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# How the World Bank's Dispute Resolution Services Should Benefit Affected People and Borrowing States

Jonathan Brosseau

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# WORKINGPAPER

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## How the World Bank's Dispute Resolution Services Should Benefit Affected Persons and Borrower States

Jonathan Brosseau



## About the author

Jonathan Brosseau is a PhD/DCL Candidate at Université Paris 1 Panthéon-Sorbonne and McGill University. His thesis, jointly supervised by Professors Mathias Audit and Andrea Bjorklund, focuses on the rules of civil procedure that implement State immunity. In 2021, he served as a Visiting Research Fellow at UNU-CRIS.

A member of the Quebec Bar, Jonathan practiced international law for four years in total at the global law firm Freshfields, the International Court of Justice, the United Nations, and Canada's Ministry of Foreign Affairs. He graduated from the BCL/LLB Honours program at McGill University (Gualtieri-Doran and Cook Awards) and the LLM program at the University of Cambridge (Volterra Fietta and Nappert Prizes).

Jonathan has authored or coauthored more than a dozen scholarly publications on diverse international law topics.

Contact: [jonathan.brosseau@mail.mcgill.ca](mailto:jonathan.brosseau@mail.mcgill.ca)

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## **Abstract**

The World Bank recently established the Dispute Resolution Services (DRS) to address complaints related to its projects through mediation, fact-finding, and similar methods. This paper evaluates how the DRS improves the right of access to a remedy for project-affected persons.

First, the paper identifies the legal and policy standards against which the DRS should be evaluated. The right of access provided through the Inspection Panel's compliance review process has three pillars: accessibility, efficiency, and independence. Since the DRS was intended to only improve this right in light of best practices regarding dispute resolution processes, the DRS should be at least as protective of affected persons as the Panel process is.

Second, the paper suggests improvements to the DRS regarding the three pillars. To increase accessibility, the Bank should strengthen procedural protections and participation opportunities for affected people by providing a minimum standard of access to project-related materials. To increase effectiveness, the Bank should clarify the minimum threshold for acceptable remedies, and provide mandatory verification of the implementation of the parties' agreements. To improve independence, the Bank should offer more options regarding sequencing the compliance review and dispute resolution processes, and provide funding to affected persons to support complaints.

## **Keywords**

World Bank, Dispute Resolution Services, Law and Responsibility of International Organisations, Inspection Panel, International Accountability Mechanisms

## **Note**

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## 1. Introduction

In the early hours of a December morning in 2020, the Kampala Capital City Authority and armed guards reportedly began demolishing the homes and farmland of members of the Kawaala community in Kampala, Uganda.<sup>1</sup> Kawaala community members allege that their eviction and the ensuing destruction paved the way for the World Bank-funded Lubigi drainage channel project. According to them, the project was initiated without adequate consultation or plans for compensation and resettlement, resulting in significant harm to their livelihoods and well-being, in breach of the Bank's Environmental and Social Framework policies.<sup>2</sup> Bank Management responded that most of the Kawaala community's concerns about resettlement should be addressed through the project-level grievance mechanism, and that it was collaborating with the Kampala Capital City Authority to strengthen the resettlement plan related to the channel project.<sup>3</sup> However, the Kawaala community members were dissatisfied with the Bank's response to their concerns, prompting them to file a complaint with the Inspection Panel in June 2021 with the support of local and international civil society organisations. Following an initial investigation, the Inspection Panel recommended to the Bank's Executive Directors that the complaint be investigated further.<sup>4</sup>

Upon the Executive Directors' approval of the Panel's recommendation for inspection,<sup>5</sup> the Kawaala community and Uganda were offered the opportunity to pursue dispute resolution rather than to go forward with the compliance review conducted by the Panel, a first in the Bank's history. The Executive Directors had only approved in September 2020 the updated Inspection Panel Resolution<sup>6</sup> and the Accountability Mechanism Resolution (AM Resolution),<sup>7</sup> which established the new Dispute Resolution Services (DRS).<sup>8</sup> Under the DRS, those affected by Bank-funded projects (also referred to as requesters once they submit a request for inspection to the Panel) and the borrower State can now resolve a complaint through joint fact-finding, mediation, and other similar approaches, where both Parties agree. In the fall of 2021, the DRS was staffed and published its Interim Operating Procedures. The Kawaala community and Uganda agreed to pursue dispute resolution shortly thereafter.<sup>9</sup> According to a civil society organisation supporting the Kawaala community, the dispute resolution process would provide an 'appropriate forum' for the community to raise their demands, which include 'a new, proper land survey and identification of project-affected persons, provision of adequate compensation, and adequate time to resettle.'<sup>10</sup> The complaint from the Kawaala community is representative of the type of complaints made by affected people against Bank-financed projects. As of this writing, two other cases have also entered the dispute resolution process under the DRS.<sup>11</sup>

<sup>1</sup> Witness Radio Uganda, 'Request for Inspection by the World Bank Inspection Panel in Kampala Institutional and Infrastructure Development Project' (17 June 2021), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/151-Request%20for%20Inspection-17%20June%202021.pdf>.

<sup>2</sup> World Bank, *Environmental and Social Framework* (4 August 2016) (Framework), <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>.

<sup>3</sup> Bank Management, 'Response: Second Kampala Institutional and Infrastructure Development Project (P133590)' (24 August 2021), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/151-Management%20Response-24%20August%202021.pdf>.

<sup>4</sup> Inspection Panel, 'Report and Recommendation: Second Kampala Institutional and Infrastructure Development Project (P133590)' (4 October 2021), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/151-Uganda-KIIDP2-Inspection%20Panel%20Report%20and%20Recommendation-4%20October%202021.pdf>.

<sup>5</sup> World Bank, 'Parties in Uganda Infrastructure Case Agree to Pursue Dispute Resolution' (7 December 2021), <https://www.worldbank.org/en/programs/accountability/brief/parties-in-uganda-infrastructure-case-agree-to-pursue-dispute-resolution>.

<sup>6</sup> Inspection Panel Resolution (8 September 2020), Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003 (2020 IPN Resolution), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/InspectionPanelResolution.pdf>.

<sup>7</sup> Accountability Mechanism Resolution (8 September 2020), Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004 (2020 AM Resolution), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/AccountabilityMechanismResolution.pdf>.

<sup>8</sup> While the DRS is a plural noun, this paper treats it as a singular noun for ease of reading, as the Bank does in its publications.

<sup>9</sup> Accountability Mechanism Secretary, 'Notice of Agreement to Pursue Dispute Resolution: Second Kampala Institutional and Infrastructure Development Project (P133590)' (2 December 2021), <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/151-Notice%20of%20Agreement%20to%20Pursue%20Dispute%20Resolution-2%20December%202021.pdf>.

<sup>10</sup> Robi Chacha Mosenda and Caitlin Daniel, 'World Bank Board Approves Investigation into Community Concerns of Forced Eviction by the Lubigi Drainage Channel' (*Accountability Counsel*, 27 October 2021), <https://www.accountabilitycounsel.org/2021/10/world-bank-board-approves-investigation-into-community-concerns-of-forced-eviction-by-the-lubigi-drainage-channel-first-case-in-the-newly-established-dispute-resolution-service/>.

<sup>11</sup> See Cameroon: Nachtigal Hydropower Project (P157734) and Hydropower Development on the Sanaga River Technical Assistance Project (P157733), <https://www.inspectionpanel.org/panel-cases/nachtigal-hydropower-project-p157734-and-hydropower-development-sanaga-river-technical>; Nepal: Nepal-India Electricity Transmission and Trade Project (P115767) and its Additional Financing (P132631), <https://www.inspectionpanel.org/panel-cases/nepal-india-electricity-transmission-and-trade-project-p115767-and-its-additional>.

In July 2022, the Accountability Mechanism released the second version of the DRS' operating procedures and solicited feedback from interested individuals and organisations.<sup>12</sup> A previous iteration of this paper, which recommended amendments to the procedures similar to those outlined here, was submitted to the Accountability Mechanism. Accountability Counsel and 56 other civil society organisations also submitted joint comments on the procedures.<sup>13</sup> In December 2022, the Accountability Mechanism published the third and final version of the DRS' operating procedures, the 2022 Accountability Mechanism Operating Procedures (AM Operating Procedures). In contrast to other multilateral development banks, the World Bank did not publicly disclose the comments it received on the procedures. It simply acknowledged that they were from civil society organisations, other accountability mechanisms, former Panel members, and scholars. As further explained below, the revision in the AM Operating Procedures that strengthens requesters' protection the most is the removal of the requirement that one Party may engage additional advisors only with the other Party's consent, which was present in the first two versions of the procedures. As further explained below, the revision that most weakens requesters' protection is that the final AM Operating Procedures only require that dispute resolution agreements be consistent with domestic or international law, not with Bank policies, as previous versions required.

Given the novelty of the DRS, this paper examines how the dispute resolution process offered by the Bank should benefit affected persons and borrower States (together, the Parties). The paper also critically evaluates the dispute resolution process in light of the mandates of the Inspection Panel and the DRS, as well as best practices concerning the right of access to a remedy under international law. In particular, it considers the strengths and weaknesses of the current dispute resolution process and suggests how the Bank should improve this process when it revises the AM Resolution in late 2023<sup>14</sup> or the AM Operating Procedures in the future. Furthermore, this paper also tracks the evolution of the DRS procedures through the three versions of the procedures, including whether any revisions suggested by civil society organisations have been incorporated into the procedures, and whether these revisions are more or less protective of affected persons. As such, the paper uses the framework developed by the Global Administrative Law scholarship for holding international organisations accountable to the rule of law. At the same time, it seeks to contribute to this scholarship by providing a case study for how international organisations can develop new forms of international accountability mechanisms, and by highlighting the best practices and challenges related to such mechanisms.

The evaluation of the DRS as part of the Bank's accountability system is significant for several reasons. First, it will enable the disputing Parties to understand better whether they should consent to the dispute resolution process because the DRS is the 'appropriate forum' for resolving their dispute, or whether they should opt for the compliance review process undertaken by the Panel. The nearly twenty other multilateral development banks, which have been influenced by the Bank's accountability practices in the past,<sup>15</sup> could also consider the relevant aspects of the evaluation when revising their respective dispute resolution processes.

Overall, the paper suggests that the DRS, as it is now designed, can potentially improve the right of affected persons to access a remedy. By emphasising party-led dispute resolution, the DRS provides affected persons assistance from an independent third party, the opportunity to participate in determining remedial measures, and the chance to receive effective remedies beyond those prescribed by Bank policies. The heavy reliance of the DRS on the consent of both Parties may also serve to preserve a significant role for the Inspection Panel, because the Parties may not reach an agreement through dispute resolution in most cases. At the same time, this reliance on consent also enables affected persons to agree to remedies that are inferior to those envisioned by Bank policies. This is a real possibility, particularly where affected persons continue to bear the adverse material effects of violations of Bank policies while the dispute resolution process runs its course, and are typically

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<sup>12</sup> Accountability Mechanism, 'Accountability Mechanism Secretary Invites Comment on the Draft Accountability Mechanism Operating Procedures' (18 July 2022), <https://www.worldbank.org/en/programs/accountability/brief/accountability-mechanism-secretary-invites-comment-on-the-draft-accountability-mechanism-operating-procedures>.

<sup>13</sup> Accountability Counsel and others, 'Joint Comments on AM & Panel Procedures' (9 September 2022) Joint Comments), <https://www.accountability-counsel.org/wp-content/uploads/joint-comments-on-am-panel-procedures.pdf>.

<sup>14</sup> World Bank, 'Report and Recommendations on the Inspection Panel's Toolkit Review' (March 2020) para. 37, <https://documents1.worldbank.org/curated/en/972351583772786218/pdf/Report-and-Recommendations-on-the-Inspection-Panel-s-Toolkit-Review.pdf>.

<sup>15</sup> Ruth Mackenzie and others, 'The Inspection Panel of the World Bank', *The Manual on International Courts and Tribunals* (2nd edn, Oxford University Press 2010) para. 17.29.

vulnerable populations with fewer resources and less expertise on Bank projects than borrower States. Furthermore, the Bank Management's involvement in the dispute resolution process is limited to serving as a technical observer if both Parties consent, meaning that Management cannot ensure that affected persons receive a meaningful remedy. Given these concerns, questions arise about whether the DRS will *actually* improve the access to a remedy of affected persons, and whether it may instead prejudice the Panel's mandate to provide access to a remedy to these persons. Therefore, the Bank should consider revising the dispute resolution process to address the power imbalance between affected persons and borrower States. One solution is to entrench minimal safeguards for affected persons, to ensure they make informed decisions on remedies.

The paper is divided into two sections. Section 2 examines the mandates of the World Bank's three avenues for a remedy as they pertain to the right of access of affected persons. These avenues include the Inspection Panel, the Grievance Redress Service (GRS), and the DRS. This section shows that the Panel and GRS have succeeded in performing their respective functions of providing independent compliance review and management-led solutions, respectively. However, a gap remained in the Bank's accountability system since they did not offer independent dispute resolution at the institution's highest level. The establishment of the DRS filled that gap by offering affected persons access to independent dispute resolution processes. It did so while seeking to improve upon the three pillars of the Panel, which can be identified as: accessibility, effectiveness, and independence.

Section 3 proposes three areas of improvement to the DRS that the Bank should consider to comply with the mandate of the Inspection Panel and best practices related to accountability mechanisms. To increase accessibility, the Bank should consider strengthening the procedural protections and opportunities for participation provided to affected persons in the dispute resolution process, such as by providing a minimum standard of access to project-related materials. To increase effectiveness, the Bank should consider clarifying the minimum threshold for remedies that affected persons can accept, and should also provide for mandatory verification of the implementation of the Parties' agreement. To increase effectiveness, the Bank should consider offering affected persons more options regarding the sequencing of the compliance review and dispute resolution processes to protect the mandate of the Inspection Panel. The Bank should also provide funding to help affected persons get support from professionals during the dispute resolution process.

## 2. The Mandates of the Bank's Three Avenues for a Remedy

Section 2 provides an overview of the three avenues for a remedy within the World Bank that enables it to meet its moral and legal obligations to provide affected persons the right of access to a remedy, given what is typically interpreted as its immunity from suit in national courts.<sup>16</sup> This serves to identify the legal and policy standards against which the avenues for a remedy provided by the Bank should be evaluated.<sup>17</sup>

<sup>16</sup> See Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature 27 December 1945, 60 Stat. 1440 (1946), HAS No. 1502, 2 UNTS 134, as amended 16 December 1965, 16 UST 1942, TIAS No. 5929, art. VII, § 1 (Articles of Agreement). In the *Effects of Awards of Compensation* advisory opinion, the International Court of Justice held that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals ... that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.' [1954] ICJ Rep 47, p. 57. In the same way, it would be 'hardly consistent' with the Bank's mandate of ending extreme poverty and boosting shared prosperity, as set out in its Articles of Agreement, not to afford people affected by its funded projects the right of access to a meaningful remedy. Moreover, if the right to a remedy is determined to exist under customary international law, this would imply that the Bank is bound, as an international organisation, to ensure the realisation of this right under international law: see *Amicus Curiae* of Daniel Bradlow, *Jam v. International Finance Corp.*, August 2016 (DC Circuit Court of Appeals), [https://earthrights.org/wp-content/uploads/2016-08-17\\_amicus\\_for\\_appellant\\_dckt\\_.pdf](https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf).

<sup>17</sup> The Resolution establishing the Inspection Panel had created in 1993 legal standards applicable to the Bank in terms of providing access to a remedy. Although multilateral development banks may resist referring to their resolutions as legal standards and may prefer referring to them as administrative standards instead, these resolutions are multilateral development banks' internal law, while domestic and international law are the external law applicable to them. See Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009) p. 448. Moreover, the Bank's 2016 Framework policies explicitly state that it establishes 'mandatory requirements' applicable to the Bank concerning its projects, including access to the Inspection Panel.



## 2.1 Inspection Panel: Panel-Led Compliance Review

The Inspection Panel was established in 1993 as the first independent accountability mechanism at a multilateral development bank. The Panel's mandate is to determine whether the Bank complies with its operational policies and procedures in any particular case. While the Panel has a compliance function and adopts a fault-finding approach, it also provides affected persons with a basic right of access to a remedy.<sup>18</sup> It is also a quasi-judicial body: as described below, the Bank's Executive Directors cannot change its findings, but they retain the power to decide on the outcome of requests at key stages of the process. Notably, the Panel cannot issue binding orders, whether interim or final, as courts can.

The right of access to a remedy provided by the Inspection Panel can be distilled into three pillars, which are at once procedural and substantive.<sup>19</sup> The first pillar is *effectiveness*, which is limited in practice by the Panel's mandate. Once it receives a complaint, the Panel first issues its recommendation to the Executive Directors on whether a full investigation should be carried out.<sup>20</sup> If the Executive Directors approve an investigation, then the Panel submits its findings of facts regarding the Bank's compliance with its operational policies and makes any related findings of harm.<sup>21</sup> Although these findings are non-binding, they enable Bank Management to propose remedial actions to prevent any non-compliance and harm from continuing. The Inspection Panel itself does not recommend remedial actions.

The second pillar is *accessibility*. The Panel has broad eligibility criteria, according to which any two or more affected persons may submit a request.<sup>22</sup> The opportunity for procedural participation afforded to affected persons is also relatively broad, as they can provide information about the facts underlying the complaints during the investigation.<sup>23</sup> They are also 'consulted' on the plan of action agreed between the Bank and the borrower State on remedial efforts, but do not have any decisional power at that stage.<sup>24</sup>

The third pillar of the right is *independence* and *impartiality*.<sup>25</sup> The Panel must be independent not only from Bank Management but also from the borrower States and requesters. The Panel must also be impartial to the merits of the complaints, meaning it should deal thoroughly and fairly with the disputes. On this basis, the Panel is required to give reasons based on the evidence and facts supporting its recommendations and findings.<sup>26</sup>

<sup>18</sup> Inspection Panel, Operating Procedures (1994), Purpose (1994 Inspection Panel Operating Procedures), <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures>. Yet, the Panel's purpose of providing access to a remedy to affected persons has sometimes been questioned. For instance, the World Bank's General Counsel in the 1990s, Ibrahim Shihata, had opined that lifting the harm 'is certainly a noble function, but it is not the function of the Panel' (quoted in Dimitri Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* [Oxford University Press 2022] p. 56, footnote 100). However, the purpose of providing access to a remedy has since been enshrined in the 2014 and 2022 Inspection Panel Operating Procedures, para. 2.a., where it is noted that the Panel's 'two important accountability functions' are assessing compliance with Bank policies and 'provid[ing] a forum for people ... to seek recourse for harm which they believe result from Bank-supported operations.'

<sup>19</sup> These three criteria are derived from the main themes in the Panel's mandate as set out in its 1993 Resolution. Others have identified similar themes, but some have broken them down into a larger number of criteria: see eg Vanessa Richard, 'Independent Accountability Mechanisms as Guardians of a Kaleidoscopic Legal Accountability' in Owen McIntyre and Suresh Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMs): Towards Good Governance in Development Finance* (Brill Nijhoff) pp. 330–337 (setting forth ten criteria of international accountability mechanisms generally).

<sup>20</sup> In the early days of the Panel, 'only two of the first 15 cases resulted in Panel investigations, with the Board rejecting Panel recommendations to investigate in four cases. ... The Second Clarification [in 1999] eased the procedural impasse, with the Board approving all 20 Panel recommendations to investigate over the following decade.' See Inspection Panel, *The Inspection Panel at 25 Years* (World Bank 2018) p. 33, <https://www.inspectionpanel.org/publications>.

<sup>21</sup> 1994 Inspection Panel Operating Procedures, paras. 16, 52, and 54.

<sup>22</sup> Inspection Panel Resolution (1993), Resolution No. IBRD 93-10 and Resolution No. IDA 93-6, para. 12 (1993 Inspection Panel Resolution), <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/Resolution1993.pdf>.

<sup>23</sup> 1994 Inspection Panel Operating Procedures, paras. 47–49.

<sup>24</sup> Inspection Panel, Updated Operating Procedures (April 2014), paras. 68, 70, <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf>.

<sup>25</sup> Lewis T Preston, 'The World Bank Inspection Panel' (*World Bank*, 24 September 1993); 1993 Inspection Panel Resolution, para. 4.

<sup>26</sup> 1993 Inspection Panel Resolution, para. 22; 1994 Inspection Panel Operating Procedures, para. 37.

Best practices have developed in the three decades since the establishment of the Panel. They suggest today that the right of access to a remedy provided by multilateral development banks should include access not only to a compliance review process but also to a dispute resolution process. Significantly, the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles) identify best practices regarding access to a remedy, and in particular to dispute resolution functions. While most relevant for States, the UN Guiding Principles also set, by analogy, a benchmark to assess how multilateral development banks should provide access to a remedy.<sup>27</sup>

Two of the dispute resolution mechanisms envisaged by the UN Guiding Principles are particularly relevant to multilateral development banks like the World Bank. The first is ‘effective *operational-level* grievance mechanisms’, which should remedy complaints early and directly.<sup>28</sup> The second is ‘effective and appropriate *non-judicial* grievance mechanisms’, which must be part of a comprehensive system to address complaints.<sup>29</sup> These two types of mechanisms complement, but do not substitute, each other.<sup>30</sup> In terms of an effective remedy, both mechanisms must ‘ensur[e] that outcomes and remedies accord with internationally recognised human rights.’<sup>31</sup> This criterion, among others, has been endorsed by a Bank publication evaluating grievance mechanisms.<sup>32</sup>

In response to the development of best practices concerning the right of access to a remedy, the nearly twenty others multilateral development banks have established accountability mechanisms similar to the Inspection Panel to provide access to remedies through a compliance review process. All the banks similar to the World Bank, in terms of size and function,<sup>33</sup> also provide access to dispute resolution processes today.<sup>34</sup>

The Inspection Panel has successfully exercised its mandate, even if it has not provided an effective remedy to affected persons through dispute resolution in line with best practices. The Bank receives complaints yearly on about 3% of its 250 ongoing projects, and of that 3% of projects the Inspection Panel investigates about a third.<sup>35</sup> Most complaints concern environmental assessment, investment project financing, consultation/disclosure, and involuntary resettlement.<sup>36</sup> In terms of its fault-finding approach, the Panel has generally been successful in holding the Bank accountable and promoting institutional learning.<sup>37</sup> It has also been moderately successful in preventing future harm.<sup>38</sup> For example, on the Uganda Transport Development Project, then-World Bank President Jim Yong Kim explained that ‘[t]he Inspection Panel’s investigation into the... Project identified multiple failures, including cases of gender-based violence,’ which played ‘an important role in the Bank cancelling the project.’<sup>39</sup>

<sup>27</sup> See, similarly, Mariette van Huijstee and others, ‘Glass Half Full? The State of Accountability in Development Finance’ (2016) p. 14, <https://www.ciel.org/wp-content/uploads/2021/06/Glass-half-full.pdf>, using the UN Guiding Principles as an assessment framework to evaluate international accountability mechanisms.

<sup>28</sup> UNHCR, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, Principle 29 (emphasis added).

<sup>29</sup> *Ibid.*, Principle 27 (emphasis added).

<sup>30</sup> *Ibid.*, Commentary to Principle 29.

<sup>31</sup> *Ibid.*, Principle 31(f).

<sup>32</sup> World Bank, ‘Evaluating a Grievance Redress Mechanism’ (2014), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/431781468158375570/evaluating-a-grievance-redress-mechanism>.

<sup>33</sup> Mackenzie and others (n 15) para. 17.29.

<sup>34</sup> Daniel Bradlow, ‘External Review of the Inspection Panel’s Toolkit’ (2018) paras. 64–67, <https://documents1.worldbank.org/curated/en/562131583764988998/pdf/External-Review-of-the-Inspection-Panel-s-Toolkit.pdf>.

<sup>35</sup> Inspection Panel, *Annual Report* (World Bank 2021) p. 26, <https://www.worldbank.org/en/programs/accountability/publication/world-bank-inspection-panel-annual-report-fy2021>.

<sup>36</sup> *Ibid.*, p. 27.

<sup>37</sup> World Bank, ‘Recommendations on Toolkit Review’ (n 14), para. 1.

<sup>38</sup> See eg Lynn MG Ta and Benjamin AT Graham, ‘Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases’ (2018–2019) 50 *Georgetown Journal of International Law*, pp. 113, 124, Figure 2, reporting that over 30% of eligible complaints at the World Bank resulted in a project change.

<sup>39</sup> *Panel at 25* (n 20) p. 70.

However, the Panel has been less successful in remedying the harm already suffered by affected persons.<sup>40</sup> While the main aim of the Panel's investigation is to bring the project back into compliance, the Panel does not *guarantee* compensation for affected persons in relation to the harm that occurred.<sup>41</sup> Moreover, according to one study, compliance investigations at the Bank take 15 months on average.<sup>42</sup> Such a delay is significant for many affected persons, especially when investigations concern allegations of serious harm. Finally, as noted above, affected persons have no decision-making power on the remedial efforts agreed to between the Bank and the borrower State. Management and the Executive Directors may also ignore—and in some cases have ignored—the findings of non-compliance by accountability mechanisms like the Panel.<sup>43</sup> In short, the Inspection Panel does not offer affected persons the same access to a remedy through a problem-solving approach as a dispute resolution process would.

## 2.2 Grievance Redress Service: Management-Led Solution

To bring its accountability system further in line with best practices concerning accountability mechanisms, the Bank established the Grievance Redress Service (GRS) and two mechanisms related to the Inspection Panel.<sup>44</sup> First, the GRS is a complaint-handling mechanism that helps project teams broker solutions at the corporate level.<sup>45</sup> Established in 2015, it reports to senior Bank Management. The mandate of the GRS is to address complaints directly and effectively with the teams, with the purpose of '[closing] the gap between project-level grievance redress mechanisms ... and the Inspection Panel in the Bank's accountability structure.'<sup>46</sup> Seeking resolution first through one of the recourses offered by the Bank, such as the GRS, is one of the preconditions for submitting a complaint to the Inspection Panel.<sup>47</sup>

The growing number of cases the Grievance Redress Service receives each year demonstrates that it has effectively provided affected persons access to certain remedies.<sup>48</sup> In 2020, the GRS worked on 211 admissible cases at various processing stages concerning various project-related issues.<sup>49</sup> It has also regularly implemented changes that have enabled it to perform its mandate better. For instance, the recent addition of an 'escalation clause' in its Directives allows the GRS to bring high-risk complaints to senior Management's attention quickly.<sup>50</sup> Given its features, the GRS, like project-level grievance mechanisms, fulfil the function of 'operational-level' grievance mechanisms envisaged by Principle 29 of the UN Guiding Principles. It has strengthened the governing framework of the Bank's accountability mechanisms in a way that has complemented the Inspection Panel's mandate.

While the Grievance Redress Service has been successful at resolving relatively simple disputes concerning operational issues, it has been less successful at resolving those concerning more complex or controversial issues. This is partly because the GRS does not report to the top level of the Bank and has a junior status in the Bank hierarchy, which hampers its operation for

<sup>40</sup> See eg Ta and Graham (n 38) pp. 124–125, Figure 2, reporting that over 15% of eligible complaints at the Inspection Panel and CAO result in compensation, but even then they 'often simply enforce[d] the payment of sums which had been promised, but not delivered, to displaced communities.'

<sup>41</sup> van Huijstee and others (n 27) p. 118.

<sup>42</sup> Ibid, p. 43.

<sup>43</sup> At the IFC/MIGA, see *Jam v. International Finance Corp.*, No. 17-1011, 139 S. Ct. 759 (2019), pp. 5–6 (US Supreme Court).

<sup>44</sup> Historically, affected persons seeking solutions to complaints through dispute resolution at the Bank only had access to project-level grievance mechanisms, and only where they were put in place by borrower States themselves: Framework (n 2), paras. 60–61.

<sup>45</sup> World Bank, 'Grievance Redress Service: Finding Solutions Together' (2021), <https://thedocs.worldbank.org/en/doc/bb2e4345aa86a6e92414ce-9041c3048f-0290022021/original/GRS-brochure-2021-english.pdf>.

<sup>46</sup> World Bank, 'Grievance Redress Service: Annual Report 2015' (2016), <https://thedocs.worldbank.org/en/doc/121911510349513569-0290022017/original/GRSAnnualReport2016.pdf>.

<sup>47</sup> 2020 Inspection Panel Resolution, para. 14. However, affected persons who submitted a complaint to the Inspection Panel could subsequently resort to the GRS, as there is no sequential relationship between the two.

<sup>48</sup> Bradlow, 'External Review' (n 34) p. 14, para. 56.

<sup>49</sup> World Bank, 'Grievance Redress Service: Annual Report 2020' (2021), <https://thedocs.worldbank.org/en/doc/735981610131855597-0290022021/original/GRSAnnualReportFY20.pdf>.

<sup>50</sup> World Bank, 'Bank Directive: Grievance Redress Service' (5 May 2021), <https://www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service>.

those disputes.<sup>51</sup> Its efficiency in resolving complex issues is also limited by its (real or perceived) lack of independence from Management.<sup>52</sup>

The limitations of the Grievance Redress Service have raised questions about whether the Bank was meeting best practices in terms of providing the right of access to a remedy, given that the GRS was then the only dispute resolution mechanism offered by the Bank itself. Neither the GRS nor other available avenues for redress fulfilled the function of ‘non-judicial’ grievance mechanisms as envisioned by Principle 29 of the UN Guiding Principles. This situation has had implications for the Bank’s credibility and reputation, especially given that all other similar multilateral development banks offered dispute resolution at the highest level of their institutions.<sup>53</sup>

As mentioned above, the Bank also introduced a second set of options to settle the complaints of affected persons. This came in the form of two mechanisms related to, but formally outside of, the Inspection Panel’s process. The first mechanism was a 2013 Pilot Project in which the Inspection Panel was empowered to postpone its decision on *registration* of a request, and thereby delay triggering the 21-business day period for Management to provide its response (the Pilot Project).<sup>54</sup> The second mechanism was based on the Inspection Panel’s 2014 Operating Procedures and entailed that the Panel delayed making a recommendation on *investigation* for a stipulated period (Operating Procedure footnote).<sup>55</sup> Both mechanisms aimed to provide affected persons and Management with more time to develop early solutions to complaints without a formal investigation by the Inspection Panel. The aim was to improve the ‘effectiveness’ of the access to a remedy of affected persons, while simultaneously adhering to the Inspection Panel’s mandate.<sup>56</sup>

Despite the lofty objective of these dispute resolution mechanisms, their success in practice was questionable. The mechanisms were only used in a few cases, meaning neither was subject to a systematic review of their effectiveness. A first-hand account of the only two cases that underwent the first mechanism—the postponement of registration—suggests that one case was reasonably successful and the other was not.<sup>57</sup>

More significantly, concerns arise as to whether the mechanisms complied with the Panel’s mandate, let alone with best practices on access to a remedy. By seeking to improve the first pillar of the Panel (*i.e.*, effectiveness), the mechanisms may well have compromised the other two (*i.e.*, accessibility as well as independence and impartiality). As to accessibility, the mechanisms did not offer affected persons a meaningful opportunity to participate in the design and implementation of measures to address their complaints and lacked procedural safeguards to counteract the inherent power imbalance between them and Bank Management.<sup>58</sup> As to independence, “[t]hese mechanisms blur[red] the clear distinction between the [Inspection Panel]’s responsibilities as an independent and objective fact finder and management’s role in the [Inspection Panel] process.”<sup>59</sup> For instance, the mechanisms lacked a neutral mediator that would oversee the problem-solving process.<sup>60</sup>

<sup>51</sup> Bradlow, ‘External Review’ (n 34) pp. 14–15, para. 57.

<sup>52</sup> Accountability Counsel, ‘Civil Society Statement on the October 31 Decision of the World Bank’s Board of Directors on the Review of the Inspection Panel’s Toolkit’ (14 January 2019), <https://www.accountabilitycounsel.org/2019/01/ac-submits-joint-statement-to-wb-board-on-panel-toolkit-review/>.

<sup>53</sup> Bradlow, ‘External Review’ (n 34) p. 18, para. 68.

<sup>54</sup> World Bank, ‘Piloting a New Approach to Support Early Solutions in the Inspection Panel Process’ (November 2013), <https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/PilotingNewApproach.pdf>.

<sup>55</sup> 2014 Operating Procedures, para. 44, footnote 7.

<sup>56</sup> World Bank, ‘Piloting a New Approach to Support Early Solutions’ (n 54) p. 3; Inspection Panel, ‘Inspection Panel Adopts Updated Operating Procedures’ (7 April 2014), <https://www.inspectionpanel.org/news/inspection-panel-adopts-updated-operating-procedures>.

<sup>57</sup> Bradlow, ‘External Review’ (n 34) p. 15, para. 58, footnote 40.

<sup>58</sup> Richard (n 19); van Huijstee and others (n 27) pp. 67–68.

<sup>59</sup> Bradlow, ‘External Review’ (n 34), p. iii, para. 12; Katelyn Gallagher, *Tools for Activists: An Information and Advocacy Guide to the World Bank Group* (Bank Information Center 2020) Module 5, p. 9, <https://bankinformationcenter.org/en-us/update/toolkit-for-activists/>.

<sup>60</sup> van Huijstee and others (n 27) pp. 67–68.

In summary, the Bank's introduction of the Grievance Redress Service, the Pilot Project, and the Operating Procedure footnote can be interpreted as an acknowledgement of the dispute resolution gaps in its accountability system. But because these mechanisms did not adequately fill the gap of a fully independent dispute resolution process, the Bank introduced a third avenue for a remedy: the DRS.

### 2.3 Dispute Resolution Services: Party-Led Dispute Resolution

The DRS was established in 2020 to increase the access to a remedy of affected persons through dispute resolution processes in addition to, but not as a substitute for, compliance review processes under the auspices of the Panel. This development was precipitated by the approval of the Bank's revised operational policies and procedures, the 2016 Environmental and Social Framework. The Framework, among other things, aligned with the concept of due diligence promoted by the UN Guiding Principles,<sup>61</sup> and included the requirement that every Bank-funded project has a project-level grievance redress mechanism.<sup>62</sup>

Following an External Review and the recommendation of Bank Management, the Executive Directors agreed to establish the DRS, along the following lines. First, the requesters must meet the eligibility criteria for submission of requests to the Inspection Panel, and the Executive Directors must approve an Inspection Panel recommendation to investigate the project. Then, should both the requesters and the borrower State voluntarily agree, they would have the opportunity to resolve their disputes through dialogue, information sharing, joint fact-finding, mediation, and conciliation. In this case, the Panel will hold its compliance process in abeyance until the dispute resolution process concludes.

While the staff of the DRS will 'administer' the proceedings, an external neutral third party will help the Parties reach an agreement. With the agreement of the Parties, Bank Management may be an observer in the DRS process, although the role of Management remains only technical.<sup>63</sup> At the end of the dispute resolution process, the DRS will issue a report to the Executive Directors through the AM Secretary, informing them of the outcome of the process. If the Parties cannot arrive at a settlement within a year and a half, then the complaint is brought back before the Inspection Panel. Like the Panel, the DRS, which facilitates the dispute resolution process, honours requests for confidentiality from the requesters.

Given its features, the DRS offers a true problem-solving approach to the Parties. It provides affected persons with a greater opportunity to have alleged harm remedied than the Bank's Inspection Panel process. Affected persons also benefit from having an additional avenue of remedy through which their concerns can be heard and addressed by borrower States. The DRS, therefore, fulfils the function of the non-judicial grievance mechanism envisaged by Principle 29 of the UN Guiding Principles.

At the same time, the DRS should not limit the access to a remedy of affected persons through the Inspection Panel, and it is not a substitute for the compliance review process. Indeed, the Executive Directors have endorsed the view that the DRS' mandate is to 'enhance the effectiveness of the World Bank's accountability system', while being accessible and independent as is the Panel.<sup>64</sup> The AM Resolution and AM Operating Procedures should therefore ensure that the results of problem-solving are no less protective of requesters than the ones provided by the Inspection Panel.<sup>65</sup>

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<sup>61</sup> Compare UN Guiding Principles, Principles 17–21, with Framework, Bank Requirement C ('Environmental and social due diligence').

<sup>62</sup> Framework, Bank Requirement I ('Grievance mechanism and accountability') p. 11, paras. 60–61.

<sup>63</sup> In contrast, the IFC/MIGA, 'Independent Accountability Mechanism CAO Policy' (1 July 2021) para. 75, [https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/cao-policy-consultation#:text=The%20IFC%2FMIGA%20Independent%20Accountability,communities%20and%20IFC%2FMIGA%20clients](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/cao-policy-consultation#:text=The%20IFC%2FMIGA%20Independent%20Accountability,communities%20and%20IFC%2FMIGA%20clients), provides that '[w]here appropriate and agreed by the Parties, IFC/MIGA may be invited to participate in a CAO dispute resolution process. IFC/MIGA will consider its participation on a case-by-case basis.'

<sup>64</sup> World Bank, 'Recommendations on Toolkit Review' (n 14) p. 4, para. 23, and p. 6, para. 38.

<sup>65</sup> van Huijstee and others (n 27) p. 68.

### 3. The Compliance of the DRS with the Panel's Mandate and Best Practices

Section 2 identified the legal and policy standards against which the DRS must be evaluated—respectively, the 1993 mandate of the Inspection Panel and the 2020 mandate of the DRS, and best practices concerning the right of access to a remedy to be provided by accountability mechanisms. Section 3 proceeds to determine the compliance of the DRS with these mandates and best practices, and suggests three areas of improvement.

#### 3.1 Accessibility: Eligibility Criterion, Choice of Representatives, and Access to Information

The first area of improvement relates to accessibility. As mentioned above, to access the DRS, requesters must meet all the eligibility criteria of the Inspection Panel.<sup>66</sup> Arguably, some criteria should apply to requests before both the Panel and the DRS, such as the requirement that a request must concern a Bank-funded project.

But others, such as the requirement that the harm has been caused by the Bank's violation and not the borrower State's, appear less relevant and may well reduce the accessibility of a remedy, as compared to the Inspection Panel's original mandate. This is because one of the Panel's eligibility criteria—*i.e.*, showing a plausible causal link between the alleged harm and the project<sup>67</sup>—may become more challenging under the Bank's new Environmental and Social Framework, given that Bank's responsibilities are set out more narrowly therein than previously.<sup>68</sup> In addition, this eligibility criterion is coupled with a new feature in the eligibility determination phase, whereby Bank Management can submit evidence of actual compliance or *intent* to comply, and requesters cannot access or respond to this evidence.<sup>69</sup> This lack of opportunity for procedural participation afforded to affected persons therefore also reduces their accessibility to a remedy.<sup>70</sup>

In the context of the Panel, it makes sense to have as one of the eligibility criteria that the harm is caused *by the Bank's violation*, because a compliance review investigation will be focused on this issue. In the context of the DRS, however, this criterion appears unwarranted, because the goal of dispute resolution processes is *problem-solving with borrower States*. Whether the requesters suffered harm caused by non-compliance with Bank policies and procedures is typically a secondary consideration.<sup>71</sup>

While the criterion adopted by the Bank on the eligibility of complaints to the DRS is consistent with that of most (but not all) other international accountability mechanisms,<sup>72</sup> questions arise as to whether it complies with the Bank's commitment to increase access to a remedy with the DRS.<sup>73</sup> In comparison, an approach that would increase the accessibility of the DRS would be allowing the Parties to proceed with dispute resolution if they both agreed to it, without requiring requesters to meet all the Panel's eligibility criteria.<sup>74</sup> In such a case, the consent of borrower States would act as a sufficient barrier to prevent a potential flood of complaints to the DRS and preserve the Panel's central role in the Bank's accountability system.

<sup>66</sup> 2020 Inspection Panel Resolution, paras. 13–15.

<sup>67</sup> 2014 Operating Procedures, para. 43.

<sup>68</sup> The shift from prescriptive standards to a 'risk management approach' makes it more difficult for the Panel to assess project compliance with the Framework: Bradlow, 'External Review' (n 34) pp. 16–17, para. 63; Inspection Panel, 'Comments on the Second Draft of the Proposed Environmental and Social Framework' (17 June 2015), paras. 10–11, <https://consultations.worldbank.org/sites/default/files/documents/Inspection%20Panel%20Comments%20on%202nd%20Draft%20ESF%20-%2017%20June%202015.pdf>.

<sup>69</sup> 2020 Inspection Panel Resolution, para. 19.

<sup>70</sup> Diane Desierto and others, 'The "New" World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab' (*EJIL:Talk!*, 11 November 2020), <https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/>.

<sup>71</sup> Bradlow, 'External Review' (n 34) pp. 16–17, para. 63.

<sup>72</sup> OHCHR, *Remedy in Development Finance: Guidance and Practices* (2022) HR/PUB/22/1, p. 117, <https://www.ohchr.org/en/publications/policy-and-methodological-publications/remedy-development-finance>.

<sup>73</sup> Peter Woicke and others, *External Review of IFC/MIGA E&S Accountability, Including CAO's Role and Effectiveness: Report and Recommendations* (World Bank 2020) para. 209, <https://www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability>.

<sup>74</sup> Inspection Panel, 'World Bank Accountability Mechanism and Inspection Panel Reforms: Virtual Discussion', [www.youtube.com/watch?v=vhv8k-Psl94](https://www.youtube.com/watch?v=vhv8k-Psl94), accessed 1 March 2022 (Jolie Schwarz).

For these reasons, the Bank should consider removing the eligibility criterion of the DRS that requires that the harm must be caused by the Bank's failure to comply with its policies. Given that this improvement concerns the AM Resolution and Inspection Panel Resolution, and not the AM Operating Procedures, they should be re-evaluated as part of the three-year review of the DRS. Another proposed improvement concerning accessibility relates to the Parties' choice of representatives and advisers. Paragraph 21.2 of the AM Operating Procedures stipulates that representatives' appointment or change of appointment must be made in 'consultation with the DRS.' Paragraph 21.3 states that the Parties can engage additional advisers, but removes the requirement that this is only when 'subject to no objection of the other Party', which was present in the first two versions of the DRS procedures. The initial requirement that the Parties agree on each other's additional advisers had the potential to exacerbate existing power imbalances between them.<sup>75</sup> For example, borrower States could have objected to requesters' retention of certain civil society organisations as additional advisers because these organisations might have criticised their human rights record in the past. This situation could have pressured requesters to accede to certain demands of borrower States to avoid objections about their choice of additional advisers.<sup>76</sup>

In this context, a study on the Compliance Advisor Ombudsman (CAO), the accountability mechanism of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), has determined that civil society organisations' involvement in assisting complainants with dispute resolution processes results in a higher likelihood of complaints receiving a remedy or reaching compliance review.<sup>77</sup> The study also observed that, 'CAO's decision to limit the participation of civil society organisations and legal representatives during negotiation and mediation engendered distrust among complainants and in some cases prompted their decision to withdraw from the dispute resolution process.'<sup>78</sup> This is sensible, because dispute resolution may not result in fair outcomes where there is a power and resource imbalance between the disputing Parties involved. These Parties are, on the one hand, local communities in developing countries, and on the other hand, State entities.<sup>79</sup> Therefore, removing the consent of the other party as a requirement for engaging additional advisers in the final AM Operating Procedures is a step towards protecting requesters better and aligns with the DRS's mandate. Despite this positive change, the Bank should also consider amending the AM Operating Procedures to specify the type of advice that DRS staff can provide to Parties concerning their choice of representatives. Additionally, either Party should be able to request that their representatives and advisers be copied on all communications sent to them and be present during any discussion of the complaint.

The latest improvement regarding accessibility concerns access to project information. Paragraph 12 of the AM Operating Procedures does not specify the powers of the neutral third-party regarding access to materials, documents, and testimonies related to the project, leaving this issue entirely to the Parties' consent. Furthermore, paragraph 16 of the AM Resolution states that only the 'Accountability Mechanism [will] have full access to project-related information in carrying out [its] functions.' In contrast, the Inspection Panel receives all available project documentation from Bank Management.<sup>80</sup> The result of these provisions is that the Parties engaged in the dispute resolution process could, in principle, agree to provide the requesters with access to an amount of information that is significantly lower than that provided to the Panel. It is not an unlikely scenario, because the project concerns that leads to a complaint before the Panel are often in practice based precisely on a breakdown in the sharing of information or adequate consultation by the borrower States.

<sup>75</sup> See Samantha Balaton-Chrimes and Kate Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA: Evaluating Potential for Human Rights Remedy* (Corporate Accountability Research 2016) pp. 40–45. See Accountability Counsel, 'Joint Comments' (n 13) p. 14 ('On one occasion the [civil society organisation] advisor to a group of requesters was completely denied entry into the mediation discussion by the bank client ... even though the client was being supported by an entire legal team.').

<sup>76</sup> See van Huijstee and others (n 27) p. 114.

<sup>77</sup> Roxanna Altholz and Chris Sullivan, 'Accountability & International Financial Institutions: Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman' (International Human Rights Law Clinic, University of California, Berkeley 2017) p. 3, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf>. See also Ta and Graham (n 38) pp. 127–129.

<sup>78</sup> *Ibid.*, p. 82.

<sup>79</sup> Desierto and others (n 70).

<sup>80</sup> 1994 Inspection Panel Operating Procedures, para. 61; 2014 Operating Procedures, para. 54(a).

However, this scenario would be problematic since requesters can only access limited project information via the World Bank Policy on Access to Information<sup>81</sup> to assert their rights and interests,<sup>82</sup> and most project information is typically in the hands of borrower States. As a result, the opportunity for requesters to obtain meaningful remedies would be hampered by their lack of access to project-related materials, especially in the early stages of the dispute resolution process when they need relevant project information to assess their position.<sup>83</sup>

Against this backdrop, the Bank should consider including in the AM Operating Procedures a minimum standard of information that must be shared with the requesters, or at least a commitment from the borrower State to share in good faith information necessary to ensure the orderly conduct of the dispute resolution process. This improvement would regulate the Parties' agreement on access to information, by ensuring that access is at the very least not significantly lower during the dispute resolution process than during the compliance review process. It would be in line with best practices, which opine that '[m]ember States have a *legal* duty to cooperate with [the] duly established [accountability] mechanisms.'<sup>84</sup> This improvement would also balance the concerns about protecting the effective access to a remedy of requesters with the potential encroachment of such measures on the sovereignty of the borrower States.

In conclusion, the DRS can potentially improve the accessibility of remedies for affected persons by offering an alternative to the Inspection Panel. Through the DRS, affected persons can actively design remedial measures that address the harm caused by a Bank project. However, the Bank could achieve this goal better by revising its eligibility criteria.

### 3.2 Effectiveness: Types of Complaint, Content of Agreements, and Verification of Implementation

The second area for improvement concerns the effectiveness of the right to access a remedy. According to the AM Resolution and the AM Operating Procedures, affected persons may bring complaints related to serious human rights violations to the dispute resolution process. However, some of these human rights, such as the prohibition of torture, are considered *jus cogens* norms.<sup>85</sup> This means they are fundamental principles of international law that must be upheld in all circumstances, and no one may ever derogate from them. International organizations like the Bank are bound by these norms, as they acknowledge themselves.<sup>86</sup> As such, the Bank is responsible under international law to put an end to any violation of a *jus cogens* norm that it may enable. When complaints at the Bank relate to violations of *jus cogens* norms, it is questionable whether continuing a Bank project according to its original terms, scope, and specifications for up to a year and a half while the dispute resolution process is underway complies with internationally recognised human rights.

In comparison to the DRS, at the Compliance Advisor Ombudsman, a case can be transferred to compliance appraisal in response to an internal request from the CAO Director General (i.e., the equivalent to the Bank's AM Secretary), the President, the Board, or Management.<sup>87</sup> This request may be made when 'concerns exist regarding particularly severe harm.'<sup>88</sup>

<sup>81</sup> World Bank, 'Bank Policy: Access to Information' (EXC401-POL01, 1 July 2015), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/391361468161959342/the-world-bank-policy-on-access-to-information>. See also AM Operating Procedures, para. 8.

<sup>82</sup> Maeve McDonagh, 'Evaluating the Access to Information Policies of the Multilateral Development Banks' in Owen McIntyre and Suresh Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMS): Towards Good Governance in Development Finance* (Brill Nijhoff 2019) pp. 135–136; Altholz and Sullivan (n 77) p. 82.

<sup>83</sup> See also Desierto and others (n 70).

<sup>84</sup> Malcolm Shaw and Karel Wellens, *Accountability of International Organisations* (International Law Association, Berlin Conference 2004) p. 45 (emphasis added).

<sup>85</sup> Dire Tladi, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)* (UN International Law Commission 2019) pp. 31–35, 63, <https://digitallibrary.un.org/record/3798216?ln=en>.

<sup>86</sup> Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 *Harvard International Law Journal*, pp. 325, 377–380.

<sup>87</sup> CAO Policy (n 63) para. 81.

<sup>88</sup> *Ibid.*, p. 82 (emphasis added).



However, such a possibility for internal requests does not exist at the Bank.<sup>89</sup> In fact, the DRS cuts the dialogic function with the Bank Management and Executive Directors. According to paragraph 22.1 of the AM Operating Procedures, Management can only be an observer in the dispute resolution process with the Parties' agreement, and is constrained to a technical role.<sup>90</sup> Yet, the practice shows that Bank Management's engagement has proven critical to resolving disputes effectively.<sup>91</sup> Given its obligation to uphold *jus cogens* norms, the Bank should revise the AM Operating Procedures and AM Resolution to ensure that allegations of violation of these norms are investigated promptly by the Panel instead of moving forward with a dispute resolution process.

Another improvement concerns the content of dispute resolution agreements. According to paragraph 16 of the first version of the procedures, 'Dispute Resolution Agreements should be consistent with World Bank policies and relevant domestic and international law.'<sup>92</sup> This provision was in line with that of other international accountability mechanisms.<sup>93</sup> It only requires ascertaining whether agreements are 'consistent' (and not fully 'compliant') with Bank policies and therefore does not call for conducting a process similar to a compliance review in parallel to the dispute resolution process. In fact, the Parties can even voluntarily agree to *some* deviations from the policies under this provision. As Professor Bradlow noted in his External Review:

*[t]his could happen, for example, if the complainants decide to accept less compensation than they may be entitled to under the policies because they believe that it is more useful to obtain certain compensation now rather than the possibility of more compensation in the future or they could agree to accept less compensation than the policies stipulate in return for access to other project benefits.<sup>94</sup>*

In contrast, the revised version of the provision, paragraph 23.1 of the AM Operating Procedures, provides that, '[i]f the DRS has reason to believe that the Parties intend to include anything in a Dispute Resolution Agreement that is inconsistent with relevant domestic or international law, the AM Secretary will request the Parties to make appropriate modifications.' This provision makes two significant changes as compared to its previous iteration. First, it removes the requirement of consistency of dispute resolution agreements with Bank policies. However, under the Articles of Agreement<sup>95</sup> and the Inspection Panel Resolution,<sup>96</sup> the Executive Directors have an 'institutional responsibility' to ensure that the Bank observes its policies. This is an international legal obligation that the Executive Directors have no power to modify unilaterally, let alone relinquish. It is therefore doubtful that the Bank would comply with its international obligation should any agreement reached through the dispute resolution processes be inconsistent with the policies — a situation that is allowed under the DRS procedures. Even more fundamentally, it is doubtful that this situation complies with the Bank's mandate of ending extreme poverty and boosting shared prosperity. Second, paragraph 23.1 shifts from an objective requirement of consistency of dispute resolution agreements with domestic and international law to a subjective requirement that the DRS doubts of such consistency. It therefore waters down an obligation of result into an obligation of means, without imposing any burden of investigation on the DRS to demonstrate that it has fulfilled it. This change weakens the protection of affected persons.

More broadly, given the inequality of power and resources between the Parties, the procedural protections afforded—or rather, not afforded—to the requesters that were examined in the previous subsection are all the more important to ensure

<sup>89</sup> Only an Executive Director 'may in special cases of serious alleged violations of [Bank] policies and procedures ask the Panel for an investigation', subject to the Panel's eligibility requirements: 1993 Inspection Panel Resolution, para. 12; 2020 Inspection Panel Resolution, para. 13.

<sup>90</sup> See also World Bank, 'Recommendations on Toolkit Review' (n 14), para. 34.

<sup>91</sup> Accountability Counsel, 'Joint Comments' (n 13) p. 18 (describing how management involvement brought positive results in a case at Inter-American Development Bank involving the Haitian Government).

<sup>92</sup> Interim Operating Procedures, para. 16.

<sup>93</sup> African Development Bank's Independent Recourse Mechanism, 'Operating Rules and Procedures' (2015) para. 49, <https://www.afdb.org/en/documents/independent-recourse-mechanism-operating-rules-and-procedures-january-2015-updated-june-2021>. See also the provision applicable to the Compliance Advisor Ombudsman, which has been revised in July 2021—after the judgment of the US Supreme Court in *Jam v. International Finance Corp*—to add that the CAO will not 'knowingly' support agreements contrary to the bank's policies: CAO Policy (n 63) para. 67.

<sup>94</sup> Bradlow, 'External Review' (n 34) p. 13, para. 51.

<sup>95</sup> Articles of Agreement (n 16), art. V, § 4, (a), to read in conjunction with arts. I, V, § 2, (f), and VIII, (a).

<sup>96</sup> 1993 Inspection Panel Resolution, para. 12; 2020 Inspection Panel Resolution, para. 13.

that requesters do not feel pressured to agree to a remedy that is substantially less than the one to which they are entitled to under Bank policies and that would normally be assessed by the Inspection Panel. As a United Nations report noted, ‘in many situations, complainants may legitimately feel that partial redress is their only feasible option.’<sup>97</sup> According to best practices, the DRS must ensure at least that its ‘outcomes and remedies accord with internationally recognised human rights’.<sup>98</sup> Therefore, the Bank should revert to a provision similar to paragraph 16 of the Interim Operating Procedures, which requires consistency with Bank policies.

The last improvement regarding effectiveness concerns the verification of the implementation of the Parties’ agreement. While the AM Resolution states that the Parties should agree on a ‘time-bound implementation schedule for agreed actions’,<sup>99</sup> it is silent on how compliance with this implementation is monitored. Paragraph 24.1 of the AM Operating Procedures adds that the DRS will monitor implementation subject to the Parties’ agreement. It is therefore allowed for the Parties to agree to a relatively weak provision on implementation, whereby compliance with the agreement and the agreed remedial actions are not effectively monitored.

This provision is compatible with the 1993 mandate of the Inspection Panel, because the Panel was not originally granted monitoring powers. In the three decades following the Panel’s inception, intense public scrutiny was often helpful for the actual implementation of an agreement to occur.<sup>100</sup> Best practices have since evolved in parallel to the point where it has become widely believed that the effectiveness of a dispute resolution process depends on the implementation of agreed remedial actions being monitored.<sup>101</sup> This is because monitoring dispute resolution agreements has proven to be a key factor in ensuring that affected persons actually get a remedy. For instance, as part of a complaint before the accountability mechanism of the Inter-American Development Bank (IDB), the monitoring of the dispute resolution agreement signed between the Haitian government and local farmers has shown that implementation remained partial and has proposed solutions to live up to the commitment made of restoring the livelihoods of displaced farmers.<sup>102</sup> Similarly, in recent years, the World Bank’s Executive Directors have allowed the Inspection Panel to monitor compliance on a case-by-case basis.<sup>103</sup> The 2020 Inspection Panel Resolution went a step further: it required verification by Management—and in some specific cases by the Inspection Panel and the Bank Audit Unit—of the action plan’s implementation.<sup>104</sup>

Given the Inspection Panel’s mandate to provide affected persons with *basic* access to a remedy, and the DRS’ mandate to provide them with an *additional* path of access, it is unclear why Management (and the Panel) now has monitoring authority with regards to compliance review, while the DRS does not have such authority with regards to dispute resolution. In fact, all international accountability mechanisms currently have monitoring authority regarding dispute resolution, except for the DRS.<sup>105</sup> For example, the Compliance Advisor Ombudsman will monitor the implementation of the Parties’ agreement, and a complaint will be transferred to the compliance review process if the Parties fail to implement this agreement.<sup>106</sup> As noted in Professor Bradlow’s External Review, failing to ensure that agreements are implemented may have ‘adverse reputational consequences’ for

<sup>97</sup> OHCHR (n 72) p. 60.

<sup>98</sup> UN Guiding Principles, Principle 31(f).

<sup>99</sup> 2020 AM Resolution, para. 13(b).

<sup>100</sup> Gallagher (n 59) Module 5, p. 9.

<sup>101</sup> Mara Tignino, ‘Human Rights Standards in International Finance and Development: The Challenges Ahead’ in Owen McIntyre and Suresh Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMS): Towards Good Governance in Development Finance* (Brill Nijhoff); van Huijstee and others (n 27) p. 114.

<sup>102</sup> Accountability Counsel, ‘The Strength of a Community: Haitian Farmers Begin Receiving Compensation, Demanding Swift Progress’ (28 January 2022), <https://www.accountabilitycounsel.org/implementation-status/haiti/>.

<sup>103</sup> Inspection Panel, ‘Overview of Status of Implementation of Management Action Plans Prepared in Response to Inspection Panel Investigation Reports’ (2016), <https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/298441514906310793/overview-of-status-of-implementation-of-management-action-plans-prepared-in-response-to-inspection-panel-investigation-reports>.

<sup>104</sup> 2020 Inspection Panel Resolution, paras. 47–53.

<sup>105</sup> Bradlow, ‘External Review’ (n 34), pp. iii–iv.

<sup>106</sup> CAO Policy (n 63) paras. 68, 70. See also European Investment Bank, ‘Complaints Mechanism Policy’ (November 2018) para. 5.3.1, <https://www.eib.org/en/publications/complaints-mechanism-policy>.

the Bank.<sup>107</sup> Therefore, the Bank should consider revising the DRS to require monitoring of implementation. Since this change is significant, it may be best addressed through the three-year review of the DRS in the AM Resolution.

In short, whether the DRS strengthens or weakens the effectiveness of the right to access a remedy depends on whether the Parties agree to a remedy that is superior, equal, or inferior to the one that is mandated by Bank policies. In a few cases, affected persons and borrower States may arrive at a win-win agreement, where their respective interests align and no compromise is needed. But it seems unlikely that in all complaints the borrower State will agree to a remedy that significantly advantages affected persons,<sup>108</sup> given that affected persons will only have brought their complaint before the Panel after their efforts to resolve it with the borrower State and Management have already failed.<sup>109</sup>

Moreover, the ‘worst-case scenario’ of a failed dispute resolution process for the borrower State is that the complaint will move forward with the compliance review process, whereby the remedy provided would be no more and no less than the one prescribed by Bank policies. In these cases, the only disadvantage for the borrower State is that it will have to go through a lengthy and public investigation. Affected persons, on the other hand, continue to experience the harm caused by the Bank project while the dispute resolution process and the compliance review process are ongoing, and therefore are incentivised to agree to some form of remedy quickly. In this context, it is all the more important that significant procedural protections ensure that affected persons do not feel pressured to agree to a remedy substantially less than the one to which they are entitled under Bank policies.

### 3.3 Independence: Panel Mandate, Staff Involvement, and Party Funding

The third area of improvement relates to independence and impartiality. As mentioned above, the DRS is independent of Bank Management and the Inspection Panel. The Panel ‘will not opine on policy compliance in dispute resolution or the outcome of the dispute resolution process.’<sup>110</sup> This firewall between the structure of the two mechanisms is warranted to avoid conflicts of interest, ensure that each mechanism performs its functions independently, and enable the Parties to fully engage in the dispute resolution process without fearing that the information divulged as part of it can be used in the compliance review process.

The DRS is intended to complement, not substitute, the compliance review process. In the Inspection Panel Resolution, ‘[t]he Executive Directors reaffirm[ed] the importance of the Panel’s function, its independence and integrity.’<sup>111</sup> In practice, however, the DRS’ mandate may infringe on the Inspection Panel’s mandate. To take one example noted by commentators, a party agreement reached through the dispute resolution process would ‘forestall any Inspection Panel review or investigation of the matter and prevent any members of the affected community, who otherwise feel that their concerns were not addressed in the process ... to request a new investigation.’<sup>112</sup> This is because the complaint on that project will be considered closed by the Panel, unless there is new evidence or circumstances unknown at the time of the request.<sup>113</sup> Thus, the result of the dispute resolution process will prevent the Inspection Panel from investigating compliance with Bank policies.

To address the potentially conflicting mandates of the dispute resolution and compliance review processes, scholars and civil society organisations have advocated that multilateral development banks like the Bank should provide more options for sequencing these processes. At most banks today, requesters typically have two options: either resort to dispute resolution first

<sup>107</sup> Bradlow, ‘External Review’ (n 34) p. iv, para. 20.

<sup>108</sup> Since the DRS is currently assisting with its first complaint, there is no data yet on the percentage of complaints resolved through it. But as a comparison, an independent review in 2020 of nearly 400 complaints across all accountability mechanisms found that just over half of claims that made it to the ‘facilitating settlement’ phase ended up with an agreement between the parties: Susan Park, *Environmental Recourse at the Multilateral Development Banks* (Cambridge University Press 2020) p. 53. However, the fact that affected people consented to an agreement as part of a dispute resolution process does not indicate that they have received a remedy equal or superior to the one envisaged by the banks’ policies: *ibid*, pp. 54–57.

<sup>109</sup> See the eligibility criterion of the Panel: 2020 Inspection Panel Resolution, para. 13.

<sup>110</sup> 2020 AM Resolution, para. 6; AM Operating Procedures, para. 11.6.

<sup>111</sup> 2020 Inspection Panel Resolution, para. 2.

<sup>112</sup> Desierto and others (n 70).

<sup>113</sup> 2020 Inspection Panel Resolution, para. 15(d).

and then move on to compliance review if they are dissatisfied with the former, or go straight ahead with compliance review but relinquish the possibility of dispute resolution.<sup>114</sup> Scholars and civil society organisations suggest that affected persons should be able to choose which process to undertake first and to change to the other one once, or to pursue both processes simultaneously.<sup>115</sup> They argue that compliance review can provide information and analysis to affected persons to which they might not otherwise have access in dispute resolution given their power imbalance vis-à-vis the borrower States; conversely, dispute resolution can highlight systemic issues relevant to compliance review that might not have become apparent without dialogue between the Parties.<sup>116</sup>

At the United Nations Development Programme (UNDP), for example, affected persons have the option to undergo compliance review<sup>117</sup> and dispute resolution<sup>118</sup> simultaneously. This shows that one concern—i.e., that allowing Parties to use compliance review regardless of the dispute resolution process's outcome would discourage borrower States from fully participating in dispute resolution<sup>119</sup>—may be exaggerated.

Another improvement regarding independence and impartiality concerns the relationship between the DRS staff and the Parties. Paragraph 14.1 of the AM Operating Procedures states that '[t]he DRS is impartial as between Parties and as to the merits of the dispute.' However, the AM Secretary and the DRS staff are also significantly involved in the dispute resolution process. This involvement raises the question of whether they are perceived as independent of the Parties. As mentioned, paragraph 21.2 of the AM Operating Procedures requires that the Parties 'consult' with the DRS staff regarding the choice of their representatives, which must be voluntary. These provisions imply that the DRS staff must determine whether this choice is in reality 'voluntary.' Meanwhile, neither the AM Resolution nor the AM Operating Procedures set limits on the content and means of communication to the Parties, raising questions about the extent of the DRS staff's influence in the Parties' decisions. For example, would the DRS staff give its opinion to the requesters on the quality of representation that different civil society organisations may offer them? Would it advise on the relation that the requesters could have with their representatives regarding the management of their complaint? The AM Resolution and AM Operating Procedures are silent on these issues.

The DRS staff is also involved in the very decision of the Parties to pursue the dispute resolution process. Paragraph 11.3 of the AM Operating Procedures also puts forward that '[i]f either of the Parties indicate, or the DRS assesses, a need for capacity-building to allow them to better make an informed decision on whether to participate in a dispute resolution process, this may be offered by DRS within the resources and time frame available.' Under paragraph 21.4 of the AM Operating Procedures, the Parties must bear the costs of their representation and advice during the dispute resolution process. Since requesters have fewer resources than borrower States, they are more likely to ask for, or be assessed as needing, this advice and capacity building. Although the requesters may benefit from this opportunity, the concern is that by treating them differently than it does borrower States, the DRS may be perceived as lacking independence and impartiality.<sup>120</sup>

The Bank should therefore consider addressing, through institutional changes, the general tension between accessibility and independence at the DRS. The World Trade Organisation (WTO) is an example of how an international organisation successfully managed this tension. On the one hand, the Secretariat, as the WTO administering institution, 'assist[s] panels, especially on the

<sup>114</sup> Bradlow, 'External Review' (n 34) p. 17.

<sup>115</sup> Accountability Counsel and others, *Good Policy Paper: Guiding Practice from the Policies of Independent Accountability Mechanisms* (2021) p. 51, <https://www.ciel.org/reports/good-policy-paper/>. See also OHCHR (n 72) p. 79 ('Allow ... fluidity between compliance reviews and dispute resolution, in order to provide the flexibility needed to enable remedy in practice.').

<sup>116</sup> van Huijstee and others (n 27) p. 68; Richard (n 19) p. 338.

<sup>117</sup> UNDP, *Social and Environmental Compliance Unit: Investigation Guidelines* (4 August 2017), para. 33, [https://www.undp.org/sites/g/files/zskgke326/files/2021-04/SEC%20Investigation%20Guidelines\\_4%20August%202017.pdf](https://www.undp.org/sites/g/files/zskgke326/files/2021-04/SEC%20Investigation%20Guidelines_4%20August%202017.pdf).

<sup>118</sup> UNDP, *Stakeholder Response Mechanism: Overview and Guidance* (2014), para. 18, <https://www.undp.org/sites/g/files/zskgke326/files/2021-04/SRM%20Guidance%20Note%20r4.pdf>.

<sup>119</sup> Daniel Bradlow, 'Private Complainants and International Organizations' (2005) 36 *Georgetown Journal of International Law*, pp. 403, 483.

<sup>120</sup> For clarity, the paper acknowledges that the DRS may treat the Parties differently, to the extent this is done based on fairness and substantive equality.

legal, historical and procedural aspects of the matters dealt with, and ... provide[s] secretarial and technical support.<sup>121</sup> In parallel, the WTO Advisory Centre is a separate and independent institution that offers free advice and training on WTO dispute settlement proceedings to developing countries.<sup>122</sup>

Because the Secretariat cannot provide such assistance to less well-off states without risking its independence, this separate entity was established.<sup>123</sup> In contrast, the DRS plays the role of both the administering institution and advisory/training institution. This dual role in turn may jeopardise the perceived independence of the DRS. Further, by confirming that the choice of representatives is voluntary, or by offering guidance on disagreement as to the scope of the dispute resolution process between the Parties,<sup>124</sup> the DRS staff may also play a role typically reserved for third-party neutrals.

To address these concerns at the DRS and increase the accessibility and effectiveness of accessing a remedy, a pragmatic approach would be for the Bank to provide funding to affected persons to obtain support from professionals during the dispute resolution process. A recent United Nations report has suggested a range of funding mechanisms that international accountability mechanisms could establish, including stand-alone remedy funds, escrow accounts, trust funds, insurance schemes, guarantees, and letters of credit.<sup>125</sup> Scholars and civil society organizations have long advocated for the establishment of such funds at the World Bank and other multilateral development banks, because civil society organizations currently supporting requesters in dispute resolution processes, often free of charge, lack the budget to assist the majority of them.<sup>126</sup> The argument is that, as part of the development mandate of multilateral development banks, they should set aside a portion of the project budget to fund potential complaints initiated by affected persons, who are typically vulnerable populations. For instance, Canada allocates a small portion of the total project budget for its major infrastructure projects to assist minorities in the areas covered by these projects in voicing their concerns about the projects.<sup>127</sup>

In sum, the DRS provides individuals with access to a neutral third-party to seek remedies, in accordance with its mandate of independence and neutrality. As designed, however, there is a potential for the DRS to encroach upon the Inspection Panel's mandate, and the participation of DRS staff in dispute resolution procedures raises concerns about their perceived independence.

#### 4. Conclusion

At the time of writing, the Kawaala community and Uganda are currently attempting to resolve the complaint regarding the Lubigi channel project amicably through the dispute resolution process provided by one of the Bank's avenues for a remedy, the DRS. Recently, the Parties had asked and were granted the additional six months to pursue the dispute resolution process.<sup>128</sup> It remains to be seen whether this new avenue will improve the right of access to a remedy for the Kawaala community and all other requesters participating in dispute resolution processes, as the Bank intended by establishing the DRS.

This paper has shown that, in the meantime, several aspects of the DRS raise concerns about whether the dispute resolution process will actually improve the right of access to a remedy or whether it may instead prejudice the Inspection Panel's mandate to provide this right of access. Given these concerns, the paper has identified three areas of improvement that the Bank could consider to empower the DRS to fulfil its mandate better.

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<sup>121</sup> World Trade Organization, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (1994), art. 27(1), [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm).

<sup>122</sup> ACWL, 'Services of the ACWL', <https://www.acwl.ch/acwl-mission/>.

<sup>123</sup> World Trade Organization, 'Lamy Lauds Role of Advisory Centre on WTO Law' (4 October 2011), [https://www.wto.org/english/news\\_e/sppl\\_e/sppl207\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl207_e.htm).

<sup>124</sup> AM Operating Procedures, para. 13.3.

<sup>125</sup> OHCHR (n 72) pp. 88–89.

<sup>126</sup> van Huijstee and others (n 27); Ta and Graham (n 38) p. 118.

<sup>127</sup> Impact Assessment Agency of Canada, 'Participant Funding Program' (23 April 2021), [www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/participant-funding-program.html](http://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/participant-funding-program.html).

<sup>128</sup> Accountability Mechanism, 'Accountability Mechanism Extends Mediation Deadline in Uganda Case' (5 December 2022), <https://www.worldbank.org/en/programs/accountability/brief/accountability-mechanism-extends-mediation-deadline-in-uganda-case>.

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How the World Bank's Dispute Resolution Services Should Benefit  
Affected Persons and Borrower States

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