EMPOWERING THE INSPECTION PANEL: THE IMPACT OF THE WORLD BANK'S NEW ENVIRONMENTAL AND SOCIAL SAFEGUARDS*

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I. INTRODUCTION

In July 2012, the World Bank (Bank) began a review of its environmental and social safeguard policies in an effort to modernize its approach to environmental and social risk management and enhance efficiency for both the Bank and borrower countries. The environmental and social safeguards attach conditions to and function as regulatory guidelines for both the Bank and borrowers working on Bank-funded projects.[1] The Bank itself claims that the review of the existing safeguards specifically aimed to expand coverage and social inclusion; enhance responsibilities and ownership of borrower countries; strengthen supervision, monitoring, and evaluation of the implementation of the safeguards; and increase accountability and grievance redress systems for those who are affected by Bank-financed projects.[2]

After a four-year consultation process, the Bank's Board of Directors approved the third draft of the *Environmental and Social Framework* (ESF) on August 4, 2016.[3] The new ESF consists of: (1) the *Vision for Sustainable Development*,[4] which sets out the Bank's aspirations for environmental and social sustainability; (2) the *Environmental and Social Policy for Investment Projects* (ESPIP),[5] which sets out the Bank's mandatory requirements for investments, and (3) the ten *Environmental and Social*

1. *Review and Update of the World Bank Safeguard*, WORLD BANK: CONSULTATIONS, http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies (last visited Mar. 22, 2017).

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

3. WORLD BANK GROUP [WBG], ENVIRONMENTAL AND SOCIAL FRAMEWORK: SETTING ENVIRONMENTAL AND SOCIAL STANDARDS FOR PROJECT FINANCING (August 4, 2016) [hereinafter ENVIRONMENTAL AND SOCIAL FRAMEWORK], https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf.

4. World Bank Group [WBG], *Vision for Sustainable Development*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 5.

5. World Bank Group [WBG], *Environmental and Social Policy for Investment Projects*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 9 [hereinafter *ESPIP*].

Standards (ESS),[6] which detail the borrower's responsibilities. The new ESF package also includes the *Bank Directive: Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups*, which gives instructions to Bank staff regarding due diligence obligations for the assessment and management of risks and impacts falling on disadvantaged or vulnerable individuals or groups.[7]

In addition, the Bank's Board of Directors has yet to approve the final version of the *Environmental and Social Procedure* (ESP),[8] which provides instructions to Bank staff on applying the ESPIP, and the *Information Note: Assessing the Borrower's Environmental and Social Framework*, which will provide further information and guidance to Bank staff about making decisions, together with the borrower, on the potential use of all or parts of a borrower's ESF in Bank-financed projects.[9] The new ESF package should be rolled out in 2018 after the Bank has completed a 12–18 month training period to prepare for the transition to the new ESF.[10] For the first seven years, the existing safeguards are expected to run in parallel to the new ESF, governing projects that were initiated before the launch of the ESF.[11]

6. World Bank Group [WBG], *Environmental and Social Standards, in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 23. This Note will cite each ESS separately.

7. World Bank Group [WBG], *Bank Directive: Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups*, EXC5.07-DIR.117 (Aug. 4, 2016) [hereinafter *Bank Directive*], https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=E5562765-a553-4ea0-b787-7e1e775f29d5.

8. World Bank Group [WBG], *Bank Procedure: Environmental and Social Procedure* (Aug. 4, 2016) (Deliberative Working Draft) [hereinafter *ESPP*], https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/draft_es procedure_clean_final_for_public_disclosure_post_board_august_4.pdf.

9. World Bank Group [WBG], *Information Note: Assessing the Borrower's Environmental and Social Framework* (August 4, 2016) (Deliberative Working Draft), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/draft_borrower_framework_information_note_final_for_public_disclosure_post_board_august_4.pdf.

10. Press Release, World Bank Group, World Bank Board Approves New Environmental and Social Framework (August 4, 2016), http://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework.

11. *Id.*

Much of the criticism and feedback received from stakeholders during consultation, such as governments, civil society, and the private sector, focused on the dilution of the Bank management's role and responsibilities under the new framework. Most input, however, has overlooked the impact that the new ESF will have on the role of the Inspection Panel. Given the Inspection Panel's structure and the scope of its authority, the changes currently proposed could have a substantial effect on the World Bank Inspection Panel (Inspection Panel) and its ability to ensure compliance with the safeguards.

This Note aims to fill this gap in scholarship by examining how the new ESF potentially limits the Inspection Panel's ability to receive and respond to complaints by individuals and communities affected by Bank-financed investment projects. The Note will first describe the key changes in the nature of the Bank's obligations under the new ESF, highlighting their relevance to the Inspection Panel's function and effectiveness. It then will evaluate the impact of the new ESF on the Inspection Panel's ability to hold the Bank accountable for harm caused to individuals and communities as a result of Bank-financed investment projects. Next, it will identify standards developed by the Inspection Panel through its investigations, which may inform the Inspection Panel's ongoing role under the existing safeguards. The final Part will make suggestions for how the Inspection Panel can maintain its accountability function, based both on the language of the new ESF and external measures it can take. If the Inspection Panel asserts its accountability function during investigations as it previously has, in particular linking the Bank to social problems or environmental damage caused by the project through the Bank's consultation and monitoring responsibilities, the Inspection Panel will be able to further and potentially expand its oversight role.

II. Development of the Inspection Panel

Since its establishment in 1944, the World Bank has distributed loans to countries to support its ultimate goal of eradicating poverty and fostering sustainable economic growth and development.[12] These long-term concessional loans support infrastructural projects, social projects in the education and health sector, and structural and sectoral reform of government institutions.[13] Governments develop the project and request a loan from the Bank. Upon reviewing the project, the Bank negotiates an implementation strategy with the borrowing country before signing an investment agreement.[14]

In order to decrease the project's environmental and social hazards, the Bank introduced the aforementioned social and environmental safeguard policies in the 1980s. The safeguards supported the integration of environmental and social risks into project decision-making and provided a framework for consultation and disclosure. In 1993, the Bank took the unprecedented step of establishing the Inspection Panel, the first institutional mechanism to allow non-state actors to directly hold an international organization responsible for its actions.[15] The Inspection Panel was established by the Resolutions of the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA) and is tasked with receiving and investigating complaints from individuals and communities whose:

> [R]ights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the Borrower's obligations under loan agreements with respect to such policies and procedures) provided in

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12. *What We Do*, WORLD BANK, http://www.worldbank.org/en/about/what-we-do (last visited Feb. 18, 2017).

13. *Id.*

14. *The World Bank Operations Manual, Bank Procedure 10.00, April 2013, revised July 1, 2014,* ¶ 27, http://siteresources.worldbank.org/OPSMANUAL/112526-1124462138612/23585577/BP10.00_July1_2014.pdf.

15. Daniel Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 409 (2005).

all cases that such failure has had, or threatens to have, a material adverse effect.[16]

The Inspection Panel fulfills this role by accepting and reviewing complaints from individuals and communities before submitting its findings to the Bank's Board of Executive Directors.[17] The Bank Management then prepares a response to the Inspection Panel's findings with recommendations and actions to address findings of noncompliance.[18] Upon considering both the Inspection Panel's report and Bank Management's response, the Board of Executive Directors decides future action.[19] In this way, the Inspection Panel generates accountability for the Bank and provides redress to those who have been adversely affected by the Bank's non-compliance with the safeguard policies.

III. Change in the Nature of the Bank's Obligations

The new ESF reflects a fundamental shift in the Bank's approach to ensuring environmental and social protection within the development finance context. Most notably, the framework conforms to the broader movement of multinational development banks (MDBs) in favor of enhanced borrower ownership and responsibility over projects. As such, the new ESF clearly distinguishes between Bank and borrower roles and responsibilities. The new ESF expands the Bank's role in due diligence while appearing to minimize its role regarding implementation. Moreover, it provides the Bank with greater discretion by qualifying many of its obligations. The Bank's and borrower's responsibilities are also expanded to cover more environmental and social issues. This Part identi-

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16. International Bank for Reconstruction and Development [IBRD] & International Development Association [IDA], *The World Bank Inspection Panel*, Res. No. IBRD 93-10/Res. No. IDA 93-6 (Sept. 22, 1993) [hereinafter *Inspection Panel*], http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf; World Bank Group [WBG], *1999 Clarification of the Board's Second Review of the Inspection Panel* (Apr. 20, 1999), http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ClarificationSecondReview.pdf.

17. *Inspection Panel*, *supra* note 16, ¶ 12.

18. *Id.* ¶¶ 16–23.

19. For more information on the Panel, see *The Inspection Panel*, World Bank, http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx (last visited Feb. 18, 2017).

fies changes to the ESF that will likely impact the Inspection Panel's ability to hold the Bank to account and provide redress to individuals and communities harmed by Bank-funded projects. While the expanded scope of certain ESSs also extends the reach of the Inspection Panel, the shifts toward greater borrower ownership and an outcome-based approach in conjunction with more vague or aspirational language threaten the Inspection Panel's effectiveness by decreasing the role and visibility of Bank management.

A. *Paradigm Shift Towards Borrower Country Ownership of Bank-Financed Investment Projects*

In a significant departure from the existing safeguards, the new ESF separates the roles and responsibilities of the Bank from those of the borrower. The new ESPIP clarifies and consolidates in one place the roles and responsibilities of the Bank, in contrast to the existing safeguards, in which they are spread over eight different operational policies and related procedures. The ten ESSs, on the other hand, delineate the requirements for borrowers.

This new structure of the ESF, which places primary responsibilities on the borrower, reflects the shift in the financing development sector towards "country or borrower ownership," as exemplified in the *Paris Declaration on Aid Effectiveness*,[20] the *Accra Agenda for Action*,[21] and the *Busan Partnership for Effective Development Cooperation*.[22] These agreements empha-

20. *See* Organisation for Economic Co-operation and Development [OECD], *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action* (2005/2008), at 3, http://www.oecd.org/dac/effectiveness/34428351.pdf ("Partner countries exercise effective leadership over their development policies, and strategies and co-ordinate development actions.").

21. *Id.* at 15. ("Country ownership is key. Developing country governments will take stronger leadership of their own development policies, and will engage with their parliaments and citizens in shaping those policies. Donors will support them by respecting countries' priorities, investing in their human resources and institutions, making greater use of their systems to deliver aid, and increasing the predictability of aid flows.").

22. BUSAN HL-4, *Busan Partnership for Effective Development Co-operation* (Dec. 1 2011), at 3, http://www.oecd.org/dac/effectiveness/49650173.pdf. ("Ownership of development priorities by developing countries. Partnerships for development can only succeed if they are led by developing countries, implementing approaches that are tailored to country-specific situations and needs.").

size the strengthening of borrowing countries' national systems. The shift towards borrower ownership involves both increasing the role given to borrowers to manage environmental and social risks when applying the ESSs, as well as providing borrowers the opportunity to implement their own national environmental and social safeguard framework. It is premised on the idea that greater borrower ownership over investment projects financed by MDBs renders international aid more effective by allowing borrower countries to exercise leadership over the project's design and implementation as well as management of environmental and social risks.[23] The move towards borrower ownership also brings the Bank into alignment with other MDBs, in particular the International Finance Corporation (IFC).[24]

At the same time, greater borrower ownership does not necessarily guarantee improvements to the environmental and social conditions. Moreover, the resulting transfer of primary obligations in the ESSs to borrowing countries risks eliminating the Inspection Panel as a tool for accountability and redress. This is because the resolution establishing the Inspection Panel explicitly precludes it from receiving "[c]omplaints with respect to actions which are the responsibility of other parties, such as a Borrower, or potential Borrower, and which

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23. *See* S. Chu et al., Int'l Orgs. Clinic at NYU Sch. of Law, The Changing Role of the World Bank Inspection Panel: Responding to Contemporary Challenges at the World Bank 1 (2014) ("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, these international instruments marked a consensus that any dialogue between international aid organizations and Borrowing countries on development initiatives needed to prioritize country ownership.").

24. Accountability Counsel et al., Comments on IFC's Consultation Drafts of the IFC Sustainability Policy and Performance Standards and Disclosure Policy 2 (2010), http://www.ciel.org/wp-content/uploads/2015/06/CSO_Submission_IFC_27Aug10.pdf ("Through adoption of the Social and Environmental Sustainability Policy (the Policy) and Performance Standards, IFC moved from providing a set of clear requirements for IFC clients to a so-called "outcomes-based" approach. Clients are given greater flexibility for determining how to address environmental and social concerns of projects; standards are more loosely defined and clients assume a greater role in determining what these standards mean in practice and how they can be met. IFC relinquished to these clients many responsibilities and obligations IFC once had.").

do not involve any action or omission on the part of the Bank."[25] These concerns are outlined below.

First, individuals and communities who have been, or are likely to be, adversely affected by Bank-financed projects may face difficulties in establishing that their rights and interests were "*directly* affected *by an action or omission of the Bank* as a result of a failure of the Bank to follow its operational policies and procedures."[26] If the ESS places the duty in question on the borrower or the action being analyzed is taken under the borrowing country's national framework, the Inspection Panel may not be able to hold Bank management accountable for environmental and social harm if the duty cannot be linked to a Bank requirement. For example, by confining Bank management's obligations to conduct due diligence or require the borrower to carry out a particular task, the ESPIP renders the Bank's actions generally imperceptible during the project's implementation. As a result, aggrieved communities cannot simply point at the violation's manifestation at ground level to prevail before the Inspection Panel; rather, they must exercise greater expertise to identify a causal link between the violation and the Bank's failure to conduct proper due diligence or adequately assess risk.

Second, the move towards borrower ownership decreases the level of control the Bank has over the project. Under the existing safeguards, the Bank has a number of responsibilities related to the borrower fulfilling specific obligations, worded using the formulation "the Bank requires the Borrower to."[27] In other instances, the existing safeguards place on the Bank the obligation *to ensure* that the Borrower does (or does not do) something.[28] In contrast, the new safeguards largely re-

25. *Inspection Panel*, *supra* note 16, ¶ 14.

26. *Id.* ¶ 12 (emphasis added).

27. World Bank Group [WBG], *OP 4.10—Indigenous Peoples*, ¶ 20 (July, 2005) [hereinafter *OP 4.10*] ("*[T]he Bank requires the borrower to* explore alternative project designs to avoid physical relocation of Indigenous Peoples." (emphasis added)); World Bank Group [WBG], *OP 4.37—Safety of Dams*, ¶ 8 (Oct., 2001) [hereinafter *OP 4.37*]. ("*the Bank requires that the borrower* arrange one more independent dam specialists to . . . inspect and evaluate the safety status of the existing dam . . . ." (emphasis added)).

28. *See, e.g.*, World Bank Group [WBG], *BP 4.01—Environmental Assessment* ¶ 1 (Annex A, Jan. 1999) ("During project identification and before assigning an environmental category, the task team (TT) ensures that the borrower selects and engages independent, recognized experts or firms,

place the word "ensure" with "require."[29] For example, Operational Principle 4.10 under the existing safeguards demands that the Bank *ensures* that the borrower conducts a social assessment; however, the equivalent provision under the new ESPIP 15 obliges the Bank to *require* the borrower to conduct certain environmental and social assessments.[30] The Inspection Panel, in its comments on the Second Draft of the ESF, flagged this transition from the use of the word "ensure" to "require" as disconcerting, noting that such a change may undermine its accountability efforts.[31] Replacing the Bank's obligation to "ensure" the borrower carries out certain tasks with "require" may reflect a subtle, yet qualitative difference in the standards underlying the Bank's obligations vis-à-vis the borrower. "To ensure" generally means to "make certain" that

whose qualifications and terms of reference (TOR) are acceptable to the Bank, to carry out environmental reconnaissance that includes . . . ."); *see also id.* ¶ 5 ("The TT ensures that the borrower establishes within the implementing ministry or agency an in-house environmental unit, with adequate budget and professional staffing strong in expertise relevant to the project, to manage the project's environmental aspects.").

29. *See, e.g.*, *ESPIP*, *supra* note 5, ¶ 15 ("*The Bank will require Borrower to conduct* environmental and social assessment of projects proposed for Bank support in accordance with ESS1." (emphasis added)); *id.* ¶ 16 ("*The Bank will require the Borrower to prepare and implement* projects so that they meet the requirements of the ESSs in a manner and a timeframe acceptable to the Bank." (emphasis added)).

30. Compare World Bank Group [WBG], *BP 4.10—Indigenous People*, ¶ 8(e) (July 2005) [hereinafter *BP 4.10*] ("[T]he TT ensures that the borrower carries out a SA and prepares an IPP and other relevant instrument(s) in accordance with the requirements of OP 4.10."), *with ESPIP*, *supra* note 5, ¶ 15 ("The Bank will require Borrowers to conduct environmental and social assessment of projects proposed for Bank support in accordance with ESS1.").

31. *See* World Bank Group [WBG], *Inspection Panel Comments on the Second Draft of the Proposed Environmental and Social Framework*, ¶ 10 (June 17, 2015), http://ewebapps.worldbank.org/apps/ip/Style%20Library/Documents/Inspection%20Panel%20Comments%20on%202nd%20Draft%20ESF%20-%2017%20June%202015.pdf ("The Panel remains unclear about the roles and ultimate responsibilities of the Bank and borrower countries . . . The Panel notes a change in terminology and language from the current safeguard policies, which call for the Bank to "ensure" the consistency of Borrower's actions with applicable safeguard policies."); *see also* Human Rights Watch, *Human Rights Watch Submission: World Bank's Second Draft Environmental and Social Framework*, at 1–2 (Oct. 2015) (noting similar concerns regarding the dilution of Bank responsibility and calling for a return to the language of the first draft generally).

something will occur.[32] In contrast, "to require" is to "demand," "ask," or "impose."[33] Arguably, the obligation "to ensure" means that the Bank must undertake necessary efforts to make *certain* that the borrower accomplishes a task, whereas the Bank's obligation "to require" could be discharged when it simply makes the request to the borrower. Under this interpretation, the change from "ensure" to "require" might evidence a weakening of the Bank's obligation. Accordingly, the Inspection Panel's role in holding the Bank accountable would be limited.[34]

Finally, the Bank's decreased control over its projects may result in its role being less visible to affected individuals and

32. *Ensure*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

33. *Require*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

34. The authors of the report don't believe that the switch from "ensure" to "require" is an unprecedented departure from the existing safeguards, but merely an attempt to standardize the language for functionally equivalent obligations. The existing safeguards utilize several terms synonymous with "require" and "ensure" and in a number of instances appears to use them interchangeably. *Compare OP 4.10*, *supra* note 27, ¶ 20 ("*The Bank requires the borrower to* explore alternatives project designs to avoid physical relocation of Indigenous People." (emphasis added)), *with ESPIP*, *supra* note 5, ¶ 55 ("[*T*]*he Bank will require the Borrower* to obtain the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples when such circumstances described in ESS7 are present." (emphasis added)). For an example of an existing safeguards that utilizes "require" instead of "ensure," see *OP 4.37*, *supra* note 27, ¶ 8 ("*[T]he Bank requires that the borrower* arrange one more independent dam specialists to . . . inspect and evaluate the safety status of the existing dam . . . ." (emphasis added)). In fact, the existing safeguards employ a wide range of verbs, all of which serve a very similar function as "require" under the new ESF: *See* World Bank Group [WBG], *BP 4.11—Physical Cultural Resources*, ¶ 4 (June 2006) [hereinafter *BP 4.11*] ("[T]he TT *requests that the borrower* inform the Bank of the relevant requirements of its legislation and of its procedures for identifying and mitigating potential impacts . . . ." (emphasis added)); World Bank Group [WBG], *OP 4.12—Involuntary Resettlement*, ¶ 9 (Dec. 2001) [hereinafter *OP 4.12*] ("[T]he Bank *satisfies itself that the borrower* has explored all viable alternative project designs to avoid physical displacement of [vulnerable groups] . . . ." (emphasis added)). In addition, such extensive variation in the terms of the Bank's obligations may have impeded both the Bank and the Inspection Panel to properly assess the extent of the Bank's responsibility vis-à-vis the borrower. Accordingly, it is possible that the change from "ensure" to "require" in the new ESF is aimed at achieving consistency in terminology. We do believe, however, that there are still significant issues regarding the move towards borrower ownership of projects, specifically regarding the use of the borrower's country systems. *See infra* Section B.III.

communities. Therefore, when environmental or social harms are caused by a project, it may not be clear to communities or individuals that the Bank was involved. As a consequence, those affected individuals or communities are less likely to be aware that it can make a complaint to the Inspection Panel, decreasing the number of situations investigated by the Inspection Panel.

B. *Shift from Prescriptive Safeguards with Few Constraints on the Bank*

In addition to the move towards borrower ownership of Bank-financed projects, the new ESF replaces the existing prescriptive and process-oriented safeguards with outcomes-oriented ones. Prescriptive requirements are generally characterized by greater, more specific details. For instance, the existing safeguards often specify the time by which certain obligations must be fulfilled.[35]

The outcomes-based approach under the new ESF "shifts the emphasis of environmental and social risk managements from carrying out processes to achieving better development outcomes,"[36] increasing the borrowers' ability to adapt projects to unexpected events or changes. The prescriptive nature of the existing safeguards received criticism for being interventionist, as they granted borrowers little discretion and barred case-specific solutions that are often necessary given the variety of projects, populations, and environments with which the Bank works.[37] Prescriptive rules have also been characterized as the equivalent of a "nit-picking bureaucracy in which compliance with detailed provisions is more important

35. *See, e.g.*, *BP 4.10*, *supra* note 27, ¶3 (establishing that the TTL must initiate the process for determining the presence of Indigenous Peoples "[*e*]*arly in the project cycle*" (emphasis added)).

36. World Bank Group [WBG], *Review and Update of the World Bank's Safeguard Policies: Proposed Environmental and Social Framework*, ¶ 70 (Aug. 4, 2016) (Proposed Third Draft), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf.

37. *C.f.* Neil Gunningham & Darren Sinclair, *Integrative Regulation: A Principle-Based Approach to Environmental Policy*, 24 LAW & SOC. INQUIRY 853, 855 (recognizing that only a flexible regulatory scheme, such as a principle-based one, adequately address the varied forms that threats to the environment can take).

than the attainment of an overall outcome."[38] In contrast, the principle-based approach, by emphasizing outcome over procedure, is lauded for its flexibility.[39] Moreover, the approach aligns with the movement towards greater borrower ownership, as the flexibility generates space for borrowers to mold the project around their particular conditions. Borrowers gain the control and creativity to more seamlessly integrate projects within their existing regulatory framework, as opposed to being forced to rigidly follow the same implementation method and criteria as all other similar and dissimilar Bank-financed projects. As a result, this alternative approach may be more efficient, effective, and politically acceptable domestically.[40]

Concerns have been raised that the existing safeguards, which detail clearly the obligations of the Bank, have been replaced with much broader obligations.[41] This shift towards borrower ownership coupled with principle-based standards may dilute the concepts embodied in the existing safeguards and could minimize protection for affected individuals. As one commentator observes, "[t]he bank proposes replacing its own mandatory safeguards and accountability mechanisms with vaguely worded aspirational standards and an over-reliance on borrowers' national systems, and even those of opaque 'financial intermediaries'. . . ."[42] Moreover, members of the Bank's

38. Julia Black, *The Rise, Fall and Fate of Principles Based Regulation* 3 (London Sch. of Econ. Law, Society & Economy Working Papers, Paper No. 17/2010, 2010).

39. *Id.* at 3.

40. *C.f.* Gunningham & Sinclair, *supra* note 37, at 860–62 (noting that prescription is a component of interventionist policies, and that less-interventionist regulation as opposed to interventionists ones generate greater efficiency, effectiveness, and political acceptability with regards to private firms).

41. For examples of other documents using principle-based standards, see the UNITED NATIONS GLOBAL COMPACTS, https://www.unglobalcompact.org/ (last visited Mar. 21, 2017); *Guidelines for Multinational Enterprises*, OECD, http://www.oecd.org/corporate/mne/ (last visited, Mar. 21, 2017); CLARKSON CTR. FOR BUS. ETHICS, PRINCIPLES OF STAKEHOLDER MANAGEMENT: "THE CLARKSON PRINCIPLES" 4 (1999); Dirk U. Gilbert et al., *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23, 26 (2011).

42. *World Bank: Dangerous Rollback in Environmental and Social Protections*, INCLUSIVE DEV. INT'L (Aug. 4, 2015), http://www.inclusivedevelopment.net/world-bank-dangerous-rollback-in-environmental-and-social-protections/ (quoting Cesar Gamboa from Derecho Ambiente y Recursos Naturales).

Board of Executive Directors have expressed concern that the Bank has not adequately explained how the transfer of responsibility will work in practice, underscoring that "it is fundamentally the Bank's responsibility to ensure that it is able to deliver on the requirements of its own policies."[43]

In addition, the new ESF gives the Bank more discretion in fulfilling its roles and responsibilities in its interaction with the borrower. For example, the existing safeguards contain temporal caveats that provide the Bank with discretion in discharging its obligations. The existing Bank Policy 4.10 specifies, "*Early in the project cycle*, the task team leader (TTL) initiates a process to determine whether Indigenous Peoples are present in, or have collective attachment to, the project area."[44] The lack of specificity as to when the process must be initiated leaves the Bank with some flexibility in deciding the timeframe. Yet, because frameworks for respecting indigenous peoples must be included in the environmental assessment and other initial documents, the Bank cannot avoid or prolong its duties significantly. Another example is the use of the phrase "in a timely manner" in the existing safeguards: "In addition, the Bank ensures that relevant project-related environmental and social safeguard documents, including the procedures prepared for projects involving subprojects, are disclosed *in a timely manner before project appraisal formally begins*, in an accessible place and understandable form and language to key stakeholders."[45] The Bank's discretion as to when disclosure takes place is thus bounded by the fact that it must occur before the project appraisal begins. In contrast to the existing safeguards, the amount of discretion afforded to the Bank in the new ESF appears to be less bounded. For instance, the ES-PIP adopts the terminology of the Bank requiring the Borrower to carry out a certain obligation "in a manner and a

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43. Nezir Sinani, *Leaked Document Reveals Internal Struggle for Human Rights Protections as the World Bank*, THE WORLD POST (Nov. 18, 2015), http://www.huffingtonpost.com/nezir-sinani/leaked-document-reveals-i_b_8582120.html (last visited Mar. 22, 2017).

44. *BP 4.10*, *supra* note 27, ¶ 3 (emphasis added).

45. World Bank Group [WBG], *OP 4.00—Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects,* ¶ 7 (March 2005) [hereinafter *OP 4.00*] (emphasis added).

timeframe acceptable to the Bank,"[46] which appears to allow the Bank's subjective determinations to guide when and how a requirement is executed. Thus, the new ESF appears to contain fewer (or no) boundaries or limitations on the Bank's exercise of its discretion.

The concern is that if the Bank is left with this wide discretion over the timeframe in which the borrower must fulfill certain conditions, the likelihood of individuals or communities being harmed by the project increases. In addition, if the Bank does not set a concrete timeframe for the borrower to fulfill its obligations, it may become difficult for the Inspection Panel to find that the Bank has failed to meet the requirements of the policy or procedure because technically the Bank could argue that it is still in the process of carrying out its duties.

C. *Increased Due Diligence Obligations*

As mentioned above, the requirements of the Bank and the borrower under the new ESF are clearly distinguished. Consequentially, the Bank's obligations under the ESPIP are no longer tied to specific social and environmental standards, like they are under the eight existing safeguards. Under the new ESPIP, the Bank now has general due diligence responsibilities over proposed projects. The third draft of the ESP provides more detail to the Bank's responsibilities under the ESPIP. For example, the Bank's Task Team has an obligation to

46. *ESPIP*, *supra* note 5, ¶ 16 ("The Bank will require the Borrower to prepare and implement projects so that they meet the requirements of the ESSs *in a manner and a timeframe acceptable to the Bank.* In establishing the manner and an acceptable timeframe, the Bank will take into account the nature and significance of the potential environmental and social risks and impacts, the timing for development and implementation of the project, the capacity of the Borrower and other entities involved in developing and implementing the project, and the specific measures and actions to be put in place or taken by the Borrower to address such risks and impacts." (emphasis added)); *id.* ¶ 18 ("If the project comprises or includes existing facilities or existing activities that do not meet the requirements of the ESSs at the time of approval by the Bank, the Bank will require the Borrower, as part of the ESCP, to adopt and implement measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of the ESSs within a timeframe acceptable to the Bank. In determining satisfactory measures and an acceptable timeframe, the Bank will take into account the nature and scope of the project and the technical and financial feasibility of the proposed measures.").

review "the capacity and commitment of the Borrower to develop and implement the project in accordance with the ESS" and "the need, if any, for enhancement of the Borrower's capacity to meet the requirements of the ESSs, particularly in respect to relevant baseline data and information, on-site training, institutional strengthening, and inter-institutional collaboration."[47] In addition, during the initial screening of the project, the Bank's Task Team has certain obligations; these include gathering sufficient information to enable it to identify key environmental and social risks and impacts, considering the most appropriate type of environmental and social (ES) assessment to be conducted by the borrower and the tools to be used, identifying the borrower's ES Framework and any gaps, and proposing a preliminary schedule for consultation with stakeholders.[48]

Moreover, the ESP provides details on what the Bank's due diligence might entail. These obligations include reviewing documents and information provided by the borrower (requesting additional information if necessary),[49] assessing whether the project can be developed in accordance with the ESSs or whether the borrower's ES Framework is able to achieve objectives materially consistent with the ESSs,[50] ensuring that the Environmental and Social Commitment Plan (ESCP) covers specific requirements,[51] and preparing an Environmental and Social Review Summary (ESRS) document setting out an accurate and comprehensive record of the Bank's due diligence of the project.[52]

These broader due diligence obligations on the Bank increase its involvement, preparation, and implementation of the project at the front end. But this front-loading of responsibilities also presents new a concern. The Bank may claim that it has fulfilled its due diligence obligations early in the project, thereby avoiding accountability and effective monitoring once the borrower has control of the project. This concern might be mitigated, however, by the introduction of the Environmen-

47. *Id.* ¶ 33; *ESPP, supra* note 8, ¶ 17.
48. *Id.* ¶ 19
49. *ESPIP, supra* note 5, ¶ 32.
50. *Id.* ¶ 23.
51. *Id.* ¶ 37.
52. *ESPP, supra* note 8, ¶ 42.

tal and Social Commitment Plan, a binding agreement between the Bank and the borrower.[53]

D. *Enhanced Coverage of Environmental and Social Issues*

The key changes in the new ESF outlined so far appear to weaken the Bank's role and make it more difficult for the Inspection Panel to hold the Bank accountable. A welcomed aspect, however, is the expanded thematic coverage of the ESSs to "emerging areas," consistent with other MDBs safeguard policies.[54] This expanded coverage will enable the Inspection Panel to hold the Bank responsible for causing harm to a wider group of people.

The new standard on Labor and Working Conditions, ESS2, was introduced after consultation with the International Labor Organization (ILO) and was guided by the Declaration on the Fundamental Principles and Rights at Work and the core conventions of the ILO.[55] The standard provides detailed provisions addressing child and forced labor, freedom of association, collective bargaining, occupational health and safety, and the requirements for the provision of a grievance mechanism for project workers.[56] ESS3 on Resource Efficiency and Pollution Prevention Management incorporates the existing standard on pest management, and embraces a more holistic approach by addressing new areas, such as efficient management of energy, water, raw materials, and other resources.[57] The standard also requires the borrower to estimate project-related greenhouse gas emissions, and to consider options to reduce project-related pollutants.[58] The new standard address-

53. *See infra* Part V.

54. Harvey Himberg, *A "Comparative Review of Multilateral Development Bank Safeguard Systems"* (May 2015), https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf.

55. World Bank Group [WBG], *Environmental and Social Standard 2: Labor and Working Conditions, in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 52.

56. *Id.*

57. World Bank Group [WBG], *OP 4.09—Pest Management* (Dec. 1998); World Bank Group [WBG], *Environmental and Social Standard 3: Resource Efficiency and Pollution Prevention, in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 61 [hereinafter *ESS3*].

58. *ESS3*, *supra* note 57.

ing Community Health and Safety, ESS4, expands the scope of the existing safeguards by fleshing out the current policy on the safety of dams to address the design and safety aspects of infrastructure, equipment, products, services, traffic, and hazardous materials.[59] The standard also requires borrowers to develop and implement measures to address possible community exposure to disease[60] and includes new requirements on security personnel.[61]

In addition, the ESF addresses new principles and issues, including non-discrimination, climate change, sustainable resource management, land tenure, biodiversity conservation, gender, disability, and human rights.[62] In particular, the introduction of new Borrower requirement to obtain free, prior and informed consent from indigenous peoples when a project, for example, affects access to their land or resources, and to document that consent;[63] the broadening of the definition of cultural heritage to include both tangible and intangible

59. World Bank Group [WBG], *Environmental and Social Standard 4: Community Health*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 67.

60. *Id.* ¶¶ 15–16.

61. *Id.* ¶¶ 24–27.

62. World Bank Group [WBG], REVIEW AND UPDATE OF THE WORLD BANK'S SAFEGUARD POLICIES: ENVIRONMENTAL AND SOCIAL FRAMEWORK CONSULTATION PAPER 1 (July 1, 2015) [hereinafter CONSULTATION PAPER], https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/consultation_paper_for_es_framework_second_draft_for_consultation_july_1_2015_0.pdf (proposed second draft). One could criticize the ESF's inconsistent approach to "emerging areas." For example, community health and safety, labor and working conditions, land acquisition, and biodiversity conservation all have separate ESSs specifically allocated to them, which address detailed standards for each of these issues that borrowers are required to adhere to. On the other hand, the same degree of focus has not been applied to climate change, gender, disability, disadvantaged groups, or human rights. For instance, reference to human rights in the new ESF is made in aspirational terms, and Bank Management has maintained a "firm view that it should refrain from proposing that Borrower human rights compliance be a standard requirement within the ESF." *Id.* at 26. In addition, the new ESF does not comprehensively provide for specific requirements for assessing and managing the impacts of climate change on ecosystems, or on the viability of projects.

63. World Bank Group [WBG], *Environmental and Social Standard 7: Indigenous Peoples*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 106, ¶¶ 18–20.

cultural heritage;[64] and new requirements for the increased and ongoing engagement of stakeholders, including project-affected parties, throughout the project cycle[65] increase the Bank's obligations and therefore, increase the possibility that an individual or community may make a complaint to the Inspection Panel if the Bank has not fulfilled these obligations. This means the Inspection Panel can hold the Bank accountable for a greater range of social and environmental harms caused by its projects.

The addition of the principle of non-discrimination to the new ESF received considerable attention from civil society groups. During the second round of consultations, many groups who considered themselves particularly vulnerable to discrimination demanded individuated standards and dedicated assessments of their status.[66] Although the latest draft does not go this far, communities that were underrepresented or never before included in the Bank's safeguards, such as persons with disabilities, are now protected under the new ESF. ESS1 on Environmental Assessment provides that the Bank will take into account environmental and social risks in its due diligence, defining social risks to include project impacts that fall disproportionately on "disadvantaged or vulnerable groups."[67] This term is further defined in a footnote as someone who:

> [B]y virtue of, for example, their age, gender, ethnicity, religion, physical or mental disability, social or civic status, sexual orientation, gender identity, eco-

64. World Bank Group [WBG], *Environmental and Social Standard 8: Cultural Heritage*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 119, ¶ 4. Tangible cultural heritage includes objects such as significant buildings, monuments, and artifacts. Intangible cultural heritage, by contrast, reaches "practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural space associated therewith—that communities and groups recognize as part of their cultural heritage." *Id.*

65. World Bank Group [WBG], *Environmental and Social Standard 10: Information Disclosure and Stakeholder Engagement*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 131.

66. CONSULTATION PAPER, *supra* note 62, at 12.

67. World Bank Group [WBG], *Environmental and Social Standard 1: Assessment and Management of Environmental and Social Risks and Impacts*, *in* ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 24, ¶ 28(b)(ii) [hereinafter *ESS1*].

> nomic disadvantages or indigenous status, and/or dependence on unique natural resources may be more likely to be adversely affected by the project impacts and/or more limited than others in their ability to take advantage of a project's benefits.[68]

Significantly, the new ESF clarifies that assessments must examine the impact of projects on specific disadvantaged or vulnerable groups, such as those with disabilities, women, and children, rather than assessing the impacts on them as a whole.[69] The final ESF removes the list of vulnerable groups after borrowing countries raised concern about the explicit mention of examples of vulnerable groups. Now, the list will be included by Bank management in the *Bank Directive Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups* that will be binding on Bank staff and subject to the Inspection Panel's consideration.[70]

The enhanced scope of social and environmental issues covered under the new ESF and the inclusion of the principle of non-discrimination and FPIC reflect a positive move toward ensuring a greater number of people are able to have complaints investigated by the Inspection Panel. As a result, the Inspection Panel's workload will likely increase, which will provide more opportunity for the Inspection Panel to strengthen and enhance its ability to hold the Bank accountable.[71]

IV. INSPECTION PANEL'S INTERPRETATION OF ITS ACCOUNTABILITY FUNCTION UNDER THE EXISTING SAFEGUARDS

The Inspection Panel has, from its birth and throughout its development, asserted its important role in holding the Bank to account for non-compliance with its safeguards. Despite some of the perceived issues with the new ESF highlighted above, the Inspection Panel must preserve—if not aug-

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68. *ESPIP, supra* note 5, ¶ 4(b), n.22.

69. CONSULTATION PAPER, *supra* note 62, at 1.

70. *See Bank Directive, supra* note 7, at 1; ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 3, at 2.

71. Although the new standards, such as labor and working conditions, community health and safety, and resource efficiency and pollution prevention are set out under the borrower's obligations, the Panel could use the connections between the Bank and borrower obligations outlined below to hold the Bank accountable for compliance with the new standards.

ment—its function by employing the same tools it has previously used, including ones not found in its resolution. Specifically, the Inspection Panel has utilized several standards of interpretation in determining the Bank's duties under the existing Safeguards and whether they have been fulfilled on a particular project. These standards indicate how the Inspection Panel has held the Bank liable for its implicit responsibilities as well as borrower actions, problems particularly relevant to the new ESF. This Part will list the issues under the new ESF and outline how the standards previously employed by the Inspection Panel can be used to ensure they have an effective role in holding the Bank to account under the new ES, as well as examining their importance to the Inspection Panel continuing its accountability role, even with the new theoretical framework of borrower ownership behind the new ESF.

A. *The Less Prescriptive Nature of the Bank's Obligations Should Not Limit the Inspection Panel's Assessment of the Bank's Compliance*

The less prescriptive nature of the Bank's obligations in the new ESF[72] raises the question of whether it will be more difficult for the Inspection Panel to assess the Bank's compliance with its obligations under the new ESF. Based on a review of many of the complaints that the Inspection Panel has investigated so far, this concern may not be a major obstacle to the Inspection Panel's function. When the Inspection Panel makes a determination as to whether the Bank has complied with the existing safeguards, it does not merely assess the language of the safeguards. Instead, it holds the Bank to a *reasonableness* standard of care, which goes further than merely assuring that the Bank has followed the letter of particular duties under the safeguards. As the Inspection Panel itself has stated, "[a]fter all, tests of reasonableness and common sense must be applied."[73] Moreover, the Inspection Panel has made clear in past cases that, regardless of the language used, the Bank cannot shirk duties essential to accomplishing the objectives of

72. *See supra* Section I.B.
73. World Bank Inspection Panel, *Request for Inspection: Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project*, Report and Recommendation, 13 (Aug 18, 1998), http://ewebapps.worldbank.org/apps/ip/PanelCases/12-Eligibility%20Report%20(English).pdf.

the existing safeguards:[74] "Read in their entirety . . . the directives cannot possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding."[75] This object-and-purpose approach applied by the Inspection Panel gives it discretion to exercise its interpretive powers in an organic way, that is, by assessing compliance with the safeguards within the facts and circumstances of the particular case to assure that relevant substantive requirements have been met. For example, in *China Western Poverty Reduction Project*,[76] the Inspection Panel investigated claims that the Bank-funded resettlement and agriculture project threatened the existence of grazing lands on which indigenous nomads depended.[77] It held that, "[i]n appraising compliance, Management had an obligation to satisfy itself not only that the process and procedures mandated by the policies had been followed, but also that the work under review met professionally acceptable standards of quality."[78] In other words, both process and quality were essential components of compliance.[79]

The Inspection Panel has also indicated in several cases that the Bank is required to provide proper guidance to the Borrower in the implementation of certain standards. For example, in *Argentina Santa Fe Road Infrastructure Project*,[80] the Inspection Panel intervened on behalf of local farmers whose

74. World Bank Inspection Panel, *The Qinghai Project: A Component of the China: Western Poverty Reduction Project (Credit No. 3255-CHA and Loan No. 4501-CHA)*, Investigation Report, 23 (June 18, 1999) [hereinafter *China*], http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Investigation%20 Report%20(English).pdf ("While not all the standards provided for in the ODs are binding (it depends on the wording of each standard), those stated in binding terms create a duty for the staff to exert their best efforts to achieve them.") (quoting Senior Vice President and General Counsel of the World Bank, Ibrahim Shihata).

75. *Id.* at xiv–v.

76. *Id.*

77. *Id.* at 5–8.

78. *Id.* at 20.

79. *Id.* at 72–75.

80. World Bank Inspection Panel, *Argentina: Santa Fe Road Infrastructure Project (Loan No. 7429-AR)*, Investigation Report, ¶97, Report No. 49110-AR (July 2, 2008) [hereinafter *Argentina*], http://documents.worldbank.org/curated/en/474641467998188720/pdf/491100IVNR0P09101Official0Use0only1.pdf.

fields faced flooding as a result of poor project planning by finding that the Bank had failed to comply with its responsibilities in the Environmental Assessment Policy (OP 4.01). Under this requirement, the Bank must "advise the borrower on the Bank's EA requirements" and "review[ ] the findings and recommendations of the EA to determine whether they provide an adequate basis for processing the project for Bank financing."[81] The Inspection Panel found that the reports written by a consulting firm on hydraulic studies of roads for the environmental assessment showed a "lack of rigor and robustness."[82] In that case, the Inspection Panel concluded that the Bank did not identify "the lack of coherence and consistency in the methodologies used" by the consulting firm,[83] which amounted to the Bank's failure to "succeed in guiding appropriately the borrower to ensure a rigorous analysis of flood impacts as required under OP 4.01 paragraph 5."[84]

Furthermore, in the *Nepal Power Development Project*,[85] the Inspection Panel found that the Bank inadequately assisted the Borrower in its consultation with indigenous peoples. The Indigenous Peoples Policy (BP 4.10) provides that the Bank "assists the borrower in carrying out free, prior, and informed consultation with affected communities about the proposed project throughout the project cycle," and requires the Bank to take into consideration and record the voluntary nature of consultation, the need for access to information in an appropriate language and form, recognition of existing indigenous peoples organizations, and early commencement of the consultation process.[86] The Inspection Panel concluded that "a lack of sustained communication and consultation during project preparation and implementation led to the spread of misinformation about the transmission line," finding that the Bank, among its failure to comply with other Safeguards, did

81. World Bank Group [WBG], *OP 4.01—Environmental Assessment* ¶ 5 (Jan. 1999), [hereinafter *OP 4.01*].

82. *Argentina*, *supra* note 80, ¶ 97.

83. *Id.* ¶ 98.

84. *Id.* (footnote omitted).

85. World Bank Inspection Panel, *Nepal: Power Development Project (PO43311)*, Investigation Report, Report No. 93722-NP (Feb 12, 2015) [hereinafter *Nepal*], http://ewebapps.worldbank.org/apps/ip/PanelCases/87-Investigation%20Report-Nepal%20Power%20Development%20Project.pdf.

86. *BP 4.10*, *supra* note 27, ¶ 2(a)–(d).

not ensure adequate, timely, and meaningful consultations under BP 4.10.[87] As is evident from these examples, the Inspection Panel has found that the Bank cannot simply fulfill its obligations through procedural "box ticking" but must be actively involved and should guide the borrower in fulfilling its requirements.

The Inspection Panel has also used the object-and-purpose approach to assess the Bank's exercise of discretion under the existing safeguards. As discussed in Part I, the Bank's flexibility in deciding when to fulfill its obligations has been expanded in the new ESF and ESPP through, for example, temporal qualifications such as in a "timeframe acceptable to the Bank"[88] or on a "regular"[89] basis. Under the existing safeguards, the Inspection Panel has taken the approach that "a safeguard postponed is a safeguard denied."[90] For instance, in a 2005, the Inspection Panel assessed whether completion of the environmental assessment of industrial scale logging was done "in a timely manner," as required by OP 4.01(15).[91] The Inspection Panel ultimately decided that it had not, on the grounds that the twenty-four months it took to create the environmental assessment was longer than the Bank's normal timeframe and as a result was in conflict with the safeguard's objectives.[92] Under the new ESF, the Inspection Panel can adopt this same approach when analyzing whether the Bank is complying with the new ESPIP when exercise its discretion.[93]

87. *Nepal*, *supra* note 85, ¶ 255.

88. *ESPIP*, *supra* note 5, ¶¶ 16, 18.

89. *See ESPP, supra* note 8, ¶¶ 23, 30 (Aug 24, 2016).

90. World Bank Inspection Panel, *Cambodia: Forest Concession Management and Control Pilot Project (Credit No. 3365-KH and Trust Fund No.26419-JPN)*, Investigation Report, ¶ 212, Report No. 35556 (Mar. 30, 2006), http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Investigation%20Report%20(English).pdf.

91. World Bank Inspection Panel, *Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TSERO) (IDA Grant No. H 1920-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824-DRC and Grant No. H 064-DRC)*, Investigation Report, ¶¶ 321–27, Report No. 40746 – ZR (Aug 31, 2007), http://ewebapps.worldbank.org/apps/ip/PanelCases/37-Investigation%20Report%20(English).pdf.

92. *Id.* ¶¶ 365–67.

93. One area of concern that may not be fully addressed by past practice may be the absence of guidelines for interpreting "regular" responsibilities that are not tied to specific stages of the project. Yet, again, if the Bank's conduct would not pass a reasonableness test as to why the delay is required

By applying the object-and-purpose standard, the Inspection Panel can continue assessing whether the Bank complies with the new ESF in a manner that would achieve the purported goal of the provisions. The less prescriptive nature of the new ESF should not be an impediment and, in fact, may lend itself more readily to the Inspection Panel applying such an analysis than the existing safeguards.

B. *The New ESF's Separation of Bank and Borrower Obligations Should Not Impede the Inspection Panel from Holding the Bank Accountable*

The problem of increased borrower ownership resulting in reduced Bank responsibility for projects directly correlates to the updated theoretical framework of the new ESF. Even under the existing safeguards, however, the Inspection Panel has shown itself capable of distilling the Bank's obligations and finding causal links between the Bank's failure to comply with operational policies and harm caused to individuals and communities by borrower's violations. For example, in the Inspection Panel case of *Ethiopia: Protection of Basic Services II Project* (*PBS Project*), the requesters, the Anuak indigenous peoples, complained that they "ha[d] been harmed by the Bank-supported PBS Program as a result of World Bank's non-compliance with its policies and procedures because the PBS Program is '*contributing directly to the Ethiopian Government's Villagization Program in the Gambella Region.*'"[94] While the government claimed the "villagization" program is a voluntary resettlement process aimed at increasing access to basic services, the program acted only as a pretext to strip indigenous people of their ancestral land against their will. In the Bank management's view, the safeguard policies did not apply to the harms alleged as the Bank neither financed nor worked with

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and also would not defeat or undermine the goals of the Safeguards, the Panel should have the same authority to consider Bank practice non- compliant.

94. World Bank Inspection Panel, *Ethiopia: Protection of Basic Services Program Phase II Project—Additional Financing (P121727) and Promoting Basic Services Phase III Project (P128891)*, Report and Recommendation, ¶ 16, Report No. 75199-ET (Feb. 8, 2013) [hereinafter *PBS Project Eligibility Report*] (emphasis added), http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Eligibility%20Report%20(English).pdf.

the villagization program.[95] The Inspection Panel, however, recommended an investigation with a "specific focus" to "examine in greater depth risks stemming from the concurrent implementation of VP and PBS in Gambella region, and Bank Management's analysis and subsequent management of these risks under PBS III."[96] The Inspection Panel made clear that its investigation will not "seek to verify allegations of specific human rights abuses linked to VP, nor will it examine the underlying purposes of VP."[97] Upon investigation, the Inspection Panel found an operational link between the villagization program and the Bank's PBS, on the grounds that:

> [B]oth PBS and VP have the ultimate objective of providing improved basic services to the population. There was a chronological and geographic overlap in the two programs' implementation . . . . VP . . . aims at restructuring settlement patterns, service infrastructure and livelihoods, including farming systems, and as such constitutes a significant part of the context in which PBS operates. In this sense, and from a development perspective, the two programs may influence each other's results.[98]

Additionally, the Inspection Panel has affirmed that Bank management cannot evade its own responsibility simply because the primary obligation for a specific action lies with a third party. As the Inspection Panel stated in *Bangladesh: Jute Sector Adjustment Credit Project*,[99] Bank management cannot "disclaim responsibility for adverse effects of Bank/IDA-financed projects simply because it is not the executor of the activities included therein" as such an interpretation would unduly limit

95. World Bank Inspection Panel, *Ethiopia: Promoting Basic Services Phase III Project (P128891)*, Investigation Report, ¶ 4, Report No. 91854-ET (Nov. 21, 2014) [hereinafter *PBS Investigation Report*], http://ewebapps.worldbank.org/apps/ip/PanelCases/82-%20Inspection%20Panel%20Investigation%20Report%20Ethiopia%20PBS%20Phase%20III%20Project.pdf.

96. *PBS Project Eligibility Report*, *supra* note 95, ¶ 106.

97. *Id.*

98. *PBS Investigation Report*, *supra* note 95, ¶ 10.

99. World Bank, Inspection Panel, *Bangladesh: Jute Sector Adjustment Credit Project (Credit 2567-BD)*, Eligibility Report (Mar. 14, 1997) [hereinafter *Bangladesh*], http://ewebapps.worldbank.org/apps/ip/PanelCases/6-Eligibility%20Report%20(English).pdf.

the Inspection Panel's jurisdiction.[100] That is to say, the Bank cannot be a bystander in relation to harmful activities carried out in the context of Bank-financed projects.[101] Similarly, in all of the cases described below, the Inspection Panel first established whether the borrower was compliant with the Safeguards before evaluating the Bank's own conduct to mitigate any errors. This principle, applied by the Inspection Panel in its cases, strengthens the proposition that Bank and borrower obligations are in fact closely connected. In addition, it relieves the burden on the requestor to show that harm was caused directly by the Bank by allowing the requestor to point towards the actions or omissions of the borrower, if such action or omission implicates the Bank.

In *Ghana/Nigeria West African Gas Pipeline*,[102] the Inspection Panel investigated allegations that the proposed gas pipeline would destroy the livelihood of local communities. The Inspection Panel found the Bank non-compliant with OP 4.12,[103] under which "the Bank . . . requires [that] . . . [a]ppropriate and accessible grievance mechanisms are established for [displaced] groups."[104] In its evaluation, the Inspection Panel looked at actions of both the sponsor and the Bank. It first found that the sponsor's grievance mechanism lacked meaningful consultation and effective disclosure procedures.[105] The Inspection Panel then turned to Bank management's documented commitment to assess the adequacy of the grievance process for project-affected people and concluded that, while it had taken some actions, it failed to correct the

100. *Id.*, at 4 box 1.

101. World Bank Inspection Panel, *Kenya: Natural Resource Management Project*, Investigation Report, ¶ 149, Report No. 88065-KE (May 22, 2014), http://ewebapps.worldbank.org/apps/ip/PanelCases/84%20-%20Investigation%20Report%20(English).pdf.

102. World Bank Inspection Panel, *Ghana: West African Gas Pipeline Project (IDA Guarantee No. B-006-0-GH)*, Investigation Report, ¶¶ 7–27 (April 25, 2008) [hereinafter *Ghana*], http://ewebapps.worldbank.org/apps/ip/PanelCases/40-Investigation%20Report%20(English).pdf.

103. *Ghana*, *supra* note 102, ¶ 296 ("The Panel finds that Management failed to ensure that the Sponsor had in place an effective grievance process to identify and redress resettlement issues, as required by OP 4.12.").

104. *OP 4.12*, *supra* note 34, ¶ 13(a).

105. *Ghana*, *supra* note 102, ¶ 296.

mechanism's deficiencies.[106] Although the Inspection Panel did identify an underlying Bank duty to correct the deficiencies, the obligation was not identified as explicitly within the safeguards and was mentioned only after the Inspection Panel discussed the borrower's duty.[107] Additionally, the Inspection Panel found that the Bank's obligations encompass an implicit duty of substantive follow up.[108]

Subsequent Inspection Panel cases have taken similar approaches. For instance, in *Albania Power Sector Generation and Restructuring Project*, the Inspection Panel found that the Bank has responsibilities that are inherent to requirements that only reference the borrower.[109] Under OP 4.01, the borrower is required to consult with project-affected groups as early as possible and at least twice.[110] The Bank has a more general responsibility of "requiring environmental assessment (EA) of projects proposed for Bank financing to help ensure that they are environmentally sound and sustainable."[111] Despite the direct obligation of consultation applying to the borrower, the Inspection Panel still concluded "that through a deficient EA process, Bank Management failed to ensure meaningful public consultation for the Project, which is not in compliance with OP 4.01."[112] The Inspection Panel's investigation centered on

106. *See, e.g.*, *id.*, ¶ 295 (noting that Management's decision to disseminate non-technical translation of the mechanism's procedures was "to[sic] late for institution of any meaningful process").

107. *See generally id.*

108. *Id.* ¶ 125. The Panel found that the Bank failed to comply with several provisions of the Involuntary Resettlement Policy (OP 4.12) by not ensuring that: "the requisite socioeconomic information was gathered" by the Borrower, *id.*, "the Sponsor performed an adequate analysis of the socioeconomic risks to vulnerable people," *id.* ¶ 138, "Project planners used reliable and specific data on individuals or households," *id.* ¶ 141, the displaced people were at least as well off as they were before the displacement *id.* ¶ 195, and effective grievance mechanisms were in place, *id.* ¶ 296.

109. World Bank Inspection Panel, *Albania: Power Sector Generation and Restructuring Project (Credit No. 3872 ALB)*, Investigation Report, ¶¶ 114–129 Report No. 49504-AL (Aug. 7, 2009) [hereinafter *Albania*], http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20(English).pdf (need to add a cite at end of sentence to support this finding from the Albania report, not clear from a general cite to the document, please provide a parenthetical, or example, or cite).

110. *OP 4.01*, *supra* note 81, ¶ 14.

111. *Id.*

112. *Albania*, *supra* note 109, at xxx.

the actions taken by the borrower, and it determined that although the borrower held multiple meetings, consultation occurred only after the site had been selected, thus creating "only the appearance of consultation, while contributing nothing to improving Project selection, siting, planning or design of the Project."[113] Even though the requirement of consultation in OP 4.01(14) makes no mention of the Bank,[114] the Inspection Panel derived the Bank's duty to ensure borrower compliance from OP 4.01(5), which requires the Bank to advise the borrower, to review the Borrower's findings, and, where necessary, to require additional public consultation and disclosure.[115]

As a practical matter, given the shift to greater borrower ownership over projects in the new ESF and what appears to be a decrease of the Bank's control over projects that it finances, the Inspection Panel may face resistance from Bank management and the Board of Executive Directors if it continues to attribute Bank responsibility to requirements that apply primarily to the borrower. Bank management may argue that, given the qualitative changes contemplated by borrower ownership of the project, they should not have the same level of responsibility it had under the existing safeguards. Thus, they may argue that the standards the Inspection Panel previously employed no longer apply.

To this end, the Inspection Panel should continue to engage with Bank management and the Board of Executive Directors to clarify its role under the new ESF. The Inspection Panel can also assert its role and apply the standards it has to cases in the past in the first few cases it investigates under the new ESF. As it did in the "Interpretation of Bank's Policies and Procedures, and Questions about Compliance" section of

113. *Id.*

114. *See OP 4.01*, *supra* note 81, ¶ 4 ("The borrower is responsible for carrying out the EA. For Category A projects, the borrower retains independent EA experts not affiliated with the project to carry out the EA.").

115. *See id.* ¶ 5 ("The Bank advises the borrower on the Bank's EA requirements. The Bank reviews the findings and recommendations of the EA to determine whether they provide an adequate basis for processing the project for Bank financing. When the borrower has completed or partially completed EA work prior to the Bank's involvement in a project, the Bank reviews the EA to ensure its consistency with this policy.").

China Western Poverty Reduction Project,[116] the Inspection Panel must codify its own authority, as well as its interpretation of the new ESF, in its findings to clarify any lingering confusion or differing expectations.

V. Maintaining the Inspection Panel's Role Under the New ESF

The structural and philosophical shifts in the new ESF previously outlined raise some concerns regarding the Inspection Panel's ability to continue to hold the Bank accountable for harm caused to people as a result of projects that it has financed. The following sections identify and analyze these concerns and how they might impact the work of the Inspection Panel. It concludes that the Inspection Panel can use the requirements of the Bank under the new ESF to continue to assess the Bank's responsibility for a project throughout its entire lifecycle. Despite the division in the new ESF between the requirements on the borrower and the Bank, the Bank can continue to be linked to the Borrower ESSs through three main actions: (1) consultation and participation; (2) documentation and assessment; and (3) monitoring and implementation. Through these duties, the Bank must remain involved, and in fact take an active role, in the project past the due diligence stage, while also guaranteeing greater responsiveness to and participation of the affected communities in establishing project guidelines.

A. *Consultation and Participation*

The Inspection Panel can hold the Bank accountable for the borrower's actions through the Bank's continued duties to consult with the borrower and other parties and participate in the development of the project. These obligations can be found throughout the new ESF and the draft ESPP. The Bank's obligations to consult and participate include: (1) discussing with the borrower the measures required by the framework;[117] (2) advising the Borrower on and assisting the borrower with carrying out assessments in accordance with the

116. *China*, *supra* note 74, at 16–23.
117. *See, e.g.*, *ESPP*, *supra* note 8, ¶ 20.

ESF;[118] and (3) ensuring that the borrower also fulfills its own consultation requirements.[119] The first two sets of obligations appear to reserve a degree of Bank ownership in the development of projects. The third links Bank responsibility directly to the borrower's actions; that is to say, the borrower's failure to consult could be seen as the Bank's failure to ensure the fulfillment of the borrower's obligation.

The new ESPIP explicitly extends these duties to more complex financial situations in which various funding agencies are involved. For instance, where projects are jointly financed by other multilateral or bilateral funding agencies, the Bank is compelled to cooperate with such agencies in order to ensure that the common approach is consistent with the Bank's own ESF.[120] Furthermore, the Bank is obliged to require the borrower to apply this common approach.[121] Thus, the Bank may be held liable both if the approach does not comply with the Bank's own standards (despite the involvement of other funding agencies) and, even if it is compliant, if the borrower fails to implement it properly.

B. *Documentation and Assessment*

The Bank continues to play a vital role in the project lifecycle through the joint development with the borrower of an Environmental and Social Commitment Plan (ESCP), a new

118. *See, e.g.*, *id.* ¶ 5(c) (requiring the Bank to "assist the Borrower in identifying appropriate methods and tools to asses and manage potential ES risks and impacts on the project"); *id.* ¶ 29 ("The Bank advises the Borrower on carrying out the ES assessment of the project in accordance with the requirements of ESS1.").

119. *See, e.g.*, *ESPIP*, *supra* note 5, ¶ 50 (requiring the Bank to ensure that the Borrower provides sufficient information about the project risks to affected parties so as to allow effective participation and consultation); *id.* ¶ 53 (requiring the Bank to require Borrower to engage with stakeholders and with other interested parties through "information disclosure, consultation, and informed participation"); *id.* ¶ 54 (requiring the Bank to undertake a screening to determine whether Indigenous Peoples are present, in part to ensure that the Borrower does engage with all such communities).

120. *See, e.g.*, *id.*, ¶ 9 ("The Bank will cooperate with such agencies and the Borrower in order to agree on a common approach for the assessment and management of environmental and social risks and impacts of the project. A common approach will be acceptable to the Bank, provided that such approach will enable the project to achieve objectives materially consistent with the ESSs.").

121. *Id.*

mandatory tool under the ESF,[122] and its obligations to assess and review the borrower's project documentation.[123]

The ESCP is a binding document that forms part of the legal agreement between the Bank and the borrower.[124] The purpose of the ESCP is to "facilitate project participation and support compliance throughout the lifetime of the project."[125] The ESCP is a living document that develops, as necessary, according to the needs of the project.[126] Its key functions include: (1) consolidating in a clear and unambiguous manner the significant measures and actions that are required to achieve compliance with the ESS, as well as the timeframe in which they must be implemented; (2) taking into account the findings of the environmental and social assessment, the Bank's due diligence, and the results of stakeholder engagement; (3) providing a basis for monitoring the performance of the project; (4) defining the means and frequency of reporting on the implementation of measures and actions required to achieve compliance with the ESS; and (5) specifying the aspects of the national environmental and social framework to be used, if any.[127]

The ESCP provides a crucial link between the Bank and the borrower under the new ESF by ensuring Bank involvement in the project from project preparation and appraisal through to its implementation. In addition, the ESCP requires the Bank to continually monitor the project throughout its life cycle. Under the new ESF, the Bank has several obligations relating to the ESCP. For example, if the project comprises facilities or activities that do not meet the requirements of the ESS, "the Bank will require the Borrower, as part of the ESCP, to

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122. *Id.* ¶ 46; *ESS1*, *supra* note 67, Annex 2, ¶ 1, at 48 ("The Borrower will agree on an Environmental and Social Commitment Plan (ESCP) with the Bank. The ESCP forms part of the legal agreement.").

123. *Infra* Section V.B.

124. *ESPIP*, *supra* note 5, ¶ 46.

125. CONSULTATION PAPER, *supra* note 62, at 10.

126. *ESPIP*, *supra* note 5, ¶ 48 ("The Bank will require the Borrower to prepare, submit to the Bank for approval and implement a process that allows for adaptive management of proposed project changes or unforeseen circumstances. The agreed adaptive management process will be set out in the ESCP. The process will specify how such changes or circumstances are to be managed and reported, and how any necessary changes will be made to the ESCP and the management tools used by the Borrower.").

127. CONSULTATION PAPER, *supra* note 62, at 10.

adopt and implement measures satisfactory to the Bank so that the material aspects of such facilities or activities meet the requirements of the ESSs within a timeframe acceptable to the Bank."[128] The ESPIP dedicates a section to the Bank's obligations regarding the ESCP. In the initial planning stages of the project, the Bank assists the borrower with the development of the ESCP.[129] The Bank will also "require the borrower to implement the measures and actions identified in the ESCP diligently, in accordance with the timeframes specified in the ESCP," and has an ongoing obligation to "review the status of implementation of the ESCP as part of its monitoring and reporting."[130] Finally, the Bank is required to agree with the borrower on an adaptive management process for "proposed project changes of unforeseen circumstances" which must be set out in the ESCP.[131]

Moreover, the Inspection Panel may continue to assert its role under the new ESF by virtue of the link to the borrower created by the documentation required in environmental and social due diligence assessments. For instance, under the ESPIP and the draft ESPP, the Bank is required to review all relevant project information provided by the borrower relating to the environmental and social risks of the project and to request additional information where there are gaps.[132] The Bank also assists the borrower in preparing the terms of reference for any tools to be used as part of the ES assessment,[133] as well as providing guidance to the borrower in developing measures to address environmental and social risks in accordance with the ESS.[134]

The Bank's role is ongoing, which is evident from its obligation to "ensure that the documents relating to the ES assessment and management of the project provide adequate, accurate and up to date information regarding the potential risks and impacts of the project, and the agreed mitigation measures."[135] In addition, the Bank is required to play an active

128. *ESPIP*, *supra* note 5, ¶ 18.
129. *Id.* at 19 n.35.
130. *ESPIP*, *supra* note 5, ¶ 47.
131. *Id.* ¶ 48.
132. *Id.* ¶ 30–32; *ESPP*, *supra* note 8, ¶ 37.
133. *ESPP*, *supra* note 8, ¶ 33.
134. *ESPIP*, *supra* note 5, ¶¶ 30–31.
135. *ESPP*, *supra* note 8, ¶¶ 71.

role in the evaluation and review of the borrower's ESF, which is set out in detail in the ESPP.[136] These obligations last throughout the project lifecycle and include ongoing discussions with the borrower if changes in the borrower's environmental and social framework may adversely affect the project.[137]

C. *Implementation Support and Monitoring*

Once due diligence of the risks and impacts has been completed and a project has been approved, the Bank still must monitor the project "on an ongoing basis."[138] The Bank's general implementation and monitoring duties[139] assure that the Bank retains some degree of oversight for the entirety of the project, regardless of whether it has remaining, on-site actions to complete. The fact that, where appropriate, independent experts and affected communities have to be engaged in the monitoring of the project[140] demonstrates that the Bank's monitoring responsibilities exceed a perfunctory assessment. Furthermore, the Bank's implementation and monitoring obligations necessitate examining any change in the project or environment to assure that relevant plans and documents remain applicable. For instance, although the Bank assigns a project a risk classification status during due diligence, the Bank must actively scrutinize the project throughout implementation and operation to ascertain that the ranking is still accurate.[141]

This duty of implementation support and monitoring links the Bank's obligations to the borrower's. For example, although the borrower has the primary responsibilities under the ESS, "[i]n accordance with OP/BP 10.00, the Bank carries out regular reviews of the Borrower's compliance with the ES

136. *Id.* ¶¶ 44–57.
137. *Id.* ¶ 57.
138. *ESPIP*, *supra* note 5, ¶ 56.
139. *See generally id.*, ¶ 3 ("To carry out this Policy, the Bank will: . . . (e) Monitor the environmental and social performance of a project in accordance with the ESCP and the ESSs."); *ESPP*, *supra* note 13, ¶ 5 ("As set out in the Policy, paragraph 3, the responsibilities of the Bank to manage ES risks and impacts of a project are: . . . e. monitor the ES performance of the project in accordance with the ESCP and the ESSs.").
140. *See ESPIP*, *supra* note 5, ¶¶ 53, 58.
141. *See ESPP*, *supra* note 8, ¶ 22–24; *ESPIP*, *supra* note 5, ¶ 21.

requirements relating to the project, as set out in the legal agreement, including the ESCP."[142] Though this powerful duty is connected to what is delineated in the ESCP, as described above, the Bank does have substantive obligations regarding its development. Therefore, the Bank could be held accountable for assuring that the ESSs are upheld. This presumption is supported by the provision that the "TT (including ESF Accredited Staff) are responsible and accountable for project-level preparation, implementation support and monitoring activities relating to the ESF, and . . . handling grievances related to implementation at the project level."[143] The Bank must listen and provide redress to affected communities throughout the project lifecycle. Moreover, the obligation does not limit the Bank's accountability to its own actions, instead holding it generally accountable for implementation at the project level. This suggests that the Bank's responsibility to oversee extends to the borrower's deeds, as its obligation encompasses the execution of the project, necessarily covering all on-the-ground acts related to the project's development. Therefore, even if the grievance results from a borrower's action, the Inspection Panel may still have a basis to investigate where such an action falls within the purview of the Bank's supervisory duty.

Lastly, though the extent to which the new ESF shifts the responsibilities for the project to the Borrower is arguably unprecedented, it is not dissimilar to the Country System Pilot, which allows for the use of a Borrower's national framework under the existing Safeguards. The Joint Statement on the Use of Country Systems issued by the Chairperson of the Inspection Panel and Senior Vice President and General Counsel in July 2004 clarifies that "the country systems strategy would not change the role of the Inspection Panel as set forth in the 1993 Resolutions establishing the Inspection Panel."[144] The joint statement further affirms that the "Inspection Panel will continue to investigate whether [Bank] Management is in compliance with its policies and procedures in the design, ap-

142. *ESPP*, *supra* note 8, ¶ 63.

143. *Id.* ¶ 10.

144. *See* World Bank Group [WBG], *Joint Statement on the Use of Country Systems* (June 8, 2004), http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/JointStatementUseCountrySystems.pdf.

praisal and implementation of projects and programs."[145] In addition, the Joint Statement states that:

> [T]he Inspection Panel could, with regard to the issues raised, examine Management's assessment of the equivalence of the relevant Bank policies and procedures with the country system (and any additional measures agreed upon to achieve equivalence) in materially achieving the objectives of Bank policies and procedures, as well as Management's supervision of the project.[146]

Although the Joint Statement pertains to the Country Systems Pilot and refers specifically to OP 13.05, which has since been replaced by OP 10.00 outlining "implementation and support" obligations of the Bank, it seems reasonable to conclude that the spirit (if not the letter) of the Joint Statement could guide the role of the Inspection Panel in assessing the Bank's obligations under the new ESF, including the Bank's obligations associated with the review of the borrower's framework's compliance with the ESS. Accordingly, the mere shift to borrower ownership of the project and the use of the borrower's framework should not reduce the Inspection Panel's ability to hold the Bank accountable.[147]

It is important to note, however, that the Inspection Panel cannot practically employ any of the tools outlined above within the new ESF if affected individuals and communities are not able to submit complaints to the Inspection Panel. As described above, the Bank's decreased control over its projects may translate to the Bank being less visible to affected communities, who as a result may not be aware of the Bank's involvement in the project. Hence, they will not know to even seek redress for their complaints in front of the Inspection Panel. To address this concern, the Bank must take explicit steps to ensure that Bank visibility (or lack thereof) does not hinder

145. *Id.*

146. *Id.*

147. Additionally, the standard of review in relation to the borrower should not be lowered to make Bank compliance easier as accepting what would "otherwise be seen as inadequate assessment seems especially patronizing in developing countries whose scientists are clearly capable of world class contributions" and burdens the borrower with the social and environmental costs of inadequate assessment. *China, supra* note 74, ¶ 41.

the ability of affected communities to bring a claim before the Inspection Panel. These steps could include placing signs or otherwise identifying the Bank's role in the project at the project site. For example, the Inspection Panel could enhance its outreach by informing communities about its function as an accountability mechanism by following the approach of the European Union. European Union Council Regulation (EC) No 1083/2006 of 11 July 2006[148] requires "the Member State and the managing authority for the operational programme [to] provide information on and publicise operations and co-financed programmes . . . to European Union citizens and beneficiaries with the aim of highlighting the role of the Community and ensure that assistance from the Funds is transparent."[149]

VI. Conclusion

The new ESF and the standards developed through the Inspection Panel's cases provide the Inspection Panel with ample opportunity to reinforce the Bank's compliance with the ESSs and provide redress for environmental and social harms arising from Bank-financed projects. Furthermore, the Bank has a strong interest in ensuring that the Inspection Panel maintains its function as its legitimacy depends on it.

The Bank has historically portrayed itself as a leader among development lenders by setting the standards other monetary organizations follow. If the Bank eschews responsibility for the ESSs by claiming they are in the domain of the borrower, the new ESF will be perceived as merely window dressing. Consequently, the Bank's legitimacy and status as a leader would be greatly challenged if it appeared to be more concerned with who had the specific duty to assure environmental and social protections as opposed to holistically focusing on achieving positive development outcomes.

If the Bank does not explicitly recommit itself to high environmental and social standards and reaffirm the saliency and importance of the Inspection Panel, there is a serious risk that

148. Council Regulation (EC) No. 1083/2006 of 11 July 2006, 2006 O.J. (L 210) 25. This regulation lays down general provisions on the European Regional Development Fund, the European Social Fund, and the Cohesion Fund, and repeals Regulation (EC) No 1260/1999.

149. *Id.* art. 69.

some States might be emboldened to refuse the Inspection Panel access or to intimidate witnesses from cooperating with the Inspection Panel. This concern is not unfounded, as the Inspection Panel has already faced such issues under the existing Safeguards.[150] The investigation is a core component of the Inspection Panel's work, and field investigation is crucial to its role.[151] Accordingly, if States interpret the ESF as allowing them to keep the Bank (and the Inspection Panel) at arm's length from their projects, it would significantly jeopardize the Inspection Panel's accountability function. The extent to which this shift may hinder the Inspection Panel's work depends on the degree of Bank support the Inspection Panel receives; the stronger the stance of the Bank towards the new ESF and the Inspection Panel's role (as incentivized by its desire for legitimacy), the less likely borrowers will be to oppose the Inspection Panel's involvement.

Given the Bank's incentives and the Inspection Panel's available tools, the Inspection Panel not only has the potential to fulfill its same function under the new ESF, but may also serve as a device that mitigates some concerns born from the shift towards borrower ownership of bank-financed investment projects.

150. In 2013, the government of Ethiopia publicly refused to cooperate with the Panel, stating "to an extent that there's a need for cooperation, it's not going to be with the Inspection Panel, but with the World Bank." William Davison, *Ethiopia Refuses to Cooperate With World-Bank-Funding Probe*, BLOOMBERG (May 28, 2013), https://www.bloomberg.com/news/articles/2013-05-27/ethiopia-refuses-to-cooperate-with-probe-on-world-bank-funding. Most recently, Ethiopia arrested a former World Bank Translator (who had assisted with the Panel's investigation) on trumped-up charges of terrorism. Press Release, World Bank Inspection Panel, Statement of the Inspection Panel Regarding the Charges Filed Against Pastor Omot Agwa in Ethiopia (Sept. 25, 2015), http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=224&source=; *Ethiopia: Activists Heading for Food Workshop Charged With Terrorism*, ECADFORUM (Sept. 22, 2015), http://ecadforum.com/2015/09/22/activists-heading-for-food-workshop-charged-with-terrorism/.

151. *See generally* World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (2009) http://ewebapps.worldbank.org/apps/ip/IPPublications/InspectionPanelAt15yearsEnglish.pdf.