

# **THE CHANGING ROLE OF THE WORLD BANK INSPECTION PANEL:**

**RESPONDING TO CONTEMPORARY CHALLENGES AT THE  
WORLD BANK**

**International Organizations Clinic  
at NYU School of Law**

**The Changing Role of the World Bank Inspection Panel:  
Responding to Contemporary Challenges at the World Bank**

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## I. EXECUTIVE SUMMARY

Since the Paris Declaration on Aid Effectiveness in 2005 (“**Paris Declaration**”) and the Accra Agenda for Action 2008 (“**Accra Accord**”), there has been a distinct move by the international aid community towards a paradigm that emphasizes greater ownership of development initiatives by borrower countries (in contrast to projects designed primarily by international aid organizations and donors) and a stronger focus on results. Developing countries — particularly those from Africa whose influence as shareholders of the World Bank (“**Bank**”) has increased noticeably after a third elected Executive Director for Sub-Saharan Africa was added in 2010 and adjustments were made to voting powers at the Board — have called for the Bank to make its internal operational policies on environmental and social protections less prescriptive and more amenable to strengthening the existing institutional and administrative systems (commonly referred to as “**country systems**”) of borrower countries. The landscape of donors and lenders has also changed with the entry of large emerging economies such as India and China. A multiplicity of lenders and sources of funding means that the Bank may contribute only a fraction of the funds for a given country’s development program. Moreover, in contrast to traditional Bank instruments, financing facilities offered by the fast-growing economies often contain few (if any) prescriptions or conditions. The confluence of these factors has created an environment in which the Bank is increasingly placed under pressure, particularly from donor member countries, to innovate so that it can retain its prominent role in setting the agenda for development.

The Bank has undertaken several institutional reforms to operationalize the concept of country ownership within the framework of the Bank’s activities and compliance systems, and to respond to the calls for change. Three significant reform initiatives are considered by this Report: the Country System Pilot, Program-for-Results Lending, and the Safeguards Review.

The Country System Pilot was implemented in 2005 and, for the first time, allowed for projects financed by the Bank’s Investment Lending instrument (“**IL**”) to use the borrower country’s own environmental and social safeguard systems in cases where they had been assessed to provide equivalent protections as those afforded by the Bank’s systems (“**Country System Pilot**”).

The Program-for-Results lending instrument (“**PforR**”) was added by the Bank in 2012 to be used in connection with development programs over which the borrower country itself exercises leadership with respect to its design and implementation, using its own country systems to manage risks, under the Bank’s supervision and guidance.

A review of its operational policies and procedures governing IL-funded operations was undertaken of the Bank (“**Safeguards Review**”), possibly as a direct response to competitive pressures in the development finance landscape. It incorporates an examination into whether the 10 environmental and social safeguard policies (each a “**Safeguard Policy**”), which apply specifically to IL-financed operations and have formed the cornerstone of the Bank’s support of sustainable development for the past 30 years, should be made less detailed and less procedurally prescriptive in favor of broader and more abstract principles that articulate standards of environmental and social protection.

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These three sets of reforms have been extensively discussed in the context of their effects on the roles and responsibilities of Bank Management,<sup>1</sup> but there have been few systematic studies of the challenges that institutional changes at the Bank and broader changes in the international aid architecture pose for the World Bank's Inspection Panel (“**Panel**”). This Report offers a contribution to fill this gap and considers how the Panel could adapt and respond to the changes while preserving the principle of citizen-driven accountability and maintaining its role as a bottom-up, citizen-driven accountability mechanism.

This Report contains a primarily legal analysis. Drawing on the Bank policy and operational documents, external commentary, recent development literature and interviews with Panel Secretariat staff, the Report identifies trends in the current international aid landscape that have exerted pressure on the Bank and analyzes the potential impact of institutional reform efforts by the Bank on the Panel's functions. The Panel's reports from past investigations are analyzed to better understand how it carries out the mandate defined in its constituent documents and to derive lessons for how the Panel may respond to challenges posed by the Bank's reforms.

The Report identifies three key impacts on the Panel's functions that may result from these challenges:

- (i) *Change to the benchmarks the Panel uses to assess complaints by people and communities who believe they have been adversely affected by a Bank-funded operation*, precipitated by the Bank's move from prescriptive standards to broader, principles-based standards of protection in the environmental and social policies for operations funded by the Development Policy Lending (“**DPL**”) and PforR financing instruments. It is also possible that the Safeguards Review will similarly result in such principles-based Safeguard Policies, bringing Investment Lending operations in line with DPL and PforR.

Members of civil society have expressed concern that the Bank's move from detailed and procedurally prescriptive standards toward broader and less detailed principles of protection across all environmental and social policies will dilute the protections afforded to communities affected by Bank-financed projects. While acknowledging this risk, this Report suggests that the Panel may be able to preserve high standards of accountability for the Bank

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<sup>1</sup> See, e.g., Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience* (2010) [hereinafter *IEG Safeguards Report*], at xx; Center for International Environmental Law, *The Use of Country Systems in World Bank Lending: A Summary of Lessons from the Pilot Projects and Recommendations for A Better Approach* (2008); Nancy Alexander, *The World Bank's Proposed Program for Results (P4R): Implications for Environmental, Social, and Gender Safeguards and Corrupt Practices* (Heinrich Boell Foundation, 2011), available at [http://www.boell.org/downloads/Alexander\\_4-6-11\\_P4R\\_Critique-FINAL.pdf](http://www.boell.org/downloads/Alexander_4-6-11_P4R_Critique-FINAL.pdf); Vince McElhinny, *P4R Update: World Bank Approves Program for Results Policy — 5% Cap over Two Years Pilot Update, But Questions about How P4R Expansion Will Be Conditional upon Results of Management and IEG Evaluations* (Bank Information Center, 2012), available at <http://www.bicusa.org/wp-content/uploads/2012/12/BIC+P4R+udpate+final+2.27.12.pdf>; Transparency International, *Transparency International's Input to the WB Consultation Process on the Draft P4R Operational Policy, Bank Procedures and Anticorruption Guidelines* (Feb. 2012), available at [http://p4rcomments.org/uploads/P4R\\_TI\\_Comments\\_to\\_OP-BP\\_-\\_September\\_30\\_2011\\_-\\_Final.pdf](http://p4rcomments.org/uploads/P4R_TI_Comments_to_OP-BP_-_September_30_2011_-_Final.pdf); Forest Peoples Programme, *Forwards or Backwards? The World Bank's Safeguard Review and Update* (2013), available at <http://www.forestpeoples.org/topics/safeguard-accountability-issues/news/2013/04/forwards-or-backwards-world-bank-s-safeguard—0>; Human Rights Watch, *World Bank: Ducking Human Rights Issues* (2013), available at <http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues>.

by continuing its use of certain techniques of interpretation when assessing Bank Management's compliance with the different benchmarks and when giving content to new principles-based standards of protection. The Panel can also draw on its problem-solving function to assist a resolution between the Bank and borrower in relation to the standard of protection required.

- (ii) *Differences in the nature of potential policy violations.* PforR's focus on *ex ante* assessment of risks involves the likelihood of more frequent decision-making that calls for the exercise of judgement and discretion on the part of Bank Management. Further, the shift in Bank Management's *ex post* implementation activities from "supervision" to "implementation support" in IL-financed operations is likely to have a similar effect. Changes to Bank Management's responsibilities in both instances may give rise to requests that require the Panel to assess Bank Management's compliance with operational policies and procedures in a manner that resembles judicial review of administrative decisions in domestic legal systems. This is likely to raise questions about the appropriateness of the Panel engaging in a form of judicial review, and what standards of review the Panel should use if it is to take on such a role. Moreover, the possible expansion of the Bank's policies and procedures to engage more explicitly with issues such as human rights, climate change and labor rights may present the Panel with the complaints on subjects with which it has not previously dealt in any detail.

The Report recommends that the Panel seek assistance from third party experts with requisite technical expertise in the evaluation of Bank Management's decisions made in the course of *ex ante* risk assessments and implementation support. The Report cautions, however, that excessive reliance on outside experts may trigger the problem of the "battle of the experts".

To assess the Bank's compliance with policies on novel subject areas, it is recommended that the Panel seek guidance from other sources and bodies of law including relevant international treaty obligations when interpreting Bank policies and procedures.

- (iii) *Potentially less recourse to the Panel by communities affected by PforR-funded projects.* The programmatic nature of operations eligible for PforR invites a modality of Bank financing — namely sectoral budget support — that is less visible to communities affected by the program. This is because there has traditionally been less transparency about how a government's budget is sourced. Consequently, the Bank's involvement in PforR operations may be less visible to affected communities. As result, it is possible that the Panel may receive relatively few requests for inspection from PforR-affected communities.

The Report recommends that the Panel (and the Bank) take the initiative to increase the visibility of the Bank's involvement in PforR operations and the availability of the Panel's processes for communities affected by those operations.

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**II. GLOSSARY OF KEY TERMS**

1996 Clarification	Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution
1999 Clarification	1999 Clarification of the Board's Second Review of the Inspection Panel
Accra Accord	Accra Agenda for Action (2008)
BP	Bank Procedure
DPL	Development Policy Lending
IBRD	International Bank of Reconstruction and Development
IDA	International Development Association
IFC	International Finance Corporation
IL	Investment Lending
MIGA	Multilateral Investment Guarantee Agency
OP	Operational Policy
Paris Declaration	Paris Declaration on Aid Effectiveness (2005)
PforR	Program-for-Results Lending
Resolution	1993 Resolution Establishing the Inspection Panel
Safeguard Policies	The following 10 OPs (and corresponding BPs) on environmental and social protection applicable to IL operations: <ul style="list-style-type: none"> <li>• OP/BP 4.01 <i>Environmental Assessment</i>;</li> <li>• OP/BP 4.04 <i>Natural Habitats</i>;</li> <li>• OP/BP 4.09 <i>Pest Management</i>;</li> <li>• OP/BP 4.10 <i>Indigenous Peoples</i>;</li> <li>• OP/BP 4.11 <i>Physical Cultural Resources</i>;</li> <li>• OP/BP 4.12 <i>Involuntary Resettlement</i>;</li> <li>• OP/BP 4.36 <i>Forests</i>;</li> <li>• OP/BP 4.37 <i>Safety of Dams</i>;</li> <li>• OP/BP 7.05 <i>Projects on International Waterways</i>; and</li> <li>• OP/BP 7.60 <i>Projects in Disputed Areas</i>.</li> </ul>
Safeguards Review	One of three tracks comprising the broader modernization effort undertaken by the Bank that aims to review and update the Safeguard Policies to enhance the development effectiveness of Bank-supported projects and program.



## I. OVERVIEW

The Report begins with an overview of the key changes in the international aid landscape in Part II before focusing on the institutional responses by the Bank that these changes have prompted. Part III seeks to identify changes to the roles and responsibilities of Bank Management, and to the Bank’s compliance framework, for the purpose of assessing their potential impact on the Panel’s functions. Part IV outlines the Panel’s mandate and provides an analysis of the Panel’s past practice, examining in particular the interpretive and problem-solving roles it has performed in the course of assessing Bank Management’s compliance with internal policies and procedures. Finally, Part V considers lessons that may be drawn from past Panel practice in assessing the kinds of functional challenges the Panel is likely to face as a result of the external changes in international aid and institutional changes within the Bank. The Report concludes by suggesting ways in which the Panel can effectively meet those challenges while maintaining its role as a citizen-driven accountability mechanism.

## II. THE CHANGING LANDSCAPE OF INTERNATIONAL AID

The Bank<sup>2</sup> has been influenced by significant changes in the international aid landscape in recent years. These changes have been caused by a number of factors that may be summarized in three broad categories.

### A. A MOVE TOWARDS COUNTRY OWNERSHIP

Since the Paris Declaration and the Accra Accord,<sup>3</sup> there has been a distinct move among the international aid community towards a paradigm that emphasizes greater ownership of development initiatives by the borrowing country (in contrast to projects designed primarily by international aid organizations and donors) and a stronger results orientation. At its core, the concept of country ownership is premised on the principle that aid effectiveness is enhanced where the borrowing country exercises effective leadership over the design and implementation of national development strategies. The assumption is that donors, in turn, will align behind the objectives underpinning those strategies by assisting the country to develop its own country systems so that they can be used as a means of delivering aid in a manner that is targeted towards the achievement of mutually agreed development results that produce real and measurable impacts.<sup>4</sup>

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<sup>2</sup> This Report adopts the common convention of using the terms “World Bank” and “Bank” to refer to the International Bank for Reconstruction and Development (“IBRD”) established in 1944 and the International Development Association (“IDA”) established in 1960. The latter provides concessional funding for less economically developed countries. The term “World Bank Group” refers to the IBRD, the IDA, the International Financial Corporation (“IFC”) established in 1956 to engage in private sector financing, the Multilateral Investment Guarantee Agency (“MIGA”), established in 1988 to provide guarantees against sovereign political risks faced by private foreign investors in developing countries, and the International Centre for Settlement of Disputes (“ICSID”), established in 1966 to provide dispute settlement and arbitration facilities for the settlement of investor–state disputes.

<sup>3</sup> OECD, *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (2008), available at <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

<sup>4</sup> See *Aid Effectiveness: Paris Declaration and Accra Agenda for Action*, OECD.ORG, <http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm#Paris>.

Although the international aid community (including the Bank) had been cognizant of the centrality of country ownership to the success of development efforts well before the Paris Declaration and Accra Accord,<sup>5</sup> these international instruments marked a consensus that any dialogue between international aid organizations and borrowing countries on development initiatives needed to prioritize country ownership, and that a focus on strengthening the institutional capacity of borrowing countries was key to the ongoing effectiveness of development. Moreover, the shift towards country ownership in recent years reflected a recognition that the profile of borrowing countries had evolved beyond developing countries with minimal institutional capacity to include countries with institutional capacity at varying stages of maturity — from developing countries with low institutional capacity to emerging economies with more developed institutional and administrative systems — such that aid organizations now needed to be flexible in adapting their support to reflect the specific requirements of client countries.<sup>6</sup> As this Report discusses, the Bank has responded to these changes in several ways that operationalize country ownership, including by introducing “Program-for-Results” (“PforR”) financing as a new lending instrument for borrowing countries<sup>7</sup> and by reallocating responsibilities between Bank Management and the borrower with respect to the design and implementation of operations so that the borrowing country assumes greater stewardship while Bank Management provides supervision and implementation support.<sup>8</sup>

## B. COMPETITION AMONG DEVELOPMENT FINANCIERS

Complementing changes on the demand side of the development landscape have been changes on the supply side. Actors in and sources of development finance are “mushrooming”<sup>9</sup> to include non-traditional donor countries such as China and India, and private sources of finance such as foreign direct investment and remittance that are provided independently of official sources of development aid like funding by the World Bank Group.<sup>10</sup> This has produced a number of consequences. First, the increased availability of development finance has given rise to greater competition among financiers such that official sources of development aid now represent a much lower percentage of funding vis-à-vis other sources of development finance than before.<sup>11</sup> A recent 2013 working paper by the Overseas Development Institute noted that “official development assistance” totaled \$130.9 billion in cross-border flows to developing countries in 2011, compared with \$514.3 billion from foreign direct investment (the largest source of development finance) and \$53.9 billion in philanthropic funding.<sup>12</sup> Despite continuing to play a catalytic role in encouraging

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<sup>5</sup> See, e.g., World Bank, *China: Western Poverty Reduction Project — Management Report and Recommendation in Response to the Inspection Panel Investigation Report* (2000) at Annex 2, ¶ 3 (“... the development assistance paradigm itself has evolved. At its core is the shift from the development project to the country as the unit of account, and the growing recognition that country-owned policies and institutions are the key to sustained development impact.”)

<sup>6</sup> World Bank, *The World Bank’s Safeguard Policies Proposed Review and Update: Approach Paper* (2012) [hereinafter *Safeguards Review Approach Paper*], at 5.

<sup>7</sup> See further below Part D discussing PforR financing which was approved by the Board on 24 January 2012.

<sup>8</sup> See further below Part E.

<sup>9</sup> Annalisa Prizzon, *Old Puzzles, New Pieces: Implications of the New Development Finance Landscape for Post-2015 Scenarios and for Partner Countries* (Paper prepared for workshop on ‘Innovation in Governance of Development Finance: Causes, Consequences and the Role of Law’, New York University, Apr. 8–9, 2013), at 1.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4–5.

other financiers to inject funding into development projects, the Bank is now funding a much smaller share of development than before in any given country.<sup>13</sup>

Second, where financial resources are provided by sources other than the World Bank Group, strict adherence to environmental and social safeguard measures may not be a precondition for disbursement.<sup>14</sup> To the extent that the Bank’s environmental and social safeguard requirements (referred to as “**Safeguard Policies**” in this Report) are seen by borrowers to impose onerous obligations that increase transaction costs, this may make financial resources offered by the Bank appear even less attractive by comparison to other sources of finance. In the face of such competition, the Bank has attempted to find ways to differentiate itself as a development financier by demonstrating its “value-added” in providing implementation support and other forms of technical assistance,<sup>15</sup> particularly in development policy operations and operations that focus on institutional capacity-building.<sup>16</sup>

### **C. INCREASED PRESSURE ON INTERNATIONAL ORGANIZATIONS TO TAKE ACCOUNT OF “EMERGING AREAS”**

Regulation of the global commons (such as protection of the oceans and atmosphere) and public goods (like mitigation of biodiversity loss) has for some time extended beyond state borders. International development organizations have long embraced the challenge of coordinating collective action to manage public and private interests over scarce resources, but it is becoming increasingly clear that their existing governance structures do not adequately address all forms of social and environmental risk that may arise in the context of development operations. For this reason, civil society actors, particularly non-governmental organizations (“**NGOs**”), have pressured powerful development organizations like the Bank to expand the breadth and depth of its existing Safeguard Policies in order to incorporate previously excluded issues and areas of protection such as land tenure, labor rights, climate change, and human rights more generally.<sup>17</sup> The Bank has responded to such calls for reform by incorporating these “emerging challenges” into the scope of its Safeguards Review.<sup>18</sup>

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<sup>13</sup> Independent Evaluation Group, *The World Bank and Public Procurement — An Independent Evaluation* (vol. 2, 2014), at 7, available at [https://ieg.worldbankgroup.org/Data/reports/Procurement\\_Vol\\_II\\_02\\_04\\_2014.pdf](https://ieg.worldbankgroup.org/Data/reports/Procurement_Vol_II_02_04_2014.pdf).

<sup>14</sup> For further discussion on the Safeguard Policies, see further below Part G.

<sup>15</sup> Interview with Ms. Dilek Barlas, Deputy Executive Secretary, World Bank Inspection Panel (New York, Sep. 11, 2013).

<sup>16</sup> See *Projects & Operations: Knowledge Activities*, WORLD BANK.ORG, <http://go.worldbank.org/HZSUDTOFO0>.

<sup>17</sup> See *Safeguards Review Approach Paper*, *supra* note 6, at 19.

<sup>18</sup> *Id.* at ¶ 35.

### III. INSTITUTIONAL RESPONSES BY THE BANK TO A CHANGING LANDSCAPE

Changes in the international aid landscape have catalyzed efforts by the Bank to reform the structure and use of its lending instruments. These efforts have also been spurred by changing international power dynamics within the Bank. Emerging economies like China and India are using their economic leverage as providers of new sources of development finance outside of the Bank to exert influence within it. Growing wealth in developing countries has also created a more self-confident set of borrower counterparts who have higher expectations about enhanced country ownership.<sup>19</sup> At the same time, the voices of developing countries within the Bank are growing stronger, especially after a third elected Executive Director for Sub-Saharan Africa was added in 2010 and adjustments were made to voting powers at the Board.<sup>20</sup> These changes have meant that over time the Executive Board has had to become more responsive to the exigencies of developing countries than before.

Some of the Bank’s institutional responses present unique challenges for the Panel and its role as a citizen-driven accountability mechanism. This Part aims to discuss those institutional reforms so as to identify their potential impact on the Panel’s work. Part A begins by providing background on the application of the Bank’s compliance framework to its lending instruments. Part B examines the changes that the Bank has made to its lending instruments in response to the evolving international aid landscape, focusing on the use of country systems pilot (“**Country Systems Pilot**”) and Program-for-Results (“**PforR**”) lending. Part E then examines changes to the Bank’s IL operational policies, focusing on the Bank’s broader modernization effort and in particular its review and update of the environmental and social safeguards (“**Safeguard Policies**”).

#### A. APPLICATION OF THE WORLD BANK’S COMPLIANCE FRAMEWORK TO ITS LENDING INSTRUMENTS

Broadly speaking, the Bank funds its projects and activities using three core types of lending instruments — Investment Lending, Development Policy Lending and Program-for-Results Financing:

- (a) *Investment Lending* (“**IL**”) provides financing in the form of loans, credits or grants to governments for specific development projects involving a set of expenditures. Commonly, these involve discrete, once-off activities, such as the construction of a specific infrastructure project or the purchase of expensive equipment.<sup>21</sup> Funds for IL projects are generally

<sup>19</sup> Jochen von Bernstorff & Philipp Dann, *Reforming the World Bank’s Safeguards: A Comparative Legal Analysis* (paper commissioned by the German Federal Ministry for Economic Cooperation and Development, Jul. 2013), at 7, available at [http://www.jura.uni-tuebingen.de/professoren\\_und\\_dozenten/vonbernstorff/projekte/WorldBanksSafeguardsacomparativelegalanalysis.pdf](http://www.jura.uni-tuebingen.de/professoren_und_dozenten/vonbernstorff/projekte/WorldBanksSafeguardsacomparativelegalanalysis.pdf) [hereinafter *Safeguards Comparative Legal Analysis*].

<sup>20</sup> World Bank, *Enhancing Voice and Participation of Developing and Transition Countries in the World Bank Group: Update and Proposals for Discussion* (2009), available at [http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22335196/DC2009-0011\(E\)Voice.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22335196/DC2009-0011(E)Voice.pdf).

<sup>21</sup> World Bank, *A New Instrument To Advance Development Effectiveness: Program-for-Results Financing* (2011) [hereinafter *PforR Policy Paper*], at 10.

disbursed against specific expenditures that support the operation.<sup>22</sup> IL has historically accounted for around 90 per cent of the Bank's funding.<sup>23</sup>

- (b) *Program-for-Results Financing* (“**PforR**”) is the Bank's newest lending facility, approved by the Board on 24 January 2012. It supports government programs or subprograms in designated sectors.<sup>24</sup> To date, PforR has been used to fund, among others, a program to improve rural water supply and sanitation in Vietnam, a health sector Millennium Development Goals support program in Ethiopia<sup>25</sup> and a national human development program in Morocco to improve access to infrastructure and basic economic opportunities to poor and vulnerable groups. Funds for PforR programs are disbursed upon the achievement of results and performance indicators. The Board approved the use of five per cent of total IBRD/IDA commitments in PforR operations for the first two years from approval and agreed to lift this cap if requested by Management following a review of the implementation experience. As of November 2013, the total IBRD/IDA commitment to PforR operations by the end of the initial two years was approximately \$2.1 billion (below the five per cent cap).<sup>26</sup>
- (c) *Development Policy Lending* (“**DPL**”) provides rapid, direct budgetary support to governments for economic policy and institutional reforms that are aimed at achieving a set of specific development results by promoting growth and increasing the income of the poor.<sup>27</sup> Previous examples of Bank-funded DPL operations include bringing investment reforms in Yemen to reduce the country's dependence on oil revenues,<sup>28</sup> and supporting Poland's goal of convergence with European Union living standards.<sup>29</sup> Funds for DPL operations are disbursed against policy and institutional actions. For the 2012 financial year, the Board approved 21 DPL operations, totaling US\$3,227 million in combined IBRD/IDA commitment.<sup>30</sup> Since DPL operations are designed to support and be consistent with the borrowing country's economic and sectoral policies that aim to accelerate sustainable growth

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<sup>22</sup> *Id.* at Table 1.

<sup>23</sup> *Projects & Operations: Investment Project Lending*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:22262276~printPK:9999~pagePK:41367~piPK:51533~theSitePK:40941,00.html>.

<sup>24</sup> *Projects and Operations, available at: Investment, Development Policy, and Program-for-Results Operations*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120732~menuPK:51564~pagePK:41367~piPK:51533~theSitePK:40941,00.html>. See further below Part D for more discussion of PforR.

<sup>25</sup> See *Program-for-Results: Operations*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:23223752~pagePK:41367~piPK:51533~theSitePK:40941,00.html>.

<sup>26</sup> World Bank, *Program-for-Results Two-Year Review: Concept Note* (2013), at ¶ 9.

<sup>27</sup> *Projects & Operations: Development Policy Operations*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:23434821~pagePK:41367~piPK:51533~theSitePK:40941,00.html>; OP 8.60 *Development Policy Lending* (Feb. 2012), at ¶ 2.

<sup>28</sup> *Projects & Operations: Institutional Reform Development Policy Grant*, WORLD BANK.ORG, <http://www.worldbank.org/projects/P101453/institutional-reform-credit?lang=en&tab=overview>.

<sup>29</sup> *Projects & Operations: Third Development Policy*, WORLD BANK.ORG, <http://www.worldbank.org/projects/P117666/development-policy-loan-3-dpl-3?lang=en>.

<sup>30</sup> *DPL Policy Paper*, at 5. These figures represent the number of operations approved through to December 2011.

and efficient resource allocation,<sup>31</sup> IL-financed projects or PforR-financed programs may be included as subcomponents of a DPL operation.

The Bank's lending and other activities are governed by various Operational Policies ("OPs"), which "establish the parameters for the conduct of operations", and Bank Procedures ("BPs"), which "explain how Bank staff carry out the policies set out in the OPs."<sup>32</sup> Together, OPs and BPs are "designed to ensure that the projects are economically, financially, socially, and environmentally sound."<sup>33</sup> The OPs and BPs are contained in the Bank's Operational Manual, as well as interim instructions to staff ("OpMemos")<sup>34</sup> on the conduct of Bank operations.<sup>35</sup>

Although only OPs and BPs are binding on the Bank's staff, additional guidance on how to comply with the OPs and BPs is usually provided in separate guidelines or best practice documents, as well in the OpMemos. Only OPs and BPs fall within the subject-matter jurisdiction of the Panel (whose role and function is outlined in detail below).<sup>36</sup> Nonetheless, the Panel sometimes takes account of best practice documents and similar documents or statements in the course of assessing the Bank's compliance with the OPs and BPs.<sup>37</sup>

The Bank has five broad categories of OPs (and corresponding BPs):<sup>38</sup>

- (a) *OPs/BPs on business products and instruments* that set out rules for lending instruments, country economic and sector work, technical assistance, grants, guarantees and other Bank products. The OPs that set out rules for the Bank's core lending instruments are:
- OP/BP 10.00 *Investment Project Financing*, which govern IL projects;<sup>39</sup>
  - OP/BP 8.60 *Development Policy Lending*, which govern DPL operations;<sup>40</sup> and
  - OP/BP 9.00 *Program-for-Results Financing*, which govern PforR operations.<sup>41</sup>

<sup>31</sup> OP 8.60 *Development Policy Lending* (Feb. 2012), at ¶ 2.

<sup>32</sup> *Operational Manual: Definitions*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20249090~menuPK:64142516~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html>.

<sup>33</sup> *Projects & Operations: Policies and Procedures*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120722~menuPK:41392~pagePK:41367~piPK:51533~theSitePK:40941,00.html>.

<sup>34</sup> *Operational Manual: Operational Memoranda*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:64701783~pagePK:64721707~piPK:64711014~theSitePK:502184,00.html>.

<sup>35</sup> World Bank, *The World Bank Operational Manual* (updated Sep. 30, 2013).

<sup>36</sup> World Bank, *Resolution Establishing the World Bank Inspection Panel*, IBRD Res No 93-10, IDA Res No 93-6, 34 ILM 520 (1993) [hereinafter *Resolution*], at ¶ 12. The *Resolution* also refers to Operational Directives ("ODs"), but these have now been fully consolidated into OPs and BPs following Management's decision in 1992 to consolidate them gradually. *Safeguards Review Approach Paper*, *supra* note 6, at 10.

<sup>37</sup> See note 125 below and accompanying text.

<sup>38</sup> *Projects & Operations: Policies and Procedures*, *supra* note 33.

<sup>39</sup> OP/BP 10.00 *Investment Project Financing* (Apr. 2013) were newly approved by the Board on October 25, 2012 to consolidate numerous policies and procedures on IL projects as part of the Bank's IL reform. See below Part E for further discussion on this reform.

<sup>40</sup> OP/BP 8.60 *Development Policy Lending* (rev. Feb. 2013) was updated to provide a unified framework for all DPL operations and to recognize DPL as a single lending instrument.

- (b) The *Safeguard Policies*, which include an OP on environmental assessments, that aim to prevent and mitigate undue harm to people and their environment as a result of Bank-financed projects or activities. These policies provide standards to be observed by the Bank and borrower staff in the identification, preparation, implementation and appraisal of programs and projects.<sup>42</sup>
- (c) *Fiduciary OPs*, including policies governing financial management, procurement and disbursement, as well as guidelines for the selection of consultants and the procurement of goods and works for Bank-financed projects.
- (d) *Management OPs*, which address the monitoring and evaluation of projects.
- (e) A *Policy on Access to Information* that sets out the Bank’s policy on public access to information in the Bank’s possession.<sup>43</sup>

The Safeguard Policies have functioned as the cornerstone of the Bank’s support of sustainable development for the past 30 years.<sup>44</sup> Although they are technically institutional policies that are internally binding on Bank staff only, the Safeguard Policies also provide requirements that the borrower must satisfy, sometimes as a precondition of funding.<sup>45</sup> When incorporated in financing agreements between the Bank and the borrower, the Safeguard Policies become legally binding on the borrowing country under international treaty law.<sup>46</sup> By entering into a loan agreement with the Bank, the borrowing country is required to take measures necessary to comply with its contractual obligations, which may in some cases include references to requirements set out in the Safeguard

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<sup>41</sup> Where an IL-financed project or a PforR-financed operation forms a subcomponent of a DPL-operation, each of the subcomponents are subject to the relevant operational policies for IL financing and PforR financing, respectively. OP 8.60 *Development Policy Lending* (Feb. 2012), at ¶ 2.

<sup>42</sup> In 1997, the World Bank regrouped 10 OPs as specific safeguard policies that targeted environmental and social issues arising primarily in IL projects, but these policies could also apply to technical assistance activities supported by the Bank and to the trust funds it administers. This Report will use the term “Safeguard Policies” to refer specifically to the 10 OPs that are set out in the Glossary of Key Terms. The environmental and social requirements of the DPL and PforR operations are set out in the specific OP that govern all aspects of the respective funding instruments. *Safeguards Review Approach Paper*, *supra* note 6, at 3.

<sup>43</sup> The *Policy on Access to Information* is not technically an OP, but it is included in the policies with which Bank Management must comply and against which its compliance is assessed by the Panel.

<sup>44</sup> *Review and Update of the World Bank Safeguard Policies: Objectives and Scope*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:23277451~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>.

<sup>45</sup> For example, for most “Category A” and “Category B” projects proposed for IBRD/IDA financing, OP 4.01 *Environmental Assessment* (Jan., 1999) requires the borrower to consult “project-affected groups” and the local community about the project’s environmental aspects. The findings and recommendations of the environmental assessment inform the Bank’s decision about whether they “provide an adequate basis for processing the project for Bank financing” (at ¶ 5) effectively operating as a condition precedent to finance.

<sup>46</sup> For a discussion of legal nature of OPs and BPs, *see* Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281–303 (Dinah Shelton ed., 2000). *See also* Sabine Schlemmer-Schulte, *The World Bank Inspection Panel: A Model for Other Organizations?*, in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 473, 504 (Niels M. Blokker & Henry G. Schermers eds., 2001).

Policies.<sup>47</sup> As a corollary, in these cases, to the extent that the Bank is required under OPs/BPs to seek compliance by the borrower with these requirements, the Bank could fail to meet its own obligations where it does not make best efforts and use due diligence to ensure that the borrower performs the required actions.<sup>48</sup>

Appendix A summarizes the key OPs and BPs that apply in relation to operations funded by of the key lending instruments.

## B. CHANGES TO THE WORLD BANK'S LENDING INSTRUMENTS

The Bank has endeavored to operationalize the concept of country ownership by making changes to its lending instruments. The Country Systems Pilot and PforR, the newest instrument to be added to the Bank's suite of lending products, are two institutional reforms that reflect the Bank's efforts to integrate country ownership into its operations and better reflect the widening spectrum of borrower profiles. Both changes impact the work of the Panel.

## C. THE COUNTRY SYSTEMS PILOT

The Bank made its first direct attempt to operationalize country ownership in IL-financed projects by launching a pilot program in 2005 to use country systems in these projects (“**Country Systems Pilot**”). The Country Systems Pilot was intended to explore the option of “using a country’s own environmental and social safeguards systems ... where they are assessed as being equivalent to the Bank’s systems, in Bank-supported operations.”<sup>49</sup> The Bank defined these country systems to include a borrowing country’s “national, subnational, or sectoral implementing institutions and applicable laws, regulations, rules and procedures.”<sup>50</sup> The rationale of the Country Systems Pilot was to scale up development impact by encouraging the use of improved systems of government expenditure to increase country ownership, build institutional capacity and increase cost effectiveness for both the Bank and the borrower.<sup>51</sup> According to the Independent Evaluation Group, the Country Systems Pilot reflected a recognition by the Bank of the limitations of the Safeguards Policies.<sup>52</sup>

Under the Country Systems Pilot, the Bank’s key responsibility is to determine:

- (a) the “equivalence” of the borrower’s systems, as assessed against defined policy objectives and operational principles on environmental and social safeguards that are set out in Table A1 of OP 4.00 *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank Supported Projects* (“**OP 4.00**”); and

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<sup>47</sup> Boisson de Chazournes, *supra* note 46, at 289.

<sup>48</sup> Ibrahim Shihata, *The World Bank Inspection Panel — Its Historical, Legal and Operational Aspects*, in THE WORLD INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 7, at 28 (Gudmundur Alfredsson & Rolf Ring eds., 2001).

<sup>49</sup> *Projects & Operations: Expanding the Use of Country Systems in Bank-Supported Operations*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20266649~menuPK:538163~pagePK:41367~piPK:51533~theSitePK:40941,00.html>.

<sup>50</sup> *Id.*

<sup>51</sup> *IEG Safeguards Report*, *supra* note 1, at 85.

<sup>52</sup> *Id.* at xx.

- (b) the “acceptability” of implementation practices, track record and capacity, and to appraise and supervise pilot projects that use these systems.<sup>53</sup>

The borrower has the responsibility of achieving and maintaining equivalence and acceptable implementation practices, track record and capacity in accordance with the Bank’s assessment.<sup>54</sup> The borrower must identify those provisions of the country system that are necessary to ensure that the requirements of Table A1 are satisfied for each project. To the extent the borrower’s systems do not meet the objectives and operational principles of Table A1, the borrower can commit to fill the gaps, with or without assistance from the Bank, by adopting measures to strengthen its implementation practices and capacity. For example, the borrowing country may choose to revise applicable legislation, regulations, rules or procedures relevant to the operation. Any gap-filling measures must be carried out before the borrower implements the project.<sup>55</sup> In all cases, the specific provisions of the country system and any gap-filling actions taken to achieve equivalence and acceptable implementation become incorporated in the borrower’s contractual obligations to the Bank and are subject to normal contractual remedies like suspension of disbursements.<sup>56</sup>

The Country Systems Pilot has had limited success.<sup>57</sup> Bank Management has itself acknowledged that the instrument is unappealing for most borrowers<sup>58</sup> due to the inflexibility of the “overly prescriptive” provisions of the environmental and social safeguard policies in Table A1, which it also assessed to be “excessively focused at the project level.”<sup>59</sup> An example of the detailed procedural requirements can perhaps be seen in the 11 separate operational principles that the borrower must satisfy to achieve the defined objective of “[supporting] integration of environmental and social aspects of projects into the decision making process.” These principles reflect requirements that range from assessing the potential physical, biological, socio-economic, cultural and health impacts of the project,<sup>60</sup> feasible alternatives<sup>61</sup> and the adequacy of applicable legal and institutional frameworks,<sup>62</sup> and preventing or compensating for adverse project impacts,<sup>63</sup> to ensuring that these principles are applied by financial or investment intermediaries in any sub-projects.<sup>64</sup>

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<sup>53</sup> OP 4.00 *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank Supported Projects* (Apr. 2013), at ¶ 5. For example, Table A1 provides at ¶ A(1) that one of the objectives of environmental assessments is “to help ensure the environmental and social soundness and sustainability of investment projects”, which is operationalized by using “a screening process ... as early as possible, to determine the appropriate extent and type of environmental assessment ... so that appropriate studies are undertaken proportional to potential risks and to direct, and, as relevant, indirect, cumulative and associated impacts.”

<sup>54</sup> *Id.* at ¶ 4.

<sup>55</sup> *Id.* at ¶ 3.

<sup>56</sup> *Id.* at ¶ 4.

<sup>57</sup> See *Safeguards Comparative Legal Analysis*, *supra* note 19, at 23.

<sup>58</sup> See, e.g., the South Africa: Eskom Investment Support Project for a project conducted under the Country Systems Pilot. World Bank, *Africa: Eskom Investment Support Project* (last visited Apr. 13, 2014), <http://go.worldbank.org/DSI0KU0010>.

<sup>59</sup> *IEG Safeguards Report*, *supra* note 51, at 85–6.

<sup>60</sup> OP 4.00 *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank Supported Projects* (Apr. 2013), at Table A1(A)(2).

<sup>61</sup> *Id.* at Table A1(A)(4).

<sup>62</sup> *Id.* at Table A1(A)(3).

<sup>63</sup> *Id.* at Table A1(A)(6).

<sup>64</sup> *Id.* at Table A1(A)(10).

Although the limited success of the Country Systems Pilot and the associated scarcity of projects conducted under it have meant that its direct impact on the Panel’s work has been minimal (if any) and is likely to remain so, the Country Systems Pilot appears to have precipitated the Bank’s general move in the direction of broader, more abstract principles-based standards of environmental and social protection. Indeed, the Safeguards Review, which this Report expects will recommend that the Bank adopt principles-based standards of social and environmental protection, includes OP 4.00 *Piloting the Use of Borrower Systems To Address Environmental and Social Safeguard Issues in Bank Supported Projects* within its scope. The Bank has also publicly stated that it would welcome the development of more flexible principles regarding the determination of equivalency and acceptability of country systems.<sup>65</sup>

#### D. PROGRAM-FOR-RESULTS FINANCING

Program-for-Results Financing (“PforR”) is the Bank’s latest financing instrument that was approved by the Board on 24 January 2012 to respond to the changing profile and needs of the borrower and the newer country engagement model in development finance. In many ways a direct operationalization of country ownership, PforR focuses on:

- (a) assisting countries to design and implement sectoral development programs;
- (b) providing disbursements against the achievement of specific results and agreed performance indicators (rather than expenditure) that is monitored and verified; and
- (c) using country systems to achieve desired results and strengthening the institutional capacity and systems of borrowing countries to do so.<sup>66</sup>

It is designed to complement the Bank’s two existing financing instruments — IL and DPL — in order to provide borrowing countries with greater choice in lending products to suit their specific development objectives and risks.<sup>67</sup> PforR’s emphasis on country ownership is demonstrated through greater delegation of responsibility to the borrower for program design and use of the borrower’s country systems to implement the program and monitor risks. It is accompanied by a standalone compliance framework that incorporates a set of social and environmental policy requirements, which, in broad principles,<sup>68</sup> express policy objectives that are similar to the more detailed Safeguard Policies.<sup>69</sup>

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<sup>65</sup> *Safeguards Comparative Legal Analysis*, *supra* note 19, at xxvi–vii.

<sup>66</sup> *PforR Policy Paper*, *supra* note 21, at iv.

<sup>67</sup> If the Bank’s key lending instruments are mapped on a spectrum, PforR financing can be positioned somewhere between IL and DPL. PforR is similar to DPL in that it provides financial support for programs of work that focus on policy and institutional reforms aimed at achieving sustainable development results, rather than for specific infrastructure or technology that is financed through IL. However, PforR differs from DPL in that it provides financial support for narrower programs of work at sectoral or subsectoral levels which may in turn form subcomponents of national programs of work financed using DP: see above note 41.

<sup>68</sup> OP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), at ¶ 8.

<sup>69</sup> As noted in Appendix A, the Safeguard Policies apply only to IL projects and not to DPL or PforR-financed operations.

Although the Bank has previously financed results-based programs through different means, PforR is viewed as a fundamental change to the Bank’s financing model because of its innovation as a standalone results-based funding instrument that is supported by a specifically-tailored compliance framework and associated set of operational policies. PforR, therefore, may require the Panel to investigate new types of alleged violations that reflect different roles and responsibilities of the Bank’s management under the PforR regime. (OP/BP 9.00 *Program-for-Results Financing* provides standards and guidelines for PforR financing.) The impact of PforR on the work of the Panel may be significant as the pressure to respond to calls for the incorporation of greater country ownership in development projects appears to have stimulated an institutional desire for the Bank to use PforR more frequently to finance development operations.

## 1. Changes to the Bank’s roles and responsibilities

Under PforR, the following changes to the Bank’s roles and responsibilities may have a consequential impact on the work of the Panel:

- (a) *The focus of Bank Management’s responsibility shifts from ex post to ex ante social and environmental risk assessment (including environmental classification of proposed projects).*

*The Panel may be asked to investigate novel claims and engage with new standards. To the extent that ex ante assessments turn out to be highly technical, the Panel may need to increase its reliance on the technical expertise of outside consultants. On the other hand, as explained below, this change may encourage the Panel to look deeper into the historically problematic process of social and environmental assessments.*

Bank Management can select PforR as the lending instrument for a project after it has considered certain prescribed factors concerning the borrower country and the project,<sup>70</sup> and has completed an environmental screening process to determine whether the operation presents “significant adverse impacts that are sensitive, diverse, or unprecedented on the environment and/or affected people”.<sup>71</sup> The high-risk operations are classified as “Category A” under OP 4.01 *Environmental Assessment*, attract stricter environmental assessment requirements,<sup>72</sup> and are ineligible for PforR financing.<sup>73</sup> Historically, this

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<sup>70</sup> These factors include the Bank’s Country Assistance Strategy/Country Partnership Strategy (“CAS/CAP”), its assessment of the borrower’s country systems and the specific challenges constraining the achievement of desired development outcomes in the operation. See *PforR Policy Paper*, *supra* note 21, at 12–13, where it also states that: DPL may be the more appropriate funding instrument if the “primary bottleneck” is one that requires policy action; IL may be more appropriate if the bottleneck relates more to the right inputs and technology being in place; and PforR if the implementation challenges are predominantly institutional.

<sup>71</sup> BP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), at ¶ 5.

<sup>72</sup> The environmental assessment for a Category A project must examine the project’s potential negative and positive environmental impacts, compare them with those of feasible alternatives, and recommend any measures that are needed to prevent, minimize, mitigate or compensate for adverse impacts and improve environmental performance. The borrower must also prepare a comprehensive report (usually an environmental impact assessment) on the project. OP 4.01 *Environmental Assessment* (rev. Apr. 2013), at ¶ 8(a). Cf. “Category B” projects that involve less adverse environmental impacts on human populations and the environmental, which require an environmental assessment that is narrower than that for a Category A project, and require the findings and results of the environmental assessment to be described in the project documentation itself (rather than in a separate report). *Id.* at ¶ 8(b).

<sup>73</sup> PforR also excludes operations that involve “high-value contracts” for the procurement works, goods and services that exceed prescribed amounts. OP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), at ¶ 5.

environmental classification and screening process has been problematic for the Bank, either because operations have been misclassified (that is, high risk projects were classed as Category B rather than Category A),<sup>74</sup> thereby resulting in a failure to identify project risk and mitigate harm, or because environmental and social risks escalate during the course of project implementation, after the project has already been classified as a Category B project. This poor track record<sup>75</sup> may encourage the Panel to take a closer look at the *ex ante* environmental and social assessment process as Bank Management undertakes greater responsibilities in this area under PforR.

- (b) *An arguably less “visible” role for Bank Management in program preparation/assessment and appraisal (and its decreased role in project implementation) may affect the number of requests submitted to the Panel. The technical nature of these activities may also present the Panel with requests that requires it to assess compliance in a manner that more strongly resembles judicial review of administrative decisions in legal systems.*

PforR is not unique among Bank lending instruments in giving responsibility to the borrower for overall project implementation, but it is the first instrument that “hardwires” country systems as the central implementation and social and environmental risk mitigation tools. One consequence of using country systems in this way is that Bank Management’s responsibilities are moved towards program preparation/assessment and appraisal, with greater responsibility project implementation being delegated to the borrower.

This new division of Bank–borrower responsibilities is reflected in OP 9.00 *Program-for-Results Financing*. Specifically, under OP 9.00 Bank Management is required to engage in the following program preparatory/assessment and appraisal activities that involve complex analysis and evaluation by technical experts:

Preparation/assessment

At two stages in a PforR operation’s lifecycle:

- At the “identification” stage: consultation with the borrower on its development program and goals, and preliminary assessment of the program<sup>76</sup> for the purpose of preparing a “Program Concept Note” and initial “Program Information Document” (“PID”) for “Concept Review”. Bank Management effectively makes a prima

Appraisal

Three types of activity:

- Agreeing specific “action plans” to implement gap-filling recommendations and mitigate risks identified in the assessments.
- Setting specific, measurable and verifiable “disbursement-linked indicators” (“DLIs”) relating to the program’s development objectives and results framework, which incentivize

<sup>74</sup> Inspection Panel, *Observations of Inspection Panel on P4R* (2011), at 3. For examples of high risk projects in respect of which the Panel concluded that Bank Management had applied a “Category B” classification, see the China: Western Poverty Reduction Project (1999) and the Pakistan: National Drainage Program Project (2004).

<sup>75</sup> See especially below note 111 and Table 2 that highlights the high number of requests implicating OP 4.00 *Environmental Assessment* as at October 23, 2013.

<sup>76</sup> This preliminary assessment looks at the program’s overall parameters, objectives, strategic relevance and rationale, financing requirements, possible level of PforR financing, overall program expenditure, nature of activities and implementation arrangements. See, e.g., BP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), at ¶ 4.

facie determination of the program's suitability for PforR financing, defines the program's scope, broadly identifies results to be achieved and associated risks, and provides an initial cost estimation.

- After Concept Review approval: comprehensive technical, fiduciary systems, environmental and social systems assessments, as well as "integrated risk assessments";<sup>77</sup> recommendations for program enhancements and risk mitigation.<sup>78</sup>

the borrower to achieve key milestones or to improve performance.<sup>79</sup>

- Determining processes to monitor and evaluate the program's implementation, including verification protocols to determine how to measure agreed DLIs,<sup>80</sup> audit arrangements involving regular financial reports by the borrower,<sup>81</sup> economic evaluations on the efficiency of program delivery and identifying the Bank's "value-added".<sup>82</sup>

Bank Management retains a prominent role in the appraisal stages of the PforR operation and works closely with the borrower.<sup>83</sup>

In contrast with implementation, these preparation/assessment and appraisal activities are less likely to be visible to the communities affected by the PforR financed programs.<sup>84</sup> Even if they were aware of the Bank's involvement, affected communities may lack knowledge about the Panel's processes or they may lack expertise to challenge the quality of the Bank's appraisal activity.

Lesser visibility of the Bank's involvement may result in an initial decrease in the number of requests for inspection submitted to the Panel. As communities and civil society becomes more familiar with the Bank's role in PforR operations and how they may be

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<sup>77</sup> OP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), ¶ 10; BP 9.00 *Program-for-Results Financing* (February 2012), ¶ 32.

<sup>78</sup> *PforR Policy Paper*, *supra* note 21, at ¶¶ 26, 28. Such recommendations may be described as "gap-filling" measures that focus on strengthening institutional capacity to enhance the long-term efficiency of the borrower's program and addressing "material weaknesses". *Id.*

<sup>79</sup> *Id.* at ¶ 54.

<sup>80</sup> *Id.* at ¶ 56.

<sup>81</sup> *Id.* at ¶ 61.

<sup>82</sup> *Id.* at ¶¶ 62–5.

<sup>83</sup> *See also Safeguards Comparative Legal Analysis*, *supra* note 19, at 19.

<sup>84</sup> Under PforR, the government development program may already be under way before PforR financing is injected, which may make it more difficult for communities to identify exactly when Bank involvement in the project begins. The programmatic nature of PforR operations may reduce the incentive or opportunity for borrowing governments to generate publicity about the Bank's involvement because results that are enabled by PforR finance could take some time to materialize. This may be contrasted with IL operations where the tangibility of infrastructure-based projects and the shorter timeframe required for outputs to become visible may create stronger incentives for the borrowing government to promote awareness of the Bank's involvement, whether in an effort to capitalize politically on the community's approval of the project or to allocate responsibility for project deficiencies. Furthermore, even if the community is aware of the Bank's involvement in a PforR operation, the lack of transparency over the exact nature and extent of its involvement may generate allegations of Bank noncompliance for harms that predate the injection of Bank funds. This problem has already emerged in the context of some requests that are currently being considered by the Panel. *See, e.g.*, Inspection Panel, *Ethiopia: Protection of Basic Services Program Phase II — Additional Financing and Promoting Basic Services Program Phase III*, WORLD BANK.ORG, <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=88>. Note however that this project was financed using a Sector Investment and Maintenance Loan, and not using IL, PforR or DPL.

challenged using the Panel's processes, scrutiny of the appraisal and program preparation activities may increase.

Program preparation/assessment and appraisal are by definition activities that require greater technical expertise. Changes to Bank Management's responsibilities in this respect may give rise to inspection requests that to assess Bank Management's compliance with operational policies and procedures in a manner that more strongly resembles judicial review of administrative decisions in domestic legal systems. The Panel may find this form of compliance review challenging.

- (c) *PforR's strong emphasis on providing "implementation support" may mean that the Bank Management adopts less of a top-down, supervision-heavy and more of a dialogue-like approach in dealing with the borrower during the project implementation process. It is possible that, given the general apprehension by NGOs about how borrowers will manage environmental and social risks under PforR's principles-based standards of protection, there may be heavier external scrutiny of the Bank's relationship with the borrower during the implementation process. Potentially, this could increase the numbers of requests for inspection relating to the Bank's compliance review of borrower activities.*

OP/BP 9.00 *Program-for-Results Financing* places a strong emphasis on Bank Management's responsibilities in providing "implementation support" in PforR operations.<sup>85</sup> This can be contrasted with the policy documents of IL-financed projects that had set out the Bank's responsibilities during project implementation in a discrete policy on "supervision"<sup>86</sup> before the IL Policy Consolidation Exercise culminated in October 2012. References to the Bank's supervisory responsibilities in PforR operations are noticeably absent in the operational policy documents for PforR. Additionally, there appears to have been a deliberate shift in lexicon in Bank policy documents more generally from "supervision" towards the language of "implementation support".

In preparing this Report, we have not had the opportunity to interview Bank staff to understand the practical effects, if any, of this evolution in terminology. The following conclusions about the anticipated effects of this change on Panel's work have been drawn from analysis that is based on a review of publicly available Bank documents only and, in particular, a comparative analysis of the Bank's defined responsibilities under the current IL and PforR operational policies

With this limitation in mind, we suggest that this terminology change should not, in practice, result in a significant difference in the types of activity over which Bank Management has responsibility during implementation of a PforR operation vis-à-vis an IL project. The Bank's responsibilities at the implementation stage of a PforR operation are still primarily in the nature of compliance review — that is, involving project appraisal,

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<sup>85</sup> Although there has been a noticeable shift towards greater references to the Bank's provision of "implementation support" across all of its policy documents, there currently is no clear or consistent definition of the types of activities encapsulated by the term.

<sup>86</sup> For further discussion on the IL Policy Consolidation Exercise, see below Part F.

assessment of the borrower's compliance with contractual obligations and applicable policies, review of progress reports, and the achievement of results and DLIs.<sup>87</sup>

Nevertheless, based on the policy documents that “implementation support” under PforR, there appear to be minor differences in the types of activity that the Bank will need to engage in to discharge its compliance review responsibilities. For example, under PforR, Bank Management is required to:

- (i) appraise a broader range of country system requirements (which is consistent with the stronger use of country systems as an implementation tool);
- (ii) engage in greater consultation with relevant stakeholders on the Bank's environmental and social assessment of the operation, and disclose the findings and recommendations of that assessment; and
- (iii) work with the borrower to agree “gap-filling” and “institutional capacity-building” measures.

On the one hand, the technical nature of these activities may result in the Bank being less involved in a project's implementation than before, for they appear to require less time on the ground and more time completing “desktop reviews”. On the other, it is possible that, while these activities may involve less day-to-day oversight of the borrower's activities, they could require greater dialogue between the Bank and the borrower during project implementation, particularly where the institutional capacity of the borrower is less developed. This approach would be more consistent with the Bank's current partnership model of engagement with borrowers. Given the general apprehension by NGOs about how borrowers will manage environmental and social risks under PforR's principles-based standards of protection,<sup>88</sup> the relationship between the Bank and the borrower may attract heavier external scrutiny (mainly from the civil society) and could, potentially, increase the numbers of requests for inspection relating to the Bank's compliance review of borrower activities.

- (d) *Principles-based standards of social and environmental protection may pose challenges to, but also provide opportunities for, the Panel in clarifying standards embedded in the principles.*

The standalone compliance framework that supports PforR incorporates a new set of social and environmental policy requirements that are articulated in broad, principles-based terms embedded within OP 9.00 *Program-for-Results Financing*.<sup>89</sup> Although this Report does not conceive any differences between the mandatory or binding nature of principles and prescriptive rules contained in the OPs/BPs, principles are expressed at a greater level of abstraction and may, as one study suggests, be “concretized by a ... rule or policy with

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<sup>87</sup> See further Appendix A which sets out the responsibilities of Bank Management and the borrower.

<sup>88</sup> See, e.g., Nancy Alexander, *The World Bank's Proposed Program for Results (P4R): Implications for Environmental, Social, and Gender Safeguards and Corrupt Practices* (Heinrich Boell Foundation, 2011); John Vidal, *NGOs Criticise World Bank's New Lending Plan for Poorer Countries*, GUARDIAN POVERTY MATTERS BLOG (Oct. 21, 2011), <http://www.theguardian.com/global-development/poverty-matters/2011/oct/21/ngos-criticise-world-bank-lending>.

<sup>89</sup> OP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), at ¶ 8.

more concrete prescriptive meaning.”<sup>90</sup> PforR’s principles-based requirements differ from the approach used in each of the Safeguard Policies applicable to IL-operations. Although a detailed comparative analysis of the differences between the principles-based approach of PforR’s environmental and social risk mitigation framework and the prescription of the Safeguard Policies is beyond the scope of this Report, at a general level, we suggest that principles-based standards of protection are likely to involve:

- (i) greater procedural flexibility that confers more discretion on the borrower in choosing how to comply with the social and environmental policy requirements at the project level. This, together with the use of country systems, is consistent with the notion of country ownership and its implicit appreciation of differing borrowing profiles. The Bank has acknowledged these as some of the rationales underpinning the decision to create a dedicated set of principles-based operational policies on environmental and social protection;<sup>91</sup> and
- (ii) as a corollary, less detail on the specific procedural requirements that apply to Bank Management. This has attracted criticism from external commentators, particularly NGOs. They argue that the move towards principles-based standards of social and environmental protection by the Bank, at least on the basis of the principles as they are currently expressed, would result in a dilution in the level of protection that will be afforded to Bank-financed operations.<sup>92</sup> The Bank has consistently maintained that this would not occur; rather, it is of the view that the programmatic nature of PforR operations and the flexibility of OP/BP 9.00 *Program-for-Results Financing* will allow the Bank’s strict standards of environmental and social protection to penetrate more deeply in a borrowing country,<sup>93</sup> perhaps because of PforR’s focus on strengthening the capacity of the borrower’s country systems.

Communities affected by PforR operations will have access to the Panel’s procedures.<sup>94</sup> Thus, OP/BP 9.00 *Program-for-Results Financing* will be directly invoked. This may present

<sup>90</sup> *Safeguards Comparative Legal Analysis*, *supra* note 19, at 9.

<sup>91</sup> See, e.g., World Bank, *A New Instrument To Advance Development Effectiveness: Program-for-Results Financing — Revised Concept Note* (2011) [hereinafter *PforR Revised Concept Note*], at ¶ 23, discussing the rationale justifying the creation of a “dedicated policy statement that maintains, inter alia, the Bank’s high standard of fiduciary and environment and social performance adapted appropriately to the more programmatic and results-driven form of engagement presented by PforR.” The *PforR Revised Concept Note* also explains at ¶ 23 that IL policies are inappropriate for PforR operations because they are generally “prescriptive, transaction-based and procedural in nature because they were designed to fit a discrete investment project, particularly in infrastructure, in which close attention to the details of how inputs are obtained are critical ingredients to success.” Moreover, it makes the interesting observation at ¶ 23 that while it is theoretically possible to amend the IL OPs/BPs to create “the necessary authorizing environment for PforR”, this task would have been “complicated and time-consuming, and the result may still confuse clients and staff.”

<sup>92</sup> See, e.g., Alexander, *supra* note 98, at 2–3; Vidal, *supra* note 98.

<sup>93</sup> See, e.g., 10<sup>th</sup> Annual Meeting of Independent Accountability Mechanisms (IAMS) hosted by the World Bank Inspection Panel, ‘Addressing People’s Concerns: 20 Years and Counting’, Sept. 27, 2013, 9:30am–12:30pm, World Bank Main Building, Washington, D.C., Ms. Sri Mulyani Indrawati, Chief Operating Officer and Managing Director, The World Bank.

<sup>94</sup> *C.f.* Inspection Panel, *Observations of Inspection Panel on P4R* (2011), at 1, where the Panel initially expressed concern that there is a lack of clarity on the basis for determining the eligibility of requests submitted to the Panel under the PforR instrument “since Bank financing may constitute a small portion of the program”. The *PforR Policy Paper*, *supra* note 21, subsequently clarifies at ¶ 81 that PforR operations will be subject to the same internal oversight as IL and DPL operations, including as a result of affected communities submitting requests to the Panel.

functional challenges, but also offer opportunities, to the Panel for ascertaining standards embedded in this OP/BP (see Part 4 below).

- (e) *As the modality of the Bank's support in PforR operations is most likely to take the form of budget support, it may be more difficult for affected communities to have knowledge of the Bank's involvement in a country's development program and therefore lead to fewer requests for inspection. Even where there is visibility over the Bank's involvement, the commingling of Bank funds under this modality of support may make it more difficult to establish a nexus between the specific harm and the Bank's financing. On the other hand, there may be greater pressure on the Bank to accept some degree of responsibility for ex ante assessment of harms that predate the Bank's involvement.*

PforR is intentionally designed to support government development programs.<sup>95</sup> As such, in PforR operations, the modality of the Bank's financing is most likely to take the form of sectoral budget support. The programmatic nature of PforR financing may offer the Bank an opportunity to increase its influence over the design and implementation of results-based program,<sup>96</sup> but it invites a modality of support that is less visible to communities affected by the program because there is commonly little transparency for ordinary citizens about how a government's budget is sourced. Without knowledge of the Bank's involvement, having recourse to the Panel's procedures becomes moot for affected communities. This may lead to fewer requests for inspection from communities affected by PforR operations.

Even if a community does have knowledge of the Bank's involvement in a PforR operation, the modality of providing budget support may still bring challenges. First, it is expected that sectoral programs eligible for PforR will be financed substantially by the borrowing government (or other development partners and sources of finance).<sup>97</sup> As a result, Bank funds will usually be commingled with the borrower's funds. This may make it more difficult for the Panel to establish a sufficient nexus between specific harm and the Bank's financing. However, this challenge may not be insurmountable, given that the Panel has successfully investigated DPL operations which similarly involve commingled funds in the past,<sup>98</sup> and has demonstrated that a sufficient nexus may be established so long as there is a plausible 'link' between the alleged harm and the activities supported by Bank financed activities.<sup>99</sup> Second, a PforR operation is likely to be in progress by the time the Bank

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<sup>95</sup> *PforR Revised Concept Note*, *supra* note 91, at ¶ 23.

<sup>96</sup> *See supra* note 93 and accompanying text.

<sup>97</sup> *PforR Revised Concept Note*, *supra* note 91, at ¶ 23.

<sup>98</sup> *See, e.g.*, Inspection Panel, *Yemen: Institutional Reform Development Policy Financing – Final Report and Recommendation* (2010).

A request was also submitted in relation to the Poland: Third Employment, Entrepreneurship and Human Capital Development Policy Loan (2010), but the Panel determined there was no nexus between the Bank-financed DPI operation and the claims made by the requesters in this case. Accordingly, the Panel did not register this request for inspection. Inspection Panel, *Poland: Third Employment, Entrepreneurship and Human Capital Development Policy Loan (Not Registered)*, WORLD BANK.ORG, <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=82>.

<sup>99</sup> *See, e.g.*, below note 166 and accompanying text, which discuss the Panel's eligibility findings in the Uzbekistan: Second Rural Enterprise Support Project and Additional Financing for Second Rural Enterprise Support Project. *See also Ethiopia: Protection of Basic Services Program Phase II Project Additional Financing (P121727) and Promoting Basic Services Phase III Project (P128891) – Report and Recommendation* (2013). The requesters in this case claimed that the Bank's financing and administration of its Protection of Basic Services program (such as health, education, agriculture, water supply and sanitation, and rural roads) ('**PBS program**') directly contributed to a government program of forced 'villagization' or

becomes involved.<sup>100</sup> To the extent that harms arise in connection with activities that predate the Bank’s involvement in the operation (for example, those arising in connection with the borrowing government’s activities), affected communities may try to seek recourse through the Panel’s processes by filing requests for inspection into potential deficiencies in how the Bank performed its *ex ante* assessment of the operation. However, it must be acknowledged that the responsibility of the Bank for harms caused by prior governmental activity, even if ongoing, is likely to be very difficult to establish in the absence of manifest deficiencies in the Bank’s own conduct.

The challenges these changes present to the functions of the Panel are discussed in Part 4.

## E. CHANGES TO WORLD BANK INVESTMENT LENDING OPERATIONAL POLICIES

Since 2009, the Bank has engaged in an effort to review and modernize its policies that apply to IL-funded operations. This general review has proceeded along three tracks: (a) a consolidation exercise of certain IL policies and procedures (“**IL Policy Consolidation Exercise**”); (b) a review of the Safeguards Policies (“**Safeguards Review**”); and (c) review of the IL procurement policy.<sup>101</sup> As the Panel’s mandate does not extend to allegations of Bank noncompliance with the IL procurement policy,<sup>102</sup> this Part E only considers the actual and expected outcome of the first and second tracks of the general IL review.

## F. IL POLICY CONSOLIDATION EXERCISE: INCREASED BANK ROLE IN IMPLEMENTATION SUPPORT

The IL Policy Consolidation Exercise culminated in October 2012 with the recommendation (subsequently adopted) to consolidate 19 OPs and BPs (excluding the Safeguard Policies and the IL procurement policy) that applied to IL operations into a new, singular OP/BP 10.00 *Investment Project Financing*.<sup>103</sup> Of the consolidated provisions, the provisions on project supervision and the changes made to them as a result of the consolidation exercise are most likely to have the greatest impact on the Panel’s work. Specifically, the consolidation appears to have incorporated changes in relevant policy text that result in:

- (a) Bank Management having greater responsibility for evaluating results during project implementation; and

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displacement of the Anuak indigenous people in the Gambella Region. The requesters specifically claimed that OP 4.10 *Indigenous Peoples and Voluntary Resettlement* should have applied and been complied with by the Bank. In recommending an investigation to the Board, the Panel notes that the existence of a ‘plausible link’ between the Bank’s PBS program and forced villagization was sufficient to support an investigation to allow the Panel to make definitive findings with respect to such a link: at ¶¶ 66–85. This approach is consistent with the Panel’s revised operating procedures: see Inspection Panel, *Operating Procedures* (Apr. 2014), available at <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf>, at ¶ 12.

<sup>100</sup> *PforR Revised Concept Note*, *supra* note 91, at ¶ 23.

<sup>101</sup> OP/BP 11.00 *Procurement* (rev. Apr. 2013).

<sup>102</sup> See *1996 Clarification*.

<sup>103</sup> For the details regarding the consolidation process, see World Bank, *Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures* (2012) [hereinafter *Investment Lending Reform Paper*].

- (b) a nuanced shift in the policy lexicon, from “supervision” to “implementation support”,<sup>104</sup> the latter of which emphasizes the role of technical advice in which “the Bank brings added value to the borrower, providing technical assistance and policy advice on capacity-building activities”.<sup>105</sup>

“Implementation support” under OP/BP 10.00 *Project Investment Lending* applies a more flexible, principles-based approach to capacity-building and risk management in efforts to accommodate the unique circumstances of each borrowing country. This rationale is consistent with the stronger emphasis on the Bank’s responsibility for implementation support in PforR.<sup>106</sup> As discussed above, it is possible that implementation support will involve less day-to-day oversight of borrower obligations by Bank Management and a more consultative, hands-on role in assisting the borrower. Given that the Inspection Panel itself has been critical of the Bank Management’s track record in project supervision,<sup>107</sup> the greater emphasis on implementation support in OP/BP 10.00 may shine an even stronger spotlight on the Bank’s performance in regard to its responsibilities during project implementation.

## G. REVIEW AND UPDATE OF THE BANK’S INVESTMENT LENDING ENVIRONMENTAL AND SOCIAL SAFEGUARDS

The outcome of the ongoing Safeguards Review<sup>108</sup> may have a significant impact on the responsibilities of the Bank and the Panel. Because the Safeguard Policies form the cornerstone of the Bank’s support of sustainable development,<sup>109</sup> they have each been implicated in requests for inspection to the Panel, with some at a high level of frequency. The following table sets out eight of the 10 Safeguard Policies and OP 4.00 *Piloting the Use of Borrower Systems To Address Environmental and Social Safeguard Issues in Bank Supported Projects* which fall within the scope of the Safeguards Review,<sup>110</sup> along with the number of requests in which the Panel has found them to be implicated (as at October 23, 2013):<sup>111</sup>

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<sup>104</sup> While the former IL supervision policy contained prescriptive requirements for the Bank to detect and respond to problems during project implementation, the equivalent provision in OP 10.00 *Investment Project Financing* (Apr. 2013), at ¶ 19, refers simply to the Bank’s role in providing “implementation support” as it reviews the progress of the project.

<sup>105</sup> World Bank, *Investment Project Financing Implementation Support Guidance Note* (2013), at 1. *C.f.* “compliance oversight, in which the Bank ‘monitors’ the borrower to implement the project with due diligence to achieve objectives in conformity with the project’s Legal Agreements.” *Id.*

<sup>106</sup> *See supra* Part D(c).

<sup>107</sup> See Inspection Panel, *Submission to the World Bank’s Safeguard Review and Update Process: Lessons from Panel Cases — Inspection Panel Perspectives* (2013), at 2.

<sup>108</sup> The Bank is currently in the middle of the second of three phases of this review. In this phase, a draft integrated safeguard policies framework is expected to be presented to the Board of Executive Directors in mid-2014. World Bank, *Review and Update of the World Bank Safeguard Policies*, WORLD BANK.ORG, <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>.

<sup>109</sup> *See supra* note 44.

<sup>110</sup> OP/BP 7.05 *Projects on International Waterways* and OP/BP 7.60 *Projects in Disputed Areas* are excluded from the scope of the Safeguards Review.

<sup>111</sup> Inspection Panel, *Summary of Inspection Panel Cases* (Oct. 23, 2013), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20240657~menuPK:495328~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

**Table: Safeguard Policies Currently under Review**

OP 4.01 <i>Environmental Review</i>	59
OP 4.12 <i>Involuntary Resettlement</i>	42
OP 4.10 <i>Indigenous Peoples</i>	31
OP 4.04 <i>Natural Habitats</i>	20
OP 4.11 <i>Physical Cultural Resources</i>	18
OP 4.36 <i>Forests</i>	11
OP 4.37 <i>Safety of Dams</i>	9
OP 4.09 <i>Pest Management</i>	2
OP 4.00 <i>Use of Country Systems</i>	1

The Safeguards Review has not concluded and it is expected that the recommendations to the Board will be presented in the second half of 2014.<sup>112</sup> However, we offer a number of hypotheses as to the recommendations it will produce, based on: (a) Bank documents defining the scope and objectives of the Safeguards Review,<sup>113</sup> and an updated report explaining the progress of the Safeguards Review as at July 2013;<sup>114</sup> (b) public statements by the Bank explaining the rationale that would guide the Safeguards Review;<sup>115</sup> and (c) submissions solicited and received by the Bank from a variety of stakeholders (including donor and borrower countries, civil society organizations, other development organizations, and the private sector).<sup>116</sup>

We expect that the outcome of the Safeguards Review is likely to include recommendations that respond to the trends and tensions that currently characterize the international aid landscape as discussed in Part 1. Specifically, we anticipate that the Safeguards Review is likely to recommend two types of change to the Safeguard Policies that may impact the work of the Panel:

- (a) *That the detailed, procedural requirements of the Safeguard Policies be replaced with broader, principles-based standards of social and environmental protection. This would change the nature of the benchmarks by which the Panel is mandated to scrutinize the Bank's compliance.*

Although we are uncertain if the Bank will move fully in the direction of a comprehensive “integrated framework” such as that used by the International Finance Corporation and other multilateral development banks (“**MDBs**”) as originally anticipated in the *Safeguards Review Approach Paper*, we anticipate that the Safeguards Review will recommend that the detailed procedural requirements of the Safeguard Policies be replaced with broader, principles-based standards of social and environmental protection that allow greater flexibility in how they are followed. This would respond to criticism that the procedurally detailed requirements of the current Safeguard Policies are inconsistent with the notion of

<sup>112</sup> World Bank, *Review and Update of the World Bank Safeguard Policies*, *supra* note 108.

<sup>113</sup> *Safeguard Review Approach Paper*, *supra* note 6; IEG *Safeguards Report*, *supra* note 51.

<sup>114</sup> World Bank, *Review and Update of the World Bank's Safeguard Policies: A Status Report Following Phase One Consultations* (2013) [hereinafter *Safeguards Review Status Update*].

<sup>115</sup> For a detailed explanation of the Bank's rationale for the Safeguards Review, see *Safeguards Review Approach Paper*, *supra* note 6, at 4–7.

<sup>116</sup> Submissions from some of these actors are available on the Bank's website at: World Bank, *Review and Update of the World Bank Safeguard Policies*, *supra* note 108.

country ownership, which accepts the use of country systems to manage the specific environmental and social risks relevant to borrowing countries of different profiles.

If the Safeguard Policies are amended so that they incorporate broader, principles-based standards of protection, this may be advantageous for the Bank in that they could allow for more country- and project- specific application of the Safeguard Policies. However, it could also create challenges for the Panel (discussed further in Part 4). If the detailed, procedural requirements of the Safeguard Policies are retained, the benchmarks currently used by the Panel will not change.

- (b) *That the Safeguard Policies be amended to broaden their social coverage to incorporate new subject areas. This would require the Bank to engage in new activities to address these issues, and introduce new benchmarks for the Panel to use to assess Bank compliance.*

Based on the Bank's public statements,<sup>117</sup> we expect that the Safeguards Review will recommend that the Safeguard Policies be amended to address new subject areas such as human rights, labor and occupational health and safety, gender, disability, the free, prior, and informed consent of indigenous peoples, land tenure and natural resources, and climate change.<sup>118</sup> This would directly respond to external pressure to expand the scope of rights-based issues for which the Bank should take responsibility.<sup>119</sup>

If the Safeguard Policies are amended to address new subject areas, it is likely that the Bank will be required to accept new responsibilities to address these issues. Moreover, should the amended policies be implicated in future requests for inspection to the Panel, this will require the Panel to consider new benchmarks in assessing Bank compliance.

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<sup>117</sup> *Safeguards Review Approach Paper*, *supra* note 6, at 11.

<sup>118</sup> *Id.* The *Safeguards Review Status Update*, *supra* note 114, at 14, highlights some divergence on which of these issues should be prioritized and how they should be addressed. Donor countries and civil society organizations tend to strongly support consideration of as many areas as possible, whereas borrower countries prefer for them to be considered selectively depending on a country's stage of development and capacity to actually apply protections in the given new subject area.

<sup>119</sup> *See supra* Part C.

## IV. THE WORLD BANK INSPECTION PANEL

Since its creation, the Inspection Panel (“**Panel**”) has served as the watermark of the Bank’s commitment to internal governance and promoting external accountability in respect of Bank-financed operations. The complementarity of its citizen-driven, “bottom-up” approach to accountability and traditional, “top-down” forms of accountability (for example, evaluations initiated by the Bank’s Independent Evaluation Group) was an innovation in international governance that provided a blueprint for other international financial institutions which subsequently created accountability mechanisms modeled on the Panel.<sup>120</sup> This Part analyzes the Panel’s function as a citizen-driven accountability mechanism for the purpose of understanding how it is positioned to address the challenges presented by the institutional changes at the Bank and broader changes in the international aid architecture. Part A considers the Panel’s mandate as set out in its constituent documents. Part B examines how the Panel carries out its mandate as a citizen-driven accountability by engaging in the functions of interpretation and problem-solving, and suggests lessons that can be drawn from the Panel’s past investigations on how it has responded to previous challenges.

### A. THE INSPECTION PANEL’S MANDATE

The Inspection Panel is an independent complaints-handling procedure created by the World Bank in 1993. It allows third-party non-state actors to hold the Bank directly accountable for harm caused by the Bank’s failure to comply with its policies and procedures. Although the Panel is established by and reports to the Bank’s Board of Executive Directors (“**Board**”) in relation to requests for inspection and recommendations following inspection, it is an independent body that is subject to certain qualifications and restrictions that were designed to ensure its functional independence.<sup>121</sup>

The *1993 Resolution Establishing the Inspection Panel* (“**Resolution**”) establishes the Panel’s legal framework. Under the Resolution, to be accepted by the Panel a request for inspection must generally:

- (a) be made by a “community of persons” in a borrowing member’s territory (or, in exceptional cases, by a foreign representative if the Board agrees) (“**affected party**”);
- (b) demonstrate that the affected party’s “rights or interests have been or are likely to be directly affected by an act or omission of the Bank” and that “such failure has had, or threatens to have, a *material adverse effect*”; and
- (c) show that the actual or threatened “material adverse effect” has been caused “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”.<sup>122</sup> (emphasis added)

<sup>120</sup> Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (2009) [hereinafter *Inspection Panel at 15 Years*], at 6.

<sup>121</sup> See, e.g., *1993 Resolution* at ¶ 4 (a Panel member’s appointment must be independent from Bank Management), [5] (conditions on a Panel member’s affiliation with the Bank prior to their appointment), ¶ 6 (Panel member must not work for the Bank after their appointment), ¶ 8 (a Panel member can only be removed by the Executive Board “for cause”), and ¶ 11 (the Panel has its own secretariat and must have the right to be “given such budgetary resources as shall be sufficient to carry out its activities”).

<sup>122</sup> *1993 Resolution*, at ¶ 12.

Where the OP or BP prescribes actions that the Bank should seek from the borrower, the Bank's failure would occur where the Bank fails to make *best efforts* or to use *due diligence* to ensure that the borrower in fact carry out the required actions.<sup>123</sup>

The *Resolution* provides that the Panel shall consider whether the Bank's staff has complied with the policies and procedures set out in the OPs, BPs and ODs, but not in the Guidelines or Best Practice documents (although the Panel may have regard to these documents in the course of assessing the Bank's compliance with the OPs and BPs).<sup>124</sup> The *1996 Clarification* to the *Resolution* further stipulates that procurement actions, along with the policies and procedures addressing them, are not subject to the Panel's jurisdiction.<sup>125</sup>

Neither the Resolution nor the Operating Procedures of the Inspection Panel, which provide detail on the Panel's operations and practice within the ambit of the Resolution,<sup>126</sup> expressly permit or require the Panel to create new standards of compliance for the Bank. Nor do they permit or require the Panel to assess the adequacy, let alone to amend, existing OPs and BPs.<sup>127</sup> Vested with investigatory powers, the Panel has limited decision-making powers with respect to "procedural matters" only (that is, determining whether the subject-matter of a request for inspection satisfies the threshold requirements for it to be heard),<sup>128</sup> to make "recommendations" to the Board on whether to proceed with a request for inspection and to issue reports of its investigation findings.<sup>129</sup> Moreover, pursuant to the *1996 Clarification*, the Inspection Panel cannot review "the consistency of the Bank's practice with *any* of its policies and procedures".<sup>130</sup> Its mandate is limited to reviewing *specific* cases of alleged noncompliance by the Bank with the OPs/BPs with respect to the design, appraisal and implementation of projects, and alleged failure by the Bank to follow up on borrowers' obligations under loan agreements.<sup>131</sup>

Procedurally, the Panel's functions are performed in two stages:

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<sup>123</sup> Shihata, *supra* note 48, at 40–1.

<sup>124</sup> *1993 Resolution*, at ¶ 12. *See also supra* notes 36–37 and accompanying text. For a discussion of how the Panel uses the Guidelines to assist its interpretation of requirements in OPs/BPs, *see below* note 160 and accompanying text.

<sup>125</sup> World Bank, *1996 Clarification of Certain Aspects of the Resolution* (1996) [hereinafter *1996 Clarification*]. For further discussion of the distinction between OPs and BPs, *see supra* notes 32–33 and accompanying text.

<sup>126</sup> *The Inspection Panel: Update of the Panel Operating Procedures*, WORLD BANK.ORG, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22991942~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

<sup>127</sup> Laurence Boisson de Chauzournes, *Compliance with Operational Standards: The Contribution of the World Bank Inspection Panel*, in *THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE* 67, 81 (Gudmundur Alfredsson & Rolf Ring eds. 2001); 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 BROWNIE* 324, 331 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

<sup>128</sup> *1993 Resolution*, at ¶ 13; World Bank, *1999 Clarification of the Board's Second Review of the Inspection Panel* (1999) [hereinafter *1999 Clarification*], at ¶ 7.

<sup>129</sup> *1993 Resolution*, at ¶ 24. The Panel is required to seek advice from the Legal Department on matters relating to the Bank's rights and obligations with respect to the request under consideration. *Id.* at 15. It is also required to "clear" issues of interpretation of the Resolution with the Board. *1999 Clarification*, at ¶ 10.

<sup>130</sup> *1996 Clarification*, at 1 (emphasis in original).

<sup>131</sup> *Id.*

- (a) *Preliminary review.* After the complaint is registered, Bank Management is required to respond to the request by providing evidence that it has complied or intends to comply with the policies and procedures that are the subject matter of the request.<sup>132</sup> The Panel assesses whether the request satisfies the threshold requirements and whether, taking into account Management’s response, Management has failed to take adequate steps to comply with the relevant policies or procedures.<sup>133</sup> The purpose of this assessment is to determine whether the preconditions are satisfied for the Panel to investigate the request. On the basis of its assessment, the Panel submits a recommendation to the Board on whether or not to authorize an investigation, together with an “eligibility report”.<sup>134</sup>
- (b) *Investigation.* If authorized by the Board, the Panel carries out an investigation on the merits of the request.<sup>135</sup> Based on the outcomes of its investigation, the Panel submits its findings to the Board on whether the Bank has failed to comply with all relevant policies and procedures applicable to the project, and whether that failure caused an actual or threatened “material adverse effect” to the affected party.<sup>136</sup>

Before the Board considers the Panel’s report, Management is given an opportunity to respond to the Panel’s findings and make recommendations for any corrective action.<sup>137</sup> The submissions of the Panel and Management are each considered by the Board, which makes the ultimate decision in relation to the request. The Board may agree or disagree with the Panel’s report or with Management’s recommendations, and may instruct Management to take corrective action.<sup>138</sup>

As of October 23, 2013, 91 requests have been made to the Panel, with 29 requests proceeding to the Panel investigation stage (upon Board authorization).<sup>139</sup> To date, the Board has not followed the Panel’s recommendation to investigate a complaint in five instances.<sup>140</sup> Of the 91 requests that have been made to the Panel, 74 requests have alleged a violation of the Safeguard Policies.<sup>141</sup> Environmental assessment (addressed in OP/BP 4.01 *Environmental Assessment*) has been raised the most frequently, followed by project supervision (addressed in OP/BP 10.00 *Investment Project Financing*).<sup>142</sup> Other regular complaints (which have been raised less frequently) concern involuntary resettlement (addressed in OP/BP 4.12 *Involuntary Resettlement*), indigenous peoples (addressed in OP/BP 4.10 *Indigenous Peoples*) and the Bank’s *Policy on Access to Information*.<sup>143</sup>

## B. LESSONS FROM THE PAST PRACTICE OF THE INSPECTION PANEL

<sup>132</sup> 1993 Resolution, at ¶ 17.

<sup>133</sup> *Id.* at ¶ 19.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at ¶¶ 20–21.

<sup>136</sup> *Id.* at ¶ 22.

<sup>137</sup> *Id.* at ¶ 23.

<sup>138</sup> *Id.* at ¶¶ 23–4.

<sup>139</sup> Inspection Panel, *Summary of Inspection Panel Cases* (Oct. 23, 2013), *supra* note 111.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Environmental assessment has been raised 59 times and project supervision has been raised 55 times. *Id.*

<sup>143</sup> Involuntary resettlement was raised in 42 requests, indigenous peoples in 31 requests and disclosure of information in 27 requests. *Id.*

By its mandate, the Panel is intended to make the Bank more accountable to communities by providing local citizens who believe they have been adversely affected by Bank-financed operations a procedure to bring their concerns to the highest decision-making levels of the Bank. In performing its central function as a citizen-driven accountability mechanism, the Panel also engages in an interpretative role by elucidating standards of performance inherent in OPs and BPs in the course of investigating a request. Additionally, a core objective of the investigation process is to improve the conditions affecting people in-country while at the same time assessing whether the Bank is in compliance.<sup>144</sup> The Panel contributes to this objective by taking steps to enhance opportunities to address and resolve problems of affected people, especially during the early phase of the Panel process. This Part B analyzes the Panel’s investigative and problem-solving roles and suggests lessons that can be drawn from the Panel’s past investigations to inform the manner in which the Panel may deal with challenges posed by the various changes precipitated by the Bank’s reforms (as described in III above).

### C. THE PANEL’S INTERPRETIVE ROLE

The Inspection Panel does not have an explicit mandate to engage in standard-setting, to amend OPs and BPs or to assess their adequacy. However, in determining whether the Bank is in compliance in a particular case, the Panel must interpret the specific requirements of the OPs and BPs in order to ascertain the standard for assessing the Bank’s performance in that case. Requirements embedded in the OPs and BPs may be mapped on a spectrum of prescriptiveness. On one end of the spectrum are requirements that set out specific actions that must be taken: for example, the Bank is required to undertake environmental screening of each project that is proposed for funding in order to determine the appropriate extent and type of environmental assessment to be performed by the borrower, and it is required to classify the project by reference to prescribed factors (the type, location, sensitivity and scale of the project, and the nature and magnitude of its potential environmental impacts).<sup>145</sup> On the other end of the spectrum are requirements that embed key words and phrases: for example, the requirement for ‘meaningful consultation’ between the borrower and project-affected groups following the completion of an environmental assessment.<sup>146</sup> While in some instances the OPs/BPs include guidance on how these broadly expressed requirements should be satisfied in implementation,<sup>147</sup> or point to specific Guidelines outside of the Operational Manual that may be consulted by the Bank at its discretion,<sup>148</sup> such instances are rare. Accordingly, in instances where the standards of compliance are not previously defined, the Panel has interpreted the OPs/BPs so as to give meaning to the underlying standards.

#### 1. Examples of Standard-Setting through Interpretation

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<sup>144</sup> *Inspection Panel at 15 Years*, *supra* note 120, at 51.

<sup>145</sup> OP/BP 4.01 *Environmental Assessment* (rev. Apr. 2013), at ¶ 8.

<sup>146</sup> *Id.* at ¶ 15.

<sup>147</sup> *See, e.g., Id.* at ¶ 12, explaining for the purpose of environmental assessment classification that a potential impact is considered “sensitive” if “it may be irreversible (e.g. lead to loss of a major natural habitat)” or “raise issues” covered by OP/BP 4.04 *Natural Habitats*, OP/BP 4.01 *Indigenous Peoples*, OP/BP 4.11 *Physical Cultural Resources* or OP/BP 4.12 *Involuntary Resettlement*.

<sup>148</sup> *See, e.g.,* OP 8.60 *Development Policy Lending* (rev. Apr. 2013), at note 10, directing the Bank staff to the “internal Guidance Notes on Development Policy Lending for additional information and guidance” regarding the Bank’s responsibility to carry out environmental assessments of DPL-funded projects.

The following are notable examples of how the Panel has set standards through its interpretative function:

- (a) *Giving content to imprecise standards:* The Panel is often required to give content to key concepts and terms contained in OPs/BPs that are not precisely defined and the meaning of which is open to interpretation. For example, in the China: Western Poverty Reduction Project, one of the early cases considered by the Panel concerning the proposed resettlement of around 58,000 farmers from a rain-fed area to arable land, the Panel was asked to investigate whether Bank Management had failed to comply with various policies that would lead to Tibetan and Mongolian ethnic communities living in the adjacent areas potentially suffering irreversible harm. The Panel was asked to consider whether the consultations required to be carried out by the borrower with project-affected communities were adequate for the purposes of Bank policies on indigenous peoples, environmental assessment and involuntary resettlement<sup>149</sup> that required “full and informed” consultation. Bank Management had taken the view that this requirement had been met by direct consultation with indigenous peoples in the affected areas and by incorporating indigenous knowledge in assessing potential harm and possible project approaches.<sup>150</sup>

In performing its interpretative function, the Panel determined that Bank Management had failed to comply with the requirement because questionnaires that were used to survey the affected communities were not confidential, which in the Panel’s view was particularly hazardous for respondents from the “move-in” area who had been asked whether they would welcome the influx of settlers. In making this finding of noncompliance, the Panel stated that the responsibility to ensure confidentiality derived from the requirements for “full and informed” consultation “since full and informed consultation is impossible if those consulted even *perceive* that they could be adversely affected for expressing their opposition to, or honest opinions about, a Bank-financed project.”<sup>151</sup> This determination imported a requirement of confidentiality that was not immediately apparent from the face of the standard expressed in the ODs.

- (b) *Assessing choices made by Management:* The Panel often assesses specific choices made by Management in complying with policy requirements. In this respect, one of the ways in which the Panel has been most influential in standard-setting is by making determinations as to the adequacy of the Bank’s definition of the “areas of project influence” that are subject to the relevant OPs/BPs. For example, in the China: Western Poverty Reduction Project, the Panel found that the area of project influence was defined too narrowly such that significant geographical areas affected by the project were excluded from the scope of the required environmental and social assessment, which resulted in areas and groups being left out of the

<sup>149</sup> OD 4.20 *Indigenous Peoples*, OD 4.01 *Environmental Assessment*, and OD 4.30 *Involuntary Resettlement*. This project was governed by a combination of ODs, OPs and BPs.

<sup>150</sup> *World Bank, China: Western Poverty Reduction Project — Management Response to Panel Investigation Report*, *supra* note 5, at ¶ 68.

<sup>151</sup> Inspection Panel, *China: Western Poverty Reduction Project — Investigation Report* (2000), at ¶ 29. This project was ultimately discontinued because of the controversy surrounding potential harm to the indigenous population.

assessments for the project. This meant that project risks to these areas and groups were not identified at the design stage of the project, leading to potential harm.<sup>152</sup>

- (c) *Evaluating Bank Management’s decision-making process*: The Panel also evaluates Bank Management’s decision-making process in the course of conducting investigations. In the Uganda: Private Power Generation Project, the Bank contributed funds to the construction of a hydroelectric power plant on the Nile River near the Bujagali Falls area in Uganda.<sup>153</sup> A request for inspection was made to the Panel, challenging the accuracy of Bank’s determination that the Bujagali Falls area was not a “critical natural habitat” under OP 4.04 *Critical Natural Habitats* to the project, a categorization that would have required the Bank to make a special priority of ensuring that the project did not involve the “significant conversion or degradation” of the area.<sup>154</sup> An annex to the OP 4.04 provides a detailed definition of the term “critical natural habitat”.<sup>155</sup> However, instead of making a finding about the accuracy of the Bank’s definition, deciding instead that either conclusion was reasonable, the Panel found that the Bank’s error was in “omitting the reasons behind its own determination”.<sup>156</sup> In other words, the Panel appears to have set a specific standard in its interpretation of the critical natural habitats provisions — a standard that is not explicitly present in the OP — by requiring the Bank to actually provide a justification for why it has made the determination that a natural area does not fit a certain category.

## 2. Tools Used by the Panel to Guide Its Interpretation

We have identified a number of useful “tools” that the Panel has used to guide its interpretative function:

- (a) *Looking at the object and purpose of policy provisions*: Where key concepts are expressed in broad terms, the Panel has looked at the underlying object and purpose of the OP/BP to fill in gaps in substantive meaning. In some instances, the Panel has expressly articulated its consideration of the intent of the relevant OP/BP in determining the standard of compliance. For example, in the China: Western Poverty Reduction Project, the Panel rejected Management’s reliance on the silence of the policies on how the scope of the environmental assessment should be defined, finding that “the letter and intent” of OD 4.20 *Indigenous People*, OD 4.01 *Environmental Assessment* and OD 4.30 *Involuntary Resettlement* required Management to define the “project area” broadly for the purposes of the environmental assessment.<sup>157</sup> Similarly, in the Pakistan: National Drainage Program Project, which addressed waterlogging and salinity threatening the sustainability of irrigated agricultural lands, the Panel found that failure to establish an environmental advisory panel

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<sup>152</sup> The Panel has made frequent determinations that the Bank had inadequately defined the area of project influence — for example, in Pakistan: National Drainage Program Project (2004) — and has identified this as a “systematic lesson” for Bank Management. Inspection Panel, *Submission to the World Bank’s Safeguard Review and Update Process: Lessons from Panel Cases — Inspection Panel Perspectives* (2013), at 2. See also Inspection Panel, *Operating Procedures* (Apr. 2014), *supra* note 99, at ¶ 79.

<sup>153</sup> Inspection Panel, *Uganda: Private Power Generation Project — Investigation Report* (2008), at xi.

<sup>154</sup> OP 4.04 *Critical Natural Habitats*, at ¶ 4.

<sup>155</sup> *Id.* at Annex A, ¶ 1(b).

<sup>156</sup> Inspection Panel, *Uganda: Private Power Generation Project — Investigation Report* (2008), at 203 (emphasis added).

<sup>157</sup> Inspection Panel, *China: Western Poverty Reduction Project — Investigation Report*, *supra* note 151, at ¶¶ 17–18.

for the project was “not consistent with the intent of OD 4.01”, especially as the project was significant in scale, highly risk and contentious.<sup>158</sup>

In other instances, the Panel has been less explicit in its reliance on its asserted purpose of the OP/BP in performing its interpretative function, but a purposive approach can be nevertheless be deduced from its report. The Panel also determined in the China: Western Poverty Reduction Project that Management could not use the project documents as a substitute for producing discrete indigenous population development plans for each indigenous group because Bank policy towards indigenous people required the development process to “foster full respect for their dignity”.<sup>159</sup>

- (b) *Referral to other Bank documents:* Although the Panel does not formally have jurisdiction over Bank compliance with Guidelines or Best Practice documents under the Resolution, it has sometimes referred to these documents to inform its interpretation of requirements set out in OPs/BPs. In the Albania: Power Sector Generation and Reconstruction Project, a project involving the construction of the Vlora Thermal Power Plant that was jointly financed by the Bank, the EBRD and the Albania Power Corporation, the requesters asserted that they would suffer potential harm as a result of the Bank’s failure to take into account the future “cumulative environmental impacts” of one or more additional power stations, not expected to be funded by the Bank in any part at that stage, that had the potential of being built in the same area. In response, the Panel found that Bank Management had failed to comply with the requirement under OP 4.01 *Environmental Assessment* to prepare a specific sectoral environmental assessment that paid attention to potential cumulative impacts of multiple activities.

The Panel based its finding primarily on the project’s location in an area where, in the Panel’s view, there was “prima facie evidence” that more than one energy related project was being undertaken, thereby satisfying the relevant condition for which a sectoral environmental assessment was advised under Annex A of OP 4.01.<sup>160</sup> However, in considering evidence that indicated the potential expansion of the Vlora Thermal Power Plant, the Panel also “note[d] that the omission of cumulative impact assessment of possible expansion of the [Vlora Thermal Power Plant] from the final [environmental impact assessment] is not in accord with the Bank’s own Guidelines for new thermal power stations”, which required the Bank to analyze the impact of the proposed plant design “both immediately and after any probable expansion in capacity”.<sup>161</sup> Although the Panel only “noted” that the Guidelines had not been followed, it appears that reference to the Guidelines, which contained similar requirements to OP 4.01 for analysis of cumulative impacts of the Bank-funded project, may have influenced the Panel’s finding of noncompliance by the Bank with the OP.

<sup>158</sup> Inspection Panel, *Pakistan: National Drainage Program Project — Investigation Report* (2006), at xxv.

<sup>159</sup> Inspection Panel, *China: Western Poverty Reduction Project — Investigation Report*, *supra* note 151, at ¶ 63.

<sup>160</sup> A sectoral environmental assessment is advised when there is “a series of projects for a specific sector”. OP 4.01 *Environmental Assessment* (rev. Apr. 2013), at Annex A, ¶ 9.

<sup>161</sup> Inspection Panel, *Albania: Power Sector Generation and Restoring Project — Investigation Report* (2009), at ¶ 188, citing *World Bank Group Pollution Prevention and Abatement Handbook, Thermal Power, Guidelines for New Plants* (1998), at 415–16.

- (c) *Referral to external sources of law and standards:* Generally, the Panel does not express an opinion about the sources of law and normative standards that Bank Management must take into account to discharge its responsibilities,<sup>162</sup> and restricts its reference to external sources of law such as international law to instances where the OP that is the subject of a request requires the Bank to assess the borrowing country's compliance with relevant international obligations. Within these boundaries, however, the Panel has expressed openness to considering the borrower's compliance with its obligations under international law in determining compliance with Bank OPs/BPs where the obligations under international law are comparable to the Bank's own requirements.

In the Honduras: Land Administration Project, the requesters claimed that flaws in design and implementation of the Bank-financed land titles registration process would cause them to lose their rights over their ancestral lands and bring about the demise of their traditional system of collective property ownership. In addition to arguing that the project had violated OP 4.10 *Indigenous Peoples*, the requesters argued that the project had also violated the Honduran Government's commitments under ILO Convention No. 169.<sup>163</sup> The Panel acknowledged that its mandate was limited to questions of compliance with the Bank's OPs/BPs and did not expressly comment on Honduras' implementation of its obligations under the ILO Convention. However, the Panel concluded that the ILO Convention provisions were applicable to the Bank through its operational policy on project appraisal (previously OMS 2.20 *Project Appraisal*), which required the Bank to "consider whether the proposed project plan and its implementation would be consistent with ILO Convention No. 169."<sup>164</sup>

In the Albania: Power Sector Generation and Reconstruction Project, before submitting a request for inspection, the requesters had submitted a complaint to the Aarhus Convention Compliance Committee ("**Aarhus Committee**") documenting Albania's noncompliance with the Aarhus Convention. This meant that the Panel had the benefit of reviewing the Aarhus Committee's findings with respect to that complaint before issuing its own investigation report. Although the Aarhus Committee's review focused on the actions of Albania, not those of the Bank, the Panel considered the findings of the Aarhus Committee relevant because OP 4.01 *Environmental Assessment* requires the Bank to ensure that the borrower fulfills its requirements under international law. Interestingly, the Panel added that reference to the findings of the Aarhus Committee were relevant because "requirement of the Aarhus Convention are largely similar to Bank's public consultation and disclosure requirements set forth in OP 4.01."<sup>165</sup>

In Uzbekistan: Second Rural Enterprise Support Project and Additional Financing for Second Rural Enterprise Support Project, the requesters claimed that the Bank's failure to identify forced child labor as a problem in its social risk assessment of the project resulted in Bank funds being used on agricultural lands where forced labor was practiced. The Panel

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<sup>162</sup> In the context of human rights law, see Steven Herz and Anne Perrault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, (International Accountability Project, 2009), at 2.

<sup>163</sup> Inspection Panel, *Honduras: Land Administration Project — Investigation Report* (2007), at ¶ 243.

<sup>164</sup> *Id.* at ¶ 258.

<sup>165</sup> Inspection Panel, *Albania: Power Sector Generation and Reconstruction Project — Investigation Report*, *supra* note 161, at ¶ 323.

concluded in its Eligibility Report that the technical eligibility criteria for investigation had been met, finding that there could indeed be a potentially serious link between the Bank-financed project and the alleged harms (although ultimately recommending that an investigation be deferred for 12 months to allow time for the progress to be made by the Uzbek government).<sup>166</sup> In making its findings, the Panel considered reports of the International Labor Organization (“ILO”) on the application of ILO Convention 182 on the Worst Forms of Child Labor, which found gaps in Uzbekistan’s compliance with the applicable standards during peak cotton harvests.<sup>167</sup> While the Panel’s reference to the ILO Convention informed its findings only with respect to the request’s eligibility for inspection, and the specific relevance of the ILO’s findings to the Panel’s ultimate determination with respect to the Banks’ internal compliance will not be known unless an investigation is recommended and completed, this case provides a more recent example of the Panel’s willingness to engage with external and international sources of law and legal standards in performing its functions.

### 3. The Normative Effect of the Panel’s Interpretations

As an international fact-finding body, the Panel’s findings lack the precedential value of binding, judicial determinations of domestic courts of law in common law jurisdictions. The *Resolution* does not specify the extent to which the Panel should look to its previous interpretations of Bank policies to guide its work. Additionally, as a practical matter, our review of past Panel reports<sup>168</sup> suggests that Panels rarely, if ever, refer to their previous findings and conclusions to support their reasoning, most likely because Panels are charged with resolving the specific instances of alleged noncompliance immediately presented before them and not to address the general consistency of Bank practice with OPs and BPs.<sup>169</sup>

However, examples can be found where requirements established by the Panel in past cases have been applied consistently by subsequent Panels. For instance, the requirement of confidentiality which the Panel in the China: Western Poverty Reduction Project found to be inherent in the requirement for “full and informed” consultation with affected communities under Bank policies on indigenous peoples, environmental assessment and voluntary resettlement, was subsequently applied by the Panel considering the Chad–Cameroon: Petroleum Development and Pipeline Project. In its investigation report for that case, the Panel found that Bank consultations that occurred at least before 1997:

... were conducted in the presence of security forces, which was certainly incompatible with Bank policy requirements. In its report, the Panel emphasized once again that full and informed consultation was impossible if those consulted perceive that they could be penalized for expressing their opposition to or honest opinion about a Bank-financed project.<sup>170</sup>

<sup>166</sup> Inspection Panel, *Uzbekistan: Second Rural Enterprise Support Project and Additional Financing for Second Rural Enterprise Support Project – Eligibility Report and Recommendation* (2013), at ¶ 101.

<sup>167</sup> *Id.* at ¶ 59–63.

<sup>168</sup> See below Appendix B for a full list of Panel cases that we have reviewed in compiling this Report.

<sup>169</sup> See *supra* notes 130–131 and accompanying text.

<sup>170</sup> Inspection Panel, *Chad–Cameroon: Petroleum Development and Pipeline Project — Investigation Report* (2002), at ¶ 36.

Thus, although it is not bound by a system of precedent to do so, the Panel draws from standards it has elucidated from past investigations in assessing Bank compliance in later ones. Relatedly, the Panel has publicly expressed the view that one of the effects of the Panel process is to generate lessons that have been applied by the Bank in similar projects or sectors.<sup>171</sup> To this end, it has in recent years attempted to include specific concluding sections in its reports on what it calls “systemic issues” which draws on the Panel’s observations and experiences over time.<sup>172</sup>

#### D. THE PANEL’S PROBLEM-SOLVING ROLE

The *Resolution* does not explicitly provide a formal process for the Panel to engage in problem-solving. However, in addition to assessing whether the Bank is in compliance with its OPs and BPs, one of the core objectives of the Panel’s investigatory process is to improve the conditions affecting communities impacted by Bank-financed projects.<sup>173</sup> For the most part, the Panel has performed this problem-solving function by facilitating dialogue between the affected community, the Bank and the borrowing country.

The “life cycle” of a Panel request, as set out in the *Resolution*, provides several opportunities for the Panel to facilitate the resolution of disputes. First, at the receipt of a request, the Panel has the opportunity to liaise with the requesters and Bank Management for further information and to seek clarification.<sup>174</sup> Second, after the Panel receives the Management Response to the request, it normally conducts a field visit to the project area to confirm the technical eligibility of the request, during which the Panel team meets with requesters and, if applicable, briefs them orally about any proposed remedial actions in the Management Response.<sup>175</sup> The Panel also meets with representatives of the borrowing country and the Executive Director at the Board representing the borrowing country where the project is being planned to seek further input.<sup>176</sup> Third, if authorized to conduct an investigation, the Panel will interview and liaise regularly with Management and requesters throughout the investigation process to discuss key questions that the investigation is expected to address, including by conducting field visits to the project-affected area.<sup>177</sup> Each of these stages provides an opportunity for the Panel to act as a conduit of information and facilitate constructive interaction between the parties to find “common ground” and appropriate solutions.

The Panel has tried to create additional “space” for problem-solving by recommending in its eligibility report, where appropriate, that the Board defer its decision on whether to investigate a project to give additional time for Bank Management to address the problems and harms facing the requesters. The Panel is also piloting a new approach to enhance opportunities for early solutions in the Panel process in certain cases that may be amenable to resolution in the interests of the affected community.<sup>178</sup> In essence, the process envisaged under the new approach involves the Panel postponing its decision to register a request upon confirmation by the requesters that they support

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<sup>171</sup> *Inspection Panel at 15 Years*, *supra* note 120, at 12.

<sup>172</sup> *Id.* at 13.

<sup>173</sup> *Id.* at 12.

<sup>174</sup> See also *Inspection Panel, Operating Procedures*, *supra* note 99, at ¶¶ 24, 27.

<sup>175</sup> *Id.* at ¶ 37.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at ¶ 53.

<sup>178</sup> *Id.* at Annex 1.

such an initiative.<sup>179</sup> The Panel still informs the Board of the receipt of the request, through a “Notice of Receipt of a Request”, attaching Management’s proposal of remedial actions.<sup>180</sup> The procedures for this new approach to support early solutions have been designed so that they are consistent with the *Resolution* and the *1996 Clarification* and *1999 Clarification*.

There is complementarity in the interpretative and problem-solving functions performed by the Panel. Both functions contribute to the Panel’s role as an accountability mechanism insofar as it involves an assessment of the Bank’s compliance with its own policies and improving the conditions of affected communities. However, where the opportunity to address the grievances of affected communities without the need for a formal investigation report exists, the Panel has shown itself to be amenable to facilitating discussions to find a solution between the affected community, the Bank and the borrowing country. For example, in the Yemen: Institutional Reform Development Policy Financing, the requesters had been concerned about potential adverse social effects the project could have on the affected community, partly because they could not even access the project documents which had not been translated into Arabic. There, the Panel essentially served as an intermediary between the affected community and Management, including by making arrangements for the project documents to be translated.<sup>181</sup> Notwithstanding the Panel’s demonstrated willingness to engage in problem-solving, however, it has exercised careful judgment in determining when to engage in this kind of dispute resolution, particularly as it requires the Panel to engage in a careful exercise of balancing harm minimization on the one hand, and facilitating transparency in respect of the Bank’s activities on the other. Certainly, in cases of serious noncompliance, the Panel has shown itself not to be afraid of publicizing the results of its investigation.<sup>182</sup>

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<sup>179</sup> *Id.* at Annex 1, ¶ 4.

<sup>180</sup> *Id.* at Annex 1, ¶ 5.

<sup>181</sup> Inspection Panel, *Yemen: Institutional Reform Development Policy Financing — Final Report and Recommendation* (2010).

<sup>182</sup> See especially Inspection Panel, *China: Western Poverty Reduction Project — Investigation Report*, *supra* note 151; Inspection Panel, *Albania: Integrated Coastal Zone Management and Clean-Up Project — Investigation Report*, *supra* note 161.

## V. IMPLICATIONS, CHALLENGES, AND OPPORTUNITIES FOR THE PANEL

This Report has identified trends in the international aid landscape and institutional reforms that may present challenges to the Panel's work, and has analyzed how the Panel has performed its mandate as a citizen-driven accountability mechanism, looking in particular at its interpretative and problem-solving functions. In this Part 4, we identify specific functional challenges that contemporary changes may present for the Panel and offer recommendations on how these challenges may be addressed.

The following table summarizes:

- (a) specific changes in the international aid landscape and Bank reform initiatives that may impact the work of the Panel;
- (b) key impacts of those changes on the work of the Panel;
- (c) specific functional challenges that each area of impact presents for the Panel;
- (d) proposed strategies to address each of these challenges within the context of the Panel's current mandate and any opportunities to maintain its effectiveness as a citizen-driven accountability mechanism; and
- (e) issues for further consideration and potential research that fall outside the scope of this Report.

Each of these issues is discussed in detail.

Table : Summary of Potential Impacts and Challenges To the Panel’s Work, and Proposed Strategies

Relevant Changes in International Aid Landscape and Institutional Reforms	Impact on the Panel’s Work	Challenge for the Panel	Proposed Strategies	Potential Limitations and Issues for Further Consideration	
Expected increase in use of DPL and PforR financing, with their principles-based standards of protection, as part of Bank’s operationalization of greater country ownership in development financing.	<b>Changes to the benchmarks by which the Panel assesses Bank compliance</b>	Specific instances of noncompliance may be more difficult to identify	<i>Give content to principles-based requirements by:</i>	Critique that this strategy is antithetical to the goal of the Bank’s institutional reform: giving Bank Management more discretion and flexibility. Additionally, the Panel does not have an explicit mandate to engage in standard-setting.	
Expected results of Safeguards Review replacing detailed and procedurally prescriptive requirements with broad, principles-based standards of protection.			Expanding use of purposive tools and interpretive techniques, including reliance on Guidelines and Best Practice documents.		Problem-solving may result in less transparency regarding Bank noncompliance as focus is shifted to efficiently resolving disputes, effectively “behind closed doors”.
Greater emphasis on two broad categories of Bank activity that may permit greater discretion and entail more technical responsibilities: (a) project preparation and assessment, particularly in PforR; and (b) greater “implementation support” activities in IL.			Increasing engagement in problem-solving.		The Panel’s mandate may limit it to reviewing <i>specific</i> cases without developing a larger and more coherent body of jurisprudence.
Greater emphasis on two broad categories of Bank activity that may permit greater discretion and entail more technical responsibilities: (a) project preparation and assessment, particularly in PforR; and (b) greater “implementation support” activities in IL.	<b>Differences in the nature of potential policy violations</b>	The Panel may find itself called on to perform more of an “administrative review” or quasi-judicial review of discretionary Bank decisions	<p>Increase reliance on third party experts with requisite technical expertise. Develop appropriate standards of review.</p>	<p>There may be a “battle of the experts” in cases in which both the Bank Management and the Panel have retained experts who come to different conclusions regarding how adequately the Bank has addressed environmental and social concerns with its discretionary decisions.</p> <p>The development of standards of administrative/judicial review may be thought to go beyond the legitimate</p>	

				role of the Panel's role.
The Safeguards Review may result in the adoption of policies addressing new areas such as the protection of the global commons and a broader set of human rights concerns.		The Panel may have no prior experience or existing standards on which to draw to address new kinds of policy violations	Draw on new internal guidance material that accompanies the new Safeguards	The Panel could probably not use the internal guidance in such a way as to make it effectively mandatory for the Bank.
			Increase practice of referring to standards incorporated in external sources like international agreements and the requirements of other MDBs	Potential actual or perceived misalignment between the substantive requirements of Bank policies and the external legal sources and standards used by the Panel.

<p>PforR’s expected modality of support is likely to render the Bank’s involvement less visible</p>	<p><b>Potentially less recourse to the Panel’s procedures by PforR affected communities</b></p>	<p>The Panel cannot operate as an effective citizen-driven accountability mechanism if communities do not know that the harm affecting them may be caused by the Bank’s involvement</p>	<p>Promote awareness of the Bank’s involvement in PforR operations and the availability of the Panel’s processes</p>	
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## A. THE CHANGING BENCHMARKS BY WHICH THE PANEL WILL NEED TO ASSESS COMPLIANCE: FROM PRESCRIPTIVE REQUIREMENTS TO PRINCIPLES-BASED STANDARDS OF PROTECTION

Institutional reforms taken by the Bank are likely to change the benchmarks that the Panel uses to assess the Bank's compliance. Two reform initiatives suggest this outcome: (1) the expected increase in the use of DPL and PforR financing relative to IL financing, and (2) our expectation that the Safeguards Review will recommend a move from detailed and prescriptive procedural requirements to broad, principles-based standards of social and environmental protection. We have observed that these two institutional changes are related and are likely to produce complementary results. All three lending instruments currently appear to be designed to move in the direction of facilitating increased country ownership and the increased use of country systems in the application of environmental and social protections. More principles-based standards of social and environmental protections will give the Bank the flexibility to build in this type of country ownership when it is appropriate and practical for the Bank. However, the two reform initiatives are likely to present a challenge to the Panel.

Specific instances of noncompliance may become more difficult for the Panel to identify as benchmarks move away from detailed procedural requirements. The very flexibility that principles-based standards of protection provide to Bank Management may, in the most practical sense, give the Panel less policy language and specific requirements on which to rely when assessing compliance. In the case of the Safeguard Policies, detailed procedural requirements that are currently present may be relegated to Guidance Notes or disappear altogether as a result of the Safeguards Review. This putative "dilution" of standards may be seen to threaten the Panel's ability to perform as an effective accountability mechanism.

At the same time, the changing benchmarks may in fact present the Panel with an opportunity to strengthen its role as an accountability mechanism. It is recommended that the Panel adopt three strategies to take advantage of this opportunity by giving specific content to the principles-based standards of social and environmental protection:

- (a) The Panel can *expand its use of purposive interpretation techniques and reliance on Guidance and Best Practice documents*. The Panel already has a history of using internal (non-mandatory) guidance in its assessment of Bank compliance, and its past practice suggests that it may be willing to draw on external sources such as international agreements and treaties for guidance on how similar standards regarding various environmental and social issues have already been developed in the international community.
- (b) The Panel can embrace the flexibility of principles-based standards of social and environmental protection and *increase its engagement in problem-solving* to work with Management and requesters in order to achieve consensus regarding how an OP's principles-based standards can be met in any given project, before resorting to a more adversarial compliance investigation.
- (c) The Panel can *draw on its prior investigations* that interpret former detailed, procedural requirements of the Safeguard Policies to give content to the revised Safeguards Policies. Should the Safeguard Policies be amended to incorporate broad principles-based standards of social and environmental protection, they and the current principles-based policies in

DPL and PforR would nonetheless presumably be intended to serve the same purpose as the current detailed and procedurally prescriptive Safeguard Policies, given that the Bank is unlikely to resile from its publicly-declared commitment to promoting socially and environmentally sustainable development.

The recommendations may not however be immune to criticism. First, giving substantive content to principles-based policies through standard-setting may be challenged as being antithetical to the goal of the Bank's institutional reforms, namely giving Management and borrowers greater discretion and flexibility to allow for increased country ownership. The Panel may also be criticized on the basis that it does not have an express mandate to engage in standard-setting. The Panel could address this criticism by pointing to its own history of effectively giving content to the standards in order to interpret even the most prescriptive requirements.

Second, a move towards more problem-solving may result in a trade-off in the level of transparency with respect to instances of Bank noncompliance, as it may lead to a drop in the number of investigations that produce published reports, or simply less detailed reasons and analysis being given in published reports. The Panel could defend the appropriate use of problem-solving in less serious or intentional instances of Bank noncompliance, however, and at the same time prioritize involving affected communities and addressing their grievances.

Third, the Panel may be criticized for applying past Panel findings and rationales on the grounds that its mandate limits it to reviewing *specific* cases of alleged compliance, rather than to develop a body of "jurisprudence" per se. Alternatively, it could be argued that it is inappropriate for the Panel to draw on past findings without demonstrating that the new, principles-based standards of social and environmental protection are in fact comparable, if not consistent, with the detailed, procedural requirements of the current Safeguard Policies. In response, the Panel could point to current support in the Bank for it to identify "systemic issues" across similar types of projects to identify the "why" for noncompliance,<sup>183</sup> instead of looking at each case in a vacuum. Drawing on past Panel findings would be consistent with that approach.

## **B. DIFFERENCES IN THE NATURE OF POTENTIAL POLICY VIOLATIONS**

The Panel is also likely to face differences in the nature of the policy violations that are alleged in future requests. Two institutional changes suggest this outcome. First, a reallocation of Bank responsibility that entails: (a) the Bank taking on more responsibility for *ex ante* social and environmental risk assessment (including environmental classification of proposed projects) that require greater technical expertise and permit more extensive discretion; and (b) a stronger emphasis on the Bank's provision of "implementation support" in IL operations. Second, the IL Safeguards Review is expected to recommend that the Safeguard Policies be amended to incorporate new "emerging areas" that deal with protection of the global commons and other rights-based issues (for example, climate change and occupational health and safety).

Increased Bank engagement in activities that permit the exercise of more extensive discretion on the Bank's part and require the use of technical expertise may give rise to inspection requests that call on the Panel to assess Bank Management's compliance in a manner that more strongly

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<sup>183</sup> *Inspection Panel at 15 Years*, *supra* note 120, at 64.

resembles judicial review of administrative decisions in domestic legal systems. Such a move by the Panel to a more court-like role, engaging in judicial review of administrative discretion, raises potentially difficult questions, such as whether this is an appropriate role for the Panel as a citizen-driven accountability mechanism, and if so what standards of review the Panel should use in reviewing Bank action or inaction. The question of what is the appropriate standard of judicial review has been a contentious one for many domestic as well as international courts, and for the Panel to take on such a role would raise similar and perhaps sharper questions about its role vis-à-vis Bank management in this respect.

It is recommended that the Panel address this challenge by increasing its reliance on appropriate third party experts with the requisite technical expertise in its investigations of Bank noncompliance. The Panel presently hires internationally recognized independent consultants with relevant areas of expertise to assist in its investigations.<sup>184</sup> Continuing this practice may lend legitimacy to the Panel's investigations in areas that exceed its expertise, especially as the Bank's engages in tasks that involve more and more expertise. However, a stronger reliance on third party experts may also revive the problem of the "battle of the experts" where experts hired by the Bank and the Panel each reach different conclusions regarding how adequately Bank Management has addressed certain social and environmental requirements. The challenge that this problem poses to the Panel's effectiveness can be seen in the South Africa: Eskom Investment Support Project case, in which subject-matter experts within Bank Management disagreed with findings of the Panel's experts that its assessment of the 'equivalence' and 'acceptability' of South Africa's environmental and social safeguard systems had been inadequate. Rather than engage with the Panel's findings on this point, Bank Management instead reached a stalemate: it characterized the Panel's critique as one relevant primarily to procedural issues, and only marginally to the outcome of such procedures.<sup>185</sup>

If the Safeguards Review ultimately recommends that the Safeguard Policies be amended to broaden their social coverage to incorporate new subject areas, future requests for inspection are likely to allege new types of harm and implicate new policy requirements of which the Panel has not had experience. To address this challenge, it is recommended that the Panel use a familiar technique of looking at the underlying object and purpose of the new policy requirements and referring to any policy documents or guidance material that explain the rationale of requirements.

Additionally, since the subject areas may be novel, the Panel is arguably justified in continuing its occasional practice of consulting external sources — such as international agreements and the policy requirements of other MDBs — that indicate how similar international standards have been applied elsewhere. This may produce the additional benefit of harmonizing international legal standards, which could make projects involving multiple financiers and different sets of environmental and social requirements more practical. In referring to external sources of laws and standards, it is recommended that the Panel take care in demonstrating the alignment between the substantive policy requirements contained in OPs/BPs addressing new emerging areas and the standards set out in any external materials it may reference.

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<sup>184</sup> *Id.* at 15.

<sup>185</sup> Inspection Panel, *South Africa: Eskom Investment Support Project (IBRD Loan No. 78620-ZA) – Management Response and Recommendation* (2012), at [xiii]–[xv].

**C. POTENTIALLY LESS RECOURSE TO THE PANEL'S PROCEDURES BY PFORR AFFECTED COMMUNITIES**

PforR and the expected increase in its use may have an additional implication for the Panel. Since PforR was intended to be used to finance operations that are programmatic in nature, it is likely to invite Bank financing in the form of sectoral budget support, which is less visible to communities affected by the program because there is usually less transparency about how a government's budget is sourced. Consequently, it is possible that the Panel will receive relatively few requests for inspection from communities affected by PforR operations due to lack of awareness of the Bank's involvement. To address this, it is recommended that the Panel engage directly in, or encourage Bank Management to engage in, promoting greater awareness of the Bank's involvement in PforR operations and the availability of the Panel's processes for communities affected by those operations.

**VI. APPENDIX A – OVERVIEW OF KEY LENDING INSTRUMENTS AND APPLICABLE OPERATIONAL POLICIES AND BANK PROCEDURES**

	<b>Investment Lending (“IL”)</b>	<b>Program-for-Results (“PforR”) Financing</b>	<b>Development Policy Lending (“DPL”)</b>
<b>Core OP/BP governing lending instrument</b>	OP/BP 10.00 <i>Investment Project Financing</i>	OP/BP 9.00 <i>Program-for-Results Financing</i>	OP/BP 8.60 <i>Development Policy Lending</i>
<b>Environmental and social risk mitigation requirements</b>	Detailed and procedurally prescriptive requirements set out in the Safeguard Policies.	<p>Broad, principles-based standards of protection set out in OP 9.00 <i>Program-for-Results Financing</i> (rev. Apr. 2013), at ¶ 8 (Environmental and Social Systems Assessment).</p> <p>Key differences between these protections and the Safeguards Policies are:</p> <ul style="list-style-type: none"> <li>• greater procedural flexibility in respect of borrower requirements and, as a corollary, less detailed procedural requirements that apply to Bank Management’s responsibilities;<sup>186</sup> and</li> <li>• heavier reliance on the use of country systems.</li> </ul>	<p>Broad, principles-based standards of protection set out in OP 8.60 <i>Development Policy Lending</i> ¶¶ 10 (Poverty and Social Impacts) and 11 (Environmental, Forests, and other Natural Resource Aspects).</p> <p>The text of these provisions suggest that the Bank adopts a very “light touch” approach in respect of environmental and social risk mitigation in DPL operations, as compared to the Safeguard Policies and the PforR’s principles-based protections. This may be a concomitant of DPL being provided in the form of budgetary support for government economic policy and institutional reform rather than granularly defined development operations. Specifically, the above provisions require the Bank to:</p> <ul style="list-style-type: none"> <li>• determine whether specific country policies supported by</li> </ul>

<sup>186</sup> See *supra* notes 89–93 and accompanying text.

			<p>the DPL-operation are “likely to have significant poverty and social consequences” or are “likely to cause significant effects on the country’s environments, forests, and other natural resources”;</p> <ul style="list-style-type: none"> <li>• summarize those effects in the Program Document for the operation; and</li> <li>• identify how any “significant” gaps or shortcomings would be addressed.</li> </ul>
<p><b>Using country systems for environmental and social risk mitigation</b><sup>187</sup></p>	<p>OP 4.00 <i>Piloting the Use of Borrower Systems for Environmental and Social Safeguards</i></p>	<p>There is no separate OP on the use of country systems for PforR operations. The concept of using country systems to promote environmental and social sustainability and to avoid, minimize or mitigate environmental and social harm in operations is embedded in the principles-based standards of protection of OP 9.00 <i>Program-for-Results Financing</i> (rev. Apr. 2013), at ¶ 8.</p>	<p>Similar to PforR: there is no separate OP on the use of country systems for DPL operations. The concept of using country systems to promote environmental and social sustainability and to avoid, minimize or mitigate environmental and social harm in operations is embedded in the principles-based standards of protection of OP 8.60 <i>Development Policy Lending</i> ¶¶ 10, 11.</p>
<p><b>Borrower’s defined responsibilities</b></p>	<p>OP 10.00 <i>Investment Project Financing</i> ¶ 18, which refers to the borrower’s role in:</p> <ul style="list-style-type: none"> <li>• carrying out the project with due diligence;</li> </ul>	<p>OP 9.00 <i>Program-for-Results Financing</i> (rev. Apr. 2013), at ¶ 11, which refers to the borrower’s role in:</p> <ul style="list-style-type: none"> <li>• carrying out the program with due diligence;</li> </ul>	<p>OP 8.60 <i>Development Policy Lending</i> ¶¶ 15, 16 which refer to the borrower’s responsibility for:</p> <ul style="list-style-type: none"> <li>• managing operational risks affecting the DPL operation’s</li> </ul>

<sup>187</sup> For further discussion of the use of country systems, see further *supra* Part C.

	<ul style="list-style-type: none"> <li>• maintaining appropriate monitoring and evaluation (“M&amp;E”) arrangements;</li> <li>• complying with procurement, financial management, disbursement, social and environmental obligations;</li> <li>• reporting against the achievement of development objectives and results;</li> <li>• providing agreed financial and audit reports; and</li> <li>• dealing with problems or violations (individual or systematic) in these areas in a timely and effective manner.</li> </ul>	<ul style="list-style-type: none"> <li>• maintaining appropriate M&amp;E arrangements (including credible development linked indicator (“DLI”) verification protocols), fiduciary and environmental and social systems, and governance arrangements;</li> <li>• dealing with problems or violations in these areas in a timely and effective manner.</li> </ul> <p>These are similar to the borrower’s defined responsibilities in IL projects, except the obligation to maintain appropriate M&amp;E arrangements is expressed to apply to a fuller range of country systems that may be used in PforR operations.</p>	<p>“development effectiveness”;</p> <ul style="list-style-type: none"> <li>• implementing the DPL operation;</li> <li>• monitoring progress during implementation; and</li> <li>• evaluating results on completion.</li> </ul> <p>Although the nature of the borrower’s defined responsibilities are, to some extent, similar to those expressed in the IL and PforR OPs/BPs, they are expressed in more general terms and the division of Bank–borrower responsibilities is less clearly expressed.</p>
<p><b>Bank’s defined responsibilities</b></p>	<p>OP 10.00 <i>Investment Project Financing</i> ¶ 19, which refers to the Bank’s role in:</p> <ul style="list-style-type: none"> <li>• appraising the project in accordance with OP 10.00 and other applicable policies;</li> <li>• monitoring borrower compliance with contractual obligations during implementation;</li> <li>• reviewing reports on implementation progress, how the project is tracking with respect to the achievement of agreed development objectives and results; and</li> </ul>	<p>OP 9.00 <i>Program-for-Results Financing</i> (rev. Apr. 2013), at ¶¶ 12, 13, which refer to the Bank’s role in:</p> <ul style="list-style-type: none"> <li>• assessing and appraising the program in accordance with OP 9.00 and other applicable policy, technical, operational and procedural requirements;</li> <li>• consulting with program stakeholders in relation to environmental and social assessment, and disclosing the results and recommendations of its assessment;</li> <li>• agreeing with the borrower the</li> </ul>	<p>OP 8.60 <i>Development Policy Lending</i> ¶¶ 15, 16 which refer to the Bank’s role:</p> <ul style="list-style-type: none"> <li>• independently identifying the financial and nonfinancial risks associated with the DPL operation;</li> <li>• ensuring that the operation contains appropriate mitigation measures and “monitorable indicators to track high-probability risks;</li> <li>• assessing and monitoring of the adequacy of the borrower’s implementation arrangements ,“with due regard</li> </ul>

	<ul style="list-style-type: none"> <li>• reviewing updated project risk matrixes and management measures.</li> </ul> <p>In general terms, these activities may be characterized as forms of compliance review.</p> <p>There is also a greater reference to providing implementation support and monitoring until the completion of the project.<sup>188</sup></p>	<p>specific actions to be taken and arrangements to be maintained to address any identified weaknesses and risks, and to strengthen institutional capacity;</p> <ul style="list-style-type: none"> <li>• providing implementation support by reviewing progress, achievement of program results and DLIs, including actions to strengthen institutional capacity.<sup>189</sup></li> </ul> <p>In broad terms, these are similar to the Bank’s defined compliance review responsibilities in IL operations. There are a small number of new obligations, namely:</p> <ul style="list-style-type: none"> <li>• the assessment and appraisal obligations are expressed to apply to a broader range of country systems requirements;</li> <li>• there is an express consultation and disclosure obligation with respect to the Bank’s environmental and social assessment of the operation; and</li> <li>• there is an express obligation to work with the borrower to agree any necessary “gap-filling” and</li> </ul>	<p>to the country’s capacity”;</p> <ul style="list-style-type: none"> <li>• verifying borrower’s fulfillment of program conditions and compliance with contractual obligations; and</li> <li>• validating the borrower’s monitoring and evaluation findings.</li> </ul> <p>Refer to above comments with respect to the more general terms in which these obligations are expressed and the relative lack of clarity in this policy document. There is also a more general reference to “supervision” which includes “assessing the changes in outputs and outcomes resulting from supervision.”</p>
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<sup>188</sup> See also BP 10.00 *Investment Project Financing* (Apr. 2013), ¶¶ 35–6. See further discussion in *supra* Part F. Note that, before the IL Policy Consolidation Exercise, more prescriptive requirements on project supervision set out in OP/BP 13.05 *Project Supervision* also applied to IL projects. This OP has since been archived following the decision in to consolidate all supervisory requirements into OP 10.00 *Investment Project Lending* (rev. Apr. 2013).

<sup>189</sup> See also BP 9.00 *Program-for-Results Financing* (rev. Apr. 2013), ¶¶ 37–8. See further discussion in *supra* Part D.

		<p>“institutional capacity-building” measures.</p> <p>These differences reflect the following features of PforR: greater delegation of responsibility to the borrower for project implementation; stronger use of country systems; different model of engagement with borrower countries that reflect a partnership.</p>	
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## VII. APPENDIX B – SUMMARY OF PANEL INVESTIGATIONS ANALYZED IN THIS REPORT

Project	Project Description	Panel Conclusions
<b>China:</b> Western Poverty Reduction Project (1999)	The “Qinghai Project”, implicated in the investigation, was one of three components of a broader poverty alleviation project, involving the voluntary resettlement of 58,000 farmers to a “move-in” area. An existing dam in the “move-in” area would be renovated, and a new dam would also be constructed in the area.	The Panel identified a number of specific instances of Bank noncompliance, and was particularly concerned by the wide range of diverging views among Bank management regarding major Bank decisions required by the policies. The Panel was extremely critical of the level of flexibility applied by Bank staff in interpreting the policy requirements, especially with respect to the level of discretion that the Bank staff interpreted the policies to grant them. The Panel also expressed disapproval of the (minority of) senior Bank staff who took a “check list” approach to compliance, rather than focusing on the quality of compliance.
<b>Pakistan:</b> National Drainage Program Project (2004)	First phase of Pakistan’s National Drainage Program “framework program” that addressed waterlogging and salinity that threatened sustainability of irrigated agriculture in Pakistan.	The Panel found generally that the Bank failed to consider the “down-stream effects” of the project on areas other than the direct beneficiaries of the irrigation and drainage system, and that this was a result of the Bank’s use of a narrow definition of project scope. The damages suffered by persons to date had not been redressed, and the conditions that cause harm were still in place.
<b>DR Congo:</b> Transitional Support for Economic Recovery Credit & Emergency Economic & Social Reunification Support Project (2005)	Funding the preparation of a new forest zoning plan and initiating a legal review of forest concessions.	The Panel found that the Bank had been interested in the tax and revenue generation and local employment potential of the project from an early stage, and that this influenced the Bank’s (inadequate) consideration of the socioeconomic and environmental issues of forest use that were embedded in the safeguard policies. This in turn contributed to problems of Bank compliance with its social and environmental policies at the design and appraisal stage of the project.
<b>Albania:</b> Integrated Coastal Management and Clean-Up Project (2007)	Set up and initiate an integrated coastal zone management approach to reduce coastal degradation. When the Bank began to fund the project, the government had already been continuously demolishing homes on the coast as part of its own efforts in the	The requesters alleged that the Bank was wrong in not applying OP/BP 4.12 <i>Involuntary Resettlement</i> to the government’s demolition activities it was conducting in tandem with the project. The Panel found that while the Bank was not itself directly funding or participating in the demolitions, they were adequately connected to the project that they should have fallen under the scope of the OP

Project	Project Description	Panel Conclusions
	area.	and of the Bank’s responsibility. The Panel additionally found evidence of bad faith actions on the part of some Bank Management, resulting in disciplinary actions in the Bank.
<b>Albania:</b> Power Sector Generation & Restructuring Project (2007)	Construction of thermal power station and connection to network, plus technical assistance to Albania Power Corporation for implementation of project and improvement of company operations, especially in procurement and environmental management.	The requesters alleged, and the Panel agreed, that the Bank did not satisfy its requirements for: (a) environmental assessment, particularly by not demanding adequate environmental assessment prior to the actually choosing of the project site; and (b) management of cultural property, by not considering relevant threats to cultural property and not consulting relevant local actors regarding those threats.
<b>Yemen:</b> Institutional Reform Development Policy Financing (2009)	Income tax reform, land titling and registration reform, strengthening public procurement, improving revenue transparency, and public administration reform.	The requesters alleged that the consultations held by the Bank did not satisfy the requirements of OP/BP 8.60 <i>Development Policy Lending</i> . An official Panel investigation never took place, because the Bank proposed ways to ameliorate the consultations to the satisfaction of the affected communities. The requesters also alleged a violation of the Bank’s policy on the disclosure of information, which was also satisfied when the Bank committed to translating important project documents into Arabic, the local language.
<b>Cambodia:</b> Land Management and Administration Project (2009)	Improving land tenure security and promoting development of efficient land markets. The request regarded “serious harm” suffered by residents in the project’s geographical area.	The requesters alleged “serious harm” suffered by residents in the project’s geographical area do to their involuntary resettlement. The Panel found that the Management’s omission of explaining how the Resettlement Policy Framework, which was intended to address resettlement concerns, should be triggered was the primary reason why it was not triggered to protect the people being displaced, and therefore that it was a violation of OP/BP 4.12 <i>Involuntary Resettlement</i> . The Management subsequently agreed that the framework should have been applied.
<b>South Africa:</b> Eskom Investment Support Project (2010)	Enhancement of South Africa’s power supply and energy security, including the construction of plants and energy infrastructure.	The requesters alleged, and the Panel agreed, that both the <i>equivalence</i> and <i>acceptability</i> requirements of OP 4.00 <i>Piloting the Use of Borrower Systems To Address Environmental and Social Safeguard Issues in Bank Supported Projects</i> had not been satisfied. The Panel found that the <i>equivalence</i> assessment did not adequately recognize the gap between Bank policy requirements and national legislation with respect to

Project	Project Description	Panel Conclusions
		<p>environmental assessment, particularly water use and mining activities. The Panel additionally found that South African law did not require an independent advisory panel in the implementation of a project like this, while OP 4.00 does.</p> <p>The Panel found that the assessment of <i>acceptability</i> was inadequate in that it: (a) did not address the institutional capacity of key regulatory institutions involved in environmental monitoring and management related to the project; (b) did not adequately address concerns relating to implementation practices and track record in regard to the environmental impact assessment process; and (c) did not properly identify gap-filling measures to help address issues of capacity within competent environmental authorities at certain tiers of government.</p>
<p><b>Ethiopia:</b> Protection of Basic Services Program Phase II Project Additional Financing and Promotion of Basic Services Phase III Project (P128891) (2013)</p>	<p>The Bank financed and administered a program to protect basic services (such as health, education, agriculture, water supply and sanitation, and rural roads) ('Protection of Basic Services program', or '<b>PBS program</b>')</p>	<p>The requesters in this case claimed that the Bank's financing and administration of its Protection of Basic Services program (such as health, education, agriculture, water supply and sanitation, and rural roads) ('<b>PBS program</b>') directly contributed to a government program of forced 'villagization' or displacement of the Anuak indigenous people in the Gambella Region. The requester specifically claimed that OP 4.10 <i>Indigenous Peoples and Voluntary Resettlement</i> should have applied and been complied with by the Bank.</p> <p>In recommending an investigation of the request to the Board, the Panel notes that the existence of a 'plausible link' between the Bank's PBS program and forced villagization was sufficient to support an investigation to allow the Panel to make definitive findings with respect to such a link.</p>
<p><b>Lebanon:</b> Greater Beirut Water Supply Project (2013)</p>	<p>The Bank funded bulk water supply infrastructure, supplied reservoir distribution network and metering, and contributed to project management, utility strengthening and national studies, in order to increase the provision of potable water to the residents in the Greater Beirut area.</p>	<p>The Requesters alleged that the Bank had not adequately assessed the project's potential consequences on water quality. The Panel did not deal with the adequacy issue by proposing its own standards per se. In its Recommendation Report, the Panel instead detailed what the Management had proposed and was carrying out, and determined that it was satisfied with the Management's efforts.</p>

Project	Project Description	Panel Conclusions
		<p>As an observation, this more passive approach on the part of the Panel may be at least partially a result of the fact that this played out at the preliminary stages of the project, where the potential harm being discussed was still prospective.</p>
<p><b>Uzbekistan:</b> Second Rural Enterprise Support Project and Additional Financing for Second Rural Enterprise Support Project (2013)</p>	<p>Bank finance to increase the productivity and financial and environmental sustainability of agriculture and the profitability of agribusiness in rural Uzbekistan through the provision of financial and capacity building support to agribusinesses, and improved irrigation services and drainage infrastructure.</p>	<p>The requesters alleged that the Bank had failed to identify forced labor as a problem in its social risk assessment of the project, which prevented the Bank from taking action to avoid contributing to the problem by preventing Bank funds from being used on agricultural lands where forced labor is practiced.</p> <p>In its Eligibility Report, released December 2013, the Panel stated its conclusion, following a document review, on-site observations and discussions with the requesters, that there could indeed be a plausible and potentially serious link between the Bank-financed project and the alleged harms. As part of its conclusions, the Panel considered reports by the International Labor Organization (“ILO”) and findings of the ILO Committee of Experts on the application of ILO Conventions on child labor in Uzbekistan, which found gaps in complying with the applicable standards during cotton harvests.</p> <p>The Panel determined that the technical eligibility criteria had been met, but recommended to the Board that an investigation be deferred for 12 months to allow progress to be made in eradicating forced labor in Uzbekistan.</p>

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