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

JONATHAN BROSSEAU

9.1 Introduction

Members of the Kawaala community in Kampala, Uganda, report that the Kampala Capital City Authority and armed guards woke them in the early hours of 4 December 2020, and began destroying their homes and farmlands.¹ Kawaala community members allege that their eviction and the ensuing destruction paved the way for the World Bank-funded Lubigi drainage channel project. They claim that the project began without proper consultation or plans for compensation and resettlement, and compromises their livelihoods and well-being, in violation of the Bank's Environmental and Social Framework (Framework) policies.² In turn, Bank management claimed that the project-level grievance mechanism should handle most of the Kawaala community's concerns about resettlement and that it is working with Kampala Capital City Authority to strengthen the resettlement plan related to the channel project.³ Dissatisfied with the World Bank's (Bank) solution to their concerns,

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

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

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

Kawaala community members filed a complaint to the Inspection Panel (Panel) in June 2021 with the support of local and international civil society organisations. The Panel subsequently recommended to the Bank's executive directors that the complaint be investigated.⁴

Upon the executive directors' approval of the Panel's recommendation for inspection,⁵ 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. Indeed, the executive directors had only approved the updated Inspection Panel Resolution⁶ and the Accountability Mechanism Resolution,⁷ which established the new Dispute Resolution Services (DRS) in September 2020.⁸ Under the DRS, those affected by Bank-funded projects (affected persons, also referred to as requesters once they submit a request for inspection to the Panel) and the borrower State can now resolve a complaint before the Inspection Panel through joint fact-finding, mediation, and other similar approaches, where both agree to this process. In the autumn of 2021, the DRS was staffed and published its Interim Operating Procedures to implement dispute resolution processes. The Kawaala community and Uganda agreed to pursue dispute resolution shortly thereafter.⁹ According to a civil society organisation supporting the Kawaala community, the dispute resolution process

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

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

⁶ Inspection Panel Resolution (8 September 2020), Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003 (2020 Panel Resolution), available at www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/InspectionPanelResolution.pdf.

⁷ Accountability Mechanism Resolution (8 September 2020), Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004 (2020 Accountability Mechanism Resolution), available at www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/AccountabilityMechanismResolution.pdf.

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

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

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.'¹⁰ At the time of writing, two more cases have also begun dispute resolution process.¹¹

In July 2022, the accountability mechanism published a second version of the DRS' operating procedures, on which it sought comments from any interested individuals and organisations.¹² An earlier form of the present chapter was therefore sent to the accountability mechanism, recommending amendments to the procedures similar to the ones set out below. Accountability Counsel and fifty-six other civil society organisations also submitted substantial joint comments on the procedures.¹³ In December 2022, the accountability mechanism published the third and final version of the DRS' operating procedures: the 2022 Accountability Mechanism Operating Procedures. In contrast to other multilateral development banks, the World Bank did not make public the comments it received, simply noting they were from civil society organisations, other accountability mechanisms, former Panel members, and scholars. As will be explained, the revision in the accountability mechanism operating procedures that strengthens requesters' protection the most is that the requirement that additional advisers may be engaged by one Party *only* subject to the other Party's consent, which was present in the first two versions of the procedures, was

¹⁰ RC Mosenda and C Daniel, 'World Bank Board Approves Investigation into Community Concerns of Forced Eviction by the Lubigi Drainage Channel' (*Accountability Counsel*, 27 October 2021), available at 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/.

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

¹² Accountability Mechanism, 'Accountability Mechanism Secretary Invites Comment on the Draft Accountability Mechanism Operating Procedures', 18 July 2022, available at www.worldbank.org/en/programs/accountability/brief/accountability-mechanism-secretary-invites-comment-on-the-draft-accountability-mechanism-operating-procedures.

¹³ Accountability Counsel and others, 'Joint Comments on AM & Panel Procedures' (9 September 2022) (Joint Comments), available at www.accountabilitycounsel.org/wp-content/uploads/joint-comments-on-am-panel-procedures.pdf.

removed. As also explained below, the revision that weakens requesters' protection the most is that, while the first version required that dispute resolution agreements be consistent with *Bank policies* and domestic or international law, the final accountability mechanism operating procedures requires that the Accountability Mechanism Secretary requests the Parties 'to make appropriate modifications' if she believes there are inconsistencies with domestic or international law only.

Given the novelty of the DRS, this chapter examines how the dispute resolution process offered by the Bank should benefit affected persons and borrower States (together, the Parties). The chapter 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 Accountability Mechanism Resolution in late 2023¹⁴ or the accountability mechanism operating procedures in the future. By noting how the DRS procedures have been reformed through the three versions, the chapter also records the evolution of the DRS, which includes identifying whether civil society organisation-suggested revisions have been incorporated into the procedures and whether the revisions implemented are more or less protective of affected persons. As such, the chapter seeks to contribute to the global administrative law scholarship.

The task of evaluating the DRS as part of the Bank's accountability system matters for several reasons. First, it will enable the Parties to understand better whether the DRS is indeed the 'appropriate forum' for resolving the complaint in each case, and whether they should therefore consent to it or opt instead for the compliance review process undertaken by the Panel. Further, the Bank, its executive directors, and its accountability mechanism could consider this evaluation when revising the DRS. The nearly twenty other multilateral development banks, which have been influenced by the Bank's practices on accountability in the past,¹⁵

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

¹⁵ R Mackenzie, CPR Romano, Y Shany, and P Sands, 'The Inspection Panel of the World Bank' in *The Manual on International Courts and Tribunals* (2nd ed., Oxford University Press 2010) para 17.29.

could also consider the parts that apply to them when revising their respective dispute resolution processes.

Overall, the chapter suggests that the DRS, as it is now designed, has the *potential* to enhance the right to access a remedy of affected persons. By emphasising party-led dispute resolution, it provides affected persons with the assistance of an independent third party, the opportunity to participate in the determination of remedial measures, and the chance to receive effective remedies beyond those envisaged 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 come to an agreement through dispute resolution in most cases. At the same time, this reliance on consent also enables affected persons to agree to remedies to some degree inferior to those envisaged 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 vulnerable populations with fewer resources and less expertise on Bank projects than borrower States. Moreover, as Bank management is involved in the dispute resolution process only if the Parties consent to it and as a technical observer, management cannot ensure that affected persons obtain a meaningful remedy. Given that the DRS does not fully address these concerns at the moment, the question arises as to whether it will *actually* enhance 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. Against this backdrop, the Bank should consider altering the dispute resolution process to better address the inequality of power between affected persons and borrower States, such as by entrenching certain minimal safeguards for affected persons, to ensure that they make informed decisions on remedies.

The chapter proceeds in two sections. Section 9.2 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 are the Inspection Panel, the Grievance Redress Service, and the DRS. This section shows that the Panel and Grievance Redress Service have succeeded in performing their respective functions of providing independent compliance review and management-led solutions. However, because they did not offer independent dispute resolution, a gap nevertheless remained in the Bank's accountability system. The establishment of the DRS filled that gap by offering affected persons access to independent dispute resolution processes. It did so while enhancing the three pillars of

the Panel, which can be identified as: effectiveness, accessibility, and independence.

Section 9.3 then 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 enhance accessibility, the Bank should consider strengthening the procedural protections and opportunities for participation afforded to affected persons in the dispute resolution process, notably by providing a minimum standard of access to project-related materials. To enhance effectiveness, it should consider clarifying the minimum threshold for remedies that affected persons can accept and provide for the mandatory verification of the implementation of the Parties' agreement. Finally, to enhance independence, the Bank should consider offering affected persons more options regarding the sequencing of compliance review and dispute resolution to protect the mandate of the Inspection Panel, and offer them funding to get support from professionals during the dispute resolution process.

9.2 The Mandates of the Bank's Three Avenues for a Remedy

Section 9.2 provides an overview of the three avenues for a remedy within the World Bank that enables the Bank to meet its moral and legal obligations to provide affected persons the right of access to a remedy, given its immunity from suit in national courts.¹⁶ This serves to identify

¹⁶ 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, Article 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 Accountability Mechanism which may arise between it and them'. [1954] ICJ Rep 47, 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), available at https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf.

the legal and policy standards against which the avenues for a remedy provided by the Bank should be evaluated.¹⁷

9.2.1 *Inspection Panel: Panel-Led Compliance Review*

The Inspection Panel was established in 1993 as the first independent accountability mechanism at an international financial institution. The Panel's mandate is to determine whether the Bank complies with its operational policies and procedures in any particular case. While the Panel thus has a compliance function and adopts a fault-finding approach, it also provides affected persons with a basic right of access to a remedy.¹⁸ It is also a quasi-judicial body: as described below, the executive directors of the Bank cannot change its findings, but they retain the power to decide on the outcome of requests at key stages of the process. For example, 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.¹⁹ 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

¹⁷ 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 constitutive instruments and resolutions as legal standards and may prefer referring to them as administrative standards instead, these instruments and resolutions are multilateral development banks' internal law, while domestic and international law are their external law. See P Sands and P Klein, *Bowett's Law of International Institutions* (6th ed., Sweet & Maxwell 2009) 448.

¹⁸ Inspection Panel, Operating Procedures (1994), Purpose (1994 Panel Operating Procedures), available at 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 D Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press 2022) 56, fn 100). But see, more recently, the 2014 and 2022 Inspection Panel Operating Procedures, para 2.a., noting 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[s] from Bank-supported operations'.

¹⁹ 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 have broken them down into a larger number of criteria: see e.g., V Richard, 'Independent Accountability Mechanisms as Guardians of a Kaleidoscopic Legal Accountability' in O McIntyre and S Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMs): Towards Good Governance in*

recommendation to the executive directors on whether a full investigation should be carried out.²⁰ 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.²¹ 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.²² 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.²³ They are also 'consulted' on the plan of action agreed between the Bank and the borrower State on remedial efforts, but do not have decision-making power.²⁴

The third pillar of the right is *independence* and *impartiality*.²⁵ 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 requests brought to it. On this basis, the Panel is required to give reasons based on the evidence and facts supporting its recommendations and findings.²⁶

Development Finance (Brill Nijhoff 2019) 330–37 (setting forth ten criteria of international accountability mechanisms generally).

²⁰ 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) 33, available at www.inspectionpanel.org/publications.

²¹ 1994 Panel Operating Procedures (n 18) paras 16, 52, and 54.

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

²³ 1994 Panel Operating Procedures (n 18) paras 47–49.

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

²⁵ LT Preston, 'The World Bank Inspection Panel' (World Bank, 24 September 1993); 1993 Panel Resolution (n 22) para 4.

²⁶ 1993 Panel Resolution (n 22) para 22; 1994 Panel Operating Procedures (n 18) para 37.

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

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

In response, in part, to the development of best practices concerning the right of access to a remedy, twenty multilateral development banks have established accountability mechanisms similar to the Inspection Panel to provide access to remedies through a compliance review process. Many of these banks have also included dispute resolution processes to increase the effectiveness of access.³³ All multilateral development banks

²⁷ See, similarly, M van Huijstee, K Genovese, C Daniel, and S Singh, 'Glass Half Full? The State of Accountability in Development Finance' (2016) 14, available at www.ciel.org/wp-content/uploads/2021/06/Glass-half-full.pdf, using the UNGPs as an assessment framework to evaluate international accountability mechanisms.

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

²⁹ *Ibid.*, Principle 27 (emphasis added).

³⁰ *Ibid.*, Commentary to Principle 29.

³¹ *Ibid.*, Principle 31(f).

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

³³ Mackenzie, Romano, Shany, and Sands (n 15) para 17.29.

similar to the Bank in terms of size and function, for instance, provide access to dispute resolution processes today.³⁴

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 per cent of its 250 ongoing projects, and of that 3 per cent of projects, the Inspection Panel investigates about a third.³⁵ Most complaints concern environmental assessment, investment project financing, consultation/disclosure, and involuntary resettlement.³⁶ In terms of its fault-finding approach, the Panel has generally been very successful in holding the Bank accountable and promoting institutional learning.³⁷ It has also been moderately successful in preventing future harm.³⁸ For example, on the Uganda Transport Development Project, then-World Bank Group 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 canceling the project'.³⁹

However, the Panel has been less successful in remedying the harm already suffered by affected persons.⁴⁰ While the result of the Panel's investigation is to bring the project back into compliance, it does not guarantee compensation for affected persons in relation to the harm that occurred.⁴¹ Moreover, according to one study, compliance investigations at the Bank take on average fifteen months.⁴² Such a delay is significant

³⁴ D Bradlow, 'External Review of the Inspection Panel's Toolkit' (2018) paras 64, 67, available at <https://documents1.worldbank.org/curated/en/562131583764988998/pdf/External-Review-of-the-Inspection-Panel-s-Toolkit.pdf>.

³⁵ Inspection Panel, *Annual Report* (World Bank 2021) 26, available at www.worldbank.org/en/programs/accountability/publication/world-bank-inspection-panel-annual-report-fy2021.

³⁶ *Ibid.*, 27.

³⁷ World Bank (n 14) para 1.

³⁸ See e.g., LMG Ta and BAT Graham, 'Can Quasi-Judicial Bodies at the World Bank Provide Justice in Human Rights Cases?' (2018–2019) 50 *Georgetown Journal of International Law* 113, 124, Figure 2, reporting that over 30 per cent of eligible complaints at the World Bank resulted in a project change.

³⁹ Inspection Panel (2018) (n 20) 70.

⁴⁰ See e.g., Ta and Graham (n 38) 124–25, Figure 2, reporting that over 15 per cent of eligible complaints at the Inspection Panel and Compliance Advisor Ombudsman of the IFC/MIGA 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'.

⁴¹ van Huijstee, Genovese, Daniel, and Singh (n 27) 118.

⁴² *Ibid.*, 43.

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 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.⁴³ 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.

9.2.2 *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 and two mechanisms related to the Inspection Panel.⁴⁴ First, the Grievance Redress Service is a complaint-handling mechanism that helps project teams broker solutions at the corporate level.⁴⁵ Established in 2015, it reports to senior Bank management. The mandate of the Grievance Redress Service is to address complaints directly and effectively with the project teams, with the purpose of '[closing] the gap between project-level grievance redress mechanisms . . . and the Inspection Panel in the Bank's accountability structure'.⁴⁶ Seeking resolution first through one of the recourses offered by the Bank, such as the Grievance Redress Service, is one of the preconditions for submitting a complaint to the Inspection Panel.⁴⁷

The growing number of cases that the Grievance Redress Service receives each year demonstrates that it has effectively provided affected

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

⁴⁴ 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: World Bank, Framework (n 2) paras 60–61.

⁴⁵ World Bank, 'Grievance Redress Service: Finding Solutions Together' (2021), available at <https://thedocs.worldbank.org/en/doc/bb2e4345aa86a6e92414ce9041c3048f-0290022021/original/GRS-brochure-2021-english.pdf>.

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

⁴⁷ 2020 Panel Resolution (n 6) para 14. However, affected persons who submitted a complaint to the Inspection Panel could subsequently resort to the *Grievance Redress Service*, as there is no sequential relationship between the two.

persons with access to certain remedies.⁴⁸ In 2020, the Grievance Redress Service worked on 211 admissible cases at different processing stages concerning various project-related issues.⁴⁹ 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 Grievance Redress Service to bring high-risk complaints to senior management’s attention quickly.⁵⁰ Given its features, the Grievance Redress Service, like project-level grievance mechanisms, fulfil the function of ‘operational-level’ grievance mechanisms envisaged by Principle 29 of the UNGPs. It has strengthened the governing framework of the Bank’s accountability mechanisms in a way that has complemented the mandate of the Inspection Panel.

But while the Grievance Redress Service has been successful at resolving relatively simple disputes concerning operational issues, it has been less successful at resolving disputes concerning more complex or controversial issues. This is in part because the Grievance Redress Service does not report to the top level of the Bank and has a junior status in the Bank hierarchy, which hampers its operation for those disputes.⁵¹ Its efficiency in resolving complex issues is also limited by its (real or perceived) lack of independence from management.⁵²

The limitations of the Grievance Redress Service have questioned whether the Bank was meeting best practices on the right of access to a remedy, given that the Grievance Redress Service was the only dispute resolution mechanism offered by the Bank itself for a long time. Neither the Grievance Redress Service, nor other avenues for a remedy, then fulfilled the function of ‘non-judicial’ grievance mechanisms envisaged by Principle 29 of the UNGPs. This has had implications for the credibility and reputation of the Bank, since all other multilateral

⁴⁸ Bradlow (n 34) 14, para 56.

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

⁵⁰ World Bank, ‘Bank Directive: Grievance Redress Service’ (5 May 2021), available at www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service.

⁵¹ Bradlow (n 34) 14–15, para 57.

⁵² 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), available at www.accountabilitycounsel.org/2019/01/ac-submits-joint-statement-to-wb-board-on-panel-toolkit-review/.

development banks have been offering dispute resolution at the top level of the institution.⁵³

As mentioned, 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 twenty-one-business day period for management to provide its response.⁵⁴ 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.⁵⁵ 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, to improve the 'effectiveness' of the access to a remedy of affected persons, while simultaneously adhering to the mandate of the Inspection Panel.⁵⁶

Despite the objective of these dispute resolution mechanisms, their success in practice was doubtful. The mechanisms were only employed in a few cases, which meant neither was subject to a systematic review of its effectiveness. A first-hand account of the only two cases that went through the first mechanism – the postponement of registration – suggests that one case was reasonably successful and the other was unsuccessful.⁵⁷

More significantly, concerns arise as to whether the mechanisms complied with the mandate of the Inspection Panel, 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 independence, '[t]hese mechanisms blur[red] the clear distinction between the [Inspection Panel]'s responsibilities as an

⁵³ Bradlow (n 34) 18, para 68.

⁵⁴ World Bank, 'Piloting a New Approach to Support Early Solutions in the Inspection Panel Process' (November 2013), available at www.accountabilitycounsel.org/wp-content/uploads/2017/08/PilotingNewApproach.pdf.

⁵⁵ 2014 Operating Procedures (n 24) para 44, fn 7.

⁵⁶ World Bank (n 54) 3; Inspection Panel, 'Inspection Panel Adopts Updated Operating Procedures' (7 April 2014), available at www.inspectionpanel.org/news/inspection-panel-adopts-updated-operating-procedures.

⁵⁷ Bradlow (n 34) 15, para 58, fn 40.

independent and objective fact finder and management's role in the [Inspection Panel] process.⁵⁸ For instance, the mechanisms lacked a neutral mediator that would oversee the problem-solving process.⁵⁹ 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.⁶⁰

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

9.2.3 *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 Framework. The Framework, among other things, aligned with the concept of due diligence promoted by the UNGPs,⁶¹ and included the requirement that every Bank-funded project has a project-level grievance redress mechanism.⁶²

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

⁵⁸ *Ibid.*, iii, para 12; K Gallagher, *Tools for Activists: An Information and Advocacy Guide to the World Bank Group* (Bank Information Center 2020), Modules 5, 9, available at <https://bankinformationcenter.org/en-us/update/toolkit-for-activists/>.

⁵⁹ van Huijstee, Genovese, Daniel, and Singh (n 27) 67–68.

⁶⁰ Richard (n 19); van Huijstee, Genovese, Daniel, and Singh (n 27) 67–68.

⁶¹ *Compare* UNGPs (n 28), Principles 17–21, with Framework (n 2), Bank Requirement C ('Environmental and Social Due Diligence').

⁶² Framework (n 2), Bank Requirement I ('Grievance Mechanism and Accountability') 11, paras 60–61.

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.⁶³ At the end of the dispute resolution process, the DRS will issue a report to the executive directors through the Accountability Mechanism 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 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 UNGPs.

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 mandate of the DRS is to 'enhance the effectiveness of the World Bank's accountability system', while being accessible and independent, as is the Panel.⁶⁴ The Accountability Mechanism Resolution and the Accountability Mechanism Operating Procedures should therefore ensure that the results of problem-solving

⁶³ In contrast, the IFC/MIGA, 'Independent Accountability Mechanism CAO Policy' (1 July 2021) para 75, available at 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.'

⁶⁴ World Bank (n 14) 4, para 23, and 6, para 38.

are no less protective of requesters than the one offered by the Inspection Panel.⁶⁵

9.3 The Compliance of the DRS with the Panel's Mandate and Best Practices

Section 9.2 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 9.3 proceeds to determine the compliance of the DRS with these mandates and best practices, and suggests three areas of improvement.

9.3.1 *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.⁶⁶ 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 original mandate of the Inspection Panel. This is because one of the Panel's eligibility criteria – i.e., showing a plausible causal link between the alleged harm and the project⁶⁷ – may become more challenging under the Bank's new Framework, given that the responsibilities of the Bank are set out more clearly and narrowly therein than previously.⁶⁸ In addition, this eligibility criterion is coupled with a new feature in the eligibility determination phase, whereby Bank management can submit

⁶⁵ van Huijstee, Genovese, Daniel, and Singh (n 27) 68.

⁶⁶ 2020 Panel Resolution (n 6) paras 13–15.

⁶⁷ 2014 Operating Procedures (n 24) para 43.

⁶⁸ 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 (n 34) 16–17, para 63; Inspection Panel, 'Comments on the Second Draft of the Proposed Environmental and Social Framework' (17 June 2015) paras 10–11, available at www.inspectionpanel.org/news/inspection-panel-comments-2nd-draft-esf.

evidence of actual compliance or *intent* to comply, and requesters cannot access or respond to this evidence.⁶⁹ This lack of opportunity for procedural participation afforded to affected persons therefore also reduces their accessibility to a remedy.⁷⁰

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 focussed 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.⁷¹

While the criterion adopted by the Bank on the eligibility of complaints to the DRS is consistent with those of most (but not all) other multilateral development banks,⁷² questions arise as to whether it complies with the Bank's commitment to increase the access to a remedy with the DRS.⁷³ In comparison, an approach that would increase the accessibility of the DRS would be to allow the Parties to proceed with dispute resolution if they both agreed to it, without requiring requesters to meet all the Panel's eligibility criteria additionally.⁷⁴ 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.

For these reasons, the Bank should consider abolishing 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

⁶⁹ 2020 Panel Resolution (n 6) para 19.

⁷⁰ D Desierto, A Perez-Linan, K Wakkaf, R Gagnon et al., 'The "New" World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab' (*EJIL:Talk!*, 11 November 2020), available at www.ejiltalk.org/the-new-world-bank-accountability-mechanism/.

⁷¹ Bradlow (n 34) 16–17, para 63.

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

⁷³ P Woicke, D Fairman, T Salam, E Waitzer et al., *External Review of IFC/MIGA E&S Accountability, Including CAO's Role and Effectiveness: Report and Recommendations* (World Bank 2020) para 209, available at www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability.

⁷⁴ Inspection Panel, 'World Bank Accountability Mechanism and Inspection Panel Reforms: Virtual Discussion', available at www.youtube.com/watch?v=vhv8k-Psl94, accessed 1 March 2022 (intervention of Jolie Schwarz).

concerns the Accountability Mechanism Resolution and Inspection Panel Resolution, and not the Accountability Mechanism Operating Procedures, they should be re-evaluated as part of the three-year review of the DRS.

Another proposed improvement regarding accessibility concerns the Parties' choice of representatives and advisers. Paragraph 21.2 of the Accountability Mechanism Operating Procedures requires that the appointment or change of appointment of representatives be made in 'consultation with the DRS'. Paragraph 21.2 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', as was present in the first two versions of the procedures. By initially requiring the Parties to agree on each other's additional advisers, the procedures risked exacerbating power imbalances that already exist between the Parties.⁷⁵ For instance, borrower States could object to requesters retaining the services of certain civil society organisations as additional advisers, because these civil society organisations would have been critical of their human rights record in the past. This could pressure requesters to 'bend' to the demands of borrower States regarding additional advisers to avoid objections concerning their choice of additional advisers.⁷⁶

Against this backdrop, a study on the Compliance Advisor Ombudsman (CAO), the accountability mechanism of the International Finance Corporation and the Multilateral Investment Guarantee Agency, has found that when non-governmental organisations assisted complainants with dispute resolution processes, the complaints were more likely to receive a remedy or to get to compliance review.⁷⁷ It also observed that 'CAO's decision to limit the participation of civil society organisations and legal representatives during negotiation and mediation engendered

⁷⁵ See S Balaton-Chrimes and K Macdonald, *The Compliance Advisor Ombudsman for IFC/MIGA: Evaluating Potential for Human Rights Remedy* (Corporate Accountability Research 2016) 40–45. See Accountability Counsel (n 13) 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.'

⁷⁶ See van Huijstee, Genovese, Daniel, and Singh (n 27) 114.

⁷⁷ R Altholz and C 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) 3, available at www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf. See also Ta and Graham (n 38) 127–29.

distrust among complainants and in some cases prompted their decision to withdraw from the [dispute resolution] process.⁷⁸ This is sensible, because dispute resolution may not result in fair outcomes where there is inequality of power and resources between the Parties, who are often, on the one hand, local communities in developing countries, and on the other hand, State entities.⁷⁹ Therefore, removing from the final Accountability Mechanism Operating Procedures the consent of the other Party as a requirement for engaging additional advisers further protects requesters and is more in line with the DRS' mandate. Despite this positive change, the Bank should also consider revising the Accountability Mechanism Operating Procedures so that they specify what type of advice the DRS staff can give to the Parties on the choice of their representatives, and specifies that either Party can request that its representatives and advisers be copied on all communications sent to it and be present in any discussion on the complaint.

The last improvement regarding accessibility concerns the access to project information. Paragraph 12 of the Accountability Mechanism Operating Procedures does not specify the powers the neutral third party would have regarding access to materials, documents, and testimonies related to the project, leaving this issue entirely to the Parties' consent. Furthermore, paragraph 16 of the Accountability Mechanism Resolution provides 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.⁸⁰ The result of these provisions is that the Parties engaged in the dispute resolution process could, in principle, agree that the requesters may access an amount of information that is (much) lower than that provided to the Panel. It is not an unlikely outcome, because often in practice, the concerns about a project lead to a complaint before Panel based precisely on a breakdown in the sharing of information or adequate consultation by the borrower States. Yet this situation would be problematic, because requesters can only access limited information on the project via the World Bank Policy on Access to Information⁸¹ to

⁷⁸ *Ibid.*, 82.

⁷⁹ Desierto, Perez-Linan, Wakkaf, and Gagnon (n 70).

⁸⁰ 1994 Panel Operating Procedures (n 18) para 61; 2014 Operating Procedures (n 24) para 54(a).

⁸¹ World Bank, 'Bank Policy: Access to Information' (EXC401-POL01) (1 July 2015), available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/>

assert their rights and interests,⁸² and most of the project information is typically in the hands of borrower States. In this case, the opportunity for requesters to obtain meaningful remedies would be hampered by their lack of access to project-related materials, especially early in the dispute resolution process when requesters need the relevant project information to assess their position.⁸³

Against this backdrop, the Bank should consider including in the Accountability Mechanism 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 in the dispute resolution process than it would be in 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.'⁸⁴ 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 may enhance the accessibility of remedy by providing affected persons with an alternative to the Inspection Panel, in which they play a central role in designing remedial measures that address the harm caused to them by a Bank project. At the same time, revising the aforementioned eligibility criterion, most notably, would better empower the Bank to achieve this goal.

9.3.2 *Effectiveness: Types of Complaint, Content of Agreements, and Verification of Implementation*

The second area of improvement relates to effectiveness of the right to access a remedy. Under the Accountability Mechanism Resolution and

[391361468161959342/the-world-bank-policy-on-access-to-information](https://doi.org/10.1017/9781009373913.014). See also 2022 Accountability Mechanism Operating Procedures, para 8.

⁸² M McDonagh, 'Evaluating the Access to Information Policies of the Multilateral Development Banks' in O McIntyre and S Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMS): Towards Good Governance in Development Finance* (Brill Nijhoff 2019) 135–36; Altholz and Sullivan (n 77) 82.

⁸³ See also Desierto, Perez-Linan, Wakkaf, and Gagnon (n 70).

⁸⁴ M Shaw and K Wellens, *Accountability of International Organisations* (International Law Association, Berlin Conference 2004) 45 (emphasis added).

the Accountability Mechanism Operating Procedures, complaints concerning serious human rights violations, such as those related to torture, may be brought to the dispute resolution process. Yet, the violation of some of these human rights, such as the prohibition of torture, have *jus cogens* status.⁸⁵ This means that they are fundamental principles of international law that must be upheld in all circumstances, and no one may ever derogate from them. International organisations like the Bank are bound by these prohibitions, as they themselves acknowledge.⁸⁶ The Bank has a responsibility under international law to end any violation of a *jus cogens* norm that it may enable. When complaints at the Bank concern violations of *jus cogens* norms, it is therefore doubtful 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 Compliance Advisor Ombudsman director general (i.e., the equivalent to the Accountability Mechanism Secretary), the president, the board, or management.⁸⁷ This request may be made when 'concerns exist regarding particularly *severe harm*'.⁸⁸ However, such a possibility for internal requests does not exist at the Bank.⁸⁹ In fact, the DRS cuts the dialogic function with Bank management and the executive directors. According to paragraph 22.1 of the Accountability Mechanism Operating Procedures, management can only be an observer in the dispute resolution process with the Parties' agreement, and is constrained to a technical role.⁹⁰ Yet, the practice shows that Bank management engagement has proven critical to resolving disputes effectively.⁹¹ Given its obligation to uphold *jus*

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

⁸⁶ K Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 *Harvard International Law Journal* 325, 377–80.

⁸⁷ CAO Policy (n 63) para 81.

⁸⁸ *Ibid.*, 82 (emphasis added).

⁸⁹ 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 Panel Resolution (n 22) para 12; 2020 Panel Resolution (n 6), para 13.

⁹⁰ See also World Bank (n 14) para 34.

⁹¹ Accountability Counsel (n 13) 18 (describing how management involvement brought positive results in a case at the Inter-American Development Bank involving the Haitian Government).

cogens norms, the Bank should revise the Accountability Mechanism Operating Procedures and Accountability Mechanism 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.'⁹² This provision is in line with that of other international accountability mechanisms.⁹³ 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.⁹⁴

In contrast, the revised version of the provision, paragraph 23.1 of the Accountability Mechanism 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 [Accountability Mechanism] Secretary will request the Parties to make appropriate modifications.' This provision makes two significant changes as compared to its previous iteration. First, it removes

⁹² Accountability Mechanism Interim Operating Procedures (13 October 2021) para 16, available at <https://thedocs.worldbank.org/en/doc/eb47509513bb29ab629f64450c465351-0330032021/original/DRS-Interim-Operating-Procedures.pdf>.

⁹³ African Development Bank's Independent Recourse Mechanism, 'Operating Rules and Procedures' (2015) para 49, available at 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 was revised in July 2021 – after the judgment of the US Supreme Court in *Jam v International Finance Corp* – to add that it will not 'knowingly' support agreements contrary to the bank's policies: CAO Policy (n 63) para 67.

⁹⁴ Bradlow (n 34) 13, para 51.

the requirement of consistency of dispute resolution agreements with Bank policies. Yet, under the Articles of Agreement⁹⁵ and the Inspection Panel Resolution,⁹⁶ the executive directors have an institutional responsibility to ensure the Bank's observance of its operational policies and procedures, an international legal obligation the Bank has 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 process it established be inconsistent with the policies. Second, the provision shifts from an objective requirement of consistency of dispute resolution agreements with domestic and international law, to a subjective requirement that the DRS doubts 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 absolve itself of this obligation. This change significantly 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 9.3.1 are all the more important to ensure that requesters do not feel pressured to agree to a remedy that is substantially less than the one to which they are entitled 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.'⁹⁷ According to best practices, the DRS must ensure at least that its 'outcomes and remedies accord with internationally recognised human rights'.⁹⁸ 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 Accountability Mechanism Resolution states that the Parties should agree on a 'time-bound implementation schedule for agreed actions',⁹⁹ it is silent on how compliance with this implementation is monitored. Paragraph 24.1 of the Accountability Mechanism Operating Procedures

⁹⁵ Articles of Agreement (n 16) Article V, § 4, (a).

⁹⁶ 1993 Panel Resolution (n 22) para 12; 2020 Panel Resolution (n 6) para 13.

⁹⁷ OHCHR (n 72) 60.

⁹⁸ UNGP (n 28), Principle 31(f).

⁹⁹ 2020 Accountability Mechanism Resolution (n 7) para 13(b).

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 inception of the Panel, intense public scrutiny was often helpful for the actual implementation of an agreement to occur.¹⁰⁰ Best practices have since evolved in parallel to the point where it has become widely accepted that the effectiveness of a dispute resolution process depends on the implementation of agreed remedial actions being monitored.¹⁰¹ This is because monitoring dispute resolution agreements has proven to be a key factor in ensuring that affected persons achieve a remedy. For instance, as part of a complaint before the accountability mechanism of the Inter-American Development Bank, 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.¹⁰² Against this background, the executive directors have allowed the Inspection Panel in recent years to monitor compliance on a case-by-case basis.¹⁰³ The 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.¹⁰⁴

Given that the mandate of the Inspection Panel is to provide affected persons with *basic* access to a remedy, while the mandate of the DRS is to provide them an *additional* path of access, it is unclear why management

¹⁰⁰ Gallagher (n 58) Modules 5, 9.

¹⁰¹ M Tignino, 'Human Rights Standards in International Finance and Development: The Challenges Ahead' in O McIntyre and S Nanwani (eds), *The Practice of Independent Accountability Mechanisms (IAMS): Towards Good Governance in Development Finance* (Brill Nijhoff 2019); van Huijstee, Genovese, Daniel, and Singh (n 27) 114.

¹⁰² Accountability Counsel, 'The Strength of a Community: Haitian Farmers Request Final Push to Receive Full Compensation' (28 January 2022), available at www.accountabilitycounsel.org/implementation-status/haiti/.

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

¹⁰⁴ 2020 Panel Resolution (n 6) paras 47–53.

(and the Panel) now have monitoring authority with regards to compliance review, but 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.¹⁰⁵ 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.¹⁰⁶ As noted in the external review, failing to ensure that agreements are implemented may have 'adverse reputational consequences' for the Bank.¹⁰⁷ The Bank should therefore 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 Accountability Mechanism 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 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,¹⁰⁸ 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.¹⁰⁹ 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

¹⁰⁵ Bradlow (n 34) iii–iv.

¹⁰⁶ CAO Policy (n 63) paras 68, 70. See also European Investment Bank, 'Complaints Mechanism Policy' (November 2018) para. 5.3.1, available at www.eib.org/en/publications/complaints-mechanism-policy.

¹⁰⁷ Bradlow (n 34) iv, para 20.

¹⁰⁸ Since the DRS is currently assisting with its first complaints, 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: S Park, *Environmental Recourse at the Multilateral Development Banks* (Cambridge University Press 2020) 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.*, 54–57.

¹⁰⁹ See the eligibility criterion of the Panel: 2020 Panel Resolution (n 6) para 13.

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.

9.3.3 *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’.¹¹⁰ 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’.¹¹¹ In practice, however, the *mandate* of the DRS may infringe on the mandate of the Inspection Panel. 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’.¹¹² 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

¹¹⁰ 2020 Accountability Mechanism Resolution (n 7) para 6; Accountability Mechanism Operating Procedures, para 11.6.

¹¹¹ 2020 Panel Resolution (n 6) para 2.

¹¹² Desierto, Perez-Linan, Wakkaf, and Gagnon (n 70).

time of the request.¹¹³ Thus, the result of the dispute resolution process will prevent the Inspection Panel from carrying out its role of investigating compliance with Bank policies.

To address the potentially conflicting mandates of the dispute resolution and compliance review processes generally, 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: they can either resort to dispute resolution first and then move on to compliance review if they are dissatisfied with the former, or go straight ahead with compliance review but thereby relinquish the possibility of dispute resolution.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ At the United Nations Development Programme (UNDP) for example, affected persons can choose to go through compliance review¹¹⁷ and dispute resolution¹¹⁸ simultaneously. This shows that the concern, according to which allowing Parties to use compliance review irrespective of the outcome of the dispute resolution process would disincentivise borrower States from fully participating in the dispute resolution process,¹¹⁹ may be overblown.

¹¹³ 2020 Panel Resolution (n 6) para 15(d).

¹¹⁴ Bradlow (n 34) 17.

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

¹¹⁶ van Huijstee, Genovese, Daniel, and Singh (n 27) 68; Richard (n 19) 338.

¹¹⁷ UNDP, *Social and Environmental Compliance Unit: Investigation Guidelines* (4 August 2017) para 33, available at www.undp.org/sites/g/files/zskgke326/files/2021-04/SECU%20Investigation%20Guidelines_4%20August%202017.pdf.

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

¹¹⁹ D Bradlow, 'Private Complainants and International Organizations' (2005) 36 *Georgetown Journal of International Law* 403, 483.

Another improvement regarding independence and impartiality concerns the relationship between the DRS staff and the Parties. Paragraph 14.1 of the Accountability Mechanism Operating Procedures states that '[t]he DRS is impartial as between Parties and as to the merits of the dispute.' However, the Accountability Mechanism 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 Accountability Mechanism 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 Accountability Mechanism Resolution nor the Accountability Mechanism Operating Procedures set limits on the content and means of communication to the Parties, which raises questions as to 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 Accountability Mechanism Resolution and Accountability Mechanism Operating Procedures are silent on these issues. Rather, the Accountability Mechanism Operating Procedures should only require that the Parties 'inform' the DRS staff about their choice of representation.

The DRS staff is also involved in the very decision of the Parties to pursue the dispute resolution process. Paragraph 11.3 of the Accountability Mechanism Operating Procedures 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 Accountability Mechanism 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.¹²⁰

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

The Bank should therefore consider addressing, through institutional changes, the general tension between accessibility and independence at the DRS. The World Trade Organization (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 legal, historical and procedural aspects of the matters dealt with, and . . . provide[s] secretarial and technical support'.¹²¹ 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.¹²² Because the secretariat cannot provide such assistance to less well-off States without risking its independence, this separate entity was established.¹²³ 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,¹²⁴ the DRS staff may also play a role typically reserved for third-party neutrals.

To address these concerns at the DRS, and more broadly increase the accessibility and effectiveness of access to a remedy, a pragmatic approach may be for the Bank to provide funding to affected persons to get support from professionals during the dispute resolution process. A recent UN report has suggested a range of funding mechanisms that international accountability mechanisms could set up to do so, which includes stand-alone remedy funds, escrow accounts, trust funds, insurance schemes, guarantees, and letters of credit.¹²⁵ Scholars and civil society organisations have long called for establishing such funds at the World Bank and other multilateral development banks, because civil society organisations currently supporting requesters in dispute resolution processes, free of charge, do not have the budget to assist most of them.¹²⁶ The argument is that, as part of the development mandate of multilateral development banks, they should reserve part of the project

¹²¹ World Trade Organization, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (1994) Article 27(1), available at www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

¹²² ACWL, 'Services of the ACWL', available at www.acwl.ch/acwl-mission/.

¹²³ World Trade Organization, 'Lamy Lauds Role of Advisory Centre on WTO Law' (4 October 2011), available at www.wto.org/english/news_e/sppl_e/sppl207_e.htm.

¹²⁴ Accountability Mechanism Operating Procedures, para 13.3.

¹²⁵ OHCHR (n 72) 88–89.

¹²⁶ van Huijstee, Genovese, Daniel, and Singh (n 27); Ta and Graham (n 38) 118.

budget to fund potential complaints launched by affected persons, who are typically vulnerable populations. Canada, for instance, sets aside a small portion of the total project budget of its large infrastructural projects to help minorities in areas covered by these projects to express their concerns about them.¹²⁷

In sum, with its mandate of independence and impartiality, the DRS offers affected persons access to a neutral third party to access a remedy. As designed, however, it may infringe on the mandate of the Inspection Panel, and the involvement of the DRS staff in dispute resolution processes raises some concerns about its appearance of independence.

9.4 Conclusion

The Kawaala community and Uganda are now attempting to resolve the complaint concerning the Lubigi channel project amicably through the dispute resolution process offered by one of the Bank's avenues for a remedy, the DRS. At the time of writing, the Parties had asked and were granted the additional six months to pursue the dispute resolution process.¹²⁸ Only time will tell whether this new avenue will enhance the right of access to a remedy of the Kawaala community and all other requesters participating in the dispute resolution process, as the Bank sought to do by establishing the DRS.

This chapter has shown that, in the meantime, different aspects of the DRS raise the concerns of whether dispute resolution will actually enhance the right of access to a remedy, and whether it may instead prejudice the Inspection Panel's mandate to provide this right of access. Given these concerns, the chapter has set out three areas of improvement that the Bank could consider which, if adopted, would empower the DRS to better realise its mandate.

¹²⁷ Impact Assessment Agency of Canada, 'Participant Funding Program' (23 April 2021), available at www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/participant-funding-program.html.

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