Bank's activities and the extent of its obligations, the Panel's practice, as described in Part II, does not contradict the political prohibition in the Bank's Articles of Agreement.

2) The Bank's mandate

The Panel's engagement with human rights does not mean that the Bank exceeds its mandate by becoming an enforcer of the borrower's human rights obligations. The role of the Panel remains limited to the determination of compliance by the Bank with its own policies, which is the central objective of the Panel's investigative work. The integration of human rights considerations on the other hand ensures that all information relevant to assessing the Bank's compliance with its due diligence policies are taken into account, and that any harm identified can be mitigated in a timely manner. As seen above, international standards may be relevant to the Panel's interpretation of the Bank's safeguard policies when they are applied to a particular project and country context. As the case of *Uzbekistan* illustrates, a timely reference to and application of the provisions of various ILO Conventions, could have helped resolve Management's uncertainty, given that there is an extensive body of jurisprudence from relevant expert bodies relating to the application of the ILO

Convention.²⁰⁸ This could have ensured more robust compliance with the Bank policy in question and better fulfilment of the Bank's own mandate.

PART IV. THE WAY FORWARD: THE PANEL'S ENGAGEMENT WITH HUMAN RIGHTS IN LIGHT OF THE NEW ESF AND ITS VISION STATEMENT

On August 4, 2016, the World Bank officially adopted the new Environmental and Social Framework (“Framework” or “ESF”), expected to come into effect in early 2018.²⁰⁹ The ESF is established as a framework with three parts:

- A Vision for Sustainable Development (“Vision Statement”), which sets out the Bank’s aspirations;
- The World Bank Environmental and Social Policy for Investment Project Financing (ESP), which sets out the mandatory requirements that apply to the Bank;
- The Environmental and Social Standards (ESS), which set out mandatory requirements that apply to the Borrower and projects.

The new ESF has introduced two main changes to the Bank’s previous policy framework. First, many obligations under the ESF now lie primarily on the Borrower rather than the Bank, and second, the Bank enjoys greater discretion in observing its own obligations. These changes have given rise to concerns that the Panel’s role as an accountability mechanism for the Bank will be weakened.²¹⁰

Despite the general shift of obligations onto the Borrower and the increase in Bank discretion, the new framework presents significant opportunities to reinforce and enhance the Panel’s ability to both ensure respect for relevant human rights and draw on appropriate international human rights standards. This argument will be developed further in the following section through an analysis of: (1) the ESF’s Vision Statement as an important human rights framework for all Bank action, (2) the human rights standards incorporated in the new ESF and (3) the Bank’s policies within and beyond the ESF and related to the Bank’s due diligence policy framework.

4.1 The Vision Statement

The Vision Statement provides a set of principles that is intended to guide both the Bank’s and the Borrower’s obligations under the new ESF.²¹¹ It expressly provides that the ESF converts the principles set forth in the Vision Statement into tangible, project-level applications in pursuit of the Bank’s mission of sustainable development.²¹² Furthermore, the Vision Statement states that the Bank’s mission of sustainable development goes beyond a principle of “do-no-harm” to focus on “maximizing development gains”. These prescriptions are important because they support the Panel’s use of human rights in its work in a number of ways.

First, the Vision Statement provides that the Bank, in its pursuit of sustainable development, is “committed to open dialogue, public consultation, full access to information, and responsive grievance mechanisms”. This language bolsters the Panel’s practice of holding the Bank accountable for incomplete realizations of procedural rights.²¹³ Further, the Vision Statement states that “social development and inclusion are critical to the World Bank’s development interventions”.²¹⁴ Social

development and inclusion are include the empowerment of individuals through participation, the promotion of equality and non-discrimination, access to education, health, and social protection, and the increased involvement of traditionally marginalized groups.²¹⁵ Each of these principles can be found in international human rights instruments.

Second, the Vision expressly refers to international human rights law by providing that “in this regard, the World Bank’s activities support the realization of human rights expressed in the Universal Declaration of Human Rights”.²¹⁶ By expressly referring to the human rights enshrined in the Universal Declaration as an element of the Bank’s sustainable development mission, the Vision Statement provides the Panel with greater authority to draw on the language of rights and to reference external sources of international human rights law when it assesses the Bank’s compliance. At the same time, the Vision Statement provides that the World Bank “through the projects it finances, and in a manner consistent with its Articles of Agreement [...] seeks to avoid adverse impacts and will continue to support its member countries as they strive to progressively achieve their human rights commitments.”²¹⁷

The Bank’s commitment to supporting borrowing countries in the progressive achievement of their human rights commitments has two main implications. On the one hand, the Panel can continue its current practice of looking at the borrower’s human rights commitments as important context for the Bank’s project and for appraising the project’s capacity to achieve its development objectives. On the other hand, it provides the Panel an opening to consider international legal frameworks and human rights in interpreting the Bank’s obligations with respect to particular ESS provisions.

4.2 The human rights standards incorporated in the new ESF

As is the case with the current safeguards, the new ESF incorporates human rights both implicitly and explicitly. This bolsters the Panel’s existing practice of enforcing and giving effect to human rights standards already incorporated in the new ESF. The reference to international law sources in the new ESF also supports the Panel’s continued engagement with external international law sources.

1) The ESF’s human rights standards

The new ESF incorporates human rights standards both implicitly and explicitly. The only operational policy which expressly mentions the term “human rights” is the new ESS 7 on Indigenous Peoples. ESS 7 mirrors the language of former OP 4.10 on Indigenous Peoples, providing that the objective of the policy is “to ensure that the development process fosters full respect for the human rights, dignity, aspirations, identity, culture, and natural resource-based livelihoods of indigenous peoples”.²¹⁸

This continued reference to human rights, coupled with the language of the Vision Statement, provides additional support for the Panel’s practice of looking to relevant international human rights law instruments and principles, such as the ILO conventions, and considering the borrower country’s obligations without passing judgment on its compliance. The Panel can use these standards to assess the Bank’s knowledge and the support it provided to the Borrower in the risk assessment, design,

and monitoring of the project to determine whether the Bank adequately ensured the development process fostered full respect for the human rights of indigenous peoples.

Significantly, the World Bank has referred to the ESF as establishing ‘an over-arching non-discrimination principle [that is] augmented by a new mandatory World Bank directive’ and issued a Directive on this as mandated by the ESF.²¹⁹ This Directive includes mandatory requirements for the identification of disadvantaged or vulnerable individuals or groups and the process for addressing their circumstances, thereby implementing the principles of non-discrimination included in the new standard on assessment and management of environmental and social risks and impacts (ESS 1).²²⁰ This suggests an expanding recognition of the spectrum of rights relevant to the Bank’s work, and a broadening of the rights receiving direct protection under the Bank’s policies.²²¹

As with the old safeguards, the remaining ESS provisions do not explicitly mention the term “human rights”. However, the substantive content of the policies implicitly refers to human rights or encapsulates important human rights-related considerations.²²² For example, the policies outlined by the Bank’s new standard on land acquisition, restrictions on land use, and involuntary resettlement (ESS 5) require land tenure to be granted to people affected by involuntary resettlement and reflect the internationally accepted fundamental economic and social rights to an “adequate standard of housing,” and to “adequate food, clothing, and housing, and to the continuous improvement of living conditions.”²²³ Additional human rights principles are enshrined in the standards on community health and safety (ESS 4), cultural heritage (ESS 8), stakeholder engagement and information disclosure (ESS 10).

The Bank’s new standard on labor and working conditions (ESS 2) is an important example of the human rights considerations in the new ESF. It was introduced after consultation with the International Labor Organization and drafted with guidance from the Declaration on the Fundamental Principles and Rights at Work and the core conventions of the ILO.²²⁴ This influence can also be seen in the substantive provisions incorporated under ESS 2, which address child and forced labor, the freedom of association, collective bargaining, occupational health and safety, and the establishment of a grievance mechanism for project workers.²²⁵ Furthermore, the standard’s language explicitly enumerates non-discrimination and equal opportunity protections for workers. Thus, it is evident that while ESS 2 does not explicitly refer to “human rights” as such, many elements of human rights protection are clearly incorporated in the guarantees provided. Therefore, the drafting history of the ESS provides an additional justification for the Panel’s practice in drawing on international law sources, such as the ILO Convention, in interpreting the scope of ESS 2, and also in determining whether the Bank complied with its obligations under the new ESF in light of the borrower country’s human rights obligations.

The embedded human rights content of the ESF thus provides an opportunity for the Panel to strengthen and consolidate its engagement with international human rights law and standards.

Concerns have been articulated that the new ESF contains gaps that could dilute the Bank’s obligations and create loopholes through which the borrower’s ESS obligations may be circumvented.²²⁶ The risk of such gaps underscores the importance of the Panel’s role in interpreting the Bank’s obligations consistently with the objectives articulated in the Vision Statement.

For example, under the new ESF (paragraph 37), only subprojects classified as ‘High Risk’ need to comply with the ESSs, while other subprojects classified as being of lower environmental and social risk need only comply with national regulations. A subproject may be classified as ‘substantial risk’, below ‘high risk’, even if it may ‘give rise to significant social conflict or harm or significant risks to human security’.²²⁷ This creates a need for Panel interpretations of risk grading processes, design of subproject schemes, and overall compliance with the Bank’s policies and objectives. Consequently, the Panel’s role in assessing Bank compliance continues to be important for ensuring that the object and purpose of the ESSs are met despite any apparent ambiguities or loopholes. This will ensure the Panel not only acts as a better internal check on the Management, but will also increase the Bank’s accountability as a whole to affected populations²²⁸

Significantly, the ESF states that the Bank may assess the borrower’s environmental and social framework and “consider recent studies, reviews and other assessments conducted by the Bank [...] or relevant stakeholders, to the extent these are relevant to the proposed project”.²²⁹ In this respect, the ESP echoes the Borrower’s obligation under ESS 1 to take the obligations of the State directly applicable to the project under relevant international treaties and agreements into account: “the Borrower will ensure that its environmental and social assessment takes into account...*obligations of the country directly applicable* to the project under the relevant international treaties and agreements’ (emphasis added). As such, the Bank’s assessment may reference international human rights law, including the studies of specialized international human rights bodies and their monitoring mechanisms, in order to ascertain potential human rights risks relevant to the project, as the Panel has done where relevant.²³⁰

The general reference in the ESF to relevant sources and to “directly applicable” obligations of the country in ESS 1 provides additional ground for the Panel to draw on international human rights law, including the reports of human rights monitoring bodies.²³¹ The Panel can thus help to ensure that the Bank properly considers relevant human rights information both in its *ex ante* assessment of the project and its supervisory functions to ensure that the Borrower complies with its Environmental and Social Commitment Plan (ESCP).²³²

Having argued that the Bank’s new Framework enhances the opportunities for the Panel to refer to international human rights standards, it further ought to be noted that other Bank policies also give rise to human rights related issues. These policies will be briefly discussed in the next section, with a particular focus on the Bank’s due diligence obligations under OP/BP 10.00.

2) The Bank’s expanded due diligence obligations

As discussed in Part II, the ESF is but one part of the Bank’s Operational Manual, which includes other operational policies, policy directives, and guidance documents.²³³ Under the ESF, the Bank’s main obligation is one of due diligence.²³⁴ The current OP/BP 10.0 will continue to govern the Bank’s due diligence obligations throughout the project cycle even under the new ESF.²³⁵ Most importantly, OP/BP 10.00 provides that the Bank must consider economic, environmental, and social considerations and related risks in projects in order to achieve its mission of sustainable development. As seen above, the Panel does not consider the environmental and social safeguards in isolation.²³⁶ Rather, these other policies and frameworks give meaning to the specific provisions of the ESF. Given the

importance of the Bank's due diligence obligations under the new ESF, there is an even greater need for the consideration of human rights risks as a component of due diligence where relevant to the success and development objectives of a project.

In the identification phase, the Bank, in consultation with the borrower, assesses the main risks to achieving the project objectives, provides an overall risk rating for the project, and identifies whether ESS policies are likely to be triggered.²³⁷ Under the Bank's Framework for Management of Risks and Operations, the Bank provides an overall risk rating for a project through a new risk-rating tool, the Systematic Operations Risk-Rating Tool (SORT). The Bank rates a project on a four point scale (high, substantial, moderate, low) against nine different types of risk (environmental and social, fiduciary, institutional capacity, macroeconomic, political and governance, sector strategies, stakeholders, technical design, other). The risk rating is publically disclosed in line with the Bank's Access to Information Policy, providing enhanced opportunities for affected communities to participate in articulating and become informed of a project's risks.

Under the ESF, the Bank is still required to conduct its own due diligence of proposed projects. This requires the Bank to assess whether the project is capable of being developed and implemented in accordance with the ESS provisions 'in a manner and timeframe acceptable to the Bank'.²³⁸ While the latter language appears to give the Bank discretion in how it interprets compliance with the ESS provisions, the Bank is constrained by the requirement that the standard of its due diligence efforts be proportionate to the nature and significance of the environmental and social risks²³⁹. Furthermore, the Bank's initial risk classification determines the applicability of specific ESS provisions triggering additional assessments on the borrower's part, such as an environmental assessment under ESS 1. ESS1 parallels the Bank's due diligence obligation in that it requires that the borrower complete an assessment that is proportionate to the potential risks and impacts of the project.²⁴⁰ In this way, the borrower's ESS obligations are tightly linked to the Bank's due diligence obligations.

As a result of the link between the Bank's due diligence obligations and the borrower's ESS obligation, the Panel continues to have grounds to find the Bank non-compliant for failing to adequately assess human rights risks. Furthermore, if the Bank inaccurately classifies the project as lower-risk by failing to take into account the type of risks identified in the ESF, the Panel can hold the Bank accountable for the harm caused in failing to comply with its due diligence obligations under the ESF.

Once the project has been assigned a risk classification, the Bank begins its risk assessment. The question that arises then is whether the social, environmental, or other related risks referred to in the ESF and OP/BP 10.00 include human rights risks. The Vision Statement and the substantive provisions of the ESF make clear that human rights issues are relevant when they manifest as social and environmental risks to the success of the project.²⁴¹ In addition to social and environmental risks, the ESP recognizes that other areas of risk may be relevant, depending on the specific project and the context in which it is being developed. This includes legal and institutional considerations, governance structures, and stability, conflict or security. These concepts are elaborated in the SORT, which provides guidance on the types of risks the Bank should consider from the earliest stage of project preparation through implementation of the project.²⁴² The SORT defines two types of risk that are relevant considerations for the Bank: risks to achieving the intended (positive) results and development goals of a project, and risks of adverse unintended (negative) consequences including

risks to money, people, and the environment. Human rights may fall into either of these categories since violations of human rights may impede the successful development objectives of the project or adversely harm individual well-being and interests. Notably, the SORT provides that systemic countrywide risks posed by a country's politics and governance, societal and security issues, are relevant risks the Bank should take into account.

While formally non-binding, the SORT provides a dynamic risk-rating tool within a broader risk assessment framework for the Panel to evaluate the scope of risks relevant to the Bank's due diligence in connection with the Borrower's ESS provisions. Indeed, this is what the Panel has done in practice with the current safeguards.²⁴³ If the harm alleged was the result of a borrower's failure to abide by the ESS provisions on involuntary resettlement, the Panel can look to the SORT to determine if the resultant harm was caused by a risk the Bank should have taken account of as a political and governance, safeguards, or other risk. This approach gives meaning to the term "other related risks" in OP/BP 10.0 as including risks related to civil and political rights, such as rights to information and assembly, and enables the Panel to ensure that the Bank supports the borrower in its ESS obligations.

After the project has been approved, the borrower implements the project and the Bank has an ongoing duty to monitor the borrower's compliance with the project obligations agreed to in the Environmental and Social Commitment Plan (ESCP). The Bank's monitoring role is focused on overseeing project implementation together with the environmental and social performance of the project in accordance with the ESCP and includes revision of the ESCP as a result of changes in design or project circumstances. In addition to its ongoing monitoring obligation, the Bank is required to ensure that the borrower has implemented the project with adequate consultation and stakeholder engagement.

Due to the fact that the Bank's ongoing due diligence obligation extends even to the borrower's implementation of the project, the Panel can continue to hold the Bank responsible for project failures that result from the Bank's inadequate monitoring procedures which disregard core human rights concerns during project implementation.

CONCLUSION

This report has examined the Inspection Panel's engagement with international human rights to date, and the legal basis for its work in this respect, as well as the likely future engagement of the Panel with human rights under the Bank's newly adopted Environmental and Social Framework. It concludes that the Panel has actively engaged with human rights claims and human rights law throughout its twenty-four year history in a range of ways, and that the new Framework has strengthened the basis for the Panel to do so in the future.

The Panel is well placed to continue to promote the World Bank's mission of sustainable development, which ought to situate the rights of the most vulnerable, disadvantaged, and marginalized communities at the core of any development action. The Panel may do so by consistently interpreting the Bank's policies in the light of the Vision Statement of the new Framework and by upholding the human rights standards contained therein. The new Framework supports the Panel's practice of interpreting the Bank's human rights due diligence and supervision obligations in such a way as to prevent human rights violations connected to Bank-financed projects and ultimately to foster the success and effectiveness of the Bank's overall development objectives.

As noted at the outset of this report, the immunity of international organizations like the World Bank is coming under increasing pressure as legal challenges are brought in a climate of increasing distrust of international organizations and their activities. The report has argued that, as a part of its broader functions as an accountability mechanism, one way to protect the immunity of the Bank is to empower the Inspection Panel to ensure a high standard of internal accountability. The work of the Panel can contribute to the robust system of due diligence and monitoring that incorporates all relevant project risks, including human rights. If the Bank is to remain a leader in the field of development and preserve the external legal immunity it currently enjoys, it should continue to empower the Panel to provide "reasonable alternative means to protect effectively [individuals'] rights".²⁴⁴ In the absence of such effective protection, the Bank risks opening itself to scrutiny by domestic courts which may favor a more flexible approach to the immunities of international organizations.

NOTES

- ¹ See Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 INT'L ORG. L. REV. 277, 277–342 (2010), for a comprehensive discussion on the immunity and accountability of international organizations.
- ² In August 2015, a class action for damages and equitable relief was filed by local communities against the International Finance Corporation (IFC) in U.S. courts (“Tata case”). The plaintiffs alleged that the IFC caused the loss of their livelihoods by funding and then failing to adequately monitor the construction and management of the Tata Mudra power plant in Gujarat, India. Complaint, *Jam v. IFC*, 172 F. Supp. 3d 104 (D.D.C. 2016) (No. 15-612). While the court ultimately dismissed the case, it did not dismiss the possibility that the ‘virtually absolute immunity’ of international organizations could be revised by higher courts. *Jam v. IFC*, 172 F. Supp. 3d 104, 112 (D.D.C. 2016). The Tata case is not an isolated occurrence. European courts have been the most willing to consider waivers of immunity for international organizations. In *Waite and Kennedy v. Germany*, the European Court of Human Rights held that granting immunity to an international organization would be permissible only where “equivalent legal protection” for affected individuals and “reasonable alternative means to protect effectively their rights” exist. See *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Comm’n H.R. para. 74 (1997); *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. para. 68 (1999). See also August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Administrative Tribunals*, 7 CHIN. J. OF INT’L L. 285, 285-306 (2008), for a discussion of how national courts in Europe have assessed alternative redress mechanisms following *Waite and Kennedy*.
- ³ Int’l Bank for Reconstruction and Development [IBRD] and Int’l Development Association [IDA] [hereinafter the World Bank], *The World Bank Inspection Panel*, ¶ 12, IBRD No. 93-10, IDA No. 93-6 (Sept. 22, 1993) [hereinafter Resolution].
- ⁴ See Steven Herz & Anne Perrault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, Bank Information Center, 1–16 (2009); Alnoor Ebrahim & Steven Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society*, 1–37 (Harv. Kennedy Sch. Faculty Res. Working Paper No. RWP07-060, 2007), for a discussion on the Panel’s practice of referring to international human rights law.
- ⁵ Herz & Perrault, at 2.
- ⁶ Resolution, *supra* note 3.
- ⁷ See Articles of Agreement of the World Bank, Art. 1, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 (Dec. 27, 1945) [hereinafter Articles of Agreement]; The World Bank, *Ending Extreme Poverty and Promoting Shared Prosperity*, (Apr. 19, 2013), http://www.worldbank.org/en/news/feature/2013/04/17/ending_extreme_poverty_and_promoting_shared_prosperity.
- ⁸ Resolution, *supra* note 3, ¶ 1.
- ⁹ In the late 1980s and early 1990s, the Bank faced immense public pressure from citizens and NGOs over its indifference and inability to address negative social and environmental impacts resulting from its projects. This public pressure, coupled with major project failures, led the Bank to establish the Panel. See THE WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL AT 15 YEARS, at 3 (2009)

[hereinafter Panel Report].

- 10 Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L. L. 553, 554 (1994).
- 11 2014 Operating Procedures, The World Bank Inspection Panel, ¶ 1.1(2) [hereinafter Operating Procedures].
- 12 Compare Bradlow, *supra* note 10, at 602 (describing the Panel as a weak quasi-judicial supervisory mechanism) with Richard E. Bissel, *Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 4, 741-44 (1997) (describing the Panel as a stronger quasi-judicial body because of its impartial decision-making).
- 13 Bradford Morse & Thomas R. Berger, *Sardar Sarovar: Report of the Independent Review*, at 14 (1992), available at <http://ielrc.org/Content/c9202.pdf>. In 1991 the President of the World Bank commissioned an independent review of its *Sardar Samovar* project following mounting public pressure about the social and environmental harms resulting from the project. The independent review, conducted by Bradford Morse and Thomas Berger, found serious compliance failures by the Bank which led to devastating social and environmental consequences. The independent review thus served as a predecessor to the Panel in assessing whether the Bank failed to comply with its internal policies and procedures as well as with “international standards of human rights” that “reflect the inalienable human rights of the oustees.” *Id.* at 14. The results of the independent review prompted the Bank to establish the Panel as an internal accountability mechanism for the Bank.
- 14 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Preamble (Dec. 10, 1948) [hereinafter Universal Declaration].
- 15 See, e.g., *Id.* at arts. 3, 4, 12
- 16 See, e.g., *Id.* at arts. 22, 25, 26.
- 17 ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION 28 (Oxford Univ. Press 2d ed. 2016).
- 18 A Vision for Sustainable Development, Environmental and Social Framework, The World Bank, ¶ 3 (Aug. 4, 2016) [hereinafter Vision Statement].
- 19 *Id.* (“[T]he World Bank...will continue to support its member countries as they strive to progressively achieve their human rights commitments.”).
- 20 The ten core UN conventions include: Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention Protection of All Migrant Workers and members of their Families (1990); Convention on the Rights of Persons with Disabilities; and International Convention on the Protection of All Persons from Enforced Disappearance (2006).
- 21 The eight core ILO conventions include: Forced Labour Convention (1930); Freedom of Association and Protection of the Right to Organize Convention (1948); Right to Organize and Collective Bargaining Convention (1949); Equal Remuneration Convention (1951); Abolition of Forced Labour Convention (1957);

- Discrimination (Employment and Occupation) Convention (1958); Minimum Age Convention (1973); and Worst Forms of Child Labour Convention (1999).
- 22 Resolution, *supra* note 3, ¶ 12, *aff'd*, 1999 Clarification of the Board's Second Review of the Inspection Panel, The World Bank, ¶ 12–13 (1999) [hereinafter 1999 Clarification].
- 23 *Id.*
- 24 *Id.*
- 25 Panel Report, *supra* note 9, at 24.
- 26 *See, e.g.*, Ethiopia Basic Services Project, *infra* note 45, ¶ 142. *See* discussion *infra* Section 2.2(5), pp. 14–16.
- 27 Brazil: Paraná Biodiversity Project (P070552), The World Bank Inspection Panel, Report and Recommendation On Request for Inspection, ¶ 43 (Sept. 11, 2006); Panel Report, *supra* note 9, at 49.
- 28 Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process, The World Bank Inspection Panel (Mar. 30, 2016) [hereinafter Retaliation Guidelines]. These guidelines were established to address concerns about retaliation against persons in previous Panel investigations, including the jailing of an opponent of the Chad-Cameroon: Pipeline Project, *infra* note 48, and the imprisonment of the Panel's translator in the Ethiopia: Basic Services, *infra* note 45.
- 29 Panel Report, *supra* note 9, at 97.
- 30 Operating Procedures, *supra* note 11, ¶¶ 53–54.
- 31 *Id.*
- 32 *Id.* at annex 1, *Piloting a new approach to support early solutions in the Inspection Panel process*, ¶ 8.
- 33 Memorandum from the Inspection Panel to the Executive Directors, Request for Inspection Nigeria: Lagos Metropolitan Development and Governance Project (P071340), Notice of Non-Registration and the Panel's Observations of the First Pilot to Support Early Solutions, ¶ 27 (July 16, 2014).
- 34 The Panel has also engaged with criticisms raised by human rights organizations such as Amnesty International regarding the pilot approach. *See* Response to Amnesty International's Concerns Raised in its Briefing Note on Badia East, The World Bank Inspection Panel, First Pilot on Early Solutions: Lagos Metropolitan Development and Governance Project (Sept. 3, 2014), for the Panel's response to such criticisms.
- 35 Review and Update of the World Bank's Safeguard Policies: Proposed Environmental and Social Framework, The World Bank, ¶ 128 (Aug. 4, 2016).
- 36 Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, at 26 (July 12, 1995) [hereinafter Shihata 1995 opinion]; *Id.* ¶ 49.
- 37 Operational Policy 4.10: Indigenous Peoples, The World Bank Operations Manual, ¶ 1 [hereinafter OP 4.10].
- 38 Operational Policy 4.12: Involuntary Resettlement, The World Bank Operations Manual, ¶ 6, ¶ 13 [hereinafter OP 4.12].

- ³⁹ Ethiopia: Basic Services Project, *infra* note 45, at ¶ 265.
- ⁴⁰ Ibrahim F. I. Shihata, ‘Issues of “governance” in Borrowing Members – the Extent of Their Relevance under the Bank’s Articles of Agreement. Legal Memorandum of the General Counsel of the World Bank Group’, 21 December 1990.
- ⁴¹ OP 4.01 (Environmental Assessment), OP 4.10 (Indigenous People), OP 4.12 (Involuntary Resettlement)
- ⁴² See Chad-Cameroon: Pipeline Project, *infra* note 48, ¶ 217; *see also*, Shihata 1995 opinion, *supra* note 36, at 30.
- ⁴³ Operational Policy 10.00: Investment Project Financing, The World Bank Operations Manual [hereinafter OP 10.00]; Bank Policy 10.00: Investment Project Financing, The World Bank Operations Manual [hereinafter BP 10.00].
- ⁴⁴ *Id.* ¶ 4.
- ⁴⁵ See e.g., Ethiopia: Promoting Basic Services Phase III Project (P128891), World Bank Inspection Panel, Investigation Report ¶ 227, ¶ 233 (Nov. 21, 2014) [hereinafter Ethiopia: Basic Services Project] (finding that human rights violations, namely lack of food and basic services after the project forced the relocation of indigenous people, constituted a violation of the Bank’s appraisal and supervision obligations under OP/BP 10.00).
- ⁴⁶ Resolution, *supra* note 3, ¶ 25.
- ⁴⁷ See Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE (Guy Goodwin-Gill and Stefan Talmon, eds., 1999); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT’L ORG. L. REV. 319, 319-58 (2009); Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 23-57 (2009).
- ⁴⁸ Chad-Cameroon Petroleum and Pipeline Project (P044305), The World Bank Inspection Panel, Investigation Report, ¶ 3 (July 17, 2002) [hereinafter Chad-Cameroon: Pipeline Project].
- ⁴⁹ *Id.* at ¶¶ 1–2.
- ⁵⁰ Chad-Cameroon Petroleum and Pipeline Project (P044305), The World Bank Inspection Panel, Request for Inspection, ¶¶ 4–5 (Mar. 22, 2001).
- ⁵¹ The core obligations of the Bank treated in this case are still in place under the current OP 4.01 on Environmental Assessment (to be replaced by ESS 1 of the ESF in 2018), and OP 1.00 on Poverty Reduction.
- ⁵² Chad-Cameroon: Pipeline Project, *supra* note 48, ¶ 34.
- ⁵³ Now, OP 4.01: Environmental Assessment (Jan. 1999, revised Apr. 2013).
- ⁵⁴ Chad-Cameroon: Pipeline Project, *supra* note 48, ¶¶ 37–39.
- ⁵⁵ *Id.* ¶ 63, ¶ 66, annex I.
- ⁵⁶ *Id.* ¶¶ 6–15.

⁵⁷ *Id.* ¶ 38.

⁵⁸ *Id.* ¶ 135.

⁵⁹ *Id.* ¶ 212 (“As for human rights, Management states in its Response to the Panel that ‘The Bank is concerned about violations of human rights in Chad as elsewhere while respecting the Bank’s Articles of Agreement which require the Bank to focus on economic considerations and not on political or other non-economic influences as the basis for its decisions. In evaluating the economic aspects of any project, human rights issues may be relevant to the Bank’s work if they may have a significant direct economic effect on the project. Having carefully considered all aspects of this issue, Management’s conclusion is that the Project can achieve its developmental objectives.’”).

⁶⁰ Chad-Cameroon: Pipeline Project, *supra* note 48, ¶ 212.

⁶¹ *Id.* ¶ 37.

⁶² *Id.* ¶ 217.

⁶³ *Id.* ¶ 214 (“The Panel appreciates the fact that the frequently imprecise concepts of ‘governance’ and ‘human rights’ acquire special significance in the context of the Bank’s mandate and operations. Nonetheless, the Panel takes issue with Management’s narrow view, and draws attention in this connection to the United Nations Universal Declaration of Human Rights adopted in December 1948, three years after the Bank’s Articles of Agreement cited above entered into effect. On the fiftieth anniversary of this Declaration, the Bank wrote; “The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being - especially the poorest - at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the countries in which it operates.”).

⁶⁴ Retaliation Guidelines, *supra* note 28.

⁶⁵ Chad-Cameroon: Pipeline Project, *supra* note 48, ¶ 38.

⁶⁶ *Id.* ¶ 214.

⁶⁷ Honduras: Land Administration Project (P055991), The World Bank Inspection Panel, Investigation Report, (June 12, 2007) [hereinafter Honduras: Land Administration Project].

⁶⁸ *Id.* ¶¶ 113–114.

⁶⁹ Replaced by OP 4.10, *supra* note 37; to be replaced in 2018 by ESS 7, *infra* note 218.

⁷⁰ Replaced by OP/BP 10.00, *supra* note 43.

⁷¹ Honduras: Land Administration Project, *supra* note 67, ¶ 183, ¶ 188.

⁷² *Id.* ¶ 223.

⁷³ *Id.* ¶ 225.

⁷⁴ *Id.* ¶ 225, ¶ 152.

⁷⁵ *Id.* ¶ 105 (referring to the Inter-American Commission of Human Rights).

⁷⁶ *Id.* ¶¶ 113–114, ¶ 385.

⁷⁷ Honduras: Land Administration Project, *supra* note 67, ¶ 253–258.

⁷⁸ *Id.* ¶ 253–255.

⁷⁹ *Id.* ¶ 256.

⁸⁰ *Id.* ¶ 256, ¶ 260.

⁸¹ *Id.* ¶ 253–255.

⁸² *Id.* at n.152.

⁸³ Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (P081850) and Emergency Economic and Social Reunification Support Project (091990), The World Bank Inspection Panel, Investigation Report (Aug. 31, 2007) [hereinafter Congo: Transitional Support Project].

⁸⁴ *Id.* at ix–xi.

⁸⁵ Replaced by OP 4.10, *supra* note 37; to be replaced in 2018 by ESS 7, *infra* note 218.

⁸⁶ Replaced by OP 4.11: Physical Cultural Resources, The World Bank Operational Manual (July 2006); to be replaced in 2018 by ESS 8: Cultural Heritage, *in* ESF, *infra* note 209 (Aug. 4, 2016).

⁸⁷ Replaced by OP 1.00 (July 2014).

⁸⁸ Congo: Transitional Support Project, *supra* note 83, ¶ 282.

⁸⁹ *Id.* ¶ 269.

⁹⁰ *Id.* ¶ 254.

⁹¹ *Id.* ¶ 332.

⁹² *Id.* at 151.

⁹³ *Id.* ¶ 7.

⁹⁴ Congo: Transitional Support Project, *supra* note 83, ¶ 285 (“OPN 11.03 on Cultural Property states that “The United Nations term “cultural property” includes sites having archaeological (prehistoric), paleontological, historical, religious, and unique natural values. Cultural property, therefore, encompasses both remains left by previous human inhabitants (for example, middens, shrines, and battlegrounds) and unique natural environmental features such as canyons and waterfalls.”).

⁹⁵ *Id.* ¶ 285.

⁹⁶ *Id.* ¶ 287.

⁹⁷ OPN 11.03 referred only to stakeholders such as the government and other agencies. *See* OPN 11.03: Cultural Property, the World Bank Operational Manual.

- 98 Congo: Transitional Support Project, *supra* note 83, ¶ 292.
- 99 *Id.* ¶ 300.
- 100 *Id.* ¶ 312.
- 101 *Id.* ¶ 336–54.
- 102 *Id.* ¶ 341.
- 103 *Id.* ¶ 346.
- 104 Congo: Transitional Support Project, *supra* note 83, ¶¶ 347–348.
- 105 *Id.* ¶ 387.
- 106 *Id.* ¶ 542.
- 107 Cambodia: Land Management and Administration Project (P070875), The World Bank Inspection Panel, Investigation Report (Nov. 23, 2010) [hereinafter Cambodia: Land Management Project].
- 108 Both replaced by OP/BP 10.00, *supra* note 43.
- 109 Cambodia: Land Management Project, *supra* note 107, at vi–vii.
- 110 *Id.* ¶ 177.
- 111 *Id.* ¶ 217, ¶ 223.
- 112 *Id.* ¶ 222.
- 113 *Id.* ¶ 265.
- 114 *Id.* ¶ 270.
- 115 Cambodia: Land Management Project, *supra* note 107, ¶ 263.
- 116 *Id.* ¶ 270.
- 117 *Id.* ¶ 275, ¶ 286.
- 118 *Id.* ¶ 274.
- 119 *Id.* ¶ 275.
- 120 *Id.* ¶ 276.
- 121 Cambodia: Land Management Project, *supra* note 107, ¶ 281.
- 122 *Id.* ¶ 286.
- 123 Ethiopia: Basic Services Project, *supra* note 45.
- 124 *Id.* ¶ 3.
- 125 *Id.*
- 126 Project Performance Assessment Report: Ethiopia Protection of Basic Services Project, World Bank

Independent Evaluation Group, at 1–5 (2013).

127 *Id.*

128 Ethiopia: Basic Services Project, *supra* note 45, ¶ 247; *Id.* at 27.

129 Guidance Note, The Operational Risk Assessment Framework (ORAF), the World Bank Operational Manual, available at <http://documents.banquemondiale.org/curated/fr/527141468148177799/text/NonAsciiFileName0.txt>.

130 Ethiopia: Basic Services Project, *supra* note 45, ¶ 168.

131 *Id.* ¶ 176.

132 *Id.* ¶ 23, ¶ 208.

133 *Id.* ¶¶ 232–33.

134 *Id.* ¶¶ 104–13.

135 *Id.* ¶ 103.

136 Ethiopia: Basic Services Project, *supra* note 45, ¶¶ 72–74.

137 *Id.* ¶ 73.

138 *Id.* ¶ 43.

139 *Id.* ¶ 142.

140 Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for the Second Rural Enterprise Support Project (P126962), The World Bank Inspection Panel, Final Eligibility Report and Recommendation (Dec. 19, 2014) [hereinafter Uzbekistan: Rural Enterprise Support Project].

141 *Id.* ¶¶ 6–7

142 See *Is the World Bank's Inspection Panel working the way it should?* (Jan. 2, 2017, 12:00PM), <https://www.devex.com/news/is-the-world-bank-s-inspection-panel-working-the-way-it-should-86973>, for critiques of the Panel's decision.

143 Uzbekistan: Rural Enterprise Support Project, *supra* note 140, ¶ 16.

144 *Id.* ¶ 19, ¶¶ 35–36.

145 *Id.*

146 *Id.* ¶ 16.

147 *Id.* ¶ 24.

148 Uzbekistan: Rural Enterprise Support Project, *supra* note 140, ¶ 17.

149 *Id.* ¶ 16, ¶ 19.

150 *Id.*

¹⁵¹ Uganda, Transport Sector Development Project - Additional financing (P121097), The World Bank Inspection Panel, Investigation Report (Aug. 4, 2016) [hereinafter Uganda: Transport Sector Development Project].

¹⁵² *Id.* ¶ 4.

¹⁵³ *Id.* ¶ 48, ¶ 50.

¹⁵⁴ *Id.* ¶ 59.

¹⁵⁵ *Id.* ¶ 105. See Environmental, Health, and Safety General Guidelines, The World Bank Operational Manual.

¹⁵⁶ Uganda: Transport Sector Development Project, *supra* note 151, ¶ 146.

¹⁵⁷ *Id.* ¶ 202.

¹⁵⁸ *Id.* ¶ 220.

¹⁵⁹ *Id.* ¶ 233.

¹⁶⁰ *Id.* ¶ 253.

¹⁶¹ *Id.* ¶ 239.

¹⁶² Uganda: Transport Sector Development Project, *supra* note 151, ¶ 357.

¹⁶³ *Id.* ¶ 358.

¹⁶⁴ *Id.* ¶ 256–59.

¹⁶⁵ *Id.* at 108, annex 3.

¹⁶⁶ *Id.* ¶ 255, ¶ 260.

¹⁶⁷ *Id.* ¶ 401.

¹⁶⁸ Cf. Cambodia: Land Management Project, *supra* note 107, at 74–75.

¹⁶⁹ Uganda: Transport Sector Development Project, *supra* note 151, ¶ 419.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* ¶¶ 255–60.

¹⁷² *Id.* ¶ 419.

¹⁷³ Chad-Cameroon: Pipeline Project, *supra* note 48, ¶ 204, ¶ 215.

¹⁷⁴ Honduras: Land Administration Project, *supra* note 67, ¶ 253, ¶ 258.

¹⁷⁵ Congo: Transitional Support Project, *supra* note 83, ¶ 387.

¹⁷⁶ Cambodia: Land Management Project, *supra* note 107, ¶ 275.

¹⁷⁷ This approach echoes some of the Legal Counsels’ positions on the role of human rights in the Bank’s work. See discussion, *infra* pp. 22–23.

¹⁷⁸ Ethiopia: Basic Services Project, *supra* note 45, ¶ 38.

179 Uganda: Transport Sector Development Project, *supra* note 151, ¶ 419.

180 Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. para. 68 (1999).

181 Resolution, *supra* note 3, ¶ 13; 1999 Clarification, *supra* note 22, ¶ 3, *see also* Bradlow, *supra* note 10, at 601–3.

182 Resolution, *supra* note 3, ¶ 4.

183 *Id.* ¶ 5.

184 1999 Clarification, *supra* note 22, ¶¶ 3–7 .

185 *See* Andria Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the Judicial Spirit in Public International Law*, at 190–97 (2009); Ibrahim F. I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, at 309 (1995); Ibrahim F. I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, at 305 (1995).

186 Resolution, *supra* note 3, ¶¶ 12–14.

187 *Id.* ¶ 22.

188 Ana Palacio, *The Way Forward: Human Rights and the World Bank* 36, The World Bank Institute (2006).

189 Chad-Cameroon Pipeline Project, *supra* note 48, ¶ 214.

190 Honduras: Land Administration Project, *supra* note 67, ¶ 256.

191 Cambodia: Land Management Project, *supra* note 107, ¶ 275.

192 *Id.* The Panel observed in this case that the project was inconsistent with the borrower’s international human rights commitments on adequate housing, namely the International Covenant on Economic, Social and Cultural Rights (1966).

193 *See* Bradlow, *supra* note 10, at 609; Laurence Boisson De Chazournes, *Public Participation in decision-making: The World Bank Inspection Panel*, 31 ASIL STUDIES TRANSNAT’L LEGAL POLICY 84, 84–91 (1999); Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples* 332, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* (Guy Goodwin-Gill and Stefan Talmon, eds., 1999); Stefanie R. Roos, *The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandates, and Desirability with Special Reference to the China (Tibet) Case*, 5 Max Planck U.N.Y.B. 473, 498–500 (2001).

194 Articles of Agreement, *supra* note 7, Art. III Section 5(b).

195 *Id.* at Art. IV Section 10.

196 *See* Letter from Anne-Marie Leroy, Senior V.P and General Counsel, World Bank, to Olivier De Schutter, U.N. Special Rapporteur on the Right to Food (Oct. 9, 2012) [hereinafter Leroy Letter] (“[O]nly economic considerations—meaning those that have a direct and obvious economic effect relevant to the Bank’s work—can be taken into account in decisions by the Bank and its officers.”).

197 *See* Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights*, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL ENFORCEMENT* 509 (Phillip Alston & Mary Robinson ed., Oxford Univ.

- Press 2012) (“[T]he Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank’s mission.”).
- ¹⁹⁸ Gernot Brodnig, *The World Bank & Human Rights: Mission Impossible*, 17 FLETCHER J. DEV. STUD. 1, 5 (2002).
- ¹⁹⁹ Hassane Cissé, *Should the Political Prohibition in Charters of International Financial Institutions Be Revisited?*, *The World Bank Legal Review*, at 62 (2011).
- ²⁰⁰ Shihata 1995 opinion, *supra* note 36, at 26.
- ²⁰¹ *Id.* at 25. See also Ibrahim F. I. Shihata, *The Creative Role of the Lawyer- Example: The Office of the World Bank’s General Counsel*, 48 Cath. U. L. Rev. 1041, 1048 (1999) [hereinafter Shihata speech].
- ²⁰² For example, in the 1960s, the Bank refused to deny assistance to Portugal or South Africa despite their egregious human rights records. See Cissé, *supra* note 199, at 71.
- ²⁰³ Shihata speech, *supra* note 201, at 1051–53.
- ²⁰⁴ Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights*, 8 DEV. OUTREACH 30 (2006). See also Shihata 1995 opinion, *supra* note 200; Leroy Letter, *supra* note 196, at 4.
- ²⁰⁵ Articles of Agreement, *supra* note 7, Art. IV, Section 10.
- ²⁰⁶ *Id.* at Art. V Section 8(a).
- ²⁰⁷ *Id.* at Art. V, Section 8(b).
- ²⁰⁸ The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on the Application of Standards of the International Labour Conference are mandated to supervise the application of Convention No.169.
- ²⁰⁹ Press release, The World Bank, World Bank Board Approves New Environmental and Social Framework, available at <http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework>. Environmental and Social Framework, World Bank (Aug 4, 2016), available at http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post-board_august_4.pdf [hereinafter ESF].
- ²¹⁰ The ESF adopts a new approach signifying greater Borrower ownership of the project. This shift, however, was not adopted without controversy. NGOs and human rights groups have argued that the new ESF significantly weakens the Bank’s obligations to ensure adequate social and environmental protections and will lead to diminished access to redress mechanisms - such as the Panel - for individuals harmed by Bank projects. The report prepared by the NYU Law’s International Organizations Clinic in 2016 analyzed the impact the ESF would have on the Panel’s work. It concluded that despite the shift to Borrower ownership, the new Framework would not diminish the Panel’s ability to hold the Bank accountable for harms caused as a result of its acts or omissions. This was based on an analysis of the Panel’s cases and the conclusion that the ESF contains a fundamental link between the Bank’s and borrower’s obligations that enables the Panel to continue its investigatory function as before. International Organizations Clinic, NYU School of

Law, Empowering the Inspection Panel: The Impact of the World Bank's Safeguards Review (2015).

211 Vision Statement, *supra* note 18, ¶ 7, ¶ 9.

212 *Id.*

213 *Id.* ¶ 8.

214 *Id.* ¶ 3.

215 *Id.*

216 Vision Statement, *supra* note 18, ¶ 3.

217 *Id.*

218 Environmental and Social Standard (ESS) 7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities, *in* ESF, *supra* note 209, at 107.

219 Fact Sheet, The World Bank's New Environmental and Social Framework at 2 (Aug. 4, 2016), *available at* <http://pubdocs.worldbank.org/en/748391470327541124/SafeguardsFactSheetenglishAug42016.pdf>. *See also* Bank Directive, Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups (Aug. 4, 2016), *available at* <https://policies.worldbank.org/sites/ppf3/PPFDocuments/e5562765a5534ea0b7877e1e775f29d5.pdf>.

220 Bank Directive, *supra* note 219; Environmental and Social Standard (ESS) 1: Assessment and Management of Environmental and Social Risks and Impacts, *in* ESF, *supra* note 209, at 32.

221 Fact Sheet, *supra* note 219.

222 For example, while the U.N. Sustainable Developmental Goals (SDGs) are not strictly speaking human rights standards in themselves, the Bank's commitment to them is relevant insofar as these SDGs import human rights concerns and are substantively similar to the provisions of the ESF. For example, SDG 5 relates to the promotion of gender equality and SDG 10 is aimed at reducing inequality within and among countries, both of which address the rights of equality and non-discrimination. *See* Table, Sustainable Development Goals and Related Human Rights, U.N. Office of the High Commissioner of Human Rights, http://www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG_HR_Table.pdf.

223 International Covenant on Economic, Social, and Cultural Rights, G.A. Res 2200A (XXI), U.N. GAOR, art. 11(1), U.N. Doc. A/6316 (1976). *See also* Universal Declaration, *supra* note 14, art. 25.

224 It also parallels SDG 8 on Decent Work and Economic Growth, which the World Bank has committed itself to supporting. *See* Development Committee, *The World Bank Group Support for the 2030 Agenda for Sustainable Development*, at ii, para. 7.

225 Environmental and Social Standard (ESS) 2: Labor and Working Conditions, *in* ESF, *supra* note 209, at 52–60.

226 For example, the ESP provides that the Bank 'will assess the significance of the gaps in information and the potential risk this may present to achieving the objectives of the ESSs', and that it will work with the Borrower to address any 'gaps' in the Borrower's proposed ES Framework, and will use the borrowers frameworks to 'achieve developmental outcomes that are materially consistent with the objectives of

the ESF'. However neither the term 'gap' nor 'materially consistent' is defined in the ESF. The proposed safeguards thus depend heavily on the Bank's good judgment. See Center for International Environmental Law, *NGO Response: Proposed World Bank Standards Represent Dangerous Set-Back to Key Environmental and Social Protections* (July 22, 2016), <http://www.ciel.org/news/safeguard-policy-endangers-rights/>, for further discussion of potential gaps in the ESF.

227 Deliberative Working Draft: Environmental and Social Procedure, The World Bank, ¶ 25(d) (July 1, 2015).

228 While the new framework was adopted in August 2016, it will not be effective until 2018 and will apply fully to all Bank financed projects only in 2023. If the new ESF is not to become outdated even before it is fully applicable, it will be important to keep it in line with evolving international standards and to the changing realities of Bank's development mission.

229 The World Bank Environmental and Social Policy for Investment Project Financing (ESP), *in* ESF, *supra* note 209, ¶ 26.

230 For example, the Panel in *Ethiopia* referred to UNHCR and UNICEF reports in establishing that issues relating to violence and security were relevant to the problems of livelihood and vulnerability that the Bank's project sought to assess. See *Ethiopia: Basic Services Project*, *supra* note 139.

231 While ESS 1 restricts the obligations of countries under relevant international agreements to those that are "directly applicable" to the project, national laws need only be "applicable" in order to be relevant to a project's environmental and social assessment. During its review of the draft ESF, OHCHR noted that creating a common standard of applicability for all relevant sources of law would ensure each is treated equally and that inconsistencies between requirements under national and international law may be identified and reconciled. See *Review and Update of the World Bank's Safeguards Policies, Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework*, at 12 (15 Mar. 2016), https://consultations.worldbank.org/Data/hub/files/20160315_memoandum_ohchr_esf_with_annexes.pdf.

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233 Operational Manual, The World Bank, *available at* <https://policies.worldbank.org/sites/ppf3/Pages/Manuals/Operational%20Manual.aspx>.

234 ESP, *supra* note 229, ¶ 3(a).

235 See Scope of Application, *in* ESF, *supra* note 209, at 12 ("This Policy and the ESSs apply to all projects supported by the Bank through Investment Project Financing); n.12: ("These are projects to which OP/BP 10.00, *Investment Project Financing*, applies.").

236 See Part II, *supra* pp. 7–20; see also Panel Report, *supra* note 9, at 16 ("As confirmed in the Panel's Resolution, these operational policies and procedures are not limited to the Bank's social and environmental safeguard policies, but include other Operational Policies, Bank Procedures, and Operational Directives, as well as other Bank procedural documents.").

²³⁷ *Id.*

²³⁸ ESP, *supra* note 229, ¶ 16.

²³⁹ *Id.* ¶ 31.

²⁴⁰ ESS 1, *supra* note 220, ¶ 2.

²⁴¹ ESS 1 directly incorporates human rights as relevant social risks. For example, relevant social risks which are based on human rights include: threats to human security, discrimination against vulnerable groups, threats to workers rights, threat to cultural heritage/property. *Id.* ¶ 28(b).

²⁴² The SORT replaced the Bank's previous risk rating tool ORAF in 2014. While the SORT is non-binding, the ESF appreciates the importance of documents like the SORT which give meaning to the Bank's due diligence obligations. *See* Overview of the World Bank Environmental and Social Framework, *in* ESF, *supra* note 209, ¶ 9 ("The Framework will also be accompanied by non-mandatory guidance and information tools to assist Borrowers in implementing the Standards, Bank staff in conducting due diligence and implementation support, and stakeholders in enhancing transparency and sharing good practice.").

²⁴³ *See e.g.*, Ethiopia: Basic Services Project, *supra* pp. 14–16.

²⁴⁴ Waite and Kennedy, *supra* note 180.