

January 15, 2013

Via Electronic Mail

Eimi Watanabe
Chair, Inspection Panel
1818 H Street, NW
Washington, DC 20433
Email: ipanel@worldbank.org

Re: Civil Society Comments on Inspection Panel Draft Operating Procedures

Dear Ms. Watanabe,

We, the undersigned, are writing in response to the invitation to submit comments on the Draft Operating Procedures (“Draft OPs”) of the World Bank’s Inspection Panel. We represent organizations from around the world that work with people and communities impacted by projects funded by the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”). Many of us have supported the work of the Inspection Panel¹ and have assisted communities in submitting requests to the Panel about adverse impacts of World Bank projects. We believe that the Inspection Panel plays a crucial role in protecting the human rights and environments of people affected by World Bank-funded projects, while holding the Bank accountable for the impacts of its investment decisions. We submit these comments with the hope and expectation that they will be taken into account to make improvements to the Panel’s operations.

The Inspection Panel has led the way for accountability mechanisms at international financial institutions since its creation in 1993.² For twenty years, the Panel has served a critical role in addressing the concerns of communities affected by Bank projects through its investigatory and reporting functions. Moving forward, it will be important to ensure that these functions are not diluted or diverted from their original purpose of giving affected communities an opportunity to have their claims investigated by an independent body that will transparently report its findings to the Bank’s decision-makers and the public. ***In particular, we are concerned about changes proposed to the eligibility criteria for investigation and the pilot program, both of which may significantly weaken the Panel process for requesters for whom there may be no other forum to raise their complaints.***

¹ See, for example, letter to President Kim on Learning from Failure, Nov. 12, 2013, signed by 27 NGOs: <http://blogs.oxfam.org/sites/blogs.oxfam.org/files/20131112-CSO-letter-learning-from-failure.pdf>.

² The Inspection Panel was created by IBRD Resolution No. 93-10, IDA Resolution No. 93-6 of September 22, 1993 (“the Resolution”). The governing framework of the Panel is comprised by the Resolution, as well as by the review of the Resolution in 1996 (“Review”) and the 1999 Clarification of the Board’s Second Review of the Inspection Panel (“Clarification”).

We also note that the Draft OPs contemplate an enhanced role for Bank Management. While we recognize that the Panel does not have the authority to dictate Management’s actions, the effectiveness of the Draft OPs, including the pilot, rely on Management’s own procedures for engaging with requesters prior to or after the filing of requests—procedures which were last revised almost fifteen years ago.³ If the changes proposed in the Draft OPs are, at least in part, to encourage Management to acknowledge honestly and address adequately the concerns of project-affected communities, we see no concomitant commitment from Management.⁴

With the goal of preserving a fair, independent, transparent, and effective process for requesters, we take this opportunity to make recommendations for the Inspection Panel’s Draft OPs based on our observations, as well as our experience regarding the design, implementation, and use of similar accountability mechanisms.⁵ Specifically, our comments address the pilot described in Annex I, and specific recommendations for the Operating Procedures.

I. Inspection Panel’s New Pilot for “Early Solutions”

The pilot, included as Annex 1 of the Draft OPs, describes an approach the Inspection Panel would apply to select cases that would essentially suspend the registration of request in order to give Management and requesters time to resolve the issues raised in the request. We agree that timely resolution of problems is in the best interest of all parties involved, but Management already has an opportunity to do so when requesters bring their concerns to them—a pre-condition to filing a request with the Inspection Panel required by the Resolution and reflected in the Draft OPs. When a request reaches the Panel, it not only indicates that Management has been unable to adequately address concerns but that the opportunity to address concerns through dialogue have passed. It is unclear why Management would engage requesters to resolve their concerns so soon after it failed to respond directly to requesters. As the Panel notes, it does not “directly engage in mediation,”⁶ nor is it equipped or designed to do so. Its primary function is to provide “an independent and impartial assessment of claims about harm and related non-compliance.”⁷ The Panel must stay true to its original mandate and function. Furthermore, the pilot phase as described is vague, vests too much discretion with the Panel, and creates unnecessary ambiguity and unpredictability for requesters.

³ Bank Procedures 17.55

⁴ President Kim’s statement on December 9, 2013 in which he commits that the Bank and the IFC will develop Action Plans for every case resulting in findings of non-compliance is not to the contrary because they are already obligated to do so.

⁵ These comments are also offered to ensure that the World Bank meets its obligations to provide effective remedy for human rights violations, consistent with the UN Guiding Principles on Business and Human Rights.

⁶ Inspection Panel Draft Operating Procedures (“Draft OPs”), para. 4.

⁷ Draft OPs, para. 2(b).

The Criteria for the Pilot Are Vague

The criteria for choosing whether or not to exercise this option are ambiguous. Requesters cannot predict whether the Panel will determine if the harm they allege is “clearly defined, focused, limited in scope and appear to be amenable to early resolution.” Moreover, the Panel will need to make the determination based only on the initial request for inspection, which may contain only partial information, and Management’s verbal response. The Panel will not have had the benefit of speaking with requesters or conducting a site visit before assessing whether the request is “narrowly focused and less contentious;” a site visit may shed additional light on the complexity of the issues involved. It is also not clear how much input requesters will have about the pilot option once Management and the Panel have decided they prefer to suspend registration.

The Pilot Undermines Institutional Learning

Furthermore, the current criteria for considering using the pilot option only relate to the nature of the alleged harm, and not the extent of the Bank non-compliance. Failure to investigate these cases may lead to lost opportunities for institutional learning. Cases in which the Bank violates its own policies and procedures, but where the alleged harm is “clearly defined, focused, and limited in scope,” could be addressed through the pilot process. Though resolution is important for the requesters, one of the major functions of the Panel is to ensure that the World Bank learn lessons from cases of non-compliance and prevent similar problems in future projects. Successful resolution of a case through the pilot process should not be a reason not to register a case. The Panel should recommend a full inspection where issues of non-compliance are alleged to have caused harm, and relevant eligibility criteria have been met.

Premature Dialogue between the Panel and Management

The proposed pilot also puts the Panel in the position of violating the Resolution because it will require the Panel to dialogue with Management about a claim before it has notified the Board of Directors, including the Director for the country from which the claim emanates. The Pilot claims that meetings between the Panel and Management shortly after a request is submitted are “per current practice.” However, this current practice is not described in the Draft OPs of the same document,⁸ and also contradicts the Resolution, in which the Panel’s first engagement with Management occurs after the registration process and the notice of a request for inspection has been issued.⁹ Not only might this generate internal problems, but also be viewed as an unfair opportunity for Management to influence the Panel with regard to the handling of a request. The provisions in the Resolution requiring transparency through notice of registration prior to

⁸ Paragraph 24 of the Draft OPs allows for the Panel to “request information and clarification about the Project from Management.” This is a new addition to the procedures that is not provided in the Resolution and clarifications, in which Management’s initial response comes after the Board and Management receive the notice of registration. This request for information should relate to ensuring that registration requirements are met, and not constitute a “dialogue” between Panel and Management on the subject matter of the request.

⁹ Resolution, para. 17-18.

contact with Management are intended to avoid exactly the type of interaction that the pilot proposes because of the risks that pressure from Management will alter the Panel's decision-making about registration, lessen its independence, and result in a non-transparent process.

Key Recommendations

For all the foregoing reasons, we do not support the pilot, but if the Inspection Panel wishes to move forward with it, then the power to initiate, participate in, and suspend such a process should be in the control of requesters. It is critical that Requesters be consulted before discussions with Management about the possibility of suspension of the registration in order for a resolution to be sought. A copy of the request should be included in the Notice of Receipt of Request. In order to ensure that this pilot does not hinder the ability of requesters to pursue an investigation through the Inspection Panel, the date of filing the request should be used to determine eligibility, if and when that stage is reached. The request should not be deemed ineligible if the project financing surpasses 95% during the time in which Management and requesters are engaged in a dialogue. Finally, resolution of the requesters' issues through a pilot should not prevent the Panel from making findings of non-compliance that may assist institutional learning and prevent repetition of policy violations.

II. Draft Operating Procedures

The Draft Operating Procedures ("Draft OPs") propose a number of changes that address concerns raised by former requesters interviewed as part of the Panel's consultation process. In particular, we welcome the introduction of a timeline for completing an investigation in Paragraph 64 and the commitment in Paragraph 53(d) to keep in regular contact with requesters during the process. However, some of the most significant changes do not appear to benefit requesters. This section provides specific comments on those changes that may negatively impact requesters' ability to effectively access the Inspection Panel to address their requests independently, transparently, and impartially.

Eligibility Criteria Should Not Be Expanded

Paragraph 43 lists criteria for eligibility determination that go beyond the technical eligibility criteria in Paragraph 39, and represents a significant deviation from the eligibility requirements provided in the Resolution and 1999 Clarification. These new eligibility considerations create barriers to access that were not discussed or contemplated in the governing framework of the Panel, threatening both the accessibility and independence of the Panel. For these reasons, Paragraph 43 should be removed, or alternatively, the language of the Resolution should be used to avoid confusion.

The first proposed criteria requires the Panel to guess about findings that should only be made through a full investigation. The Panel may not have sufficient evidence to make judgments about the plausibility of a causal link between the Bank supported project

and the alleged harm. The language of the criteria should reflect the language in Criteria B, requiring that requesters assert a connection between policy violation and harm, but not requiring the Panel to make a judgment as to plausibility.¹⁰ Not only would the Panel be required to consider this question with incomplete and potentially imbalanced information, they would not be able to put these findings into their eligibility report, as it is explicitly barred from doing so in Paragraph 44. We believe the intent of Paragraph 44 was to prevent the Panel from using discretionary criteria beyond the technical eligibility criteria in Paragraph 39 to make its recommendation for investigation.

Second, it is implied that even if Management has admitted to non-compliance leading to harm, an investigation may not be recommended if “Management has provided a statement of specific remedial actions” that “adequately address[es] the matters raised by the Request.” While the Panel must take into account the view of Requesters, it is still essential for the Panel to undertake an investigation when all the technical eligibility requirements have been met and there are documented issues of non-compliance. The Panel’s role as an accountability mechanism includes the crucial function of gathering lessons from requests to ensure that similar non-compliance is not repeated in future projects. Without a full investigation, there can be no record of lessons learned and mistakes may be repeated.

Eligibility Determination Should Not Be Delayed

Finally, Footnote 8 describes a process in which the Panel delays an eligibility decision to allow for Management and Requesters to find a resolution. This provision is not provided for anywhere in the Draft OPs, the Resolution, nor the 1999 Clarification. There is no indication of whether this will be policy moving forward, or how it will work in the context of the Draft OPs. At this point in the process, Management would have had potentially two opportunities to resolve the conflict with requesters—prior to filing and during the pilot. Allowing further delays at a critical moment in the process is unnecessary and inappropriate. To avoid confusion, the footnote should be removed. If it remains part of the Draft OPs, it should be incorporated into the policy rather than as a footnote, and should be made contingent on the agreement of all parties, especially the requesters, before such a delay is requested. If it remains a decision of the Panel, Management, or Board to delay an eligibility determination, the process becomes unpredictable and uncertain for requesters, undermining the Inspection Panel’s accessibility and effectiveness.

Requesters Should Have a More Active Role in the Panel Process

Requesters must have an active role in the eligibility determination phase described in Paragraphs 32-38 of the Draft OPs to ensure that they have an opportunity to provide the Inspection Panel with the necessary information to make a valid recommendation. Requesters must have access to all the information that goes into the determination, in order to provide all relevant evidence of their claims. This requires that they have access to Management’s response in the twenty-one day period in which the Panel is making their eligibility determination and may conduct a field visit. Access to Management’s response

¹⁰ Draft OPs, para. 39.

may be granted orally or in written form, but requesters should know whether Management has admitted non-compliance or has attempted to rebut the information in the request for inspection.¹¹

We appreciate the inclusion of Paragraph 55, which describes the Panel’s interaction with requesters during the investigation; however, it does not go far enough to include requesters in the investigation process. The investigation process should ensure that requesters are informed and consulted during key steps in the process. For example, the investigation plan that is described in Paragraph 53(b) and the final investigation report mentioned in Paragraph 65 should both not only be communicated to the requesters prior to being made public, but requesters should be consulted as to the contents of those reports.

Further, the comments from former requesters that were solicited during the Panel’s consultation expressed a desire for the requester to be present during the Board meeting in which the investigation report and Management’s response and Action Plan are discussed. While we support that suggestion, an alternative would be to allow requesters the opportunity to submit a written statement, describing their desired outcome to the case. The requester is in the best place to know what will resolve their concerns. The Board should have the benefit of their perspective when considering the Panel’s investigation report and Management’s response.

The investigation methodology in Paragraph 54 should not only include “requesting or receiving information” from requesters, but should also include meetings with the requesters during site visits. Paragraph 55 should not only include status updates, but should also include the consultations on “factual and technical questions during the investigation process, to ensure accuracy and completeness of available information,” currently only contemplated for the Panel’s interactions with Management.¹² Similar consultations should take place with Requesters during the investigation process.

Finally, any progress reports from Management and their summaries described in Paragraph 74 should be translated and provided to requesters. In addition, requesters should be provided the option of submitting progress reports on the implementation of action plans to ensure that they also have the opportunity to voice satisfaction or discontent with the outcome of the process.

¹¹ This is consistent with the 1994 Panel Operating Procedures, which says that “in order to make an informed recommendation,” the Panel may “in the light of Management’s response, request more information from the Requester; and provide relevant portions of Management’s response for comment.” 1994 Inspection Panel Operating Procedures (“94 OPs”), para. 29.

¹² Again, this is consistent with the 1994 Panel Operating Procedures, which allowed the Panel to “notify the Requester of any new material facts provided by Bank staff or by the Executive Director, or authorities in the country where the project is located” and “discuss its preliminary findings of fact with the Requester.” 94 OPs, paras.48-49. Furthermore, the 94 OPs also included provisions for the participation of third parties: “any member of the public may provide the Inspector(s)...with supplemental information that they believe is relevant to evaluating the Request.” 94 OPs, paras. 50-51.

The Procedures Should Be Made Consistent with the Governing Framework

We appreciate the reiteration of the commitment in the Introduction of the Draft OPs to the 1993 Board Resolution, 1996 Review, and the 1999 Clarification that lay out important procedural guidelines for the Inspection Panel. However, we urge that where changes in language may lead to confusion in future cases, the Draft OPs track the language of the documents in the governing structure of the Inspection Panel.

The role of the Panel to address requests in which harm that has “totally or partially resulted from failure of the Bank to comply with its policies and procedures, including social and environmental safeguard policies, during design, appraisal and implementation of Bank-financed projects,” is described in Paragraph 1 of the Draft OPs. However, an important element of the Bank’s role is supervising the obligations of the borrower. As required by the Resolution, the mandate of the Panel must also extend to “situations where the Bank is alleged to have failed in its follow-up on the borrower’s obligations under loan agreements with respect to policies and procedures.” The Draft OPs should be amended to reflect this language.

Paragraphs 34-35 outline the contents of Bank Management’s response to a request for inspection. While the contents of these requirements are largely the same, differences in wording may cause confusion in their interpretation. For example, in Paragraph 34(a), the formulation of the content of Management’s response should be limited to whether any serious failure is attributable, wholly or in part, to Management’s own actions or omissions, but should not include a discussion of harm or potential harm. Harm is alleged by requesters, and Management is not in a position to know the full extent of harm and has a conflict of interest in reporting on the harm or potential harm of their actions or omissions. The insertion of the additional words may cause confusion and ultimately may threaten the independence of the Panel’s balancing of information.

Similarly, the Draft OPs slightly alter the requirements set forth in Paragraph 35. While the Draft OPs give Management the option to include information about measures to address concerns raised, it does not clearly state that Management *must* included this description in any case where Management, in its response, admits serious failure attributable wholly or in part to the Bank, as required in the 1999 Clarification.¹³

Finally, Paragraph 39 lays out the technical eligibility criteria for a request, first by quoting the criteria from the 1999 Clarification and then providing explanatory language. We appreciate the effort to create more clarity in the Draft OPs, but at least in one instance, change in language may cause confusion. Criterion 39(c) requires that requesters first approach Management with their concerns before filing a request to the Panel, and the determination of whether Management response was adequate lies with the requesters. However, the interpretation implies a shift in who makes that determination: the additional language implies that the Panel will have discretion to determine whether “Management had a reasonable opportunity to respond.” While this may not be an unreasonable request,

¹³ Clarification, para. 4.

it goes beyond the scope of the language in the governing framework. Confusion will be avoided by removing this language.

We thank you for your attention to these issues, and the opportunity to comment on the Inspection Panel Draft OPs. We look forward to further engagement on these issues and to the results of this consultation. Please do not hesitate to contact us if you would like to discuss these matters in further detail.

Sincerely,

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Robert Kugonza, African Rivers Network

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