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A TEST CASE FOR THE WORLD BANK

Daniel D. Bradlow*

INTRODUCTION

In 1993, the World Bank's Board of Executive Directors (the Board) established a three-member Inspection Panel (the Panel).¹ The Panel has the power to investigate complaints received from private parties, alleging that the Bank failed to act in conformity with its operating rules and procedures.² It also has the authority to make recommendations to the Board about which complaints to investigate, as well as the power to make findings based on its investigations.³ In all cases, the Board retains final decision making power.⁴ The Bank makes available to the public the requests for investigation, the Panel's recommendations and reports, and the Board's decisions.⁵ The Panel opened for business in September 1994.

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1. *The World Inspection Panel*, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association (Sept. 22, 1993) [hereinafter Resolution].

2. *Id.*; see *The Inspection Panel Operating Procedures* 4-5 (Aug. 19, 1994) [hereinafter *Operating Procedures*] (stating that the Panel serves as an independent forum for adversely affected people to request that the Bank act in accordance with its policies and procedures); see also Res. No. 93-10 (Res. No. IDA 93-6), Sept. 22, 1993, reprinted in *Operating Procedures, supra*, Annex 1, at 22 (establishing the Inspection Panel).

3. Resolution, *supra* note 1; see *Operating Procedures* at 5-6 (noting that during the preliminary review period, the Panel will gather information and then make a recommendation on whether the matter warrants an investigation).

4. Resolution, *supra* note 1; see *Operating Procedures, supra* note 2, at 16 (stating that the decision whether to accept or reject the Panel's recommendation lies with the Board).

5. Resolution, *supra* note 1; see *Operating Procedures, supra* note 2, at 16-17 (noting that the Bank will make a request available to the public after consideration by the Executive Directors).

The Board's decision has international legal significance. The Panel is the first forum in which private parties can seek to hold international organizations directly accountable for their actions.⁶ Given the broad scope of the Bank's operations, the Panel has the potential to influence the evolution of international human rights, environmental, and administrative law. The Bank's response to, and the Panel's treatment of, the first request for investigation is therefore of interest to international lawyers.

The Panel received the first request for an investigation in October 1994.⁷ The request involved the design of the proposed Arun III Hydroelectric Project in Nepal.⁸ This Request culminated in a Panel investigation of those specific aspects of the Bank's conduct that were allegedly not in compliance with the Bank's operating rules and procedures.⁹ Following the completion of the Panel's investigation, but before a final decision by the Board, the President of the Bank announced that the Bank was withdrawing its offer to fund the project.¹⁰

The conclusion of the Panel's first case offers a useful opportunity to assess the Panel's contribution towards improving the Bank's accountability to the intended beneficiaries of its operations, to the efficacy of those operations, and to international law. In order to make this assessment, this paper will first describe the Panel. It will then discuss the

6. Daniel D. Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994); Daniel D. Bradlow & S. Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 ZAORV 392 (1994); Ibrahim F.I. Shihata, *THE WORLD BANK INSPECTION PANEL* (1994).

7. Since then, the Panel has received three additional requests. *See Request for Inspection: Tanzania Power VI Project*, Request No. 95/2 (June 16, 1995) [hereinafter *Tanzania Request*]; *Request for Inspection: Brazil Rondonia Natural Resources Management Project*, Request No. RQ 95/3 (June 19, 1995) [hereinafter *Rondonia Request*]; *Request for Inspection: Ethiopia* (Letter from the Pappasinos family, March 29, 1995) (not registered with the Inspection Panel; available from the Center for International Environmental Law (CIEL)) [hereinafter *Ethiopia Request*].

8. *See* Arun Concerned Group, Request for Investigation, October 24, 1994 [hereinafter *Request*] (copies available at the World Bank's Public Information Center) (objecting to the dam project and claiming that the Bank plans to lend money for a dam violated Bank policies on environmental assessment).

9. *See id.* (alleging that the Bank violated its internal policies and procedures).

10. *Chief to Refuse Nepali Request for Arun*, IPS, Oct. 19, 1995, available in LEXIS, Nexis Library, WORLD, ALLWLD file. After an 11-month investigation, and just before the publication of the report by the Bank's inspection Panel, the President of the Bank announced that the Bank "failed to observe in substance the policy requirements of the Bank." *Id.*

Arun Request for investigation. Finally, it will draw some conclusions about the Panel process.

I. A DESCRIPTION OF THE PANEL

A. COMPOSITION OF THE PANEL

The Board established requirements for the Panelists¹¹ designed to produce an independent, diverse, and competent Panel. The bank will select panelists "on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and independence from the Bank's management, and their exposure to developmental issues and to living conditions in developing countries."¹² Each of the three Panelists must be a citizen of a different World Bank member country¹³ and may not have worked for the World Bank for at least the two years prior to their appointment to the Panel.¹⁴ Each member is eligible to serve only one non-renewable five-year term of office.¹⁵ Panelists will be ineligible to work for the Bank after their term of office expires.¹⁶ During their term of office, Panel members can only be removed from office "for cause."¹⁷

B. REQUESTS FOR INVESTIGATION AND PANEL REVIEW

The Panel has the authority to receive and investigate requests for investigation from any "affected party in the territory of the borrower [country]."¹⁸ An "affected party" is any party "which is not a single individual"¹⁹ whose rights or interests have been directly affected in the course of a Bank operation.²⁰ The affected group's local representative, or, in exceptional cases, a non-local representative may also file a re-

11. See *Operating Procedures*, *supra* note 2, at 4-5 (establishing a Panel for the purpose of receiving requests from those adversely affected by Bank-financed projects).

12. Resolution, *supra* note 1, ¶ 4.

13. *Id.* ¶ 2.

14. *Id.* ¶ 5.

15. *Id.* ¶ 3.

16. Resolution, *supra* note 1, ¶ 8.

17. *Id.*

18. *Id.* ¶ 12.

19. *Id.*; see *infra* notes 109-13 and accompanying text (discussing the meaning of this standard for eligibility to file requests for investigation),

20. Resolution, *supra* note 1, ¶ 12.

quest for an investigation.²¹ Executive Directors may also initiate complaints.²²

Requests for investigation, which must be in writing, must allege that the "rights or interests" of the affected party "have been or are likely to be directly affected" by acts or omissions of the Bank that are inconsistent with the Bank's "operational policies and procedures."²³ These policies and procedures are defined to include the Bank's Operational Policies, Operational Directives, Bank Procedures, and similar policies and procedures issued before these series of documents became effective. They do not include Guidelines and Best Practices.²⁴

The "operational policies and procedures" cover all aspects of the Bank's operations including such issues as participation by non-governmental actors in Bank operations, the Bank's treatment of indigenous people, the treatment of people involuntarily resettled during the course of Bank operations, and the procedures to be followed in conducting environmental impact assessments.²⁵

The request for investigation must also describe the harm suffered by, or threatened to, the complainant because of the Bank's allegedly wrongful action,²⁶ and the attempts of the requester to communicate with the Bank about the problem.²⁷

Once the Panel receives the request, it notifies the Board and the President of the request.²⁸ The Bank Management then has twenty-one days to provide the Panel with evidence that it complied with, or "in-

21. *Id.*

22. *Id.*

23. *Id.*

24. The Bank revises the operating rules and procedures periodically. Prior to the Operational Directives, the policies and procedures were expressed in a series of Operational Management Statements. Some of these Operational Manual Statements were in effect at the time of the design of the Arun III project. The Bank is presently reviewing its Operational Directives and replacing them with three separate documents. These are an Operational Policy, which establishes binding rules of policy for Bank staff, Bank Procedures, which are statements that spell out the procedures that Bank staff are required to follow in their work; and Good Practices, which are non-mandatory guidelines for Bank staff.

25. The Bank's policies and procedures are available through the Bank's Public Information Center, 1818 H Street, N.W., Room GCI-300, Washington, DC 20433; Tel: (202) 458-5454.

26. Resolution, *supra* note 1, ¶ 16.

27. *Id.* ¶ 13.

28. *Operating Procedures*, *supra* note 2, at 11.

tends to comply with," the relevant policies and procedures.²⁹ After receiving this response, the Panel has twenty-one days to determine if the request satisfies the requirements of the Resolution and to make a recommendation to the Board of Direction as to whether there should be an investigation of the issues raised in the request.³⁰

The issues that the Panel considers in its review of the request are:

- (i) Is the request filed by "an affected party in the territory of the borrower which is not a single individual"?³¹
- (ii) Did the requester communicate with the Bank staff prior to filing the request and did it receive an adequate response?³²
- (iii) Does the request state sufficient grounds to justify an investigation? "Sufficient grounds" appear to exist if the requester alleges that its "rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures"³³ and this failure caused or threatens to cause a "material adverse effect" to the requester.³⁴ Furthermore, requests for investigation must relate to acts which are the exclusive responsibility of the Bank.³⁵
- (iv) Is the violation of the Bank's policies and procedures of a "serious character"?³⁶
- (iv) Does the request arise from the conduct of the Bank in the design, appraisal or implementation phases of the project? The Panel may also address the Bank's failure to "follow-up" on the borrower's obligations under the loan agreement. The complaint, however, cannot relate to procurement issues³⁷ or to loans which are substantially disbursed.³⁸

29. Resolution, *supra* note 1, ¶ 18.

30. *Id.* ¶ 19.

31. *Id.* ¶ 12. The Panel, in its Operating Procedures, states that "any group of two or more people in the country where the Bank financed project is located," can file a request. *Operating Procedures, supra* note 2, art. II(A)(4)(a); *see infra* notes 109-13 and accompanying text (discussing the Bank and the Management's differing interpretations of this issue).

32. Resolution, *supra* note 1, ¶¶ 13, 16.

33. *Id.* ¶ 12.

34. *Id.*

35. *Id.*

36. Resolution, *supra* note 1, ¶ 13.

37. It should be noted that the restriction on procurement issues appears to be directed at requests brought by suppliers of goods and services to Bank funded projects or by losing bidders in procurement procedures. These complainants have other means of recourse. The situation with other interested parties who feel they have suffered harm as a result of procurement decisions is less clear. This issue has been raised in the second request for investigation. *See Rondonia Request, supra* note 7.

38. *Id.* ¶¶ 12, 14. A loan may be considered to be substantially disbursed when

C. PANEL RECOMMENDATION AND INVESTIGATION

Upon completion of this review, the Panel makes a recommendation to the Board about whether the Board should authorize an investigation of the issues raised in the request.³⁹ The Board then decides whether to accept or reject the recommendation. The Resolution establishing the Panel (the Resolution) specifies that the Panel must distribute its recommendation to the Executive Directors "within the normal distribution period,"⁴⁰ but does not specify the time period within which the Executive Directors must act on the Panel's recommendation. Nevertheless, the requester must be informed of the Board's decision within two weeks of the decision.⁴¹ The request, the Board's decision, and the Panel's recommendation are then made available to the public.⁴² The Resolution does not state whether the Bank Management's response to the request should be available to the public.⁴³

The Panel conducts the investigation according to the terms established by the Board.⁴⁴ In the course of an investigation, the Panel has access to all "pertinent" Bank staff, documents, and records.⁴⁵ The Resolution does not specify the scope of the Panel's access to this information or its ability to compel staff to provide information. At the end of the investigation, the Panel must submit its findings and recommendations to the Board and the President.⁴⁶ Within six weeks of receiving the report, the Bank Management submits its recommendation in response to the Panel's findings to the Board.⁴⁷

The Board then renders a final decision on the matter. There is no specified time period within which the Board must make this decision.

95% of the funds are distributed. *Id.* ¶ 14.

39. *Id.* ¶ 19.

40. *Id.* According to the Bank's General Council, the normal distribution period is three weeks. Shihata, *supra* note 6, at 73 n.75.

41. Resolution, *supra* note 1, ¶ 19.

42. *Id.* ¶ 25.

43. See *Operating Procedures*, *supra* note 2, at 13 (discussing the Bank Management's response to notification of receipt of a request). The Procedures are silent on whether Management's response should be made available to the public.

44. *Id.* at 17.

45. Resolution, *supra* note 1, ¶ 21.

46. *Id.* ¶ 22.

47. *Id.* ¶ 23.

The Board then informs the requester of its decision.⁴⁸ The Board's decision and the Panel's findings and report are made available to the public within two weeks of the Board's decision.⁴⁹

In addition to its reports on each complaint and investigation, the Panel must submit an annual report on its activities to the President and the Board. This report must be made available to the public.⁵⁰

II. THE ARUN III HYDROELECTRIC PROJECT⁵¹

The Arun III Hydroelectric Project (Arun III) contemplated the development of a 122 kilometer access road through the Arun valley to the proposed dam site;⁵² and, construction of a 201 MW hydroelectric power scheme, including a 68 meter dam and 122 kilometers of transmission lines.⁵³ The project was to be the first phase of a 402 MW power project. The total cost of the project was estimated to be US \$800 million.⁵⁴ The International Development Association (IDA) proposed to lend the Kingdom of Nepal US \$136.1 million to finance this project.⁵⁵

IDA also proposed to restructure an existing credit, "The Arun III Access Road Project," so that the funds available through this credit could be used to build the 122 kilometer access road to the hydroelectric project.⁵⁶ The original purpose of this latter credit, which was approved by the Board in 1989, was to fund the construction of an access road through the hills surrounding the Arun Valley to the future site of the Arun dam.⁵⁷ This plan had been abandoned and the project

48. *Id.*

49. Resolution, *supra* note 1, ¶ 25.

50. *Id.* ¶ 26.

51. *The Inspection Panel Report on Request for Inspection: Nepal: Proposed Arun III Hydro-Electric Project and Restructuring of the Arun III Access Road Project*, Request No.RQ 94/1, 3 (Dec. 16, 1994) [hereinafter *Panel Recommendation Report*].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Panel Recommendation Report*, *supra* note 51. The balance of the funds for the Arun III project would be provided by the Asian Development Bank, the Kreditanstalt für Wiederaufbau, the Government of France, the Swedish Agency for International Technical and Economic Cooperation, the Finnish International Development Agency, and other donors. These other agencies appear to have deferred to the Bank in the design and structuring of the project.

56. *Id.*

57. *Id.* The borrower on this loan was the Kingdom of Nepal. *The Inspection*

sponsors now planned to build the access road through the Arun Valley, rather than through the surrounding hills.

In order to prepare for construction of the originally planned hill road, the government of Nepal expropriated land and forced the resettlement of a number of people on the project route.⁵⁸ The borrower, however, never commenced construction of the hill road.⁵⁹ Thus, although the hill road project was abandoned, there were people who had been adversely affected by the actions taken to prepare for the construction of the hill road.⁶⁰

The total cost of the Arun project would have had a significant impact on Nepal's debt profile, and could have affected the amount of funds available for other development projects.⁶¹ The project therefore had important implications for the future development path of one of the world's poorest countries. It also raised important questions about the Bank's role and responsibility in funding infrastructure development.

Not surprisingly, the proposed Arun III project generated a great deal of controversy in Nepal and around the world. Those supporting the project contended that Nepal desperately needed new sources of energy⁶² and revenue.⁶³ Opponents to the project contended that the project would not produce affordable electricity for the people of Nepal; was so large and complex that it would crowd out other possible development projects that would benefit the poor in Nepal more directly; and would cause serious environmental problems.⁶⁴ In addition, the project's

Panel Investigation Report, Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit, 5 The Inspection Panel, World Bank Doc. Annex 1 (June 21, 1995) [hereinafter *Panel Report*].

58. *Panel Recommendation Report*, *supra* note 51, at 18.

59. *Id.*

60. *Id.*

61. Letter from Arun Concerned Group to The World Bank Inspection Panel (Oct. 24, 1994) (on file with the *American University Journal of International Law and Policy*) [hereinafter *ACG Letter*]. The total cost of the project would have exceeded Nepal's annual budget. It is important to note that the project expenditures would be spread over a number of years.

62. Only nine percent of Nepalese citizens have access to electricity. *Nepal: Arun III, Management Response to Request for Inspection*, 2 World Bank Doc. (Nov. 21, 1994) [hereinafter *Management Response*].

63. *ACG Letter*, *supra* note 61. The initial design of the Arun III project assumed that Nepal would sell much of the power produced by the Arun III project to India. *Id.* However, the appraisal report does not appear to base its projections on this assumption.

64. *Id.*

opponents claimed that cheaper and less damaging hydropower alternatives were available to Nepal.⁶⁵

A. THE ARUN REQUEST FOR INVESTIGATION

In October 1994, four citizens of Nepal, acting through the Arun Concerned Group (ACG), requested the Panel to investigate the proposed Arun III Hydroelectric Project.⁶⁶ The ACG filed the Request before the recently elected Government of Nepal had formally re-submitted its Request for IDA funding for the project.⁶⁷ The Request for inspection was therefore filed before IDA formally decided to lend money to the Arun project.

ACG claimed that the Bank, in planning and designing the Arun III project, failed to act in conformity with its operating rules and procedures.⁶⁸ In particular, the requesters alleged that:

- (1) The Bank did not adequately study alternatives to the proposed project and so had not fulfilled the basic criteria for project acceptability which are set out in Operational Policy 10.04,⁶⁹ regarding economic evaluation of the Bank's investment operations;⁷⁰
- (2) The Bank did not meet all the requirements set out in Bank Procedures 17.50,⁷¹ pertaining to the Project Information Document;⁷²
- (3) The Bank did not meet all the requirements set forth in Operational Directive 4.01⁷³ for an adequate environmental impact assessment, including the evaluation of alternatives, consultation with those affected by

65. *Id.*

66. *Id.* at 10.

67. The Government of Nepal was required to re-submit a request for funds to IDA because IDA had conditionally responded to Nepal's initial request for funds. IDA had informed Nepal that funds would only be available if it agreed to a stipulated increase in electricity tariffs for the energy generated by the project. The re-submission was required to indicate acceptance of this condition.

68. ACG Letter, *supra* note 61, at 2.

69. THE WORLD BANK, WORLD BANK OPERATIONAL POLICY 10.04: ECONOMIC EVALUATION OF INVESTMENT OPERATIONS (1994).

70. ACG Letter, *supra* note 61, at 2.

71. THE WORLD BANK, WORLD BANK PROCEDURES 17.50: DISCLOSURE OF OPERATIONAL INFORMATION (1993). A Project Information Document which gives basic information on the project is prepared for all planned Bank projects. It is a publicly available document which can be obtained from the Public Information Center. *See supra* note 25.

72. Request, *supra* note 8, at 4.

73. THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.01: Environmental Assessment (1991).

the project, and the evaluation of the cumulative environmental impact of all the planned phases of the project.⁷⁴

(4) The Bank violated the requirements for determining adequate compensation for involuntarily resettled people established in Operational Directive 4.30,⁷⁵ which discusses involuntary resettlement issues⁷⁶

(5) The Bank failed to ensure that the project would provide some benefits to indigenous communities in the project area as required by Operational Directive 4.20,⁷⁷ which deals with indigenous people.⁷⁸

Two of the four requesters lived in the project area. Both claimed to have been directly and adversely affected by the hill access road project. One of these two requesters complained of inadequate compensation for land surrendered to the project.⁷⁹ The other claimed that he lost title to his land, but had not yet received compensation from the government.⁸⁰

Interestingly, these two requesters asked the Panel to keep their identities secret. They informed the Panel that they were concerned about their safety if it became known that they had filed the Request.⁸¹ They authorized the other two requesters to represent them before the Panel.⁸² The Panel respected their request, and throughout the Arun III proceedings, kept their identity secret from the Bank staff, the Executive Directors, and the Nepalese government.

The other two requesters do not live in the project area, but claimed that the scope of the proposed project was so extensive that it would affect their interests as citizens of Nepal.⁸³ They argued that the effect of the project on the Nepalese economy would be to crowd out other possible development projects and to create undue risks to the future of Nepal.⁸⁴

74. Request, *supra* note 8, at 5.

75. THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.30: Involuntary Resettlement (June 1990) [hereinafter OD 4.30].

76. Request, *supra* note 8, at 6.

77. THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, Operational Directive 4.20: Indigenous Peoples, ¶ 2 (Sept. 1991) [hereinafter OD 4.20].

78. Request, *supra* note 8, at 7.

79. Request, *supra* note 8, at 101.

80. *Id.* The second requester still retained possession of his land because the government of Nepal and the Bank suspended the hill access road project.

81. *Panel Recommendation Report, supra* note 51, at 3.

82. *Id.*

83. *Id.*

84. Request, *supra* note 8, at 8.

B. THE BANK RESPONSE

1. Applicable Bank Operating Rules and Procedures

The Bank Management did respond to the complaint within the requisite twenty-one days.⁸⁵ The Management disputed the allegations of the ACG and contended that the Bank staff had acted in compliance with the applicable operational policies and procedures.

An interesting issue the Bank Management's response raises is the choice of the applicable operational policies and procedures. The Bank Management contended that the Panel should evaluate the staff's performance in terms of the rules in force at the time that the Bank undertook the challenged action and not in terms of the rules currently in force.⁸⁶ The Management claimed that, in some instances, the operating rules cited by the ACG were not the applicable rules in force at the time of the alleged wrongful acts.⁸⁷

As a legal matter, this argument is persuasive. *Prima facie*, it does not seem reasonable to hold the Bank staff to standards that did not apply at the time of the challenged acts or omissions. The problem with this argument is that these operating rules and procedures in effect prior to 1993, when the Bank adopted its present information disclosure policy, may not be available to the public.⁸⁸ Therefore, if the Bank were to adopt Management's argument, it would seriously weaken the ability of potential requesters to seek investigations of projects that were initiated prior to 1993. In order to successfully bring such a request, the potential requester would need to ascertain the applicable operating rules at that relevant time *and* be able to obtain copies of these rules.⁸⁹ The Bank's

85. *Management Response*, *supra* note 62, at 8.

86. *Id.* at 8; *Panel Recommendation Report*, *supra* note 51, Annex A.

87. *Management Response*, *supra* note 62, at 9 n.16.

88. To date, the World Bank has not applied its new information disclosure policy retroactively. This means that only those operational policies and procedures that were in force at the time the new policy became effective are publicly available. THE WORLD BANK, THE WORLD BANK POLICY ON DISCLOSURE OF INFORMATION (containing the current policies on information disclosure).

89. While the problem is one that will presumably be resolved through the passage of time, it is a significant issue. The time that can lapse between the identification of a project and the moment that the project loan becomes substantially disbursed (and therefore outside the scope of the Panel's jurisdiction) can be as much as ten or more years. WARREN C. BAUM & STOKES M. TOLBERT, *INVESTING IN DEVELOPMENT: LESSONS OF WORLD BANK EXPERIENCE* 580-84 (1985). Consequently, there are a significant number of Bank projects which could potentially be the subject of requests

argument therefore should not be determinative unless it is linked to a more transparent Bank information disclosure policy. In the absence of such a policy, the Bank staff should not be allowed to rely on secret operating policies and procedures to avoid a Panel investigation.

Fortunately, the Bank Management did not premise its response on this technicality. Instead, it sought to demonstrate that the Bank did comply with the rules and procedures cited in the Arun Request.⁹⁰ Significantly, the Panel, in its review of the complaint, relied in all critical areas on the rules cited in the ACG Request.

2. Confidentiality of the Bank Response

A second important issue the Bank raised is whether its response is a publicly disclosable document or not.⁹¹ The Bank Management insisted that the Panel treat the response as confidential and not release it to the ACG or the public.⁹² The Management's demand was technically consistent with the Panel's procedures. The Resolution merely requires the Bank to release to the public the request for investigation, the Panel's recommendation, and the Board's decision.⁹³ It does not discuss the Bank response and so cannot be construed as expressly requiring or prohibiting release of the Bank's response.⁹⁴ Furthermore, the Panel's Operating Procedures provide that any party may request the Panel to keep information confidential.⁹⁵

The Bank Management's insistence on the confidentiality of its response gives two grounds for concern. First, it denies requesters access to the Bank's response and an opportunity to address the issues raised therein. Second, the Management's interest in keeping its response confi-

for inspection but for which the potential requesters may be unable to identify the applicable operating policy or procedure and to obtain a copy of the policy or procedure.

90. *Management Response*, *supra* note 62, at 6-8. The Bank Management, disputed the ACG's claim regarding the Public Information Document (PID). *Id.* The Management argued that Annex A to Bank Procedure 10.00 (which discusses in more detail than the information disclosure policy—Bank Procedure 17.50, what information should be contained in a PID) was issued only after the release of the Arun III PID. *Id.* Consequently, the Management contended, it was not applicable to the Arun situation. *Id.*

91. *Panel Recommendation Report*, *supra* note 51, Annex A.

92. *Id.*

93. Resolution, *supra* note 1, ¶ 25.

94. *Id.*

95. *Operating Procedures*, *supra* note 2, ¶ 63.

dential was selective. The Management provided copies of its response to the Executive Directors before the Panel completed its review of the complaint. This meant that the Executive Directors did not receive the Management's response from the Panel as envisaged by the Panel Procedures. In addition, they received the Management Response before they had formally received the Panel's recommendation or the Request. Since the Executive Directors make the final decision on whether or not there will be an investigation,⁹⁶ the Management's actions amounted to an extra-procedural attempt to influence the Board's decision on the Request for an investigation.

Executive Directors are officials of the Bank. Consequently, it is possible for the Bank Management to contend that showing the Bank response to the Executive Directors did not breach the confidentiality of the response. It was merely sharing the information with other Bank officials.

This argument, however, fails to recognize that by creating the Panel, the Executive Directors, in effect, created a new role for themselves. They are now the decision-makers in a procedure that is designed to investigate the performance of Bank staff. Hence, since the creation of the Panel, the Executive Directors act as both the directors of the Bank and the final decision-makers in the Panel proceedings.⁹⁷

In the Resolution, the Board established procedures to govern the form of the communications between the Management and the Board when they are acting in their capacity as decision-makers in the panel process.⁹⁸ These procedures do not provide for extra-procedural communications between the Board and the Bank Management and staff.⁹⁹

C. RECOMMENDATION OF THE PANEL

The Panel based its recommendation to the Executive Directors on the Request; the Bank response; additional information and clarifications that the Panel sought from the Bank and the requesters; and the site visit conducted by one of the Panelists.¹⁰⁰ The Panel's Recommendation Re-

96. *Id.* at 16.

97. For discussion on the related issue of the role of the Legal Department in the Panel Process, see *infra* notes 311-22 and accompanying text.

98. Resolution, *supra* note 1.

99. See *infra* notes 306-11 and accompanying text (discussing the propriety of *ex parte* communications).

100. See *Panel Recommendation Report*, *supra* note 51, at 3 (describing the location of the site). Mr. Richard Bissell conducted the site visit. *Id.*

port reviews all the issues raised in the Request and the Management's response, and provides a rationale for the Panel's recommendation to the Board.¹⁰¹ In the Recommendation Report, the Panel recommends that the Executive Directors authorize an investigation of the environmental, indigenous people, and involuntary resettlement issues that the requesters raised.¹⁰²

The Recommendation Report does not endorse an investigation of the Bank's failure to comply with Operational Directive 10.04, regarding economic analysis of the project.¹⁰³ The Panel notes in the Recommendation Report, however, that the allocation of attention and effort to the assessment of numerous alternative project designs is a question of judgment.¹⁰⁴ Nevertheless, the Panel suggests that the Bank should have conducted a more careful analysis of alternatives to the chosen project.¹⁰⁵ The Panel, however, concluded that it would serve no useful purpose for the Panel to duplicate the work already done by the Bank's staff.¹⁰⁶

1. Follow-Up to the Recommendation Report¹⁰⁷

The Panel's Recommendation Report led to meetings between the Panel and the Board, and the Panel and senior Bank staff. These meetings generated a debate over who is eligible to file requests for inspection with the Panel. The Bank Management in its response to the Request did not challenge the eligibility of the ACG to file its Request. Nevertheless, the Panel hints in its Recommendation Report that there may be some grounds for concern in this regard.¹⁰⁸ The Board howev-

101. *Id.* at 5.

102. *Id.* at 3.

103. *Id.*

104. *Panel Recommendation Report, supra* note 51, at 3.

105. *Id.* at 7.

106. *Id.* at 6.

107. This section is based on discussions with people with detailed knowledge of these meetings.

108. *Panel Recommendation Report, supra* note 51, at 4. The Panel states that "the serious nature of the substance of the Request as a whole and its timing in relation to the project process outweighed outright rejection of the Request on the grounds of doubts about the standing of the requestors and incomplete compliance with formal procedures." *Id.*

In this regard, it should be noted that the two requesters who lived in the Arun Valley were differently affected by the Hill Road credit and the proposed Arun III project. *See supra* notes 79-84 and accompanying text (discussing the nature of the

er explicitly raised this issue.

The key question in these meetings was: does paragraph twelve in the Resolution, which provides that the Panel shall receive requests for inspection filed by "an affected party . . . which is not a single individual (i.e., a community of persons such as an organization, association, society or other group of individuals)"¹⁰⁹ mean that any two or more affected people can file a request for investigation?

In order to resolve this issue, the Executive Directors requested a legal opinion from the Bank's General Counsel.¹¹⁰ The General Counsel, in complying with the Request, provided the Board with an opinion that discusses the requirements for eligibility in general terms, but does not specifically address the Arun case.

2. General Counsel's Legal Opinion

In the opinion, the General Counsel argues that "a number of persons each acting in his own, single capacity"¹¹¹ cannot submit a complaint. Instead, he claims that only a group that has a "commonality of interests"¹¹² is eligible to bring a request for investigation. The General Counsel does not explain how to distinguish a group with a "commonality of interests" from one that is merely a collection of individuals, each of whom is differently affected by the proposed or ongoing Bank project, but who share a common interest in having the Panel investigate the project in question. It appears, however, that the ACG requesters

complaints). One of the requesters actually had his land taken and received allegedly inadequate compensation. *Panel Recommendation Report, supra* note 51, at 3. The other lost title to, but not possession of, his land. *Id.* He also did not receive any compensation from the government of Nepal. *Id.* The other two requesters did not live in the Arun Valley and claimed that the size of the project meant that it would affect all Nepali citizens. *Id.* The impact of the project on these two requesters may not be identical because of their physical location and life circumstances. *Id.* The Panel appears to have viewed the first two claimants as representative of classes of people affected by the project. As such, the Panel viewed these claimants as sharing a commonality of interest with the class of potential claimants.

109. *See* Resolution, *supra* note 1, ¶ 12 (describing who may file a request for inspection).

110. *See* Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection: A Memorandum of the Senior Vice President and General Counsel (Jan. 3, 1995) [hereinafter Shihata Legal Opinion] (copies available at the World Bank's Public Information Center) (stating the legal opinion of Doctor Ibrahim F.I. Shihata, General Counsel of the World Bank).

111. *Id.* at 4.

112. *Id.*

would not meet this "commodity of interest" standard because the project would have affected each individual complainant in a different manner. Consequently, they cannot argue that they have a common interest in the project which they are jointly seeking to protect in the Panel process.

The General Counsel's opinion raises a number of concerns. First, the opinion does not refer to the Panel's Operating Procedures or to paragraph twenty-four of the Resolution which appears to authorize the Panel to make decisions on procedural matters. In fact, it contradicts the Panel's Operating Procedures which do not require the requesters to demonstrate a community of interest. The Operating Procedures merely stipulate that "any group of two or more people" may file a complaint.¹¹³

Second, the effect of the General Counsel's opinion would be to limit access to the Panel. If the Board adopts the General Counsel's advice on this issue, it would not be sufficient for potential requesters to claim that they have all been affected by the same project, albeit, in different ways, and that they share a common interest in having the project investigated. Instead, complainants would need to demonstrate that they share the requisite "commonality of interests," as defined by the Bank, and that an act or omission of the Bank has, or is likely to, affect these common interests.

Third, even if potential requesters are able to satisfy the "commonality of interests" standard, they will be hampered by the requirement that they must communicate their concerns to Bank officials before they can file a request for inspection.¹¹⁴ This requirement suggests that the common interest of the group must have been conveyed to the Bank Staff Management. To satisfy this requirement, the requesters would have to possess sufficient resources and organizational capacity to be able to identify their common interests and convey their shared concerns to the Bank. The General Counsel's interpretation would therefore impose an almost impossible burden on the many poor and uneducated¹¹⁵ people

113. See *Operating Procedures*, *supra* note 2, ¶ 4(a) (listing the persons who may file a request). Interestingly, the General Counsel previously stated that the drafting history of the Resolution shows that the Board decided to amend the draft Resolution to exclude requests filed by certain individuals only to avoid the Panel receiving frequent, frivolous requests that would cause unwarranted disruption of its work. Shihata, *supra* note 6, at 56, 95-96.

114. See Resolution, *supra* note 1, ¶ 13 (explaining how the Panel must satisfy itself before an inspection request is filed).

115. In this context, "uneducated" means "lacking in formal school education."

who are directly affected by Bank operations.

In addition to its impact on people affected by the project, it is not clear that the General Counsel's opinion serves the interests of the Bank. A major benefit of the Panel is that it provides the Board with a mechanism for a timely and independent review of the Bank staff's acts or omissions. This mechanism can function effectively only if persons with meritorious requests for inspection are assured of easy access to the Panel and timely investigation of the merits of their complaint. The General Counsel's interpretation of the eligibility requirement threatens to turn this mechanism into one that is characterized as much by technical arguments over procedure and jurisdiction as by an investigation of the merits of the claim.

Evidence suggests that this may be occurring already. In all three requests for inspection filed since the Arun Request, the Bank has challenged the eligibility of the requesters.¹¹⁶ Additionally, the requesters deemed it prudent to engage a lawyer to help prepare the Request in all three cases. These developments threaten to place the Panel process outside the reach of those who need it most.

D. THE BOARD DECISION

The Board of Executive Directors met on February 2, 1995, to consider the Panel's recommendation of an investigation.¹¹⁷ At the meeting, the Board adopted the Panel's recommendations and authorized the Panel to investigate:

whether IDA's policies and procedures have been observed with respect to environmental assessment, indigenous people and involuntary resettlement, in terms of (1) the consistency of the determination of the road alignment with Operational Directive 4.01 (Environmental Assessment); (2) the consistency of the treatment of indigenous peoples, if any, with OD [Operational Directive] 4.20 (Indigenous Peoples), and (3) consistency of arrangements for compensating seriously affected families for land acquired by Government with OD [Operational Directive] 4.30 (Involun-

116. The treatment of the second request to the Panel involving the Planaflo project in Rondonia state in Brazil provides the most telling support for this observation. The Management response to this Request raised a series of complex technical issues related to the eligibility of the requesters and the nature of the injury they have suffered. *See supra* note 7; *see also Tanzania Request, supra* note 7; *Ethiopia Request, supra* note 7.

117. *World Bank Authorizes Inspection of Nepalese Project*, WORLD BANK PRESS RELEASE, Feb. 2, 1995.

tary Resettlement).¹¹⁸

The Board also instructed the Panel to determine, "taking into account the complexities of the issues involved, . . . whether the requirement of the above-mentioned Operational Directives were observed in substance."¹¹⁹

The Board's instruction regarding an examination of the staff's compliance with the Operational Directives should be contrasted with its observations on the eligibility issue. The Board suggests that the Panel needs to establish clearly the eligibility of requesters and to observe strictly the provisions of the Resolution.¹²⁰ The Board, therefore, appeared to adopt the advice of the General Counsel in this regard.

The Resolution of the Board, authorizing the investigation, instructs the Panel to incorporate into its investigation information and studies provided by the Government of Nepal, the Bank, and other co-financiers, "as well as any remedial measures agreed by Nepal and the Bank"¹²¹

Finally, according to the Resolution, the Executive Directors note that the Panel did not recommend an investigation of the economic alternatives to the Arun III project, as had been requested by the ACG.¹²² The Resolution states that "[m]ost Directors accepted that alternatives were sufficiently examined and the choice of the most appropriate alternative is ultimately a matter of judgement"¹²³ The careful wording of the Resolution suggests that all the Directors did not share this view and that some of the Directors may have been willing to authorize an investigation of this issue.

E. SUBSEQUENT DEVELOPMENTS

In March 1995, the Government of Nepal formally requested IDA funding for the Arun III project.¹²⁴ At approximately the same time, the Panel completed the first phase of its investigation. This phase consisted of interviews with the pertinent Bank staff and consultants, and a

118. *Id.*

119. *Id.*

120. *Id.*

121. *World Bank Authorizes Inspection of Nepalese Project*, *supra* note 117.

122. *Id.*

123. *Id.*

124. *Nepal Government Approves Controversial Dam Project* (Japan Economic Newswire), Mar. 3, 1995.

desk study of the documents relevant to the project.¹²⁵ In April 1995, IDA announced that it would send a mission to review the Arun III project.¹²⁶ In light of this development, the Panel notified the Executive Directors and the Bank President that it would delay its field investigation until after the IDA mission had completed its discussions with the Government of Nepal.¹²⁷ On May 23, 1995, the Bank Management sent the Panel a memorandum discussing the findings and recommendations of the April 1995 mission.¹²⁸ The memorandum mentions a number of proposed remedial measures that were designed to bring the project into compliance with the relevant IDA policies.¹²⁹

III. THE PANEL'S INVESTIGATION

Following the receipt of the Bank Management's memorandum and pursuant to the consent of the Government of Nepal, the Panel conducted a field investigation in late May 1995.¹³⁰ The investigation's objectives were to confirm the findings of the Panel's desk study and to review the Bank Management's proposed remedial measures in terms of the requirements of the relevant Operational Directives and the Executive Directors' resolution authorizing an investigation.¹³¹ The Panel's investigation included a visit to the project area and meetings with officials of the Government of Nepal, the requesters, representatives of other aid agencies and non-governmental organizations, and thirteen public meetings in towns and communities that would be affected by the proposed project.¹³² Over one thousand people attended these meetings.¹³³ In addition, the Panel interviewed "and exchanged views with . . . a wide range of people."¹³⁴ It is therefore probable that the Panel's final report rests on more extensive consultations with the peo-

125. *The Inspection Panel Investigation Report: Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit-2029-NEP*, June 21, 1995, at 2 (available from the World Bank's Public Information Center) [hereinafter *Investigation Report*].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Investigation Report*, *supra* note 125, at 2.

130. *Id.* Panel members Messrs. Richard E. Bissell and Alvaro Umaña Quesada conducted the mission, which lasted from May 27, 1995, to June 1, 1995. *Id.*

131. *Id.*

132. *Id.*

133. *Investigation Report*, *supra* note 125, at 2.

134. *Id.*

ple that the project would most likely affect than any other Arun III study undertaken by the Bank. Following this investigation, the Panel issued its report to the Board on June 21, 1995.¹³⁵

Based on its investigation and on the recommendations of the April 1995 mission to Nepal, the Panel concludes that IDA is "moving towards and intends to comply in substance" with the Operational Directives dealing with Environmental Impact Assessment, Involuntary Resettlement, and Indigenous Peoples.¹³⁶ The Panel, however, found problems with the Bank staff's compliance with specific aspects of each of the applicable Operational Directives.¹³⁷ The Panel's findings on each of the ODs are discussed below.

A. OPERATIONAL DIRECTIVE 4.01: ENVIRONMENTAL IMPACT ASSESSMENT

Operational Directive 4.01 delineates factors that the Bank staff should address in an environmental impact assessment.¹³⁸ Specifically, a project environmental assessment should consider, *inter alia*, the following issues: direct and indirect environmental impacts; alternative investment sites, technologies, and designs; preventive, mitigative, and compensatory measures; and environmental management, training and monitoring.¹³⁹ Additionally, an environmental mitigation or management plan should incorporate preventive and compensatory measures.

In its Report, the Panel notes that the Arun III project did not follow the comprehensive approach required by the Operational Directives.¹⁴⁰ Instead, it followed "a piece-meal approach that . . . did not fully comply with OD [Operational Directive] 4.01."¹⁴¹ The Panel bases its conclusion on two findings. First, the Panel found the Bank was willing to proceed with the appraisal and negotiation of the Arun III project before completion of the environmental assessment of the valley route for the dam access road.¹⁴² Second, the Panel expressed concern that the nec-

135. *Id.* at 1.

136. *Id.* at 5.

137. *Investigation Report*, *supra* note 125, at 5.

138. *See Management Response*, *supra* note 62, at 9 (describing the requirements of Operational Directive 4.01); *see also Panel Report*, *supra* note 57, at 22 (listing the proposed issues in a project specific environmental assessment).

139. *Panel Report*, *supra* note 57, at 22-23.

140. *Id.* at 23.

141. *Id.*

142. *Id.*

essary institutional structures for monitoring the environmental impacts of the project would not be in place before project implementation and construction began.¹⁴³

These two findings are significant. The former suggests that the Bank was willing to lend to a project before it adequately accounted for the environmental costs of the project. This creates the risk that the Bank could have loaned money to a project that proves to be less economically and environmentally feasible than expected.

The Panel's Report indicates that this risk was not insubstantial. In the course of its investigation, the Panel found that the Bank did not pay sufficient attention to certain key environmental concerns in the project, including forest conservation and management, and the risk of natural catastrophic events such as flooding and road washouts.¹⁴⁴ The Panel reported that the IDA management addressed these issues after the April 1995 mission.¹⁴⁵

The Panel also found that the project would require IDA (or some other project financier) to provide contingency financing in the event that some of these risks occurred.¹⁴⁶ The Report, however, does not indicate if, following the April 1995 mission, IDA management addressed the issue of these contingency funds.¹⁴⁷

The finding regarding institutional structures suggests that the Bank may be paying more attention to arranging loans than to ensuring implementation of sustainable high quality projects. While this raises an issue about the Bank's modus operandi,¹⁴⁸ it is particularly pertinent in a poor country with a history of problems in managing large and complex projects.¹⁴⁹

The project implementation issue is significant in the case of Arun because the Bank relied on a precedent-setting and complex Regional Action Plan (RAP) to deal with the environmental and resettlement impacts of the project.¹⁵⁰ The purposes of the RAP included the fol-

143. *Panel Report, supra* note 57, at 25-27.

144. *Id.* at 31.

145. *Id.* at 30-31.

146. *Id.* at 33.

147. *Panel Report, supra* note 57, at 32-37.

148. See Willi A. Wapenhans et al., Report of the Portfolio Management Task Force, The World Bank, July 1, 1992 (discussing the problems with the "loan approval" culture in the Bank and the proposed remedies).

149. See *infra* notes 204-09 and accompanying text (discussing the Marsyangdi project).

150. *Panel Report, supra* note 57, at 27, 35.

lowing: to strengthen the Nepali government's administrative capacity to deal with the rapid expansion in the number of people who will need to be resettled as a result of this project; to implement a program to strengthen government institutions; to undertake women's programs, including education, and the development of micro-enterprises and co-operatives; to undertake environmental conservation and research activities; to implement a program to preserve sacred sites, monuments and folk heritage; and to take advantage of new economic opportunities.¹⁵¹ The Bank, in the Staff Appraisal Report, states that the RAP is "integral" to the Arun III project.¹⁵²

The Panel concluded that the RAP constitutes "an innovative approach . . . which has the potential to become either a model for future work or, if badly implemented, a serious weakness of the entire Arun III project."¹⁵³ It added that the RAP remains "an extremely ambitious undertaking," containing numerous specific measures to deal with a variety of complex issues.¹⁵⁴ The Panel expressed "serious concern" about the heavy burden placed on the RAP.¹⁵⁵ It observed that IDA lacked experience in overseeing such a plan, and that the borrower's "widely recognized lack of institutional experience" would make implementation of this plan difficult.¹⁵⁶ The Panel also noted that RAP was to be funded "almost exclusively" from resources provided by other donors.¹⁵⁷ The Panel observed that this implies that "a major burden of compliance with IDA policies falls on project components not financed by IDA."¹⁵⁸

Given the Bank's own view of the centrality of the RAP to the success of the Arun III project, the Panel's findings regarding institutional structures is surprising. It suggests that despite the Bank's professed concern with environmental issues and its claim that the Arun III project had been thoroughly appraised, the Bank failed to comply with its own policies and procedures with regard to a critical component of the project.

151. *Id.* at 28.

152. *Id.*

153. *Id.* at 35.

154. *Panel Report, supra* note 57, at 35.

155. *Id.* at 29.

156. *Id.*

157. *Id.*

158. *Panel Report, supra* note 57, at 29.

B. OPERATIONAL DIRECTIVE 4.30:
INVOLUNTARY RESETTLEMENT

The Panel noted in its analysis of the resettlement issue that the policy context for this project is Operational Manual Statement 2.33 and not Operational Directive 4.30, which was issued after IDA and the government of Nepal reached agreement on the hill road credit.¹⁵⁹ It concluded, however, that “in spirit and major substance, the Operational Directive and OMS [Operational Manual Statement] were close to each other.”¹⁶⁰ Furthermore, the Panel indicated that at the applicable time, the Bank Management knew of the requirements and attempted to meet the standards of Operational Directive 4.30 in its handling of the resettlement issue.¹⁶¹ Consequently, the Panel applies the standards of Operational Directive 4.30 in its investigation.¹⁶²

The Panel’s investigation focuses primarily on IDA compliance with Operational Directive 4.30 in the case of the IDA credit for the hill access road.¹⁶³ At the end of its investigation, the Panel concluded that “IDA failed to observe in substance the policy requirements for supervision of resettlement and subsequently failed to enforce covenants in the Credit Agreement.”¹⁶⁴ In its Report, the Panel also suggests that IDA experienced problems in complying with Operational Directive 4.30 with regard to planning the valley route for the access road.¹⁶⁵ In order to reach this finding, the Panel developed an interpretation of Operational Directive 4.30 which challenges the Bank’s and the Board’s understanding of specific aspects of the Operational Directive.¹⁶⁶

The Panel begins its analysis by identifying the following four criteria

159. *Id.* at 6. Operational Manual Statement (OMS) 2.33 constituted the Bank Operational policy applicable to resettlement issues before Operational Directive 4.30 became effective. *Id.* Operational Directive 4.30 issued on June 29, 1990, and the credit was signed in 1989. *Id.*

160. *Id.*

161. *Id.* at 9. The Panel observes that “[t]he Bank can take credit for having applied the substance of OD 4.30 to the design of the road project when there would have been legal shelter not to do so.” *Id.* Interestingly, the Bank Management attempts to argue in its submission to the Panel during the recommendation phase of the proceedings that only OMS 2.33 is applicable to this project. *See supra* text accompanying notes 85-90 (discussing the Bank’s response to the Request).

162. *Panel Report, supra* note 57, at 6.

163. *Id.* at 6-10.

164. *Id.* at 34.

165. *Id.* at 19-20.

166. *Panel Report, supra* note 57, at 21.

for determining compliance with Operational Directive 4.30:

[(1)] Does the project adequately recognize the range of economic, social and environmental problems that will affect people displaced by the project?

[(2)] Does the project deal with the "long term" nature of the hardship and damage that the project may cause?

[(3)] Are the compensatory measures appropriate?

[(4)] Are the compensatory measures carefully planned and likely to be carried out?¹⁶⁷

The Panel notes that, in order to investigate the Bank's compliance with Operational Directive 4.30, it needs to identify which people qualify for the treatment that the Operational Directive prescribes.¹⁶⁸ The Panel's discussion of this issue raises a number of interesting points. First, the Panel addressed the size of the forced resettlement.¹⁶⁹ Operational Directive 4.30 establishes two different standards for compensation based on the scale of the resettled population.¹⁷⁰ According to paragraph four of the Operational Directive, "[w]here large scale population displacement is unavoidable, a detailed resettlement plan, timetable and budget are required."¹⁷¹ A footnote to the paragraph states that in cases where "only a few people (e.g. about 100-200 individuals) are to be relocated, appropriate compensation for assets, logistical support for moving and a relocation grant may be the only requirements."¹⁷² Thus, while the Operational Directive requires the Bank staff to ensure that the borrower is planning to render compensation to all resettled people, it requires the Bank staff to scrutinize the resettlement plan more carefully in the case of a "large scale" resettlement.¹⁷³ It also creates a higher standard for an acceptable resettlement plan in the case of "large scale" resettlements than in the case of relocations of a "few people."¹⁷⁴

The Panel notes that some observers contend that the approximately 1000 families to be resettled in the Arun case are insignificant compared

167. *Id.* at 6.

168. *Id.* at 31.

169. *Id.* at 1-2.

170. OD 4.30, *supra* note 76.

171. *Id.* ¶ 4.

172. *Id.* ¶ 4 n.8.

173. *Id.* ¶ 4.

174. OD 4.30, *supra* note 76, ¶ 4. It should be noted that in both cases the OD places the primary burden of developing the resettlement plan and establishes compensation on the borrower. *Id.* ¶ 20.

with the scale of resettlement in projects such as the Narmada dam project.¹⁷⁵ The Panel concludes that the scale of resettlement in Arun easily exceeds a "few people" because in Operational Directive 4.30 there are substantially more people being resettled in the project than the 100-200 people described as a "few people."¹⁷⁶ Thus, the Panel applied the higher standard applicable to "large scale" resettlements in its investigation of the Bank's compliance with paragraph four of the Operational Directive.¹⁷⁷

This decision of the Panel establishes a precedent which should guide all Bank staff in the future implementation of Operational Directive 4.30. Consequently, unless the Bank or the Board takes an explicit countermanning measure, the Bank staff should apply the "large scale" resettlement standard to all resettlements involving more than two hundred people.

The Bank's effort to convert all Operational Directives into Operational Policies, Bank Procedures and Good Practices will affect the precedents set by the Panel under the Operational Directives.¹⁷⁸ Nevertheless, in the absence of a clear break in policy, the Panel's finding should influence the interpretation of the new Operational Policy.

A second issue the Panel discussed is the Board's instruction to the Panel to focus its investigation on the impact of the resettlement plan on "seriously affected people."¹⁷⁹ The Panel began its consideration with the following observation: "[b]y specifying a focus on 'seriously affected people' the Board has created a category that does not exist in OD [Operational Directive] 4.30 and, indeed, is not addressed in the Bank's current principal guide to the subject, *Resettlement and Development* (1994)."¹⁸⁰ The Panel refused to read a distinction between different categories of affected people into the Operational Directives.¹⁸¹ Rather, it suggested that the Board's distinction is a compromise with the borrower to limit the application of the policy to a minority of those losing

175. At least 100,000 people are expected to be forcibly resettled in the Narmada Dam Project. See D. MORSE & T. BERGER, *SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW* (1992).

176. *Panel Report*, *supra* note 57, at 7.

177. *Id.* IDA, in fact, required a formal resettlement plan as part of the Arun III project design. *Id.*

178. See *supra* note 24 and accompanying text.

179. *Panel Report*, *supra* note 57, at 7-8.

180. *Id.* at 7.

181. *Id.*

their land.¹⁸² Thus, on this issue as well, the Panel engaged the Board in a dialogue on the interpretation of the applicable Operational Directives and, in so doing, establishes a precedent which should help the Bank staff to understand the nature of their responsibilities under Operational Directive 4.30.

A third specific "scope" issue the Panel considered is whether Operational Directive 4.30 requires the Bank to consider the project's specific impact on women.¹⁸³ The Panel concludes that the Operational Directives does establish such a requirement.¹⁸⁴ The Panel reasons that women are a separate class of affected people who are often invisible to monitors because the project's impact on them, occurs within the household framework.¹⁸⁵ Consequently, the Panel concluded that an adequate assessment of the resettlement plan must include an examination of the impact of the project on women.¹⁸⁶ The Panel's investigation of this aspect discovered that "[i]n the context of the Arun projects, only token attention is given to women."¹⁸⁷

The Panel's willingness to provide reasoned interpretations of the language in the Operational Directives is an important development that, if encouraged, should benefit all stakeholders in the Bank. It contributes to a jurisprudence of the Bank's operating law and policies,¹⁸⁸ which will help both the Bank staff and other Bank stakeholders to understand the procedures and standards of conduct established by the Bank's operating rules and policies.¹⁸⁹ This will improve both the transparency and the accountability of the Bank's operations.¹⁹⁰ In addition, the Panel's interpretations will discourage any Bank efforts to implement the operating rules and procedures through *ad hoc* and unexplained interpretations of the Operational Directives.¹⁹¹

The next issue the Panel focused on was the problems the project

182. *Id.*

183. *Panel Report, supra* note 57, at 8-9.

184. *Id.* at 9.

185. *Id.* This conclusion is surprising in light of the Bank's often expressed concern with gender issues.

186. *Panel Report, supra* note 57, at 8-9.

187. *Id.* at 8-9.

188. Bradlow, *supra* note 6, at 605-12.

189. *Id.* at 605-12; Bradlow & Schlemmer-Schulte, *supra* note 6, at 404.

190. See IBRAHIM F. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS* (Franziska Tschofen & Antonio K. Parra eds., 1991) (discussing the importance of accountability and transparency in good governance).

191. Bradlow & Schlemmer-Schulte, *supra* note 6, at 403-06.

causes for the affected people.¹⁹² The Panel reports that IDA's April 1995 mission discovered families "seriously affected" by the access road project who sought rehabilitation but did not receive assistance.¹⁹³ The inspectors noted that the uncertainties caused by the change in the access road alignment adversely affected as many as 1400 families, including the two people who filed the Request.¹⁹⁴ The Panel predicts that there may be more families adversely affected by the project.¹⁹⁵ In addition, the Panel asserts that "although necessary both for those displaced and for a large portion of the Arun Valley population, provision for access to jobs/training is not adequately addressed."¹⁹⁶

The fourth issue the Panel addressed was the adequacy of the compensation the borrower provides to the affected people.¹⁹⁷ The Panel criticized IDA for not paying adequate attention to this issue.¹⁹⁸ It pointed out that Bank experience with compensation for tribal or minority groups demonstrates that compensation purely in the form of money is unsatisfactory.¹⁹⁹ Such groups often need compensation that is in the form of new land, jobs, and training.²⁰⁰ The Panel concluded that:

[f]rom virtually all writings, it was essential for IDA to insist on adequate non-cash compensation . . . and yet when land was acquired on the Hill route, the only compensation identified so far was cash—no land, no jobs, and no training. The risk is that same tragedy could emerge in the valley route as well.²⁰¹

Based on this report, one is forced to conclude that the risk of inadequate compensation is substantial. The project design calls for the Bank to help the government increase its capacity to manage the rehabilitation of displaced people "almost from the ground up."²⁰² After reviewing

192. *Panel Report, supra* note 57, at 34.

193. *Id.*

194. *Panel Report, supra* note 57, at 34.

195. *Id.* The mission found that the Government of Nepal compensated most of the 1635 families who lost their land to the hill access road. *Id.* These families are not the same as those referred to in the text. *Id.*

196. *Id.*

197. *Id.* at 9-10.

198. *Id.*

199. *Id.*

200. *Panel Report, supra* note 57, at 9-10.

201. *Id.* at 9.

202. *Id.* at 10. The Panel notes the serious deficiencies in the applicable legal framework and the efforts of the Bank and the government of Nepal to draft ad hoc guidelines to deal with this issue. *Id.* The government carefully drafted the guidelines

the Bank and the borrower's efforts in this regard, the Panel expressed concern about the Nepali Government's ability to develop this capacity quickly enough to handle the problems the Arun III project could potentially cause.²⁰³

The Panel's concern does not seem unwarranted in light of the Bank's and the borrower's experience in the Marsyangdi Hydro Electric Project,²⁰⁴ an IDA-funded dam project located in Nepal.²⁰⁵ This project, negotiated by the government of Nepal and IDA, was to construct a 69 MW facility. It involved the resettlement of over 200 families who were affected by the government's acquisition of their land.²⁰⁶ Covenants in the project loan agreement stipulate that the Government of Nepal should adopt and implement a resettlement program satisfactory to the Bank before a specified date.²⁰⁷ The Bank failed to enforce this provision and the project was completed well in advance of implementation of the resettlement plan.²⁰⁸ In fact, while the Panel Report states that a compensation plan was eventually developed, it does not state whether the plan was ever adequately implemented.²⁰⁹

The relevance of the Marsyangdi experience should not be underestimated. The 1994 Bank-wide review of resettlement refers to a Bank decision "that the Bank will not finance any new project involving resettlement for a borrowing agency that is not living up to its existing commitment for resettlement in an ongoing project."²¹⁰ Unfortunately, it does not appear that the Bank took this decision into account in the Arun case.

The fifth issue the Panel considered was whether compensatory measures were well planned and likely to be implemented.²¹¹ The Panel focused on the Bank staff's treatment of these issues in the context of the appraisal and negotiation of the IDA credit for the hill access

to be inapplicable to other projects in Nepal. *Id.*

203. *Id.*

204. *Panel Report, supra* note 57, at 3-5.

205. *Id.* at 3.

206. *Id.* Pursuant to the meaning of Operational Directive 4.30, the project therefore involved a "large scale" resettlement. *See* OD 4.30, *supra* note 74, ¶ 4 n.8 (listing the requirements for a "large scale" resettlement project).

207. *Panel Report, supra* note 57, at 3.

208. *Id.*

209. *Id.* at 5.

210. *Id.* at 3.

211. *Panel Report, supra* note 57, at 10-14.

road.²¹² The Panel notes that Operational Manual Statement 2.33 in cases of displacement of a significant number of people,²¹³ required the borrowing government to develop a resettlement plan by the time the Bank appraises the project.²¹⁴ Operational Manual Statement 2.33 establishes the following clear timetable for the development of the resettlement plan:

- (1) At the time of project identification, the magnitude and nature of resettlement must be identified.²¹⁵ This should include a review of past experience and the relevant legal framework.²¹⁶
- (2) Resettlement components of the project must be developed at the same pace as the preparation of other project components.²¹⁷ The design and schedule of the resettlement plan must be completed before the Bank sends an appraisal mission to the borrower country so that the appraisal mission can assess the various resettlement options.²¹⁸
- (3) A detailed resettlement plan must be completed "before the negotiation of the project loan."²¹⁹

The Panel also found that Operational Manual Statement 2.33 establishes the following criteria that the plan must satisfy:

- (1) The displaced people must be "afforded an opportunity to become established and economically self-sustaining in the shortest possible period, at living standards that at least match those before resettlement."²²⁰
- (2) The plan must provide resettled people with compensation which takes into account the replacement value of their lost assets.²²¹ According to the Panel, Operational Manual Statement 2.33 utilizes a broad definition of what assets deserve to be recognized in calculating compensation.²²²

The Panel found that the Bank staff did not require the borrower to follow the prescribed timetable in developing the resettlement plan in

212. *Id.* at 5-7.

213. This is true at least for projects which will displace as many people as Arun. See *Panel Report, supra* note 57, at 7-8 (discussing the scale of the displacement issue). Also see OD 4.30, *supra* note 76.

214. *Id.* at 6. Operational Directive 4.30 contains a similar requirement. *Id.*

215. *Panel Report, supra* note 57, at 11.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Panel Report, supra* note 57, at 10.

220. See *id.* at 10 (citing paragraph 18 of Operational Directive 4.30).

221. *Id.* at 13.

222. *Id.*

the case of the hill route.²²³ Instead, "the careful steps laid out in OMS [Operational Manual Statement] 2.33 were being telescoped into the period between appraisal and negotiation."²²⁴ In fact, the Panel concluded that IDA was eager to begin construction of the project, even though the project sponsors "did not have a final road alignment, did not know how many people would be displaced, and the government had not begun drafting" the required resettlement plan.²²⁵ Moreover, the Panel found that, in IDA discussions of the resettlement plan, there was no "citation of problems in the Marsyangdi project"²²⁶ concurrently under construction.²²⁷

The Panel also reported that the Management submitted the credit for the hill road to the board before the borrower approved the agreement. This suggests that the Bank staff exposed the Bank to the possibility of approving a loan which the borrower could later reject. In addition, the project submitted to the Board did not include an adequate plan to deal with the indirect environmental and social effects of the project.²²⁸ Presumably, the Bank's Statutory Committee,²²⁹ which must clear all loans before they are submitted to the Board for approval, and the Bank's Loan Committee,²³⁰ which authorizes all Bank appraisal missions, approved these deviations from Bank operating rules and policies.

The sixth issue the Panel addressed was the supervision of the pro-

223. *Panel Report, supra* note 57, at 10.

224. *Id.* at 11-12.

225. *Id.* at 11.

226. *Id.*

227. *Panel Report, supra* note 57, at 11. The significance of this later finding is that the Bank previously decided that it would not finance any projects involving resettlement for a borrower which did not live up to its existing commitments for resettlement in a prior project. *Id.*; see *supra* notes 204-09 and accompanying text (discussing the Marsyangdi project).

228. *Panel Report, supra* note 57, at 14. In the same month that the Board approved the credit, the non-governmental organization hired to study the indirect effects of the project was still discussing its Terms of Reference with the staff. *Id.*

229. THE WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL, Bank Procedure 10.00: Investment Lending: Identification to Board Presentation (Jan. 1995) [hereinafter BP 10.00]. The Statutory Committee is established pursuant to Article V(7) of the Articles of Agreement. The members of the committee are the Regional Vice President, the General Counsel, and for each particular loan, a representative of the borrower country.

230. See *id.* There is a general Bank Loan Committee and regional loan committees. The membership of the regional loan committee consists of the senior officials of the regional office and a representative of the Legal Department.

ject.²³¹ It notes that after credit approval and execution by the Board, “[C]redit 2029-NEP [the hill road credit] was essentially forgotten, other than the legal/financial questions of how to restructure it so the money never disbursed could be devoted to the new, much larger Arun III project.”²³² The Panel concluded its discussion of this issue with the following statement: “[a]s the requesters had submitted to the Inspection Panel, the resettlement issue on the Hill Route had suffered abuse by neglect.”²³³

With regard to the proposed valley route for the access road, the Panel noted that under IDA policies, a draft program for compensating involuntarily resettled people is required before project appraisal can begin.²³⁴ In this case, all potential donors to the Arun III project, including IDA, undertook a joint mission to appraise the valley access road before the borrower prepared a draft resettlement program that satisfied the applicable requirements of Operational Directive 4.30.²³⁵ Following the mission, IDA put the borrower on notice that loan negotiations could not take place until the borrower developed such a plan.²³⁶

IDA did not enforce this requirement. Senior management sought the authorization of the Bank’s Loan Committee to begin loan negotiations that would include discussion of the level of compensation payable to certain affected groups.²³⁷ The Loan Committee acceded to this Request even though the Staff Appraisal Report stated that an acceptable plan would be developed during negotiations.²³⁸

The negotiations did succeed in that they produced a mutually agreeable compensation plan. Unfortunately, this plan did not withstand the scrutiny of the April 1995 mission, which recommended that more work should be done on the baseline data, cost, and budget of the plan before presentation of the loan to the Board.²³⁹

The Panel’s findings regarding the Bank’s non-compliance with the

231. *Panel Report, supra* note 57, at 15.

232. *Id.* at 16.

233. *Id.* at 18.

234. *See supra* notes 159-62 and accompanying text (discussing OMS 2.33 and Operational Directive 4.30).

235. *Panel Report, supra* note 57, at 20-21.

236. *Id.* at 21.

237. *Id.*

238. *Id.* The loan negotiations began in June 1994. *See id.* at Attachment 1 (containing the “Agreed Minutes of Negotiations-Arun III” dated June 13-21, 1994).

239. *Panel Report, supra* note 57, at 21-22.

requisite standards for development and implementation of an adequate resettlement plan are troubling. They suggest that, at least in the case of Nepal, the Panel uncovered a serious problem regarding the Bank's ability to learn from its mistakes regarding resettlement issues. First, IDA did not appear to treat its experiences in the Marsyangdi project as relevant to the design of the hill access road credit. Second, it ignored the lessons from the hill credit in the planning of the Arun III project. The Panel concludes its investigation of this issue with the following observation:

[i]t is worth noting that both the Operations Evaluation Department and regional reviews of the Bank's experience with resettlement stress the central importance of early attention to strengthening governmental capacity to manage such programs. The studies point out that monitoring by IDA has been chronically inadequate despite consistent findings that oversight must be exercised constantly during implementation and beyond.²⁴⁰

Hopefully, the Bank will take the Panel's finding seriously and will ensure that this problem in the Bank's operations in Nepal is corrected. As can be seen from by the above discussion, many people stand to suffer if the Bank fails to do so.

C. OPERATIONAL DIRECTIVE 4.20: INDIGENOUS PEOPLE

Operational Directive 4.20 establishes the standards of conduct applicable to the Bank's treatment of indigenous people.²⁴¹ The directive is intended to ensure that indigenous people benefit from development projects and that the Bank avoids or at least mitigates the potentially adverse effects of these operations on indigenous people.²⁴² The standards established by Operational Directive 4.20 apply to "indigenous people," "indigenous ethnic minorities," and "tribal groups."²⁴³ Operational Directive 4.20 stipulates that these terms describe "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process."²⁴⁴

The first issue the Panel addressed in the Report relates to the defini-

240. *Id.* at 35.

241. OD 4.20, *supra* note 78, ¶ 2.

242. *Id.*

243. *Id.*

244. *Id.* ¶ 3.

tion of "indigenous people" for the purposes of Operational Directive 4.30.²⁴⁵ Certain observers of Bank operations sought to dismiss the applicability of the Operational Directive to the Arun case on the grounds that the ethnic groups in the area "do not fit the classic expectations associated with OD [Operational Directive] 4.30."²⁴⁶ According to the Panel, these 'classic expectations' are that the Operational Directives would apply only to "isolated tribal groups untouched by modernity."²⁴⁷

The Panel stated that, at least in the Arun case, this position is untenable,²⁴⁸ given that observers on the ground and in Bank Management recognize that the larger purpose of Operational Directive 4.20 is:

[to] ensure that groups in the population chronically vulnerable to damage from the development process, who can be identified by their ethnic affiliation, need special monitoring and programs. The fact that some of any given ethnic group have achieved some degree of integration into mainstream society does not discount the concerns of the majority of a given ethnic group, whether labelled 'indigenous people' or not.²⁴⁹

The Panel utilized this broad interpretation of "indigenous people" in the Arun case. It stated that some of the ethnic groups in the Arun region are prepared better than others to deal with changes in their lives.²⁵⁰ Furthermore, the Panel noted that virtually the entire population of the three districts affected by the project are very poor and therefore occupy a highly vulnerable status.²⁵¹ The Panel added that "[w]here there is a propensity for any disadvantage among particular groups of people, it will be crucial for a working monitoring system to pick up distress signals quickly, before communities disintegrate . . ."²⁵²

In the Arun case, the Panel proposed that the "sensible" approach would be to ensure that adequate anthropological surveys with clear measures of well-being are conducted well in advance of construction.²⁵³ This should be complimented by close monitoring of the rele-

245. *Panel Report, supra* note 57, at 31.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Panel Report, supra* note 57, at 31.

250. *Id.*

251. *Id.* at 32.

252. *Id.*

253. *Panel Report, supra* note 57, at 32.

vant population groups during the progression of the project.²⁵⁴ In addition, the project plan should include contingency plans to cope with challenges as they emerge during the course of the project.²⁵⁵

The Panel investigation indicated that the Bank's treatment of indigenous people in Arun III did not satisfy the standards proposed by the Panel. The Bank did not conduct adequate surveys of the vulnerable population.²⁵⁶ In addition, it did not develop effective monitoring procedures.²⁵⁷

It is unclear whether the Bank or the Board agrees with the Panel's definition of "indigenous people." However, it is to be hoped that, the Bank will adopt the Panel's suggestion that the standards of Operational Directive 4.20 are applicable to all vulnerable ethnic minorities, regardless of whether they satisfy the criteria of a more technical definition of "indigenous people." This approach would advance the purpose of Operational Directive 4.20, which is to mitigate the adverse impact of Bank-funded projects on these groups.²⁵⁸ The Panel's broad, pragmatic approach to determining which vulnerable population groups qualify for special treatment may be applicable in other fora that deal with the responsibility of others towards indigenous people.

D. POST-REPORT DEVELOPMENTS

After the Panel issued its report, the new President of the World Bank, James D. Wolfensohn, asked Maurice Strong, the former Secretary General of the United Nations Conference on Environment and Development, to conduct a separate review of the project. During the course of his review, Strong consulted with the Panel. The Bank President, after receiving both the Panel's and Strong's reports, decided to withdraw IDA's offer to fund the Arun project. This decision effectively ended the proposed Arun III project.²⁵⁹

The Bank, in announcing the President's decision, cited the following reasons for withdrawing the offer: Nepal's lack of capacity to implement the project; its inability to "substantially increase" the electricity rates

254. *Id.*

255. *Id.*

256. *See id.* at 3, Annex 2 (listing recommendations for further actions in the Arun III project).

257. *Panel Report, supra* note 57, at 3, Annex 2.

258. OD 4.20, *supra* note 78.

259. Other funding agencies would not fund the project without the World Bank's participation.

charged to its people; Nepal would be running "too large a risk" by implementing this project because the project could cause cuts in spending in other social sectors such as health, and education; and the Bank's failure to raise adequate funds from other sources for the project.²⁶⁰

The Bank President added that:

the judgment made over a year ago came out in favor of the project. Irrespective of whether that was the right or the wrong decision at the time, I have concluded that under today's circumstances and with the information at my disposal, the risks to Nepal were too great to justify proceeding with the project.²⁶¹

The collapse of the project caused mixed emotions in Nepal, where people realized that the country remains ill-prepared to meet its energy needs. Both supporters and opponents of the project blamed the Government of Nepal and the World Bank for this situation. They contended that the Arun project had the effect of precluding Nepal from considering alternative hydroelectric projects.²⁶² This contention should be evaluated in light of the fact that the requesters asked the Panel to investigate the Bank's consideration of alternatives to the Arun III project and the concerns expressed by the Panel regarding the Bank's analysis of the alternatives to the Arun project.

Numerous groups in Nepal, including the requesters in Arun III, are beginning to explore alternative power projects.²⁶³ The World Bank has announced that it will send a mission to Nepal to discuss alternate power projects with the Nepalese Government.²⁶⁴

One of the potential effects of the President's decision was to maintain the Panel report's confidentiality. The Resolution establishing the Panel only requires the Bank to make the Panel report available to the

260. *Bank, Nepal Seek Alternatives to Power Projects*, WORLD BANK NEWS, Aug. 10, 1995 at 3 (available from the World Bank Joint Library) [hereinafter *Bank, Nepal Seek Alternatives*]; see *World Bank Says No to Nepal Power Project*, Japan Economic Newswire, Aug. 4, 1995 (reporting that the World Bank informed the Nepalese government that it failed to raise the funds for the project); see also Alver Carlson, *Arun Dam Reversal Poses Question on W. Bank's Role*, Reuter Bus. Rep., Aug. 13, 1995; Suman Pradhan, *Nepal: What Now? Nepalis Ask After Arun Shock*, Inter-Press Svc., Aug. 7, 1995; Pratap Chatajee, *Environment: Greens Laud World Bank Move to Scrap Dam Loan*, Inter-Press Svc., Aug. 4, 1995.

261. See *Bank, Nepal Seek Alternatives*, supra note 260, at 3-4.

262. See Pradhan, supra note 260.

263. See Chatajee, supra note 260.

264. See *Bank, Nepal Seek Alternatives*, supra note 260, at 3.

public within two weeks of the Board's consideration of the report.²⁶⁵ Fortunately, the Bank decided to release the Panel report to the public despite the fact that the Board did not meet formally to consider the Report.

It should be noted that many of the reasons cited for the Bank President's decision are mentioned in the Arun Request.²⁶⁶ In this limited sense, the President's decision can be seen as a vindication of the Request.

His decision can also be seen as a compliment to the Panel and its work on the Arun claim. In his statement to the press announcing the Bank's decision, the Bank President states:

[t]he public debate on this controversial project was valuable in that it served to heighten the concerns of Bank staff about the risks faced by the project. It also led to a review by the World Bank's Inspection Panel of environmental and social aspects of the project with the result that measures to address these concerns were strengthened.²⁶⁷

IV. ANALYSIS OF THE ARUN CASE

A number of conclusions about the operation of the World Bank's Inspection Panel can be drawn from the discussion of the Arun case. First, it demonstrates that the Panel can play a useful role in protecting the interests of people who may be, or have been, harmed by the Bank's operations. The Arun case also suggests that the Panel process, if allowed to operate freely, will highlight weaknesses in Bank performance, and thereby enhance the efficacy of Bank operations. Finally, it suggests that the World Bank needs to clarify the respective rights and responsibilities of the Panel, the Bank Management, and the Board of Executive Directors during the different stages of the Panel process. Each of these conclusions is discussed in more detail below.

A. THE PANEL'S BENEFIT TO PEOPLE WHO MAY BE HARMED BY BANK OPERATIONS

The Panel proceedings ensured that the requesters' concerns relating to the project received a fair hearing on the merits *before* IDA and the

265. Resolution, *supra* note 1, ¶ 23.

266. *See* Request, *supra* note 8, at 4 (listing alleged violations of Bank operational policies and procedures).

267. Chatajee, *supra* note 260.

borrower actually signed a loan agreement.²⁶⁸ Thus, the investigation in the Arun case occurred at a time when meaningful change in the project was still possible.

There are a number of examples that demonstrate that the Request was able to influence decisions regarding the Arun project. First, the Executive Directors' decision to authorize an investigation of the Arun project culminated in an IDA mission to Nepal, whose purpose, was, *inter alia*, to examine many of the issues raised in the Request.²⁶⁹ This mission led IDA officials to propose design changes in the Arun project.²⁷⁰ These changes sought to improve the environmental impact of the project, the compensation offered to involuntarily resettled people, and the project's treatment of indigenous people.²⁷¹

Second, the Request led to extensive consultation between the Panel and project-affected people.²⁷² During the course of its investigation, the Panel conducted a number of public meetings and consultations.²⁷³ These meetings afforded affected people an opportunity to express their views and concerns to Bank officials who report directly to the Bank's most senior decision-makers. As a result, the Panel's Report is probably based on broader consultation with the people affected by the project than any other single Arun project document. The information learned from this process should enhance the Bank's ability to design and implement projects in Nepal that are responsive to the needs of those people that the projects most directly affect.

The potential for the Panel to have a beneficial impact on future Bank operations in Nepal is substantial. The Panel's Report draws attention to certain problems in the Arun III project that are relevant to future Bank operations in Nepal. For example, the Panel Report makes clear that the Bank staff failed to access accurately the Nepalese Government's capacity to manage a compensation program for resettled

268. *Panel Report, supra* note 57, at 1-2. In fact, the Board received detailed information about the problematic aspects of the project while the Bank and the Nepalese government conducted negotiations of the terms of the Bank's participation in the project. *Id.*

269. *See id.* at 22 (stating that after the April 1995 mission, Bank Management required many remedial measures).

270. *See id.* at 33-37 (discussing the findings of the Panel after the April 1995 mission).

271. *Id.*

272. *Panel Report, supra* note 57, at 2.

273. *See id.* (stating that over 1000 people participated in the meetings with the investigators).

people.²⁷⁴ It also demonstrates that this is not the first time IDA staff erred in this regard.²⁷⁵ Now that this information is public knowledge, the Bank officials can be expected to take the findings of the Panel seriously. This should result in the Bank paying greater attention to the Nepalese Government's institutional capacity to manage projects. Such a change in Bank operating procedures in Nepal should result in improved treatment of resettled people in future projects as well as better managed projects.²⁷⁶

The Arun proceedings also demonstrate that even a request which does not result in a Panel recommendation for investigation can serve a useful purpose.²⁷⁷ Since the Panel must make the Request available to the public,²⁷⁸ the mere filing of the Request will succeed in publicizing the issues raised therein. In addition, given that the Board must review the Panel's recommendation, the Request will succeed in bringing the issues raised in the request to the attention of the Executive Directors.

A demonstration of the utility of a request which failed to result in an investigation is the Panel's treatment of the issue of economic alternatives to Arun III. The Panel recommended against investigation of the ACG's allegation that the Bank's analysis of economic alternatives to the chosen project design was inadequate.²⁷⁹ Nevertheless, in its Report, the Panel made clear that it was concerned about the adequacy of the analysis of economic alternatives.²⁸⁰ In its subsequent communications to the Board, the Panel continued to mention this issue.²⁸¹ The fact that ultimately the Bank cancelled the Arun project and is beginning to investigate alternative hydropower projects in Nepal suggests that the allegations of the ACG succeeded in stimulating both public and internal Bank discussion of this issue.

Another contribution the Panel can make to avoiding undue injury to project-affected people and to the environment relates to project implementation. Studies by the Bank and by other organizations suggest that

274. See *id.* at 34-35 (detailing the findings of the Panel and its analysis of involuntary resettlement in the Inspector's report).

275. *Id.*

276. *Panel Report, supra* note 57, at 35.

277. *Operating Procedures, supra* note 2, at 24-25. This observation is only applicable to requests which are actually registered by the Panel. *Id.*

278. Resolution, *supra* note 1, ¶ 25.

279. See *id.* at 5-6 (recommending against a further study of alternative proposals).

280. *Panel Report, supra* note 57, at 7.

281. See *id.* (stating that the consideration of alternatives is one of the most important features of a proper project analysis).

the Bank's failure to monitor the construction and management of projects adequately causes many of the adverse social and environmental impacts experienced in Bank-funded projects.²⁸² In its report, the Panel pointed to the inadequacy of the Bank's monitoring of the IDA hill credit and suggested that more attention should be devoted to monitoring issues in the Arun project.²⁸³ Hopefully, the publication of this finding will result in Bank officials being more diligent in monitoring future Bank-funded projects in Nepal. It could also stimulate greater efforts by the public to hold the Bank accountable for the quality of its project monitoring.

B. PANEL'S ROLE IN PROMOTING THE EFFICACY OF THE BANK

One of the potential benefits that the Panel offers the Bank is that the information it gathers will enhance the efficacy of the Bank's operating policies and procedures.²⁸⁴ The Panel's investigations and review of requests for investigation should result in the collection of empirical data on the way the Bank staff actually implements the Bank's operating rules and procedures.²⁸⁵ The Panel's findings in this regard may help educate Bank officials about their responsibilities in the various phases of the project cycle. This information should help the Bank develop more effective operating policies and procedures.²⁸⁶ Finally, it may help promote the Bank's new operating policy, which encourages Bank staff to be more concerned with the quality of the projects the Bank funds than with the quantity of new Bank lending.²⁸⁷

The Arun case confirms that the Panel can provide this benefit to the Bank. For example, the Panel investigation revealed that, at least in the case of Nepal, the Bank staff adopted an inappropriately relaxed approach to their obligations to ensure that the borrower provided adequate compensation for involuntarily resettled people.²⁸⁸ The Panel found that

282. See, e.g., Wapenhans, *supra* note 148.

283. See *Panel Report*, *supra* note 57, at 3-4 (emphasizing the need for the IDA to learn lessons from its experience under previous projects).

284. Bradlow, *supra* note 6, at 556.

285. See *id.* at 580 (stating how the Panel's process instructs the Bank's staff on Bank policies and procedures).

286. *Id.* at 556. The Panel process may also indicate that the Bank would benefit from more open rulemaking procedures. *Id.*

287. THE WORLD BANK, GETTING RESULTS: THE WORLD BANK'S AGENDA FOR IMPROVING DEVELOPMENT EFFECTIVENESS (1993).

288. *Panel Report*, *supra* note 57, at 10-14. Similar observations can be made

there were problems with the Nepali Government's compensation plan to resettle people. It found that the plan which was eventually developed did not adequately assess the borrower's administrative capacity to administer such a plan.²⁸⁹ Furthermore, the Panel discovered that the Bank had previously experienced problems with the Nepali Government's ability to manage compensation plans for involuntarily resettled people.²⁹⁰ Nevertheless, in the Arun case the Bank waived the requirement that resettlement plans be developed before Bank appraisal missions.²⁹¹ These findings suggest that there is a problem either with the Bank's enforcement of the Operational Directives or with the Bank staff's understanding of the applicable operating rules and procedures.

Another example is that the Panel found deficiencies in the Bank's implementation of the provisions of the Operational Directives applicable to environmental impact assessments.²⁹² These deficiencies include a failure to consider certain environmental risks to the project²⁹³ and a failure to account fully for all contingencies in the project design.²⁹⁴

It is still too early to determine whether the Bank will use the findings from the Panel's investigation to improve the Bank's operating policies and procedures.²⁹⁵ However, it would suggest a remarkable inability of the Bank to learn from experience, if the Bank failed to make

about the Bank's economic analysis of the Arun Project. *Id.*

289. *Id.* In its recommendation of an investigation of Arun, the Panel suggested that the Bank did not sufficiently assess alternatives to Arun III. *Panel Recommendation Report, supra* note 51, at 57. The Panel also concluded, however, that this was an issue of judgment over which it does not have jurisdiction. *Id.* Nevertheless, based on the evaluation of the Arun III project, it is hard to avoid the conclusion that if the Bank paid more attention to the possible alternatives to the Arun III dam, it may have selected a project design more consistent with the administrative capabilities and environmental situation in Nepal.

290. *See supra* notes 204-09 and accompanying text (describing the Marsyangdi Project).

291. *Panel Report, supra* note 57, at 10. The Bank expressed a willingness to conduct its appraisal of Arun III before the borrower developed an adequate compensation plan. *Id.* It also entered into loan negotiations without a fully developed plan being in place, contrary to the mandates of Operational Directive 4.30. *Id.* This was contrary to this applicable ODS.

292. *Panel Report, supra* note 57, at 22. The Panel concludes that the IDA staff did not use the comprehensive approach required by Operational Directive 4.01. *Id.*

293. *Id.* at 22-23.

294. *See id.* at 23-25 (disclosing the environmental disadvantages involved in changing the road route).

295. *See supra* note 24 and accompanying text (discussing the Bank's Operating Procedures).

improvements in its procedures for planning and monitoring of projects in Nepal.²⁹⁶

C. THE LEGAL SIGNIFICANCE OF THE ARUN CASE

There are four aspects of the Arun case, described in more detail below, which are of legal significance. The first demonstrates the impact of the Panel's findings on the internal law, that is, the operating rules and procedures, of the Bank. The second is the relevance of the Panel's findings to international human rights and environmental law. The third involves the development of a Panel jurisprudence. The fourth is the potential implications of the Panel's findings for the Bank's loan agreements.

The Panel, in its Recommendation Report, provided reasoned interpretations of key aspects of the applicable Operational Directives in its analysis of the Bank's treatment of resettled people and indigenous people.²⁹⁷ For example, the Panel criticized the Bank's proposed distinction between "seriously affected people" and "affected people."²⁹⁸ It also clarified how many people must be involuntarily resettled to warrant the higher standards of treatment established in Operational Directive 4.30.²⁹⁹ In addition, the Panel discussed the meaning of "indigenous people" in Operational Directive 4.20 and suggested that this term should be interpreted pragmatically to ensure that Bank operations do not result in undue injury to vulnerable people.³⁰⁰

The Panel's interpretations should provide guidance to Bank officials and other Bank stakeholders on the requirements established by the Bank's operational policies and procedures. These interpretations therefore contribute to the development of standards against which Bank staff performance will be measured. Furthermore, because the Panel's inter-

296. See *supra* notes 204-09 and accompanying text (discussing the Marsyangdi project and the treatment of resettlement issues in the Hill Credit and Arun projects).

297. *Panel Recommendation Report, supra* note 51, at 16-19. The role of the Panel in interpreting the Bank's operating policies and procedures could increase as the Bank converts its Operational Directives into Operational Policies.

298. See *Panel Report, supra* note 57, at 13, 34 (reporting the Panel's findings on Operational Directive 4.30); see also *supra* notes 204-09 and accompanying text (discussing this case).

299. See *Panel Report, supra* note 57, at 7 (providing the number of persons relating to population displacement).

300. See *id.* at 35 (suggesting an expanded category for indigenous people); see also *supra* notes 248-58 and accompanying text (discussing this issue).

pretations are public, neither the Board nor Bank Management will find it easy to reject the Panel's interpretation without providing some rationale for their decision.

The Panel's interpretations of the Operational Directives are also relevant to international environmental and human rights law. The Panel's reasoned interpretation of these issues can influence our understanding of the responsibilities of all international organizations in this regard. It could also illuminate the extent to which international law is incorporated into the operating rules and procedures of international organizations such as the Bank.³⁰¹

It is important to note that the Panel's well-reasoned recommendation and investigation report make it possible for interested parties to understand the rationale for the Panel's findings and its recommendation that the Board authorize an investigation. If the Panel continues this practice, it will develop a Panel jurisprudence that will make it easier for potential requesters to assess their chances of filing a successful request for investigation.

Finally, the work of the Panel may contribute to the negotiation and drafting of Bank loan agreements. In the course of its investigation, the Panel discussed the difficulty IDA experienced enforcing some of the covenants of the Hill Credit. This observation³⁰² may stimulate discussion in the Bank and the broader legal community on the nature of the conditions the Bank imposes on its borrowers. This could ultimately result in improved loan agreements. It could also lead to a reduction in the number of conditions that the Bank imposes on the borrower but which the Bank, in fact, is unable or unwilling to enforce.

D. IMPROVING PANEL PROCEDURES

The Arun case suggests that problems persist in the implementation of the Panel process. The primary problem relates to differing perspectives on the respective responsibilities of the Panel, the Bank Management, and the Board during the Panel process.³⁰³ The Resolution establishing the Panel makes clear that the Panel is independent of Bank Management and that "it reports directly to the Board, which is the final deci-

301. See Bradlow & Schlemmer-Schulte, *supra* note 6, at 406-11 (noting the Panel's impact on international organizations).

302. See *Panel Report*, *supra* note 57, at 19-22 (discussing the problems arising in changing the road route).

303. See *supra* notes 111-16 and accompanying text (discussing the Bank's narrow interpretation of the requirements for eligibility to file a request for inspection).

sion maker at all stages of the Panel process."³⁰⁴ This suggests that the creation of a distinct Panel mechanism creates a new role for the Board of Executive Directors. In addition to their role as the Directors of the Bank, the Executive Directors now act as the final decision-makers in a separate and independent investigative mechanism.

The creation of the Panel also should affect the Management's relationship to the Board. Since the purpose of the Panel is to investigate allegedly harmful acts and omissions of the Bank staff, the Management is an interested party in all Panel proceedings. This suggests that in order to protect the integrity of the Panel proceedings, Bank Management should only communicate with the Board regarding cases before the Panel according to the rules stipulated in the Panel's Operating Procedures.

Any *ex parte* communications between the Board and the Bank Management call into question the transparency and the independence of the Panel proceedings. In addition, because the Panel procedures do not provide for such *ex parte* communications,³⁰⁵ these communications threaten to undermine public confidence in the fairness of the Board's decisions regarding the recommendations and findings of the Panel. The reason is that once it appears that there might have been *ex parte* communications, the requester cannot be sure if the Board based its decision on the impartial recommendations of the Panel or on the interested advice of the Bank Management. These issues are discussed in more detail below.

1. Transparency of the Panel Proceedings

The Panel's Operating Procedures, which are based on the Resolution, establish a process for review of requests for inspection.³⁰⁶ The Operating Procedures stipulate that the Panel should communicate directly, and without interference, with the Board of Directors.³⁰⁷ The Operating Procedures and the Resolution also clearly define when Bank Manage-

304. Resolution, *supra* note 1, ¶¶ 16-23. The only exception to this general principle is the Panel's authority to develop its own operating procedures. See *Operating Procedures*, *supra* note 2, at 4 (stating the authority of the Panel derives from the Resolution).

305. See *Operating Procedures*, *supra* note 2, at 13-15 (describing the manner in which the Panel and Bank Management interact).

306. See *id.* at 7-20 (detailing the Panel review process from registration of requests to the submission for Board approval).

307. *Id.* ¶¶ 38, 39.

ment can intervene in these communications. The Operating Procedures expressly provide that after the Panel submits the findings from its investigation to the Board, the Bank Management has six weeks to provide its own report on the findings to the Board.³⁰⁸ Neither the Operating Procedures nor the Resolution, however, grant the Bank Management the right to initiate *ex parte* communications with the Board before the Board decides to authorize an investigation.

Three reasons support limiting the Bank Management's ability to engage in *ex parte* discussions with the Board about the Request for an inspection. First, the Panel process is designed to ensure that the Board, which in most cases will have very little prior knowledge about the specific matters raised in the Request, will make a determination of whether to authorize an investigation on the basis of their own independent review of the Request, the Bank's response, and the Panel's recommendation. If the Bank Management, which is an interested party in the matter under review, engages in *ex parte* communications before the Board receives the Panel's recommendation and the Request, it will undermine the ability of the Board to reach its decision independently.

Second, the lack of transparency inherent in *ex parte* communications between the Bank Management and the Board undermines public confidence in the Panel process. The requesters are not able to ascertain what was discussed in these communications and therefore cannot know if the Bank Management is raising issues or making arguments which require their response. Consequently, the knowledge that such communications have occurred means that requesters can never be absolutely confident that their request will receive the independent hearing that the Resolution promises.³⁰⁹

Finally, the fact that the Bank Management can engage in direct communications with the Board on a request threatens the utility of the Panel. The Panel provides the Bank with an opportunity for an independent and timely review of issues that adversely affect the efficacy of Bank operations and the interests of the intended beneficiaries. The Bank can receive this benefit only if it fully respects the Panel's direct and independent relationship with the Board.³¹⁰ This means that on all matters pertaining to requests for investigation, the Bank Management should ensure that its communications with the Bank and the Panel

308. *Id.* ¶ 54.

309. *See* Bradlow, *supra* note 6, at 591-92 (discussing the dangers of *ex parte* communications between the Bank Management and the Board).

310. *See id.* at 574 (describing the Panel's independence from the Bank).

strictly conform to the procedures established in the Resolution and in the Panel's Operating Procedures.

2. The Role of Bank Management

The new dynamic in the Board-Bank Management relationship created by the establishment of the Panel requires that, to the greatest extent possible, the Board and the Management should maintain an arms-length relationship with regard to cases before the Panel. This suggests that all direct communications between the Board and Bank Management regarding Panel matters must be transparent and according to the requisite procedures.

The rationale for requiring transparency in Board-Bank Management communications relating to Panel matters is obvious. The Bank Management is involved in approving all decisions related to Bank operations. Consequently, the Management's decisions are at issue in all Panel proceedings. The Management, therefore, faces a clear conflict of interest if it is able to advise the Board on these proceedings. An example of the difficulties created by allowing Bank Management to engage in direct and non-public communications with the Board on Panel matters emerges from an examination of the situation of the Legal Department.³¹¹

The Legal Department is required to review and comment on all pre-appraisal packages.³¹² Hence, a project cannot progress to the appraisal stage without the Legal Department having reviewed and, presumably, having determined that the Bank staff complied with all applicable operational policies and procedures. The relevant lawyers also must approve a letter sent to the Government/Borrower confirming the findings or recommendations included in the *aide-memoir* drafted at the conclusion of the appraisal mission.³¹³ The Legal Department also participates in the loan negotiations, and in the preparation of the Staff Appraisal Report³¹⁴ and the Memorandum and Recommendation of the Presi-

311. The author does not intend to suggest that the Legal Department's problems are different from those of other Bank departments. The regional departments face similar situations. The Legal Department is used as an example because of its specific interest to a legal audience.

312. See BP 10.00, *supra* note 229 (describing the project cycle). This package is submitted to the Regional Vice President and the General Counsel as well. *Id.*

313. *Id.* The *aide-memoir* summarizes the main findings of the mission, the understanding reached with the borrower, and the actions to be completed by the borrower and the Bank, including schedules for these actions. *Id.*

314. BP 10.00, *supra* note 229. The Staff Appraisal Report is the report that the

dent.³¹⁵ The lawyers in the Legal Department also help to prepare the report for submission to the Statutory Committee, on which the Legal Department is represented.³¹⁶ In this regard it should also be noted that the Bank's General Counsel, who is also a Senior Vice-President of the Bank, is a part of the Bank's Management.

The Legal Department's close involvement in the Bank's operations makes it particularly well-suited to advise the Bank Management on how to respond to a request for inspection. However, it would seem to preclude the Legal Department from providing legal advice to the Board on any issue pertaining to the Panel in general or to any particular Panel proceeding. With regard to matters related to the Panel, the Legal Department's advice to the Board, at least from the perspective of the requester and other outside observers, has the appearance of a conflict of interest. The conflict arises because the Legal Department is providing advice to the decision-maker about a matter in which some of the issues to be determined by the decision-maker are likely to relate to the Legal Department's prior advice to Bank Management and staff or to decisions in which the Legal Department participated.

The Arun case provides a good illustration of the problems that can arise when the Legal Department seeks to advise the Bank staff and the Board. First, during the appraisal and negotiation of the Arun III project, the Bank, presumably with the consent of the Legal Department,³¹⁷ waived the condition that a compensation plan for resettled people be in

staff prepares following the appraisal mission. *Id.* It contains the Staff's analysis of the project and is part of the record on which the Board bases its decision to lend money to the project. *Id.*

315. *Id.* The Memorandum and Recommendation of the President is a memorandum from the President to the Board. *Id.* In this Memorandum the President describes the project, the proposed loan agreement, and makes his recommendation on whether the Board should approve the proposed loan agreement. *Id.*

316. *Id.* The Statutory Committee is established pursuant to Art. V(7) of the Articles of Agreement. The members of this committee are the General Counsel of the Bank, the applicable Regional Vice President and an expert appointed by the borrowing country's governor. Pursuant to Article III(4)(iii), the Bank cannot loan money to any borrower unless the Statutory Committee "has submitted a written report recommending the project after a careful study of the merits of the proposal." Presumably, the Statutory Committee considers whether the Bank complied with all applicable operational policies and procedures.

317. This conclusion follows from the fact that the Legal Department is involved in the decision to approve the appraisal mission. *See supra* notes 313-14 and accompanying text (discussing the Legal Department's involvement in the appraisal process).

place before the Bank sent an appraisal mission to Nepal.³¹⁸ Similarly, and contrary to the provisions of the applicable operational policies, the Bank initiated negotiations of the Arun III loan before the compensation plan was fully developed.³¹⁹ The Legal Department participated in these negotiations and thus, presumably, acquiesced in this decision. The Panel's Report explicitly criticizes these actions.³²⁰

Second, the Board asked the General Counsel to provide it with an opinion on the standards for eligibility to bring a requests for inspection. Regardless of the merits of the General Counsel's opinion, the involvement of the Legal Department in the Arun III project means that the opinion has the appearance of being the opinion of an interested party. This is particularly pertinent because the opinion makes it harder for outsiders to seek investigations of the decisions of the Legal Department.³²¹

A number of possible solutions exist to resolve this problem. First, the Board could eliminate the necessity of a Board review of the Panel's recommendation of an investigation. If the Panel possessed the authority to decide unilaterally when to conduct investigations, the Bank Management would have less of an incentive to engage in *ex parte* communications with the Board. The reason is that a substantial number of the *ex parte* communications between the Bank Management and the Board relate to the review stage of the Panel process. A second possibility is for the Board to establish procedures for Bank Management communications with the Board on Panel-related matters.³²² These rules should be public and should provide that the requesters receive notification of these communications and an opportunity to respond to the issues raised therein.

A third possibility is to establish a presumption that the Board will endorse all Panel findings unless it specifically rejects them within a specified period of time. If it does reject them it should do so in a statement that fully explains its reasons for rejecting the Panel's recom-

318. OD 4.30, *supra* note 76.

319. *See supra* notes 313-14 and accompanying text (noting that the Legal Department is involved in the decision to initiate negotiations and in the actual negotiations).

320. *See Panel Report, supra* note 57, at 9-13 (documenting the Bank's waiving of the compensation plan).

321. *See supra* notes 312-22 and accompanying text (discussing the proper relationship between the Panel and the Legal Department).

322. Panel Operating Procedures paragraphs 37, 62, and paragraph 15 are relevant in this regard.

mendations.

CONCLUSION

The Panel is an important development for the Bank. The Arun case indicates that the Panel offers project-affected people a means for obtaining an independent and impartial investigation of their concerns about the project. It also demonstrates that the Panel is capable of helping the Bank resolve difficult operational problems. Finally, the Arun case suggests that the Panel's reasoned findings and recommendations are likely to have an influence on the Bank's operational rules and procedures and may influence the development of international law.

The legal issues that the Panel addresses include such procedural issues as eligibility to file requests for investigation, the relationship between the Bank Management and the Executive Directors, the interpretation of the Bank's operational rules and procedures, and such substantive law issues as the obligations of international organizations to indigenous people, and the adequacy of environmental impact assessments.

The Arun case also suggests that the Panel process creates certain problems for the Bank. These problems arise from the Board's dual role as directors of the Bank and as final decision makers in an independent inspection process. If the Bank does not adequately address these problems, they threaten to impair the transparency of the Panel's process and undermine public confidence in its impartiality and independence. Finally, the Arun case suggests that these problems can be resolved through changes in the Resolution establishing the Panel. These amendments should be considered during the course of the forthcoming Board review of the Panel.